

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SUSAN TAVE ZELMAN, :

4 SUPERINTENDENT OF PUBLIC :

5 INSTRUCTION OF OHIO, ET AL., :

6 Petitioners :

7 v. : No. 00-1751

8 DORIS SIMMONS-HARRIS, ET AL.; :

9 HANNA PERKINS SCHOOL, ET AL. :

10 Petitioners :

11 v. : No. 00-1777

12 DORIS SIMMONS-HARRIS, ET AL.; :

13 and :

14 SENEL TAYLOR, ET AL., :

15 Petitioners :

16 v. : No. 00-1779

17 DORIS SIMMONS-HARRIS, ET AL. :

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19 Washington, D.C.

20 Wednesday, February 20, 2002

21 The above-entitled matter came on for oral
22 argument before the Supreme Court of the United States at
23 10:08 a.m.

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25

1 APPEARANCES:
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10 Respondents Simmons-Harris, et al.
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12 the Respondents Gatton, et al.
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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 00-1751, Susan Tave Zelman, Superintendent of Public Instruction of Ohio v. Doris Simmons-Harris, and two related cases.

Ms. French.

ORAL ARGUMENT OF JUDITH L. FRENCH

ON BEHALF OF THE STATE PETITIONERS

MS. FRENCH: Thank you, Mr. Chief Justice, and may it please the Court:

In 1995, the Ohio General Assembly responded to an unprecedented educational crisis by enacting the Ohio Scholarship and Tutorial Program. Under this Court's decisions, especially Mueller, Witters, and Zobrest, and in light of this Court's teachings, most recently in Agostini and Mitchell, the Ohio program is constitutional because it offers a neutral program that offers true private choice to parents.

First, the principle of neutrality. There are two criteria that determine where the benefits will go under the program. First is residence in a school district that is or has been taken over by State control. Second is family income. Neither of these criteria has anything to do with religion, but even beyond these basic elements --

1 QUESTION: Well, do you -- you don't take the
2 position that that guarantees constitutionality, do you?

3 MS. FRENCH: We do not, Your Honor.

4 QUESTION: Okay.

5 MS. FRENCH: We have a two-pronged approach.

6 QUESTION: You take it as a necessary condition,
7 but not a sufficient condition?

8 MS. FRENCH: We do, Your Honor. We offer both
9 neutrality and true private choice, but even beyond the
10 basic elements of neutrality, there are a number of
11 provisions within this program that guarantee that it's
12 open to all-comers, both in terms of students and schools.

13 First, the program requires schools not to
14 discriminate based on race, religion, or ethnic origin,
15 that ensures that even a religious school may not
16 discriminate in favor of students of their own religious
17 faith.

18 QUESTION: And you think it would be
19 unconstitutional if it didn't have that --

20 MS. FRENCH: Not necessarily, Your Honor, but it
21 certainly goes to the neutrality of the program, but even
22 beyond the --

23 QUESTION: Well, why does it matter? I mean, if
24 they're proselytizing, doesn't it make good sense for them
25 to admit anybody who may come along, and yet the

1 proselytizing can't be established under the Establishment
2 Clause?

3 MS. FRENCH: We, of course, Your Honor, do you
4 agree that they're proselytizing. Whatever proselytizing
5 is happening in the religious schools is at the behest of
6 the parents, not at the behest of the Government, and
7 perhaps I should move to the second prong, then, and talk
8 about --

9 QUESTION: Well -- go ahead.

10 MS. FRENCH: And talk about the true private
11 choice that is at issue here for the parents.

12 QUESTION: Well, but I take it that the first
13 part of your argument as demonstrated is to try to show
14 that there are certain indexes, indicia of neutrality.

15 MS. FRENCH: Correct.

16 QUESTION: And you just -- and you tick them
17 off.

18 MS. FRENCH: Yes, Your Honor. Yes, that there
19 is the Nondiscrimination Clause, and secondly that there
20 is a cap on the number of students that -- who are already
21 in the program, and the limit on the number who can
22 continue in the program. Only 50 percent of the
23 scholarships awarded each year may be awarded to students
24 who are already in the program. That again assures that
25 the program be open to all-comers, to those eligible in

1 the Cleveland School District.

2 Thirdly --

3 QUESTION: What percentage of the students in
4 the school system are -- get vouchers?

5 MS. FRENCH: Well, there are 57,000 students,
6 elementary students in the Cleveland School District, Your
7 Honor. About 4,000 of them get scholarships.

8 QUESTION: About how many thousand get
9 scholarships, 2,000?

10 MS. FRENCH: In 1999 the number was 3,700. It's
11 now about 3,4 --

12 QUESTION: So it's about 10 percent of the
13 student body?

14 MS. FRENCH: Yes, Your Honor, a little less than
15 10 percent, but all the students in the Cleveland School
16 District are eligible. They all receive information about
17 the program, all are invited to attend, as long as the
18 resident is in the school district, and then family income
19 determines the amount of the scholarship that they
20 receive.

21 The third and final prong of the neutrality here
22 is the benefit itself. It is, of course, money. It is
23 inherently neutral. There is nothing about that benefit
24 that suggests any sort of reference to religion.

25 The second prong this Court has looked to is the

1 true private choice available for receiving the benefits.
2 Here, Cleveland parents have a number of alternatives
3 available to them. They can stay in the Cleveland Public
4 Schools --

5 QUESTION: May I ask you a question about
6 private choice which is a very important part of the case?
7 Supposing you had a situation with a small community that
8 had one public school and one religious school, and they
9 would pay for the voucher to go to the religious school if
10 the family on its own private choice wanted the child to
11 go to the religious school. Would that save the program
12 in that case?

13 MS. FRENCH: I think it would, Your Honor --

14 QUESTION: Yes.

15 MS. FRENCH: -- given -- if -- of course --

16 QUESTION: So in this case it's irrelevant,
17 really, that there are four or five choices available, as
18 long as there's a free choice either to go to the public
19 school or to go to the religious school?

20 MS. FRENCH: Well, we have a number of choices
21 within the traditional public schools, Your Honor.

22 QUESTION: But they're not -- it's not necessary
23 to your argument is what I'm trying to --

24 MS. FRENCH: They are not necessary, Your Honor.
25 However, this Court has viewed other programs in view of

1 the entire -- viewed as a whole of the program. For
2 instance, in Rosenberger, Justice Powell's decision in
3 Witters --

4 QUESTION: In Witters, there's such a dramatic
5 difference between a choice from the great universe of
6 colleges and universities, what a particular student will
7 choose, and here, the difference -- you just explained to
8 Justice Stevens that maybe it doesn't matter. The
9 difference is that in fact there is only one alternative,
10 if you don't take account of the community schools, the
11 suburban schools say no, they don't want any part of this,
12 private schools can't make it on that low tuition, so in
13 fact, isn't it true that something like 99 percent of the
14 students who were receiving these vouchers are in
15 religious schools?

16 MS. FRENCH: That's currently true, Your Honor.
17 That number has fluctuated over the years of the program.
18 It's fluctuated a great deal from 1995 to this year.
19 That's true.

20 QUESTION: May I ask why we don't take account
21 of the availability of the community schools in analyzing
22 this program?

23 MS. FRENCH: We would like the Court to take
24 very much account of the community schools, Your Honor.

25 QUESTION: The court below didn't do that.

1 MS. FRENCH: That's correct, Your Honor.

2 QUESTION: Is that an option, in fact, to the
3 parents?

4 MS. FRENCH: Very much so, Your Honor.

5 QUESTION: And the tuition assistance would be
6 provided if the selection were for a community school?

7 MS. FRENCH: There would be no tuition
8 assistance, Your Honor, only because they are public
9 schools, so there's no need for a scholarship there.
10 Parents can choose a traditional public school, they can
11 choose a tutoring grant if they're in a public school,
12 they can choose a magnet school, they can choose a
13 community school, or --

14 QUESTION: And if a community school is
15 selected, no additional money then is provided, as would
16 be provided if the religious school were selected?

17 MS. FRENCH: That's true, Your Honor. If the
18 parent chooses a community school, because it's considered
19 a public school, there is no money exchanged. It's
20 only --

21 QUESTION: Have some of the private nonsectarian
22 schools in the city become community schools?

23 MS. FRENCH: They have, Your Honor. There were
24 two schools in particular who in 1997 chose to be
25 community schools rather than be in the scholarship

1 program just after the district court's injunction.

2 QUESTION: Because they get more money. Because
3 they get more money.

4 MS. FRENCH: In part because they get more
5 money, and in part because of the uncertainty of the
6 litigation. There certainly has been a chilling effect as
7 a result of the litigation that's been going on in some
8 form since 1995.

9 QUESTION: Are slots available in the community
10 schools for these children that we're talking about?

11 MS. FRENCH: Yes, Your Honor, there are spots
12 available.

13 QUESTION: There are vacancies?

14 MS. FRENCH: Available in both community
15 schools --

16 QUESTION: Can you get a tutoring grant if you
17 go to a community school?

18 MS. FRENCH: Yes, Your Honor, you can. As long
19 as you're in a public school, and that would include
20 community or magnet schools, you're eligible for a
21 tutoring grant.

22 QUESTION: Is there anything in the record about
23 the quality of these community schools? There was one
24 brief that said they were too new, too few, too
25 unregulated, too untested to tell. Was there any evidence

1 of what these schools are, when -- there is evidence that
2 the public school system is deplorable. What evidence is
3 there of these community schools, of whether they are a
4 better choice to educate the child than the regular public
5 schools?

6 MS. FRENCH: I would direct the Court to two
7 places in the record, particularly the joint appendix.
8 One is the affidavit of Mr. Puckett, which is at 157a,
9 which simply describes what a community school is, the
10 number of schools that are available, the number of spaces
11 that are available. There is also the affidavit of Paul
12 Peterson, at approximately 98 of the joint appendix, a
13 very lengthy affidavit that describes the different kinds
14 of options available and what their benefits are.

15 The benefit for a community school is, it is
16 considered a public school. There is some amount of
17 accountability that might not be there with respect to a
18 private school, but for a parent who's looking for an
19 alternative to the public schools, that might be a good
20 option for them.

21 QUESTION: Is there a description of the precise
22 community schools that are participating in the program,
23 and the quality of education in those schools?

24 MS. FRENCH: There is to the first part of your
25 question, Your Honor, and that's in Mr. Puckett's

1 affidavit, of just describing what the schools are, why we
2 have them in Ohio. It's a State-wide program. It's not
3 just for Cleveland. It's actually a State-wide program
4 that was implemented in 1997, and was specifically
5 complemented by the district court in a desegregation
6 order relating to Cleveland as an option for Cleveland
7 parents.

8 QUESTION: Is there information in the record
9 available about the quality of the religiously affiliated
10 schools?

11 MS. FRENCH: There are a number of studies that
12 have been done both in Cleveland and with respect to other
13 scholarship programs, Your Honor. I would point
14 specifically to, again to Mr. Peterson's affidavit at 105
15 to 107 in the joint appendix.

16 QUESTION: I mean about these particular schools
17 in the program.

18 MS. FRENCH: Yes, Your Honor, in general the
19 scholarship program, not just specifically the religious
20 schools, but the voucher, or the scholarship program as a
21 whole, as to whether the students are showing academic
22 achievement or, you know, significant results beyond that.
23 Yes, there are, but not specific, again, to the religious
24 schools.

25 QUESTION: Before we leave the community

1 schools, when the State calculates the funding that goes
2 to the community schools, it takes account of the number
3 of students that go to the community schools, I take it?

4 MS. FRENCH: Oh, yes, Your Honor.

5 QUESTION: And there's a figure of something
6 like \$5,000 --

7 MS. FRENCH: Yes.

8 QUESTION: -- per student. It's not quite that.

9 MS. FRENCH: Right. \$4,500 to \$5,000. It's
10 calculated on the basis of the normal State aid number
11 that a public school would receive for educating a child
12 and, again, it's a per capita kind of number.

13 QUESTION: Does the same amount of money per
14 capita go to a community school as would go to the regular
15 public school?

16 MS. FRENCH: Yes, Your Honor, approximately.
17 There's a slightly different amount, but it's
18 approximately the same as the State aid number.

19 QUESTION: May I ask you if this Court would
20 have to overrule the Nyquist case to support your
21 position? It certainly points the other way, doesn't it?

22 MS. FRENCH: It does point the other way, Your
23 Honor, but we think that there are a number of
24 distinctions which this Court has drawn between the
25 programs at issue, say, in Mueller and Witters that

1 distinguish it from the New York program at issue in
2 Nyquist.

3 The New York program took a class of
4 beneficiaries, that is, the students already within the
5 private schools, and offered them a benefit. The Ohio
6 program approaches the problem very differently. It
7 approaches the problem from all of the schoolchildren in
8 Ohio, or in the Cleveland Public School System, and offers
9 them a benefit which --

10 QUESTION: How does that change the legal
11 concern about the Establishment Clause?

12 MS. FRENCH: Well, this Court has pointed to
13 specifically footnote 38, where the Court reserved
14 judgment in the Nyquist decision for programs that offered
15 a benefit, the specific example was scholarships there,
16 and offered to a broad base of beneficiaries without
17 regard to the nonpublic or public or nonsectarian,
18 sectarian nature of the institutions benefited, which is
19 precisely what is happening here.

20 QUESTION: Well, but doesn't that simply then go
21 back to this neutrality point, and you're saying because
22 it's neutral, in the sense that it's offered in an even-
23 handed way, query -- your friends on the other side
24 dispute that, but just accepting that categorization,
25 because it's neutral in that sense, that's a distinction

1 which ought to make a difference in the result.

2 But as you agreed earlier, the neutrality that
3 you're talking about is a necessary condition, but it's
4 not a sufficient condition of constitutionality, and at
5 the end of the day, I think what's bothering me about
6 Nyquist and, I suspect, Justice O'Connor, too, is that
7 Nyquist depended not merely on a question of neutrality,
8 but on the effect, and at the end of the day, the effect
9 is a massive amount of money into religious schools in
10 Nyquist, a massive amount of money into religious schools
11 here. That, I think, is the sticking point here.

12 MS. FRENCH: We, of course, disagree, Your
13 Honor, that there is a massive amount going to religious
14 schools as a result of something that the Government is
15 doing. It's true, it's very true --

16 QUESTION: Well, your adding a term as a result
17 of what the Government is doing, which is a separate issue
18 as to what the significance is of the private choice, but
19 the effect that Nyquist was concerned with, and the effect
20 that I think has been shown here, is a substantial amount
21 of money, aid to the schools themselves, in relation to
22 the amount of money spent on the program, and in those
23 respects the two are identical.

24 MS. FRENCH: Well, in that respect, Your Honor,
25 there's no question that there is money that is ending up

1 in religious institutions, because that's what the parents
2 have chosen, but that nondiscrimination provision that I
3 spoke of earlier did not exist in Nyquist. The New York
4 schools at issue in Nyquist could discriminate based on
5 religion, and that, of course, means that the program, the
6 New York program was not open to all-comers.

7 QUESTION: Well, Miller also made the point, I
8 think, that where the parents do the choosing, as they did
9 not do in Nyquist, it was a different ball game.

10 MS. FRENCH: Absolutely, Your Honor. In
11 Mueller, of course, the percentage of religious schools or
12 the number of parents receiving benefit because they paid
13 tuition to religious schools was 96 percent, and this
14 Court has been very clear that where there is private
15 choice, that percentage that changes from year to year is
16 simply not relevant. The wisdom of that rule --

17 QUESTION: What is the closest of our cases, do
18 you think, to the Ohio program? Is it Witters?

19 MS. FRENCH: I would suggest Witters, Your
20 Honor, because it's a financial aid going to, there it was
21 a college student, but an adult, to make a decision about
22 where to send the money. Here, it's an adult parent
23 making a decision about where to send the money on behalf
24 of the child.

25 QUESTION: What are you say --

1 QUESTION: Here, the difference would be,
2 however, that according to respondents the choices are
3 much more limited here than in Witters.

4 MS. FRENCH: That's true, Your Honor, but in
5 Mueller the Court did address that concern, as Justice
6 Powell said in his concurrence in Witters, that it didn't
7 matter that there was only one person, Mr. Witters, using
8 the money for seminary, for the Inland Empire School of
9 the Bible, nor did it matter in Zobrest that there was
10 only one child or one parent, set of parents for a child
11 looking for an interpretive or religious school. Mueller
12 teachers that the percentage that changes from year to
13 year is simply not relevant.

14 QUESTION: I suppose part of the design of the
15 program is to have a structure which will encourage over
16 the long term more and different kinds of school choices,
17 including, of course, the community schools.

18 MS. FRENCH: Absolutely, Your Honor.

19 QUESTION: May I ask you about your suggestion
20 that in Nyquist, it's a difference when the parents do the
21 choosing, but who chose where the children would go to
22 school in Nyquist? Did the parents make the decision?

23 MS. FRENCH: The parents, of course, did, Your
24 Honor.

25 QUESTION: So it's the same case.

1 MS. FRENCH: I disagree, Your Honor. I think
2 it's different in that we fall under the question that was
3 reserved by the Court that there, because they didn't have
4 the nondiscrimination provision, because of the purpose
5 behind that Nyquist program was specifically to aid the
6 private schools, that's very different from the Ohio
7 program that's at issue here.

8 Your Honor, I'd like to reserve my remaining
9 time.

10 QUESTION: Very well, Ms. French.

11 Mr. Young, we'll hear from you.

12 ORAL ARGUMENT OF DAVID L. YOUNG

13 ON BEHALF OF THE PRIVATE PETITIONERS

14 MR. YOUNG: Mr. Chief Justice, may it please the
15 Court:

16 I'd like to start out by addressing the
17 questions concerning Nyquist and the basis for
18 distinction. I would refer specifically to 463 U.S. page
19 398, and there this Court, when it distinguished -- in
20 Mueller, when it distinguished Nyquist said, in this
21 respect, as well as others, this case is vitally different
22 from the scheme struck down in Nyquist. There, public
23 assistance amounting to tuition grants was provided only
24 to parents of children in nonpublic schools -- pardon
25 me -- in nonpublic schools. This fact had considerable

1 bearing on our decision striking down the New York statute
2 at issue, and then it goes on. It talks about Allen and
3 Everson.

4 So this Court made it very clear in Mueller that
5 there was an important distinction between that and
6 Nyquist.

7 QUESTION: Does the money went to children --
8 the money went to families with children in nonpublic
9 schools, but that's exactly what's happening here.

10 MR. YOUNG: Your Honor, if --

11 QUESTION: Aren't the vouchers just for people
12 in the nonpublic schools?

13 MR. YOUNG: Your Honor, it isn't exactly the
14 same at all. In Nyquist --

15 QUESTION: Well, am I right that the vouchers
16 are just for people in nonpublic schools?

17 MR. YOUNG: In this case, no, Your Honor. We
18 have tutorial vouchers for people in public schools, and
19 tutorial vouchers for magnet schools and community
20 schools.

21 QUESTION: Speaking of the tutorial vouchers,
22 why is the number of tutorial vouchers limited to the same
23 number of vouchers paid to the private schools?

24 MR. YOUNG: Well, I would -- Your Honor, I would
25 suspect the answer to that is to try to provide some form

1 of equality and to make sure that there was no Government
2 endorsement of one choice or another, so the equality of
3 having the same number of grants for tutoring being the
4 same as the same number going for scholarships.

5 QUESTION: Of course, the amount of money is
6 vastly different, isn't it, because the -- I forget the
7 figures exactly, but isn't the limit on the tutorial
8 something like \$350 a student, as opposed to the \$2,000-
9 some-odd limit on the tuition vouchers?

10 MR. YOUNG: Your Honor, there is a difference,
11 but there is less a difference than the difference between
12 the public school and the nonpublic school deductions
13 taken in Mueller.

14 QUESTION: Well, you wouldn't limit it to the
15 vouchers anyway, would you? I mean, you would think that
16 we'd have to look at the money that goes to the community
17 schools --

18 MR. YOUNG: That is --

19 QUESTION: -- which does not go via vouchers, it
20 goes directly to the schools, and it's a greater amount of
21 money that goes to the private schools, isn't it?

22 MR. YOUNG: Your Honor, I think the fact --
23 there is no question that when this program was initially
24 implemented, every single secular school in the district
25 signed up to participate. Additionally, two brand-new

1 secular schools were established by reason of this
2 program, the two HOPE schools. They remained in the
3 program until the Community School Act was adopted. That,
4 indeed, doubled the amount of money available to the
5 families. In other words, the maximum scholarship grant,
6 \$2,250, and -- but if those same children elected to go to
7 a community school, the State would pay for each child at
8 least double the amount that it would pay if they selected
9 the scholarship --

10 QUESTION: So what is actually involved? I'd
11 like to hear what you say about the endorsement point that
12 Justice Souter initially raised, and my thought is, I'll
13 assume no discrimination, and I'll assume it's a fine
14 program, but imagine you came from Europe or Africa, or a
15 different place, and said, what do they do in the United
16 States by way of educating their children, and you're
17 told, well, \$60 billion a year, \$40 billion, or some very
18 large amount of money is being spent by the Government to
19 give children K through 12 what is basically a religiously
20 oriented education taught by a parochial school. Wouldn't
21 you then say, in the United States of America, like France
22 or like England, the Government of the United States
23 endorses a religious education for young children by
24 putting money up, massive amounts?

25 Now, I'm putting it that way to get your

1 response, and that's the problem that bothers me most
2 about the word, establishment.

3 MR. YOUNG: Thank you, Your Honor. There is no
4 governmental endorsement of religion in this program, and
5 there are several reasons why there isn't. The first,
6 Your Honor, reason would be the amount of money that is
7 spent, first of all, on a public school education, which
8 is approximately \$8,000, the amount of money paid for a
9 community secular education, \$4,500, and the maximum
10 amount provided to a family that selects a nonpublic
11 school, \$2,250.

12 So if -- the first thing you look at is the amount of
13 money that is spent depending on the nature of choice made
14 by the child, and the preference, the -- in that instance
15 is clearly a preference for the secular schools.

16 Secondly, Your Honor, if you look at the
17 history, as well as the context of this particular
18 program, this program was adopted because of one of the
19 most serious educational, public school crises in the
20 United States, and I think anyone trying to determine what
21 was the Government doing, was it endorsing religion, no.
22 The Government was trying to permit low income
23 educationally disadvantaged children who were trapped in a
24 failing system to exercise an alternate choice.

25 So I think any person -- the Cleveland district

1 has been in litigation, Your Honor, for some 20-plus
2 years, in Federal court, because of the difficulties that
3 have been encountered in the public school system. I
4 think anyone looking at this legislation as it was adopted
5 and as it was implemented would conclude that there is
6 certainly no Government endorsement of religion.

7 The Government was trying to resolve a problem
8 of these disadvantaged low income children, and giving
9 them alternate choices, which parents ought to have in any
10 event so that's certainly another reason. When no money
11 flows, not a dollar flows to a religiously sponsored
12 school under this program, but for the independent,
13 private choice of a parent. The State does not direct a
14 dollar to a religiously sponsored school. No --

15 QUESTION: There's an irony, I -- are you -- is
16 that --

17 MR. YOUNG: I could go on, Your Honor, but --

18 QUESTION: No, if -- I mean, the irony is that
19 the better the parochial school, in a sense, the less the
20 freedom of choice. I mean, I -- if it were my children
21 and I saw these comparisons, I'd say, send them to the
22 parochial school. Would you like them to learn that
23 religion, I'd say, frankly not, that's not my religion,
24 but it's very important my child get the best education,
25 and therefore I would be feeling I had to send them there,

1 if that's what I want.

2 MR. YOUNG: Your Honor --

3 QUESTION: I mean, no one's complaining about
4 the quality of the program. It's this concern about the
5 endorsement, and not even that that's what they intend,
6 but that that's the effect.

7 MR. YOUNG: For reasons I've already noted, Your
8 Honor, I believe there is no governmental endorsement, and
9 you have to realize that the overwhelming majority of the
10 eligible children elected to remain in the public school,
11 and incidentally there are --

12 QUESTION: I assume Justice Breyer could send
13 his child to one of the community schools, which is
14 entirely nonsectarian, under this program, right?

15 MR. YOUNG: Your Honor, that's another
16 alternative, and I think we --

17 QUESTION: Which schools would get more money
18 than the sectarian schools anyway.

19 MR. YOUNG: Your Honor, I see that as another
20 reason why no one could say there's a reasonable message
21 of governmental endorsement in this case.

22 QUESTION: And you agree that the Sixth Circuit
23 erred. Was it legal error? The Sixth Circuit said,
24 we're not going to take account of the community schools
25 because that's a whole other program. This case was about

1 the voucher program. In the district court, what
2 development was there about the community schools?

3 MR. YOUNG: Your Honor, the same approach was
4 taken by Judge Oliver, but I don't feel that the Sixth
5 Circuit really understood how the community school program
6 worked, or how one could use the tutorial vouchers to help
7 the children that elected to go to the community schools.

8 QUESTION: Well, there's really no record on the
9 community schools, you're saying, because you weren't
10 permitted to make a record?

11 MR. YOUNG: Your Honor, there is an extensive
12 record in affidavits in terms of the creation of the
13 community schools, the transfer of the two secular
14 scholarship schools to community school status. The
15 children who were enrolled as scholarship pupils in the
16 scholarship secular schools just transferred when those
17 schools became community schools, so this legislation
18 clearly enabled the same children, the same low income,
19 educationally disadvantaged children to elect a community
20 school, so there is record evidence to that extent, Your
21 Honor. Why the Sixth Circuit refused to consider the
22 community schools is beyond me.

23 The -- I think in order to fully understand the
24 choice issue, Your Honors, I think you have to really look
25 into more detail into the tutorial grant program. We

1 haven't addressed at all the subject of the --

2 QUESTION: Do we have to link the two programs
3 together to resolve the case --

4 MR. YOUNG: Your Honor, I believe not.

5 QUESTION: -- the tutorial program and the money
6 paid to the parents and endorsed over to the schools in
7 the case of choice? Do we have to consider both together?

8 MR. YOUNG: Your Honor, I would consider them
9 together, but it was -- it's the, all of the indicia of
10 choice, not just the endorsement.

11 QUESTION: Thank you, Mr. Young.

12 General Olson, we'll hear from you.

13 ORAL ARGUMENT OF THEODORE B. OLSON

14 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

15 SUPPORTING THE PETITIONERS

16 GENERAL OLSON: Mr. Chief Justice, and may it
17 please the Court:

18 I'd like to follow up on the point that was just
19 being made. This Court has taught repeatedly that the
20 history, the context, and the purpose for programs like
21 this are a very, very important part of the determination
22 of what the endorsement test or the effects test would be.
23 There is no question that the purpose that inspired, and
24 the history and the context that inspired the Ohio pilot
25 program could not have been more compelling and more

1 focused on the needs of children.

2 QUESTION: No, but I would think you would say
3 the program was still constitutional, even if it was just
4 conceived in the healthiest school system in the world.

5 GENERAL OLSON: Well, perhaps, Justice Stevens,
6 I might, but this -- as this Court has taught repeatedly,
7 the background history and the context informs the
8 decision which this Court has endorsed with respect to
9 what the effects or endorsement test would be, measured by
10 what a reasonable, objective observer would believe the
11 State or the Government was doing, is the Government
12 endorsing religion, and that has to be considered in the
13 context of what was going on.

14 Here we have a manifestly failing system in
15 which -- no one disagrees with that. Efforts had been
16 made, and a Federal court had decided the system had to be
17 taken over.

18 QUESTION: The thing that puzzles me about that
19 argument is, why did they make this wonderful solution
20 available to such a small percentage of the student body?

21 GENERAL OLSON: I would invite the Court's
22 attention to page 41 of the Taylor petitioner's brief,
23 which contains a chart which shows the various choices
24 which were made available to the students as a result of
25 the composite, the context of the program that we're

1 considering.

2 It shows -- that chart shows, along with the
3 other statistics in the brief, that there are 57,000
4 students in the school system. 16,000 went to the magnet
5 schools, 2,000-and-some are going into the community
6 schools -- these are present facts -- 3,700 accepted
7 scholarships to use in religiously affiliated schools,
8 1,400 accepted the tutorial program, and another 100-and-
9 so took scholarships with respect to nonreligiously
10 affiliated schools.1 There were more nonreligiously
11 affiliated schools available, but two of those, the major
12 ones, decided to become community schools.

13 I would like to invite the Court's attention --

14 QUESTION: Mr. Olson, I didn't quite understand
15 Justice Stevens' question. You acknowledge that it was
16 made available only to a small number of the students?

17 GENERAL OLSON: No. I -- what I meant --

18 QUESTION: I thought the program was available
19 to all the students.

20 GENERAL OLSON: I stand corrected. What I mean
21 to say, the choices were -- there was a broad range of
22 choices, but the program itself was made available to all
23 of the students.

24 QUESTION: Any student could have gone into a --
25 one of the community schools, or to one of the private

1 schools, isn't that right?

2 GENERAL OLSON: That's correct, and the record
3 is quite clear on this, also. Any student who wanted to
4 go to a nonreligiously affiliated private school, no
5 student who wanted to do that was declined the opportunity
6 to do that, so your child, Justice Breyer, could have gone
7 to a nonreligiously affiliated school.

8 QUESTION: Ah, but there doesn't seem to be a
9 record on this very clear, that my impression was really
10 the parochial schools are an awful lot better.

11 GENERAL OLSON: Well, I think that's an
12 impression that you may have, but --

13 QUESTION: So are we supposed to send the case
14 back? Does it turn on that?

15 GENERAL OLSON: No, no. There's no record
16 evidence to support that. Remember, this is a pilot
17 program, an experimental program. The best evidence may
18 be found in the affidavit or declaration of Howard Fuller,
19 who was the former superintendent of the Milwaukee system,
20 who watched the Milwaukee system develop and get put into
21 practice. That's at the joint appendix pages 228 to 236.

22 During the period of time that the Milwaukee
23 program has been in existence, the number of private,
24 nonreligiously affiliated schools have increased from 7 to
25 30, the number of students in those private,

1 nonreligiously affiliated schools has increased tenfold,
2 from 337 to 3,025.

3 He also points out that the existence of the
4 alternative has improved the public school systems as
5 well. Parents are involved in the choice of the
6 educational opportunities for their children. He
7 demonstrates they get more involved in the school system.

8 QUESTION: General Olson, if a private
9 individual challenges a State law as unconstitutional, the
10 burden of proof is on that individual, isn't it, to show
11 the necessary facts to establish unconstitutionality?

12 GENERAL OLSON: Yes, Mr. Chief Justice,
13 absolutely, but the record here goes even further than
14 that, because the record that is available shows these
15 many alternatives. It shows that when the program has
16 been allowed to exist free of constitutional objection, it
17 has shown improvement at the student level, and
18 improvement at the public school level as well as the
19 private school level.

20 Let me emphasize that in response to the
21 question Justice Souter raised at the very beginning of
22 the argument, it isn't just neutrality, but there is
23 clearly neutral criteria here for opting in or out of the
24 program.

25 Another factor that the Court has thought was

1 important in the past was, the parents have an option not
2 to participate in the program, and that's a part of the
3 optional choices that are available.

4 QUESTION: I want to ask how the courts faced
5 with this challenge have to view the case. Must they view
6 it as having the whole range of options available, public
7 school, magnet, community, and religious schools?

8 GENERAL OLSON: Yes, Justice O'Connor, I believe
9 that is the correct context.

10 QUESTION: And why did the court below not do
11 that?

12 GENERAL OLSON: I think the court made a legal
13 error in failing to do so, because this Court has taught
14 over and over again that the context is extremely
15 important --

16 QUESTION: Now, is it limited only to low income
17 children, or does it just -- does that affect the amount
18 of money to be given?

19 GENERAL OLSON: It affects both the amount of
20 money to be given and the preference. To the extent that
21 there are any limitations on the program at all, the
22 priorities are given to low income students on the
23 theory --

24 QUESTION: There's only a finite amount of money
25 available.

1 GENERAL OLSON: Well, that's always the case, of
2 course --

3 QUESTION: Right.

4 GENERAL OLSON: -- in any Government program,
5 but the priorities are given to the low income people.
6 The evidence that's in the record demonstrates that the
7 vast majority of these scholarships are used by people at
8 the poverty level. The rationale for that, of course, was
9 that people in the higher income level can afford the
10 alternative.

11 QUESTION: Now, there was no attempt in the
12 program to make sure that the money that ends up in the
13 parochial schools is not used for religious training, or
14 teaching. There have been other Federal programs, for
15 example, where there have been such limitations on usage.
16 There's none of that here.

17 GENERAL OLSON: That's correct, Justice
18 O'Connor, but the Court has made the point in connection
19 with those types of programs that there's a significant
20 difference between a direct aid program, where funds are
21 going from the Government to the school, as opposed to the
22 private, genuinely independent, purely private choice
23 programs where the choices are being made by individual
24 parents, and being made by individual parents motivated by
25 the best education for their children.

1 So to go back to the reasonable observer test
2 with respect to endorsement, would a reasonable observer
3 believe that the Government's putting its thumb in favor
4 of religion on the scales here under all of these
5 circumstances, the wide range of choices --

6 QUESTION: May I ask on that very question, do
7 you think these alternatives are essential from a
8 constitutional point of view, or would you make the same
9 argument if there were merely the one choice, religious
10 school or the private school?

11 GENERAL OLSON: I think applying the standards
12 this Court has adopted, that if the criteria are
13 neutral -- and I'm answering -- I'm saying yes.

14 QUESTION: The criteria is neutral. You can
15 either go to the public school, or you can go to the
16 parochial school, and if you go to the parochial school,
17 we'll pay the tuition.

18 GENERAL OLSON: Which we're also offer -- yes.
19 Yes.

20 QUESTION: I understand there's a lot more here,
21 but what would you do with that case?

22 GENERAL OLSON: I think if there was a purely
23 neutral criteria in terms of eligibility for the program,
24 and it's a purely private choice, that the -- because this
25 Court has emphasized that we're looking at whether the

1 Government's being -- going to be perceived by a
2 reasonable observer as endorsing religion, if it is a
3 purely private choice program, the teaching of this Court
4 is, it's not unlike a Government check that goes to an
5 individual who then spends it, all of it on his church.

6 QUESTION: My hypothesis is, it's purely
7 private. Either I'll go to the parochial school or the
8 public school, and the Government doesn't care which one.

9 GENERAL OLSON: It's purely neutral --

10 QUESTION: And you would say that's perfectly
11 all right.

12 GENERAL OLSON: Well, I would probably be making
13 that argument in another case. I don't have to make that
14 argument here, because we have all of these other
15 alternatives, including private schools.

16 QUESTION: But I'm trying to decide whether
17 those alternatives are constitutionally necessary, or just
18 make your argument stronger.

19 GENERAL OLSON: Well, I think that what this
20 Court has taught, that because these establishment Clause
21 cases are so difficult, that they are made in the context
22 of the particular facts of the case, and that the facts
23 and circumstances in history illuminate what the
24 Government was involved in, because we're not talking
25 about --

1 QUESTION: Why don't we -- why don't you --
2 well, I know why you don't stress, but why shouldn't we
3 stress as one of those facts the bottom line of 96 percent
4 of the kids taking the tuition aid, or taking it in
5 parochial schools?

6 GENERAL OLSON: Well --

7 QUESTION: And doesn't that suggest that there
8 is perhaps something specious about this notion that it's
9 a matter of wide-open choice here? In practical terms,
10 the money is going to end up where it ends up, and the 96-
11 percent figure is pretty persuasive.

12 GENERAL OLSON: That was the same factor in the
13 Mueller case, and one of the other cases that has been
14 cited, the Court said that is not of constitutional
15 significance. We're not going to --

16 QUESTION: Oh, I'm asking you a question about
17 practical significance, and why do we eliminate that fact
18 from our judgment about what in the real world seems to be
19 going on?

20 GENERAL OLSON: Because those choices this Court
21 has said are the result of purely private choices, and
22 that that will not be associated by a reasonable observer
23 with a governmental decision.

24 QUESTION: Thank you, General Olson.

25 Mr. Chanin, we'll hear from you.

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ORAL ARGUMENT OF ROBERT H. CHANIN

ON BEHALF OF THE RESPONDENTS SIMMONS-HARRIS, ET AL.

MR. CHANIN: Mr. Chief Justice, and may it please the Court:

Under the Cleveland voucher program, millions of dollars of unrestricted public funds are transferred each year from the State Treasury into the general coffers of sectarian private schools and the money is used by those schools to provide an educational program in which the sectarian and the secular are interwoven. It is a given that, if those funds are properly attributable to the State, the program violates the Establishment Clause.

We submit that the answer to that attribution question is yes, and it is yes because, regardless of the decision that individual parents may make, it is inevitable, it is a mathematical certainty that almost all of the students will end up going to religious schools that provide a religious education --

QUESTION: Well, Mr. Chanin, wait just a minute. A couple of things. Do we not have to look at all of the choices open to the students, the community schools, the magnet schools, et cetera? How is it that we can look only at the ones looking to the religious schools?

MR. CHANIN: The limitation to looking at the voucher program as a freestanding program is consistent

1 both with the precedents of this Court and with absolute
2 logic, Your Honor.

3 QUESTION: I don't understand either point, to
4 tell you the truth. I mean, if you want to look at what
5 the parents' choices are, do you not have to look in
6 reality at the whole program, then it isn't a 96-percent
7 thing?

8 MR. CHANIN: Your Honor, this Court has always
9 been program-specific in its financial aid cases. In
10 Nyquist, the Court looked at three separate programs under
11 the one statute, viewed them all in independent terms, and
12 viewed them all independently of whatever else was going
13 on in the New York City Public Schools and New York State.

14 QUESTION: But I'm not sure that's proper.
15 That's what I'm asking you. Why should we not look at all
16 of the options open to the parents in having their
17 children educated?

18 MR. CHANIN: Because what that does, Your Honor,
19 is, it mixes together programs that are quite
20 qualitatively different in both function and purpose. The
21 magnet schools, the charter schools, the tutorial program,
22 those are all ways in which the State is attempting to
23 discharge its basic legal obligation to provide a public
24 education for all of its students.

25 QUESTION: But the question is whether or not --

1 MR. CHANIN: All of the parents are entitled --

2 QUESTION: The question is whether or not there
3 is neutrality in this program, and it seems to me that if
4 you ask us to put on blinders, and not inquire as to
5 what's really happening in Cincinnati, what really was the
6 reason for this, what all of the choices are, that you're
7 asking us to make a decision based on an a fictional
8 premise.

9 MR. CHANIN: Your Honor, I think we're doing
10 precisely the reverse. We are asking you to look at the
11 reality. What the State of Ohio has set up here --

12 QUESTION: You're asking us to look at part of a
13 reality.

14 MR. CHANIN: No, Your Honor. We're asking you
15 to look at a special benefit that the State of Ohio is
16 making available to a selected group of parents over and
17 above the benefit that they have, along with all other
18 parents, to send their children to a public school. That
19 benefit is a qualitatively different benefit to take my
20 child out of a public school and put my child into a
21 private school and be educated with public money.

22 QUESTION: You don't have any problem with that.
23 You say it would be perfectly okay if it went to a private
24 school. It's only the portion of it that goes to a
25 private school that is religiously affiliated that you

1 object to, isn't that right?

2 MR. CHANIN: No. What I am saying --

3 QUESTION: Oh, this money could not even go to
4 nonsectarian private schools?

5 MR. CHANIN: Pardon me, Your Honor?

6 QUESTION: This money could not, in your view,
7 even go to nonsectarian private schools?

8 MR. CHANIN: Yes, it could, Your Honor.

9 QUESTION: It could, and that would be a
10 rational way for the State to provide for the education of
11 children --

12 MR. CHANIN: It would be a constitutional right.

13 QUESTION: -- some in publicly run schools and
14 some in private schools, but if any of those private
15 schools is a religiously affiliated school, that is a no-
16 no.

17 MR. CHANIN: No.

18 QUESTION: -- and that, in your view, is
19 neutrality?

20 MR. CHANIN: No, Your Honor, that is not my
21 position. We are not saying, if any of those schools are
22 sectarian it is a no-no, or the program fails. We are
23 saying, if you take a program which is designed to give
24 parents the option to go out of the public schools and
25 educate their children in a private school, and then you

1 say to 99 out of 100 of those parents, if you choose that
2 option, you must send your child to get a religious
3 education, that is not --

4 QUESTION: Well, the percentage in Mueller was
5 96 percent.

6 MR. CHANIN: I believe, Your Honor, that this
7 Court, this case is not controlled by Mueller, for the
8 very same reason that Mueller was not controlled by
9 Nyquist. The Court distinguished a Nyquist-type program
10 in Mueller on three grounds, all of which are equally
11 applicable here. The Court --

12 QUESTION: The State does not say here, as you
13 put it, that you must go to these religiously affiliated
14 schools. What you're saying is, they happen to be the
15 schools that are currently up and running. In fact,
16 originally in this system it wasn't -- what is it, 96
17 percent you say? Originally it was something much lower,
18 something like 62 percent, except that two of the schools,
19 two of the largest nonsectarian private schools, decided
20 to be come community schools, so originally it was a much
21 different percentage. Are we supposed to examine this
22 program year by year to see what the percentage is?

23 MR. CHANIN: No, Your Honor. What we would like
24 the Court to do is take the language of this program and
25 look at it, not simply on its face, but in the empirical

1 context in which it will operate. Let me give you the
2 percentages, if I may, just to track what you have done.

3 This started out in 1996 with 80 percent of the
4 schools being sectarian and 80 percent of the students
5 going to those schools. By 1999, 2000, the universe had
6 become even more skewed toward the religious. It was 82
7 percent of the schools and 96 percent of the students.

8 QUESTION: But isn't that because some of the
9 private schools had become community schools, and is it
10 not true that parents can choose to have their children
11 educated in a community school and, if they do, that
12 school gets more money from the State than if they had
13 chosen the religious school? If anything, it's skewed
14 against the religious schools --

15 MR. CHANIN: Your Honor --

16 QUESTION: -- in terms of public support.

17 MR. CHANIN: I think there are two parts to your
18 question, if I may take them in sequence. The first is,
19 why is the universe moving in the direction it is, and
20 just, if I may, to complete the point, we now have this
21 year 99.4 percent of the students in that program going to
22 religious schools.

23 QUESTION: So far, you're doing a very good job
24 of not answering Justice O'Connor's question.

25 (Laughter.)

1 MR. CHANIN: Well, the answer to it is this,
2 Justice Kennedy. From our perspective, it is not
3 determinative why the universe is the way it is. From the
4 point of view of the --

5 QUESTION: Well, but now, wait a minute. Why do
6 you not put the community schools and the magnet schools
7 in the universe of choices? That's the problem I'm having
8 with your argument. You say the figures are skewed, but
9 they're skewed only because you will not look at those
10 choices. Why?

11 MR. CHANIN: We do not look at them for two
12 reasons, Your Honor. One is that the Court in Nyquist
13 explained why it did not go beyond the program itself. It
14 said this. If you extend the -- if you look at the
15 choices that parents have to go to public schools as well
16 as the vouchers in the private schools, you allow, through
17 the tuition grant program, to do precisely what the
18 Establishment Clause prohibits, which is to use tuition
19 grants to pay totally for private, sectarian religious
20 education, the Court said. It's a back-door approach to
21 do precisely what the Establishment Clause prohibits.

22 Secondly, people talked a moment ago about
23 perception, and I think they're completely mistaken. This
24 is the perception. The reasonable observer does not look
25 at public education and the multiple, changing, various

1 programs that are offered. The person looks at this. The
2 State of Ohio has set up a special, well-publicized
3 program which allows a certain number of students to
4 escape from a troubled school district, and appropriates a
5 pot of money into that program, and what the reasonable
6 observer sees is, that program and that pot of money ends
7 up 99.4 percent giving children a religious education.

8 QUESTION: Mr. Chanin, that's only true if you
9 say the person is reasonable in not looking at all the
10 choices, which include community schools, certainly.

11 MR. CHANIN: Your Honor --

12 QUESTION: And probably magnet --

13 MR. CHANIN: Your Honor, if it extends that way,
14 there is no meaning any more to the concept of genuinely
15 independent and private choice. We don't need magnet
16 schools. We don't need community schools. We should just
17 say, you people have 57,000 options. You can stay in the
18 Cleveland public schools, or you can leave that school
19 district, take public money, and go get a religious
20 education. The magnet schools, the community schools,
21 they're not unique. They're part of the way in which a
22 State provides a public education. There are small
23 classes and large classes. There's distance education,
24 and face-to-face education. Magnet schools have been
25 around for 50 years.

1 QUESTION: But suddenly it changes, and it's
2 not education any more if you're getting it in a religious
3 school. Why is that?

4 MR. CHANIN: We're not saying it's not --

5 QUESTION: Unless there's an endorsement of
6 religion involved here, I don't see why the fact that some
7 of the money, even most of the money goes to religious
8 schools makes any difference.

9 MR. CHANIN: Well, because you have a basic
10 proposition that we build our case on, which the Court has
11 adopted, and it is this. If public money that is
12 reasonably attributable to the State is used to pay for a
13 religious education, it violates the Constitution. The
14 only way in which it's not attributable to the State is if
15 it doesn't go there by virtue of a State action or a State
16 decision, but the circuit is broken, and the circuit is
17 broken because in between, standing between the State and
18 standing between the schools, is an independent party with
19 decisionmaking to divert it away.

20 There is no intervening party with
21 decisionmaking here. The parents play a ritualistic role
22 in the transmission process, and if I am a parent, and I
23 am holding a voucher in my hand, I can say, where can I
24 use it, and 99 of my 100 choices is, send my child to a
25 religious school.

1 QUESTION: Well, suppose it weren't that number.
2 I mean, our decision, I take it, would have to govern lots
3 of programs in lots of school districts, and suppose that
4 a particular program in a particular school district was
5 set up for the best possible reason, educate the children,
6 and there's no other way, and suppose, too, that you would
7 have very, very good parochial schools, and also some
8 very, very good private schools, and let's suppose the
9 numbers were several hundred million dollars, and so
10 parents getting the money, about half of them sent them to
11 parochial schools and about half of them sent them to
12 private schools. Now, suddenly, does the constitutional
13 balance change?

14 MR. CHANIN: Not in my mind, Your Honor.

15 QUESTION: And so all this 99 percent doesn't
16 make that much difference. Why not?

17 MR. CHANIN: It -- I focus on it because it
18 makes it clear to the Court, I hope, that this isn't even
19 a close-to-the-line case. This is so far to the polar end
20 of the continuum that even if the Court may, in particular
21 cases, have to make judgments on the specific facts, this
22 is not one of those cases.

23 QUESTION: All right, so what is your response
24 if it's 50-50, and you have hundreds of millions of
25 dollars, and --

1 MR. CHANIN: My response is --

2 QUESTION: -- what they're saying, remember, is
3 private --

4 MR. CHANIN: My response is it's
5 unconstitutional.

6 QUESTION: Because?

7 QUESTION: Your response --

8 MR. CHANIN: Because of the criteria that this
9 Court used in Witters. What the Court used in Witters, it
10 didn't just say the program is constitutional in Witters.
11 It told us why it was constitutional. It said, it's
12 constitutional because the aid recipients have generally
13 independent and private choice, and then the Court went on
14 to say what that meant.

15 It said, Witters could choose from a huge
16 variety of options, most of which were secular. It said
17 that only a -- an insignificant portion of the total
18 program money will end up going to sectarian schools.
19 Those were the criteria.

20 It seems to me there may be a case, a different
21 case, in which the Court will have to determine what do
22 the words, substantial portion, significant amount, huge
23 array of choices mean, but the Court does that all the
24 time. It's the normal line-drawing.

25 QUESTION: No, but let me sure I understand --

1 MR. CHANIN: This is not a line-drawing case.

2 QUESTION: Let me just be sure I understand your
3 position. Supposing there are 10 schools out there, 10
4 private schools, nine of which are nonreligious, and one
5 of which is religious, but the Government money will pay
6 the tuition of the -- for the parents who choose the
7 religious school. Is that, in your view, consistent with
8 the Establishment Clause or not.

9 MR. CHANIN: Oh, that's clearly
10 unconstitutional, Your Honor.

11 QUESTION: So even if it's 10 percent.

12 MR. CHANIN: Oh, no. That -- I'm only -- I'm
13 responding to I think --

14 QUESTION: So we've got two extreme --

15 MR. CHANIN: -- Justice Breyer put to me was,
16 there's a choice --

17 QUESTION: See, the interesting thing, if I
18 understand the case correctly, your view is, if any one
19 school gets the money, it's unconstitutional.

20 MR. CHANIN: No. No, Your Honor.

21 QUESTION: Oh, I thought you said yes.

22 MR. CHANIN: No. I'm sorry if I -- I did not.
23 Or, I may have, but I didn't mean to.

24 (Laughter.)

25 QUESTION: Well, what is your answer if there

1 are 10 schools, nine nonsectarian, one sectarian?

2 MR. CHANIN: I think that is a borderline case,
3 but if it's structured this way, I'm a parent --

4 QUESTION: Well, say there are 100, and 99
5 nonsectarian and one --

6 (Laughter.)

7 QUESTION: Give us something that isn't
8 borderline.

9 QUESTION: Well, I'm really trying to find out
10 what your position is.

11 MR. CHANIN: I think I can explain it relatively
12 simply. If Government money that is attributable to the
13 Government is paid directly to a religious school to pay
14 for a religious education --

15 QUESTION: Well, my hypothetical --

16 MR. CHANIN: -- it's unconstitutional.

17 QUESTION: -- is that in this -- and the
18 Government says -- you pick your school. There are 100 of
19 them out there. One of you picks a parochial school,
20 we'll pay the tuition.

21 MR. CHANIN: Okay.

22 QUESTION: We'll send a check direct to the
23 school.

24 MR. CHANIN: All right.

25 QUESTION: That's unconstitutional?

1 MR. CHANIN: But do I also --

2 QUESTION: And your opponent says it's
3 constitutional if 100 percent, so --

4 MR. CHANIN: But I have to know the choice
5 you're giving me as an aid recipient. Are you saying to
6 me, I can use that money at this one religious school, or
7 at the other 99?

8 QUESTION: No, I want to use that money at that
9 one -- my private choice is to have my child go the
10 sectarian school.

11 MR. CHANIN: Absolutely violates the
12 Establishment Clause, in my opinion.

13 QUESTION: Why?

14 MR. CHANIN: Because certainly I can say,
15 without hesitation, nothing broke the circuit between the
16 State and the general coffer of the sectarian school, your
17 aid recipient in your hypothetical had no choice
18 whatsoever. The only choice was to stay in the public
19 schools or go into a religious school. That is not the
20 kind of choice that this Court referred to in Witters or
21 in Nyquist.

22 QUESTION: Well, what if, in Justice Stevens'
23 hypothetical, the State would pay the tuition to the
24 nonsectarian private schools, too?

25 MR. CHANIN: Oh, I think that's Witters.

1 QUESTION: What breaks the circuit in my 50-50
2 case? You say it doesn't break the circuit, but they're
3 saying, well -- the petitioners say, we gave the money to
4 the individuals. It was the individuals who decided, and
5 they had an equal choice between church-related schools
6 and private ones, other ones, and so that broke the
7 circuit. Now, your response to that is what?

8 MR. CHANIN: My response to that is, if this
9 Court concluded that the words, significant amount, huge
10 array of choices, if the Court concluded, as an abstract
11 proposition, that those standards were met on 50-50, I
12 would be most unhappy, but I would conclude that the
13 program was constitutional.

14 QUESTION: No, no, but give me -- not the case,
15 but give me the rationale.

16 MR. CHANIN: The rationale is this. We need to
17 break the circuit. The only case --

18 QUESTION: They say it does. Now, forgetting
19 the cases, they say it does, so why doesn't it?

20 MR. CHANIN: Well, I would not forget the cases.
21 I'd say, I don't accept what they tell me. I want to hear
22 what you've said, and I would say the one case in which
23 you allowed financial aid to go to pay the tuitions of a
24 religious school was Witters, and then I'd say to myself,
25 why did you do it in Witters, and words would pop out to

1 me, huge array of options, only an insignificant portion
2 would end up in sectarian schools. That, said the Court,
3 is genuine, independent private choice, because of the
4 numbers.

5 QUESTION: Well, let me ask you this. Suppose
6 the program were, if the parent chooses the sectarian
7 school, we'll give you a voucher of \$2,500. If the parent
8 chooses the community school, we'll give you a voucher of
9 \$4,500?

10 MR. CHANIN: Your Honor, it's an unreal
11 hypothetical.

12 QUESTION: Well, it's not, because in effect
13 that's what's happened here.

14 MR. CHANIN: No, it isn't because the --
15 everybody --

16 QUESTION: The community school gets \$4,500 a
17 head, and parochial school \$2,500, so if it were done by a
18 little voucher working that way, then what is your answer?

19 MR. CHANIN: It would be no -- it would be un --
20 a violation of the Constitution.

21 QUESTION: Would it?

22 MR. CHANIN: And it would be because --

23 QUESTION: It wouldn't be perceived as --

24 MR. CHANIN: I think it would, Your Honor. That
25 is no different than saying

1 QUESTION: -- giving undue help, or endorsing
2 the religious school.

3 MR. CHANIN: It's no different than saying, you
4 can take a voucher, you can leave public education and go
5 to a religious school, or you don't limit it to community
6 schools, or, I'll give you money to go to a community
7 school, I'll give you money to go to a magnet school, I'll
8 give you money to go to a traditional school.

9 The choice that you are positing for me is, the
10 choice is between staying in the public schools with
11 whatever the public schools may offer --

12 QUESTION: Well, we haven't been --

13 MR. CHANIN: -- or leaving to go into private
14 school.

15 QUESTION: We haven't been referring to
16 community schools as public schools. The public school
17 system that failed was the traditional old public school
18 system in the community. The community schools are
19 basically private schools that are getting a different
20 kind of State aid. Why shouldn't they be considered?

21 MR. CHANIN: They are not private schools, Your
22 Honor. They are public schools. They are subject to
23 Government control. They are just a method or a mechanism
24 by which the State has chosen to provide a species of
25 public education. There is a bright line distinction

1 between the public school system in which the community
2 schools fit, and private education in which the voucher
3 parents can take their money. It is simply --

4 QUESTION: Do these community schools have to
5 accept all-comers?

6 MR. CHANIN: There are certain -- they cannot
7 discriminate on certain bases. There are a lot of --

8 QUESTION: Right, but can they say, we're only
9 going to take kids who pass a certain test, a certain
10 entry exam?

11 MR. CHANIN: I'm not sure you can base it on
12 academic achievement.

13 QUESTION: It doesn't sound much like the public
14 school system to me.

15 MR. CHANIN: Pardon me?

16 QUESTION: It doesn't sound much like the public
17 school system to me.

18 MR. CHANIN: Well, it is, Your Honor. Magnet
19 schools do that.

20 QUESTION: Well, but why is there the bright
21 line that you talk about which separates community schools
22 from private schools and aligns them with -- other than
23 the fact that they're run by the Government? Here, the
24 community schools, as I understand it, were set up because
25 they wanted to get away from the kind of failing system

1 that so many public schools are, and do something
2 different.

3 MR. CHANIN: Because, Your Honor, if the concept
4 of breaking the circuit is going to have any meaning, you
5 have to draw a line, and the only rational line to draw is
6 between public education and private education.

7 QUESTION: Well, but you've said that time and
8 again --

9 MR. CHANIN: I --

10 QUESTION: -- but you can tell members of the
11 Court are --

12 MR. CHANIN: I say it because --

13 QUESTION: Well, I --

14 MR. CHANIN: I didn't mean to interrupt you,
15 Your Honor.

16 QUESTION: You'd better not.

17 (Laughter.)

18 MR. CHANIN: Is it too late?

19 QUESTION: You can see a number of members of
20 the Court are really not satisfied --

21 MR. CHANIN: No.

22 QUESTION: -- with that explanation.

23 QUESTION: May I ask this question, is it true
24 that the group you put on one side of the line, there's no
25 tuition in those?

1 MR. CHANIN: There is no tuition.

2 QUESTION: So those are all free schools,
3 supported -- where the others, there's tuition. That's
4 the line, isn't it?

5 MR. CHANIN: Can I -- could I try once again on
6 another --

7 QUESTION: By all means.

8 MR. CHANIN: -- example here?

9 The prototype that this Court has set out for us
10 of genuine, independent, and private choice, is a
11 Government employee. The Government can pay that employee
12 the paycheck, and that -- even knowing that the employee
13 intends to donate all or part of it to a church, all, with
14 no constitutional problem, because the employee has
15 independent discretion. He can spend that paycheck any
16 way he wants, for whatever purpose he wants, with no
17 control or direction from the Government.

18 Now, you use that as your analogy of genuine and
19 independent choice. You don't say that Government
20 employee has independent choice --

21 QUESTION: Mr. Chanin --

22 MR. CHANIN: -- because he didn't have to come
23 work for the Government in the first place.

24 QUESTION: Mr. Chanin

25 MR. CHANIN: He had all kinds of options. He

1 could have worked everywhere else.

2 QUESTION: Mr. Chanin, may I ask you a question,
3 because I think we understand the case of the Government
4 employee turning over his paycheck to the Salvation Army,
5 or whatever.

6 Suppose the suburban schools had been included
7 in this mix, that instead of saying, come in if you want,
8 and then the reality is that none of them do, suppose all
9 those school districts surrounding the city were made to
10 be part of the program, and the parents had the choice of
11 sending their children to those public schools, or to the
12 religious private schools, would you then say that --
13 would it make any difference, that is, if the public
14 schools in the suburban communities were made to
15 participate in this program?

16 MR. CHANIN: It would make a difference, but I
17 could not answer as to whether it would be constitutional
18 or unconstitutional as far as the program is concerned,
19 until I saw the specifics of that program, are those
20 public schools a really meaningful type of choice for an
21 inner city child in Cleveland, and I'd also have to make a
22 legal analysis of whether that really is just another way
23 in which the State of Ohio is providing a public
24 education.

25 QUESTION: Mr. Chanin, can you tell me how we

1 get from here to there? Here we have a failed inner city
2 school system, and the State says, part of the problem
3 with this is monopoly. We just have to provide diversity,
4 let parents choose a good education.

5 Now, it so happens that the only up-and-running
6 schools that happen to be in the inner city are religious
7 schools, educating the poor people in the city at
8 relatively low rates. The State of Ohio adopts a program
9 which allows suburban schools to accept these inner city
10 kids, but the suburban schools say, oh, heck no, we don't
11 want the inner city kids come into our suburban schools.
12 How does one get from here to there? The only schools
13 that happen to be there right now are religious schools.

14 This doesn't mean that the program will always
15 be that way. The experience in Milwaukee was that as the
16 program continued, there were more and more nonreligious
17 private schools, but right now, to start off with, of
18 course they're mostly religious, and that is going to
19 destroy the entire program, so that we can never get from
20 here to there.

21 MR. CHANIN: I do not believe, Your Honor, that
22 a crisis in the Cleveland public schools is a license to
23 ignore the mandate of the Establishment Clause, nor do I
24 think it's a mandate to say, ignore it for a while because
25 in a few years it may --

1 QUESTION: Tell us how to get from here to
2 there.

3 MR. CHANIN: I will tell you, Your Honor --

4 QUESTION: What do you do, abolish all the
5 religious --

6 MR. CHANIN: No.

7 QUESTION: -- schools in the inner city --

8 MR. CHANIN: No. No.

9 QUESTION: -- and then start from scratch --

10 MR. CHANIN: I'll tell you just what it should
11 do.

12 QUESTION: -- so that all the schools that start
13 up won't be religious?

14 MR. CHANIN: What the State of Ohio should do in
15 this specific case is exactly what the Ohio supreme
16 court's been telling them to do for 10 years to deal with
17 the problems in Cleveland. It's telling them, there are
18 innovative programs within the public schools, refinance
19 your schools, provide resources, and do that. Instead --

20 QUESTION: They've spent already \$7,000 per
21 child, which is above the average in the rest of the
22 country. It isn't a money problem.

23 MR. CHANIN: The --

24 QUESTION: It's a monopoly problem.

25 MR. CHANIN: No, Your Honor, not according to

1 the Ohio supreme court. According to the Ohio supreme
2 court, which just struck down as inadequate the financing
3 structure of the Ohio school system and has been directing
4 it for 10 years to restructure it and put in more remedial
5 classes, smaller classes, free kindergarten classes --

6 QUESTION: Mr. Chanin, it's very clear to me
7 that Ohio had that option. The question is, is it
8 unconstitutional for them to choose an option that they
9 think has more likelihood of success, and Justice Scalia
10 put the point that what they're trying to do is have a
11 structure in which different school systems, different
12 curriculums, curriculums that do not inflict terminal
13 boredom on students, can begin to flourish, and the
14 question is, how can they do that in the long term, and
15 you say they cannot do it.

16 MR. CHANIN: No, I say this, Your Honor. I say
17 that the Ohio legislature has the right to make an
18 educationally unsound judgment. It does not have the
19 right to make an unconstitutional judgment. It must solve
20 the problems in Cleveland within the parameters of the
21 Establishment Clause, and as the brief that -- the amicus
22 brief filed by the National School Boards Association
23 indicates, there are numerous programs that were available
24 to it. There are problems being solved in urban school
25 districts all over the country without voucher program.

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1 We have not said much about the educational
2 value vel non of voucher programs, because we don't think
3 that this is a forum for an educational policy debate, but
4 they are a lousy option, and we refer you to the amicus
5 brief of the National School Boards Association. The
6 evidence is conflicting. There is no evidence that
7 competition improves the lot for the 96 percent of the
8 students who remain in the troubled Cleveland Public
9 School System with less resources and even worse problems.

10 If there are no further questions, thank you,
11 Your Honor.

12 QUESTION: Thank you, Mr. Chanin.

13 Mr. Frankel, we'll hear from you.

14 ORAL ARGUMENT OF MARVIN E. FRANKEL

15 ON BEHALF OF THE RESPONDENTS GATTON, ET AL.

16 MR. FRANKEL: Mr. Chief Justice, and may it
17 please the Court:

18 Coming in at this point, I come in in a way
19 toward the beginning and also toward the end of Mr.
20 Chanin's argument. The discussion of this problem long
21 ago began with talk of a crisis in the public schools of
22 Ohio, and that talk in a strange way has gotten lost in
23 the shuffle as the Court has ranged widely, necessarily
24 but widely, over Establishment Clause questions for which
25 I am now about to submit this may be a strangely

1 incongruous vehicle for a decision.

2 As was just pointed out toward the end of what
3 Mr. Chanin was saying, you had a determination sometime
4 ago by the supreme court of the State of Ohio that its
5 system of public school financing is unconstitutional
6 under Ohio's own constitution. Now, we in our submissions
7 early felt that that was an important threshold question
8 to be looking at, very possibly before you got into big,
9 Federal constitutional questions, and so we have briefed
10 it. We briefed it in the Sixth Circuit, and we briefed it
11 in this Court.

12 Somewhat remarkably, that question of whether
13 Ohio's school financing system is unconstitutional under
14 its own constitution --

15 QUESTION: But Judge Frankel, wasn't that on the
16 ground that it used the single subject title, rather
17 than --

18 MR. FRANKEL: No, Your Honor, it had nothing to
19 do with that case. That was a quite separate case called
20 DeRolf, which was decided in 1997. Under that decision,
21 ever since 1997, Ohio's system of financing its public
22 schools has a) been unconstitutional as a matter of Ohio
23 constitutional law and b) under ongoing repair, which is
24 in progress this very day, and is approaching completion
25 of repair.

1 QUESTION: Judge Frankel, you are going to tie
2 this in to the question presented in this case?

3 MR. FRANKEL: I hope so, Your Honor.

4 QUESTION: That was a program designed to rescue
5 economically --

6 MR. FRANKEL: I hope so, Your Honor --

7 QUESTION: All right.

8 MR. FRANKEL: -- for this reason, because I want
9 to raise a question whether this Court doesn't reach hard
10 questions first is present here, whether the much-debated
11 Establishment Clause questions are as essential as the
12 Court has been led to believe they are in this case, and
13 whether a decision leaving the Establishment Clause
14 jurisprudence where we think it should stay will be an
15 appropriate resolution for the interests of Ohio and its
16 poor children.

17 QUESTION: Your assumption, Judge Frankel, is
18 that the problem is a problem of money. That's all that
19 the supreme court of Ohio --

20 MR. FRANKEL: Is what, Your Honor?

21 QUESTION: Is a problem of money --

22 MR. FRANKEL: Not only --

23 QUESTION: -- and the studies that I'm familiar
24 with suggest that that is not the case.

25 MR. FRANKEL: Whatever people suggest --

1 QUESTION: Please let me finish, sir.

2 MR. FRANKEL: I'm sorry.

3 QUESTION: The studies that I'm familiar with
4 say that the inner city parochial schools, which spend
5 much less per child on education, do a much better job
6 than the public schools that spend much more, so I just
7 don't think it follows that once you solve a
8 constitutional problem that will get more money, you're
9 going to solve the difficulty that the people of Cleveland
10 found with their public schools. I don't think that
11 necessarily follows.

12 MR. FRANKEL: Your Honor, there is mostly
13 anecdotal material comparing the kind of job that's done
14 in parochial and secular schools.

15 QUESTION: Oh, I don't think it's anecdotal at
16 all. I mean, there are extensive studies that show that
17 parochial schools do a better job.

18 MR. FRANKEL: With all --

19 QUESTION: I mean, these are studies by, you
20 know, educational scholars.

21 MR. FRANKEL: With deference, Your Honor, I
22 don't think that the difficulties that I'm trying to
23 suggest about the Court's getting into the details of some
24 of the Establishment Clause cases that have been mooted
25 here are avoided by looking what is said to be a

1 comparison between parochial schools and public schools.

2 Certainly, as you compare the subject of
3 affluence from district to district, which was the guts of
4 the Ohio decision that I refer to, the problem of
5 comparative qualities changes quite markedly, and you
6 don't have the same kind of problem. In fact, what you
7 have in Ohio, and a basis for the holding of
8 unconstitutionality, is vast regional disparities between
9 the public schools in affluent districts and the public
10 schools in impoverished districts.

11 QUESTION: Mr. Frankel, did you make this
12 argument to the court of appeals?

13 MR. FRANKEL: Yes, Your Honor. We raised --

14 QUESTION: And how did they deal with it?

15 MR. FRANKEL: Well, Your Honor, it sort of
16 slipped by --

17 (Laughter.)

18 MR. FRANKEL: -- but we made a point that -- let
19 me put it this way. I think in fairness to me and the
20 court of appeals, arguments undergo some sea changes as
21 you go from court to court. We raised this 1997 decision,
22 DeRolf, as a threshold problem that ought to be looked at
23 before you got into wide Establishment Clause questions.

24 On the Establishment Clause, I should add we are
25 as one with our friends here.

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1 QUESTION: Did you cross-petition for certiorari
2 in this case?

3 MR. FRANKEL: No, Your Honor, we didn't think we
4 had any occasion to do that.

5 QUESTION: You brought the lawsuit, though. You
6 brought the lawsuit.

7 MR. FRANKEL: We won the lawsuit.

8 QUESTION: Yes.

9 MR. FRANKEL: And we didn't believe -- I still
10 don't believe we had occasion to do that.

11 Now, what's happened --

12 QUESTION: Mr. Frankel, may I ask you, has
13 the -- have the Ohio courts ever passed upon this
14 question? I know they passed on the single statement
15 issue under the Constitution. Was that issue before the
16 Ohio courts when they passed on the single issue matter?

17 MR. FRANKEL: The Ohio supreme court, Your
18 Honor, in what we consider obiter, said it found
19 consistency with the Establishment Clause, but it had
20 already held its statute unconstitutional on State
21 grounds, so we never could reach that. That's why we came
22 to the Federal court. Now -- so we've never had that
23 question adjudicated.

24 QUESTION: But the fact that it issued the
25 obiter indicated that it was not concerned with the point

1 that you're now making, and that's the highest court of
2 the State.

3 MR. FRANKEL: It was not concerned with -- I
4 didn't hear Your Honor.

5 QUESTION: With the point that you're now
6 addressing to us.

7 MR. FRANKEL: No, Your Honor, it didn't take
8 proper concern of everything that we thought it should
9 have looked at. What I am saying is that in the midst of
10 Ohio's efforts, which are almost completed, to resolve
11 whether Mr. Justice Scalia has the answer or not, the
12 great core problem of public education in Ohio, in the
13 midst of that, they come slicing across this situation,
14 having held their own system unconstitutional in 1997, and
15 they create this voucher program.

16 Well, there we are. We're served up with a
17 voucher program, so we look at it, and looking at it, we
18 have argued, and Mr. Chanin has sufficiently covered that,
19 that it is unconstitutional, and we think their effort to
20 defend it is somewhat slap-dash, especially, for example,
21 when they try to defend proselytization in a few hasty
22 paragraphs, overturning 50 years of precedent, as they
23 would hope, and saying proselytization with Government
24 money is okay, where we say that the law since 1948 has
25 been to the contrary, and that's because this voucher

1 program came in, as it were, by the ears, while they were
2 busy working on other, more fundamental things that may
3 well -- and I don't know, Mr. Justice Scalia, and I don't
4 think any of us knows that may well go far to solving --

5 QUESTION: Thank you, Mr. Frankel.

6 MR. FRANKEL: Thank you, Your Honor.

7 QUESTION: Ms. French, you have 4 minutes
8 remaining.

9 REBUTTAL ARGUMENT OF JUDITH L. FRENCH

10 ON BEHALF OF THE STATE PETITIONERS

11 MS. FRENCH: Thank you, Mr. Chief Justice, I
12 have four points.

13 First and foremost, the Ohio supreme court
14 upheld the constitutionality of this program under the
15 Establishment Clause, and approved its use as one solution
16 for solving the problem in Cleveland and for any school
17 district that might find itself in a similar unfortunate
18 situation.

19 Second, it appears that respondents have either
20 ignored or do not accept the last 20 years or so of this
21 Court's jurisprudence. Each of the legal principles they
22 have raised here today and in their briefs have been
23 expressly rejected by the Court.

24 Their reliance on percentages was expressly
25 rejected by this Court in Mueller. Their arguments about

1 substantiality of the aid going to religious schools was
2 rejected by five members of the Witters Court.

3 Their question about indoctrination, or
4 proselytization, has been specifically rejected by this
5 Court in the cases involving true private choice, Mueller,
6 Witters, Zobrest, and confirmed again in Agostini and
7 Mitchell most recently.

8 Third, and Your Honor, I believe this goes to
9 your question, Justice Breyer, and your concerns, Justice
10 O'Connor, about the breadth of options that are offered to
11 all Cleveland students, the State of Ohio has looked to
12 every conceivable educational option available, to include
13 all Cleveland students, to include all-comers in terms of
14 students and schools.

15 QUESTION: Are community schools public schools
16 in Ohio?

17 MS. FRENCH: They are considered public schools,
18 Your Honor.

19 QUESTION: They have separate boards?

20 MS. FRENCH: They do.

21 QUESTION: Separate employees?

22 MS. FRENCH: They do. They do have separate
23 employees.

24 QUESTION: And not the same control over content
25 of programs?

1 MS. FRENCH: That's right, Your Honor. It is
2 separately, it's not --

3 QUESTION: It's publicly financed?

4 MS. FRENCH: Yes, Your Honor, and it does have
5 the same sorts of financial requirements. They get
6 audited a little differently. There are more controls,
7 but it is slightly different, because it's not --

8 QUESTION: They charge tuition, though? They
9 charge --

10 MS. FRENCH: Community schools do not charge
11 tuition, Your Honor.

12 QUESTION: Do not charge tuition?

13 MS. FRENCH: And in answer to your question
14 earlier to Mr. Chanin, it's open to all-comers. If they
15 have -- if they don't have enough spaces available for all
16 who have applied, they must accept students on a lottery
17 system the way that a public school would have to accept
18 all-comers. The scholarship program, though, among all of
19 this array of options, is really the poor relative. They
20 get less money, parents have to pay tuition, and they get
21 no tutorial grants.

22 Perhaps the best way to describe the array of
23 options is that at the eye-level of parents. This Court
24 has said it is important in Rosenberger and again in
25 Justice Powell's concurrence in Witters, that it is

1 important to view all of the circumstances, view all of
2 the consequences as a whole.

3 What respondents seem to want us to do is
4 exclude the religious schools as an option. This Court on
5 many occasions has told us that we can neither inhibit nor
6 advance religion, and that would certainly be the cause
7 there.

8 Finally, it is apparent from the Court's
9 questions and respondents' arguments that the Ohio general
10 assembly had a number of competing and conflicting
11 considerations before it in the face of and in an
12 environment of an educational crisis it needed to solve,
13 and to solve quickly. It seems that Ohio did it right.
14 It didn't take too much money away from the public
15 schools, but gave enough for a limited program that is
16 targeted to the most needy, the poorest of the poor, the
17 low income students who would not otherwise have choice.
18 It is for that reason that we ask the Court to overturn
19 the decision of the Sixth Circuit and uphold this program.

20 Thank you.

21 CHIEF JUSTICE REHNQUIST: Thank you, Ms. French.

22 The case is submitted.

23 (Whereupon, at 11:25 a.m., the case in the
24 above-entitled matter was submitted.)

25