

IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT

Docket No. 36 EAP 2006

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A CONDEMNATION PROCEEDING IN REM BY THE REDEVELOPMENT  
AUTHORITY OF THE CITY OF PHILADELPHIA FOR THE PURPOSE OF  
REDEVELOPMENT OF NORTH PHILADELPHIA REDEVELOPMENT AREA  
MODEL CITIES URBAN RENEWAL AREA CONDEMNATION NO. 30B  
PHILADELPHIA, PA, INCLUDING CERTAIN LAND IMPROVEMENTS AND  
PROPERTIES

RE: 1839 NORTH EIGHTH STREET

APPEAL OF: REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA

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**BRIEF *AMICI CURIAE* OF THE  
JEWISH SOCIAL POLICY ACTION NETWORK  
AND THE ANTI-DEFAMATION LEAGUE  
IN SUPPORT OF APPELLEE**

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Appeal from the Order of the Comm. Ct. dated 2/6/06 at No. 150 CD 2005, Reversing the Order  
of the CCP of Philadelphia City, Civ. Div., dated 1/4/05 at No. 2988 Nov. T 2003

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## **I. THE INTEREST OF AMICI CURIAE**

### **A. THE JEWISH SOCIAL POLICY ACTION NETWORK**

The Jewish Social Policy Action Network ("JSPAN") is an organization of American Jews who seek, *inter alia*, to protect the constitutional liberties and civil rights of all Americans.

JSPAN believes that the religion clauses of the First Amendment to the United States Constitution are the bedrock of American freedom, and that without the separation of Church and State neither religious freedom nor any other basic freedoms can endure. While we share that belief with most Americans, the almost 2000 year Jewish experience of living as Jews in Christendom and in Islamic societies accounts for the uncommon depth and unanimity with which that belief is held by American Jews.

Religious minorities in America would regard themselves, in the words of Justice O'Connor, as "outsiders, not full members of the political community" (*Lynch v. Donnelly*, 465 U.S. 668, 688 (1984); *Wallace v. Jaffree*, 472 U.S. 38, 69, 96 (1985); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 625 (1989)) were it not for the separation principle first enunciated by the founding fathers and then reemphasized in many Supreme Court rulings from the mid-20th century (*Everson v. Board of Education*, 330 U.S. 1 (1947)) until today (*McCreary County, Kentucky v. ACLU*, 545 U.S. 844 (2005)). That American Jews today are full members of the political community, indeed, are the freest Jewish community in our two millennia Diaspora history, is the result of this nation's adherence to the constitutional principle of separation of Church and State.

JSPAN's interest in this matter is in preventing any erosion of that principle. A decision by this Court reversing the Commonwealth Court would, in our view, be a dangerous step in that direction, because it would authorize what amounts to a direct monetary grant to a sectarian

school. It would also threaten to inject into the condemnation process the kind of divisive sectarian competition and strife that the Establishment Clause was designed to prevent. Such a decision would encourage various avowedly religious organizations to compete for governmental assets for use in propagating their faith. See *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) ("Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. [citations omitted]. The potential divisiveness of such conflict is a threat to the normal political process.").

Members of JSPAN have argued before the United States Supreme Court in *Braunfield v. Brown*, 366 U.S. 599 (1961) and *Sloan v. Lemon*, 413 U.S. 825 (1973), and contributed extensively to *amici* briefs in state and federal courts in freedom of religious worship and religious establishment cases, including cases on religious accommodation, prayer in schools, and government entanglement in religion, ranging from *School Dist. of Abington Twncshp. v. Schempp*, 374 U.S. 203 (1963), to *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986), and most recently in *Kitzmiller v. Dover Area School District*, 400 F. Supp. 707 (M.D. Pa. 2005).

## **B. ANTI-DEFAMATION LEAGUE**

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

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

## II. SUMMARY OF ARGUMENT

Although we approach this case somewhat differently than did the Commonwealth Court, *Amici* fully agree with the decision of the Commonwealth Court that the condemnation of Appellee's property by the Redevelopment Authority of the City of Philadelphia ("the Authority"), pursuant to an ordinance adopted by the Philadelphia City Council, with the intention of conveying it for nominal consideration to Hope Partnership, runs afoul of the Establishment Clause of the First Amendment to the United States Constitution (made applicable to the States by the Fourteenth Amendment), as well as Article I, Section 3 of the Pennsylvania Constitution.

In citing *Gilfillan v. City of Philadelphia*, 637 F.2d 824 (3d Cir. 1980), the Commonwealth Court relied upon the three part test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) in determining that there was a violation of the Establishment Clause. (891 A.2d at 828-830). On the same day that it decided *Lemon*, the Supreme Court also handed down its decision in *Tilton v. Richardson*, 403 U.S. 672 (1971), followed two years later by *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), both of which, given the facts of this case, will provide excellent guidance to this Court. In those cases, the Supreme Court struck down legislative programs providing financial support of physical facilities at both institutions of higher learning (*Tilton*) and elementary and secondary schools (*Nyquist*), to the extent that the programs did not include limitations on the sectarian/religious use of those facilities. It did so notwithstanding that the programs expressed a legitimate secular objective. The continuing vitality of those cases has not been questioned by the Court in its more recent Establishment Clause cases. See *Mitchell v. Helms*, 530 U.S. 793, 856 (2000) (O'Connor, J.

concurring, citing *Tilton* and distinguishing it); *Zelman v. Simmons-Harris*, 536 U.S. 639, 661 (2002) (citing and distinguishing *Nyquist*).

*Amici* submit that *Tilton* and *Nyquist* are dispositive in this case. Indeed, the facts in this case present even more compelling evidence of violation of the Establishment Clause. The Authority is not an education funding agency acting pursuant to some legislative enactment providing for aid to a government defined class of educational institutions. Instead, in the guise of redevelopment, it intends to make a virtual gift of valuable real estate, with an aggregate value of \$860,250, to an avowedly religious organization for the construction of an admittedly "faith based" elementary school, which will "assume the presence of God," without any restrictions or limitations on the sectarian use of that property.

### **III. ARGUMENT**

#### **A. THE AUTHORITY'S CONDEMNATION OF VALUABLE REAL ESTATE FOR TRANSFER TO A RELIGIOUS ENTITY FOR NOMINAL CONSIDERATION, WITHOUT RESTRICTION ON ITS SECTARIAN USE, VIOLATES THE ESTABLISHMENT CLAUSE.**

In its opinion, the Commonwealth Court relied on a three part test first articulated by the United States Supreme Court in *Lemon v. Kurtzman, supra*, to determine that the conduct of the Authority violates the Establishment Clause of the First Amendment of the United States Constitution, made applicable to the States by the Fourteenth Amendment. (891 A.2d at 828-830). On the same day that it decided *Lemon*, the Supreme Court also handed down its decision in *Tilton*, followed two years later by *Nyquist*, both of which, given the facts of this case, provide excellent guidance for this Court.

Before proceeding to analyze this case under *Tilton* and *Nyquist*, it is important to note that a few key facts clearly distinguish this case from the principle cases relied upon by the Authority and by Hope Partnership in its *amicus* brief. See *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The Authority is not an education instrumentality of the government, nor is it administering a broad based program providing aid to education enacted by a legislative body and based on some per capita formula that does not discriminate between public and private schools. Moreover, the Authority is not leasing the properties in question to Hope Partnership, thereby retaining an ownership interest, as was the case of the computers, projectors, and other equipment in the cases cited. Rather it intends to make what is in reality a gift (referred to in the record as a transfer for nominal consideration) of the properties to Hope Partnership. See *Haller v. Commonwealth of Penna. Dept. of Revenue*, 556 Pa 289, 293 (1999) ("[T]he focus of *Agostini* is specifically on government special education programs and the constitutional restraints on how

this aid may be provided to students in sectarian schools, and not on a fundamental revision of all disputes implicating the Establishment Clause.").

*Tilton*, on the other hand, involved a federal program which provided federal grants to institutions of higher learning, including sectarian ones, for construction of various types of academic facilities. The recipients were required to provide assurances that for a twenty year period no facility so funded would be used for sectarian purposes, and the government had a recapture right with respect to the funds advanced during that twenty year period in the event of a violation. However, at the end of the twenty years, the recipients were under no further restriction, and the government had no recapture right. Although there was no Opinion of the Court, the Justices were unanimous that the lack of any restriction on sectarian use and of any recapture right after twenty years violated the Establishment Clause. Writing for a plurality of the Court, Chief Justice Burger acknowledged that the grant program had a "legitimate secular objective," just as the Authority and Hope Partnership argue in this case. (Brief of Appellant, p. 20; Brief of Hope Partnership, pp. 9-12). Nonetheless, he concluded: "The restrictive obligations of a recipient institution . . . cannot, compatibly with the Religion Clauses, expire while the building has substantial value." *Id.* at 683. Justice Douglas, writing for himself and Justices Black and Marshall, stated:

The reversion of the facility to the parochial school at the end of 20 years is an outright grant, measurable by the present discounted worth of the facility. A gift of taxpayers' funds in that amount would plainly be unconstitutional.

*Id.* at 692. On that point, the remaining Justices concurred.<sup>1</sup>

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<sup>1</sup> Justice White concurred. 403 U.S. 602, 665 n.1 ("I accept the Court's invalidation of the provision in the federal legislation whereby the restriction on the use of buildings constructed with federal funds terminates after 20 years."). Justice Brennan would have invalidated the entire federal grant program to sectarian institutions regardless of the 20 year provision. 403 U.S. 651 n.10, 659-661.

*Tilton* was followed by the Court's decision in *Nyquist* in which there was a majority Opinion of the Court. In that case, the New York legislature had authorized direct grants to qualifying non-public schools, including clearly sectarian schools, to be used for the "maintenance and repair of school facilities and equipment to ensure the health, welfare and safety of enrolled pupils." Qualifying schools consisted of those with a high concentration of low income families, but the grants were expressly limited to private schools; public schools were not eligible to participate. Other than the requirement that they be used for maintenance and repair, no restrictions were placed on the use of those funds by the recipient schools. Once again, the Court acknowledged that the legislation was "adequately supported by legitimate nonsectarian state interests." It nonetheless struck down that program as violative of the Establishment Clause, concluding that:

Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools.

413 U.S. at 774.

Here, the legislative purpose is the elimination of blight and redevelopment of neighborhoods. But as *Tilton* and *Nyquist* demonstrate, that does not end the inquiry under the Establishment Clause. The Authority intends to essentially gift real estate to Hope Partnership, including the Smith property, with an aggregate acquisition cost of \$860,250 (R. 51a), by conveying it for nominal consideration. (R.69a). There is no logical or legal distinction between this form of government largesse and the funding provided in *Tilton* and *Nyquist*; the acquisition cost of the properties will still come from the public treasury. (R.68a).<sup>2</sup> Moreover, as in *Nyquist*,

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<sup>2</sup> Michael Koonce, Director of Urban Renewal Activities, testified that: "NTI [Neighborhood Transformation Initiative] dollars were -- that was pretty much the only money that we had at

in which maintenance funds went only to private schools which were predominantly sectarian, the only educational recipient of government aid here will be an entity formed by two religious orders who have been quite open about their intention to use it to construct and operate a faith-based school operated on Judeo-Christian values, which will focus on, among other things, the "spiritual development of students," and which will assume the presence of God. (R. 125b).<sup>3</sup> See *Zelman, supra*, 536 U.S. at 661 ("Nyquist involved a New York program that gave a package of benefits exclusively to private schools and the parents of private school enrollees. Although the program was enacted for ostensibly secular purposes [citations omitted], we found that its 'function' was 'unmistakably to provide desired financial support for nonpublic sectarian institutions. . . .' The program thus provided direct money grants to religious schools.") (emphasis in original). Finally, the transfer of the properties from the Authority to Hope Partnership will be outright, with no restrictions on their use, not even *Tilton's* constitutionally inadequate restriction of 20 years. As the Court explained in *Nyquist*, referring to *Tilton*:

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that time to use for acquisition, so that it would have been almost synonymous with public dollars in terms of acquisition funds."

<sup>3</sup> The Authority and Hope Partnership point to other aspects of the Authority's redevelopment plan for North Philadelphia as evidence of its secular, non-discriminatory, neutral purposes. According to Hope Partnership, "Neutrality is an increasingly important Establishment Clause consideration - perhaps the most important consideration." (Brief, p. 16). However, in *Mitchell*, Justice O'Connor wrote a separate concurring opinion precisely because she believed that the plurality (not majority) opinion placed too much emphasis on neutrality. "[W]e have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid." 530 U.S. at 839 (emphasis in original). Moreover, as already explained, *Tilton* and *Nyquist* clearly establish that a legitimate secular purpose does not in and of itself establish that government action does not run afoul of the Establishment Clause. As in *Nyquist*, the only educational recipient of the Authority's largesse is a single religious entity which intends to use the property for clearly sectarian purposes. Moreover, the properties selected by Hope Partnership have virtually no geographic relationship to the other projects cited by the Authority, almost all of which are well west of Broad Street whereas the properties selected by Hope Partnership have 8<sup>th</sup> Street as their westernmost boundary. (R.25a).

If tax-raised funds may not be granted to institutions of higher learning where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities 20 years hence, a fortiori they may not be distributed to elementary and secondary sectarian schools for the maintenance and repair of facilities without any limitations on their use. If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair,

413 U.S. at 776. If public funds may not be distributed to sectarian secondary schools for maintenance and repair of their physical facilities, it follows *a fortiori* that public funds may not be used to make a gift of land to Hope Partnership for the construction of a sectarian middle school. *Tilton* and *Nyquist* are dispositive.

Hope Partnership totally ignores this aspect of *Tilton* in its misleading parenthetical statement of the *Tilton* holding. According to Hope Partnership, the Court “approv[ed] federal aid for four Roman Catholic colleges in the form of construction grants for buildings and facilities to be used for secular educational purposes.” (Brief of Hope Partnership, p. 14). Strangely and noticeably missing from that statement are the facts that the schools in question had to give a written commitment that for 20 years (but only for 20 years) the buildings would not be used for sectarian purposes and that in the event of a violation, the government had a recapture right as to the funds advanced. Indeed, it was precisely the absence of such a provision after the expiration of 20 years that persuaded all of the Justices to find the program unconstitutional under the Establishment Clause as to the period after 20 years. Hope Partnership has not pointed and cannot point to anything in the record even suggesting that it has given any commitment against sectarian use to the Authority or that the Authority has any recapture right. As for *Nyquist*, Hope Partnership does not even cite it, let alone try to distinguish it.

Hope Partnership's reliance on *Hunt v. McNair*, 413 U.S. 734 (1973), decided the same day as *Nyquist*, is equally misleading because it totally ignores the salient facts in that case. (Hope Partnership Brief, p. 14). The state revenue bonds in that case that were to be issued for the benefit of Baptist College were not general revenue bonds or otherwise obligations of the State. Quite to the contrary, the only source of repayment for the bonds were rental fees to be paid by the College to the State. As the Court explained, there would be "no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit." 413 U.S. at 744, note 7. This is in sharp contrast to the facts in this case in which the Director of Urban Renewal Activities testified that the money the Authority has for the condemnation of Appellee's property is "almost synonymous with public dollars in terms of acquisition funds." (R. 68a).<sup>4</sup> Moreover, in *Hunt*, the buildings to be financed by the bonds were upon completion to be conveyed to the State and then leased to the College. State rules, in turn, required that the lease include an express provision prohibiting sectarian use of the buildings, and further provided that at such time as the College might seek to purchase the buildings upon payment of the bonds, the deed would require an identical restrictive provision against sectarian use not only as to the College, but as to any voluntary grantee of the College. In this respect, therefore, *Hunt* is totally consistent with *Tilton*, and far from supporting the position of Hope Partnership and the Authority, demonstrates that the conveyance to Hope Partnership for nominal consideration of properties acquired with public funds without such written restrictions cannot withstand constitutional scrutiny under the Establishment Clause.

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<sup>4</sup> In its citation of *Southside Fair Housing Comm. v. City of New York*, 928 F.2d 1336 (2d Cir. 1991), Hope Partnership includes a quote from the opinion acknowledging that the transfer of property in that case was a sale, not a gift as in this case. (Hope Partnership Brief, p.11).

Hope Partnership has stressed that “students are enrolled without regard to race, creed, color, religion or ethnicity.” (R.125b).<sup>5</sup> But it is not the composition of the student body that determines whether a school is sectarian. In its statement of its “mission and character” Hope Partnership has identified itself as “faith based” and [f]ocus[ed] on academic, physical, social, moral and *spiritual* development of students.” (*Ibid*) (emphasis supplied). The school which Hope Partnership intends to operate on the property to be gifted to it by the Authority will be based on the “Nativity Model”<sup>6</sup> which already includes three schools opened by the Society of the Holy Child Jesus - the Nativity Jesuit Middle School in Milwaukee and the Mother Seton and St. Ignatius Loyola Academies in Baltimore. (R.63a) The very names of those schools, despite protestations that they are non-denominational, underscore the sectarian nature of the model on which the Hope Partnership school will be operated, particularly since its non-denominational disclaimer is preceded by the statement that the Nativity Model “assumes the presence of God.” (*Ibid*). Moreover, the Nativity Model has been “inspired” by “Judeo-Christian values,” and “include[s] a respect for the dignity and potential of each person. . . within the family of God.” (*Ibid*). Assuming the presence of God “is a religious proposition regardless of whether that religious proposition is given recognized religious label.” *Kitzmilller, supra*, 400 F. Supp. at 707.

Nonetheless, Hope Partnership persists in arguing that the middle school it wants to build on the land to be gifted to it by the Authority will be non-sectarian. (Hope Partnership Brief, pp.

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<sup>5</sup> The Urban Redevelopment Law does require that any contract between the Authority and a redeveloper must include a prohibition against any discrimination by the developer based on race, color, religion or national origin. 35 P.S. § 1711. That provision, however, says nothing about the developer’s use of the property and does not contain a prohibition on its sectarian use as required by *Tilton*.

<sup>6</sup> “Nativity” when capitalized is itself a religious term, defined as “The birth of Jesus.” The American Heritage Dictionary of the English Language (Houghton Mifflin 1978).

6-8).<sup>7</sup> At best, Hope Partnership is being naïve in confusing non-denominational with non-sectarian, which it clearly is not. (R. 125b). At worst, it is being disingenuous. Hope Partnership attempts to deny (Hope Partnership Brief p. 6), but cannot, that its school is “faith based”; its own brochure says it is. (*Ibid*). In arguing otherwise, Hope Partnership distorts the language of that brochure. The brochure does not, as Hope Partnership asserts, simply say that the two religious orders who have founded the middle school are faith based. (*Id.* at pp.7-8). It expressly describes the “identity, mission and character” of the school as “faith based.” Moreover, that statement is taken directly from the Mission Statement of the NativityMiguel Network of Schools of which Hope Partnership is a member. That Mission Statement reads: “The mission of the NativityMiguel Network of Schools is to strengthen [member schools’] capacity to *deliver . . . faith-based education to the middle school students in their care.*” The Network goes on to state: “The middle schools are founded according to a set of guiding principles: . . . faith-based . . .” (<http://www.nativitymiguelnschools.org>) (emphasis supplied).

But whose faith? The question itself identifies the Establishment Clause concern. The answer appears to be some form of Judeo-Christian faith, since it is that “faith” that has inspired the Nativity Model of which the Hope Partnership school is a part. (*Ibid*). Whatever else that phrase may mean, it clearly refers to two religious communities, Judaism and Christianity,<sup>8</sup>

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<sup>7</sup> Hope Partnership makes a number of assertions that are nowhere to be found in the record. This is particularly troubling since its Executive Director, Sister Rose Martin was subpoenaed to testify at a deposition, but did not appear. (R. 11a).

<sup>8</sup> *Amici* JSPAN and Anti-Defamation League do not mean to concede that, as implied by that hyphenated phrase, Jewish and Christian values are totally congruent.

necessarily excluding other faith communities such as Islam, Hinduism and Buddhism.<sup>9</sup> The same document also states that the Hope Partnership school will “focus on the . . . moral and spiritual development of students.” (*Ibid*). It is telling that the Partnership distinguishes between moral and spiritual development. The former can be seen as secular, but the latter has strong religious overtones. American Heritage Dictionary, *supra*. Finally, the Judeo-Christian values that inspire the Nativity Model of which Hope Partnership is a part include “a strong sense of community within the one family of God. . . .” (*Ibid*). But no matter how noble the sentiment, the inevitable question of whose God - the Jewish God, the Christian God, the Islamic God – remains unanswered and unanswerable. However non-denominational it intends to be, therefore, it simply cannot be denied that Hope Partnership operates a sectarian middle school.

**B. THE CONDEMNATION AND PROPOSED TRANSFER OF REAL ESTATE BY THE AUTHORITY TO HOPE PARTNERSHIP INVOLVES EXCESSIVE ENTANGLEMENT IN AND ENDORSEMENT OF RELIGION**

In both *Tilton* and *Nyquist*, the Court did not find it necessary to consider any possible entanglement of government in religion nor possible government endorsement of religion in order to find a breach of the Establishment Clause. Nor need this Court do so. But if this Court elects to look at entanglement and/or endorsement (see *Agostini, supra; Mitchell, supra; Zelman, supra*), there is ample evidence of both. Throughout the process leading up to the condemnation of the Smith property, Hope Partnership was not only in regular communication with the Authority, but also met with a representative of the City Planning Commission, and updated a member of City Council on its progress. (R. 36a). It was permitted by the Authority to designate the properties it wanted for its school. (R. 44a). Hope Partnership discussed with government

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<sup>9</sup> According to the Harvard University Pluralism Project, there are at least sixteen Islamic organizations or mosques, two Hindu ashrams, and nine Buddhist temples in Philadelphia, as well as a Jain temple. See <http://www.pluralism.org/directory/results/php>.

representatives the “appropriateness of [its] project in relation to the Neighborhood Transformation Initiative” and met not only with a member of City Council, but also a State Senator and State Representative. (R. 42a). That same Senator sponsored a community meeting to provide Hope Partnership with an opportunity to make a presentation about its plans. (*Ibid*). In a letter to the Director of the City’s Urban Renewal Activities, copies of which were sent to the Senator, Representative and Councilman, Hope Partnership wrote not only about the “appropriateness of our project in relation to the Neighborhood Transformation Initiative,” but also stated: “We are confident that *in partnership with* families, existing educational institutions and *city government*, we can move closer to the reality of transformed neighborhoods.” (*Ibid*) (emphasis supplied). Agreement was also obtained from the same member of City Council to use NTI dollars to make the acquisition for the Hope Partnership project. (R. 68a).

The decision of the Authority and City Council to convey properties for nominal consideration to the Hope Partnership, therefore, impermissibly entangles the government with a religious institution. Combined with the Authority's endorsement of the sectarian, faith-based school which Hope Partnership intends to erect and operate on the properties it selected and will receive from the government, its conduct cannot survive Establishment Clause scrutiny. As Hope Partnership acknowledges (Brief of Hope Partnership, p. 13), even in *Agostini*, the three part test under the Establishment Clause was stated by the Court in the disjunctive. Therefore, excessive entanglement, such as is present in this case, standing alone requires a holding that the Establishment Clause has been violated.<sup>10</sup>

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<sup>10</sup> In his dissent in the Commonwealth Court, Judge Pellegrini would have tested the intentions of Hope Partnership by allowing it to open and operate its school before reaching the Establishment Clause issue. 891 A.2d at 834. But implicit in that approach would be an ongoing obligation of the Authority to monitor and police the activities of Hope Partnership, the worst imaginable kind of entanglement of government in religion. See

C. VIEWPOINT RESTRICTION IS NOT AN ISSUE IN THIS CASE

Contrary to the argument of the Authority (Brief of Appellant, p. 29) and Hope Partnership (Brief of Hope Partnership, pp. 22-24), this is not a viewpoint restriction case. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1999); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). Cases such as *Rosenberger*, *Good News Club* and others cited by the Authority and Hope Partnership involved forums for speech such as school facilities which were open for after school activities or for use by non-government organizations, or government funded subsidies for student publications. In those cases, the Supreme Court has held that a sectarian/religious activity or publication cannot, consistent with the Free Speech clause of the First Amendment, be excluded from an otherwise open forum policy or subsidy program solely on the basis of sectarian/religious content.

But the Urban Redevelopment Law is no more a “forum for speech” statute than was the Promise Scholarship Program in *Locke v. Davey*, 540 U.S. 712 (2004). In that case, the Court refused to strike down a state constitutional prohibition incorporated into the Promise Scholarship statute that barred the grant of otherwise broadly available state scholarship aid to students majoring in “devotional theology.” In rejecting the argument that such a ban was a viewpoint restriction on speech violative of the Free Speech provision of the First Amendment, the Court, in an opinion by Chief Justice Rehnquist, concluded:

[T]he Promise Scholarship Program is not a forum for speech. The purpose of the Promise Scholarship Program is to assist students from low- and middle- income families with the cost of postsecondary education, not to “encourage a diversity of views from private speakers” [citations omitted]. Our cases dealing with speech forums are simply inapplicable.

540 U.S. at 720 n.3.

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*Lemon v. Kurtzman, supra*, 403 U.S. at 620 (“This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids.”).

By the same token, the Urban Redevelopment Law has nothing to do with “encouraging a diversity of views from private speakers.” Its statutorily defined purposes are the elimination of blight and physical redevelopment of neighborhoods.

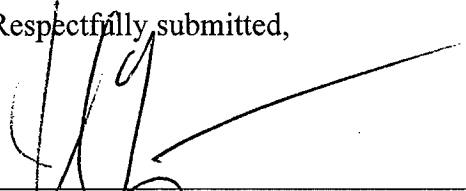
#### IV. CONCLUSION

In *Nyquist*, the Court recognized the good intentions of the State and the beneficial purposes of providing assistance to schools serving children from predominantly low income families. 413 U.S. at 773 ("We do not question the propriety . . . of New York's interest in preserving a healthy and safe educational environment for all of its schoolchildren."). Likewise, *Amici* do not question the good intentions of Hope Partnership, nor the need for the type of services it proposes to provide to the citizens of North Philadelphia. But as the holding in *Nyquist* makes quite clear, good intentions do not insulate government conduct from scrutiny under the Establishment Clause, and noble ends do not justify unconstitutional means. As James Madison, the principal architect of the religion clauses of the First Amendment observed: "[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever. . . ." 2 Writings of James Madison 183, 186 (Hunt ed. 1901). In this case, the citizens of Philadelphia would be forced to contribute not a nominal sum such as three pence but \$860,250 to the religious enterprises of Hope Partnership.

The judgment of the Commonwealth Court, therefore, should be affirmed.

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Respectfully submitted,



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