IN THE

Supreme Court of the United States

No. 72-694

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY, *et al.*,

Appellants,

v.

EWALD B. NYQUIST, *et al.*,

Appellees.

On Appeal from the United States District Court for the Southern District of New York

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL EDUCATION ASSOCIATION AND THE HORACE MANN LEAGUE

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The National Education Association and the Horace Mann League hereby move, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief amicus curiae on the merits of the case at bar. Appellants have consented to the filing of this brief. Appellees have not.

The National Education Association (NEA) is an independent, voluntary organization of educators open to any person who is actively engaged in the profession of teaching or other educational work, or any other person interested in advancing the cause of education. It is the largest professional organization in the nation. Currently, NEA has over one million, one hundred thousand regular members, the large majority of whom serve public school systems in the various States.

The Horace Mann League is an independent national organization of some five hundred leading educators. The League exists to perpetuate the ideals of Horace Mann and its basic purposes are to strengthen public education and to preserve the American tradition of separation of church and state.

This appeal involves a challenge to the constitutionality of Sections 3, 4 and 5 of Chapter 414 of the New York Laws, 1972. These provisions bestow tax benefits upon parents who have paid tuition for their children to attend nonprofit, nonpublic elementary and secondary schools. More than 90% of the children who attend nonpublic elementary and secondary schools in New York are enrolled in schools operated and controlled by churches or other religious groups. Nearly 85% of the children are enrolled in Roman Catholic parochial schools. Appellants claim that the New York statute violates the Establishment Clause of the First Amendment to the United States Constitution.

NEA and the Horace Mann League acknowledge the contributions made by private sectarian educational institutions in this country. Nonetheless, we are concerned over diversion of public money to the support of those institutions and the impact of such support upon the future of public education. We seek leave to file this brief because Sections 3, 4 and 5 of the New York statute would bring about such a diversion.

The maintenance of a system of public education is a "paramount responsibility" that "ranks at the very apex of the function" of a State. *Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972). See also *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954). Public funding of sectarian schools, whether through direct subsidy or through indirect means such as tax benefits to parents of children who attend them, could have a serious effect on the capability of the public schools to discharge this "paramount responsibility." First, such funding would divert badly needed public money to these religious institutions or to those who support them. There is at this time a financial crisis not only in private education, but also in public education. The one crisis ought not be alleviated by means that exacerbate the other. Second, such funding could lead to a renewal of the often bitter church-state controversies which the First Amendment seeks to avoid and the injury to the educational environment in the public schools that such religious divisiveness would engender.

Lastly, to the extent that funding of private sectarian education increases the enrollment at such schools, it will reduce the pluralistic composition of public school student bodies so vital to the democratic ideal and to the educational process itself. See President's Commission on School Finance, *Schools, People and Money: The Need for Educational Reform*, pp. xix, 15 (March 3, 1972). Mr. Justice Brennan, concurring in *School District* v. *Schempp*, 374 U.S. 203, 241-242 (1963), expressed the high purpose of American public education in the following terms:

> ". . . [T]he American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve. . . . It is implicit in the history and character of American public education that the

> public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions [citation omitted]." (Emphasis in original.)

Wherefore, the National Education Association and the Horace Mann League request that this Court grant leave to file the accompanying brief amicus curiae urging reversal of the judgment below.

Respectfully submitted,

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STATEMENT OF THE CASE

This case is before the Court on appeal from the holding of the United States District Court for the Southern District of New York, sitting as a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2283, that Sections 3, 4, and 5 of Chapter 414 of the New York Laws, 1972, do not violate the Establishment Clause of the First Amendment to the United States Constitution.[1] The challenged pro-

[1] The opinion of the district court is reported at 350 F. Supp. 655 and reprinted at pages 1a-46a of the Jurisdictional Statement filed by the appellants in this case. The Jurisdictional Statement will be cited hereinafter as "J.S." plus the page reference; the Appendix as "App." plus the page reference.

visions grant tax benefits to parents who have paid tuition for their children to attend nonprofit, nonpublic elementary and secondary schools. More than 90% of the children in nonpublic elementary and secondary schools in New York attend schools operated and controlled by churches and other religious groups. Nearly 85% of them are enrolled in Roman Catholic parochial schools.[2]

Chapter 414 of the New York Laws, 1972 (hereinafter referred to as the "Act" or the "New York statute") contains five parts:

Part 1 (Sec. 1)—monetary grants by the State to nonpublic schools serving low-income families for the maintenance and repair of buildings (J.S. 47a-50a);

Part 2 (Sec. 2)—tuition grants by the State to low-income parents of pupils attending nonpublic schools (J.S. 50a-53a);

Part 3 (Sec. 3, 4 and 5)—tax benefits for parents who send their children, and pay tuition, to nonpublic schools (J.S. 53a-54a);

Part 4 (Sec. 6 and 7)—financial aid for public schools which have increased enrollment due to the closing of nonpublic schools (J.S. 55a-56a); and

Part 5 (Sec. 8, 9 and 10)—financial aid to public school districts for the purchase of nonpublic school buildings where nonpublic schools have closed down (J.S. 56a-58a).

Each of the first three parts of the Act specifically excludes profitmaking schools from the category of nonpublic schools (J.S. 48a, 51a, 54a).

Part 3 of the Act provides explicitly that, for New York State income tax purposes, an individual shall be

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[2] See Univ. of the State of New York, *1970-71 Annual Educational Summary*, Table 30, p. 35.

entitled to subtract "from his Federal adjusted gross income an amount shown in a table for his New York adjusted gross income, multiplied by the number of his dependents, not exceeding three, attending a nonprofit nonpublic [elementary or secondary] school on a full-time basis" (J.S. 6a-7a; 350 F. Supp. at 659).[3] Eligibility

[3] The table referred to in the text above provides (J.S. 54a; 350 F. Supp. at 659):

If New York adjusted gross income is:	The amount of the allowable exclusion for each dependent is:
Less than $9,000	$1,000
9,000-10,999	850
11,000-12,999	700
13,000-14,999	550
15,000-16,999	400
17,000-18,999	250
19,000-20,999	150
21,000-22,999	125
23,000-24,999	100
25,000 and over	0

The following table shows the estimated net benefits to taxpayers under Part 3 of the Act. The information is taken from the memorandum which accompanied the bill in the New York Legislature (J.S. 7a, 45a; 350 F.Supp. at 659, 676):

Estimated Net Benefit to Family		
One Child	Two Children	Three or more
$50.00	$100.00	$150.00
42.50	85.00	127.50
42.00	84.00	126.00
38.50	77.00	115.50
32.00	64.00	96.00
22.50	45.00	67.50
15.00	30.00	45.00
13.75	27.50	41.25
12.00	24.00	36.00
-0-	-0-	-0-

for the benefit is conditioned upon payment by the individual of at least $50 in tuition for each such dependent. The benefit may be claimed only by persons with adjusted gross incomes of less than $25,000 who do not receive a tuition assistance payment under Part 2 of the Act. The exclusion from adjusted gross income may be as much as $1,000 for each child, up to three children, with the estimated net benefit to taxpayers not exceeding $50 per child. The amount of income that may be excluded is reduced as the individual's adjusted gross income increases.

The Legislature made specific findings and declarations in connection with Part 3 of the Act:

> "1. Statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions.
>
> "2. Nonpublic educational institutions are themselves entitled to a tax exempt status by virtue of legislation which has been sustained by tax courts.
>
> "3. Such educational institutions not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for those children.
>
> "4. Tax laws also authorize deductions for education related to employment.
>
> "5. The legislature hereby finds and determines that similar modifications of federal adjusted gross income should also be provided to parents for tuition, paid to nonpublic elementary and secondary schools on behalf of their dependents for whom exemptions are claimed under the tax law." (J.S. 53a.)

On May 25, 1972, the Committee for Public Education and Religious Liberty, an unincorporated association, and

a number of taxpayers, some of whom are parents of children attending public schools, instituted suit challenging the constitutionality of Parts 1, 2 and 3 of the Act under the Establishment and Free Exercise Clauses of the First Amendment. The complaint sought a judgment declaring Parts 1, 2 and 3 unconstitutional and enjoining their enforcement. (App. 7a-15a.)[4]

In their complaint plaintiffs alleged that the Act "authorizes New York State tax benefits for payments of tuition to schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial and dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach" (App. 11a-12a). These allegations were not specifically denied by the State defendants (App. 64a-65a). The complaint further alleged, among other things, that the Act "constitutes governmental financing and subsidizing of schools which are controlled by religious bodies, organized for and engaged in the practice, propagation and teaching of religion, and of schools limiting or giving preference in admission and employment to persons of particular religious faiths" and "constitutes governmental action whose

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[4] Separate motions for intervention as parties defendant were made by a group of parents of children in nonpublic schools and by State Senator Earl W. Brydges, as Majority Leader and President *pro tempore* of the New York State Senate (App. 17a-59a). Both motions were granted on June 28, 1972 (App. 60a-62a, 72a).

purpose and primary effect is to advance religion" (App. 12a-13a).

A three-judge court was convened, consisting of Circuit Judge Paul R. Hays and District Judges John M. Cannella and Murray I. Gurfein. After a hearing on July 6, 1972, the court unanimously held Parts 1 and 2 of the Act violative of the Establishment Clause. The court divided on Part 3. Judges Cannella and Gurfein held that this part did not violate the Establishment Clause. Judge Hays dissented. Judges Cannella and Gurfein also held that Part 3 was severable from Parts 1 and 2. As to this, too, Judge Hays dissented.

The district court accepted the legislative findings and declarations set forth in the statute, "except where they purported to state principles of applicable constitutional law" (J.S. 8a; 350 F.Supp. at 659). Although the court did not go behind these findings and declarations, it did note that "regardless of the variety of secular arguments advanced to support the legislation, the prime legislative concern is to see that religious parochial schools do not go under for lack of financial support" (J.S. 9a; 350 F. Supp. at 660).

In striking down the maintenance payments provided under Part 1 of the Act as having the effect of advancing religion, the court observed, *inter alia*, that although the payments were "neutral" in that they were not directly connected with religious activity, they were given to none "but a small class of institutions, almost all Roman Catholic, in deprived areas" (J.S. 22a; 350 F.Supp. at 666).

With respect to Part 2 of the Act providing for partial reimbursement to needy parents of the tuition they pay to send their children to nonpublic schools, the court noted that there is no distinction between a grant to a family and a grant to a parochial school "where the parent is a mere conduit for a payment of tuition" (J.S.

26a-27a; 350 F.Supp. at 668). The court stated that "it is the school which benefits by getting tuitions from State funds which it might otherwise not receive" (*id;* J.S. 26a-27a). Moreover, "a subsidy to those who practice a particular religion to enable them to observe its tenets is not compatible with either clause of the First Amendment" (J.S. 29a; 350 F.Supp. at 669). Finally, the court rejected the argument that the poor economic health of the parochial school system and the possible consequence of forced absorption of their burdens by the public schools could overcome the commands of the First Amendment (J.S. 30a-31a; 350 F.Supp. at 669).

Judges Gurfein and Cannella found the tax benefit provided in Part 3 for tuition paid by parents to nonpublic schools different from the other forms of subsidy in Parts 1 and 2, and constitutional. They gave five reasons for their conclusion (J.S. 32a-33a; 350 F.Supp. at 670-671): (1) The tax benefits were not restricted, as were the maintenance payments, to areas containing practically only Catholic parochial schools, but covered attendance at all nonprofit private schools in the State; (2) the tax benefit, unlike the maintenance payments and tuition reimbursement, did not involve money from the State Treasury; (3) the tax benefit provisions had "a particular secular intent—one of equity—to give some recompense by way of tax relief to all citizens who bear their share of the burden of maintaining the public schools and who, because of religious belief or otherwise, send their children to nonpublic full-time schools"; (4) "the benefit to the parochial schools, if any [realized as a result of the tax benefit], is so remote as not to involve impermissible financial aid to church schools"; (5) the tax benefit would involve "a minimum of administrative entanglement with the nonpublic schools" and "the on-going political activity" it would generate would not be as likely as direct subsidy laws "to cause division on strictly religious lines."

Circuit Judge Hays, in his partial dissent, said that the "purpose and effect" of Part 3 was "to subsidize religious training for children" (J.S. 41a; 350 F. Supp. at 674). Judge Hays pointed out that "[t]here is no essential difference between a parent's receiving a $50 *reimbursement* for tuition paid to a parochial school and his receiving a $50 *benefit because* he sends his child to a parochial school" (J.S. 43a, emphasis in original; 350 F. Supp. at 675). In his view the tax benefit was enacted for higher income families as a substitute for the partial subsidies made available to low-income parents by Part 2 of the Act. To him, those two parts of the Act were inseparable and unconstitutional (J.S. 45a-46a; 350 F. Supp. at 676).

ARGUMENT

I

INTRODUCTION

We argue in this brief that Part 3 of the Act violates the Establishment Clause of the First Amendment to the Constitution. This Part, we submit, deviates substantially from the "neutrality" required of the State in its dealing with believers and non-believers and among the various religions. *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970); *School District* v. *Schempp*, 374 U.S. 203, 215 (1963); *id.* at 244-46 (Brennan, J., concurring); *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947).

In *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971), this Court set forth three "tests" as guidelines to a determination whether a statute offends the Establishment Clause:

> "First, the statute must have a secular legislative purpose; second its principal or primary effect must be one that neither advances nor inhibits religion

> . . . ; finally, the statute must not foster an excessive government entanglement with religion." [5]

It is our understanding that these tests must be read in the conjunctive. A statute is unconstitutional if it fails any one.

We contend here that Part 3 of the New York statute violates the neutrality principle in that its principal or primary effect is to advance religion, especially the Roman Catholic religion, by conferring a tax benefit upon a limited class of taxpayers consisting predominantly of parents who send their children to religious schools, especially Catholic parochial schools. It well may be that the New York statute is unconstitutional for one or more additional reasons under the Establishment Clause, *i.e.*, that is sponsors a single religion or religion generally, that its purpose is to promote or advance a single religion or religion generally, or that it fosters an excessive entanglement between government and religion, but those issues we shall leave to others.

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[5] There may well be a fourth test in addition to the three guidelines set forth in *Lemon*. A statute granting direct government subsidies to churches or religious schools, without restrictions as to use, may well constitute "sponsorship" of religion and thus violate the Establishment Clause even though, because the class of recipients is extremely broad, the purpose and primary effect of the statute is secular and no entanglement ensues. See *Walz* v. *Tax Commission, supra,* 397 U.S. at 675; *Everson* v. *Board of Education, supra,* 330 U.S. at 16; *Zorach* v. *Clauson,* 343 U.S. 306, 314 (1952).

II

THE PRINCIPAL OR PRIMARY EFFECT OF THE TAX BENEFIT PROVIDED BY THE ACT IS TO ADVANCE RELIGION GENERALLY AND A SINGLE RELIGIOUS FAITH IN PARTICULAR

The New York statute permits a taxpayer to exclude a specified amount from his adjusted gross income, and hence from his taxable income, for each dependent, not exceeding three, who attends on a full-time basis a nonprofit, nonpublic elementary or secondary school in the State. The amount of the exclusion decreases in steps from $1,000 to $100 per dependent as the taxpayer's adjusted gross income increases. The exclusion is unavailable to taxpayers whose adjusted gross income exceeds $25,000 and may not be taken with respect to a dependent unless the taxpayer has paid at least $50 in tuition for the dependent to attend the nonpublic school. (J.S. 53a-54a.)

The fall 1970 school and school enrollment figures for New York State show 1,950 nonpublic elementary and secondary schools at which 787,853 children were enrolled. 663,855 of these children (84.3%) were enrolled in Roman Catholic parochial schools. An additional 66,831 children (8.5%) attended schools operated and controlled by other religious groups. Univ. of the State of New York, *1970-71 Annual Educational Summary*, Table 30, p. 35.[6] There were approximately 4,412 public elementary and secondary schools in the State in 1970. Their student population approached 3,500,000. *Id.*, Tables 4 and 9, pp. 7 and 13.[7]

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[6] The figures in the text include enrollment in profit-making private schools, which are excluded from the definition of nonpublic schools under Part 3 of the New York statute (J.S. 54a).

[7] As far as we know, no more recent figures are available with respect to how the nonpublic school population in New York divides

When viewed against the composition of the nonpublic school population of New York, the terms of Part 3 make manifest its impermissible effect, the advancement of religion. More than 90% of the children attending nonpublic schools in New York are in religious schools. These are predominantly schools which, as the district court found (J.S. 17a; 350 F.Supp. at 633):

> "(a) impose religious restrictions on admissions;
>
> (b) require attendance of pupils at religious activities;
>
> (c) require obedience by students to the doctrines and dogmas of a particular faith;
>
> (d) require pupils to attend instruction in the theology or doctrine of a particular faith;
>
> (e) are an integral part of the religious mission of of the church sponsoring [them];
>
> (f) have as a substantial purpose the inculcation of religious values;
>
> (g) impose religious restrictions on faculty appointments; and
>
> (h) impose religious restrictions on what or how the faculty may teach."

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among Catholic, other sectarian and non-sectarian schools. Statistics published by the Office of Education of the U. S. Department of Health, Education and Welfare show that as of fall 1971, enrollment in the New York public elementary and secondary schools was estimated at 3,486,000 and in the State's nonpublic counterparts at 837,100. *Digest of Educational Statistics, 1971*, Tables 27 and 40 at pp. 24 and 34. Note, however, that the legislative findings with respect to Part 4 of the Act here challenged contain the statement that fewer than 760,000 students were enrolled in New York's nonpublic schools in the fall 1971 (J.S. 55a). The Office of Education's fall 1972 enrollment estimates have not yet been published; we understand that they are 3,501,000 for New York's public, and 743,000 for New York's nonpublic, schools.

See *Tilton* v. *Richardson*, 403 U.S. 672, 680, 682 (1971), suggesting that these characteristics mark schools where "religion so permeates the secular education" that the "religious and secular educational functions" of the school are inseparable.[8]

The challenged tax benefit provisions have but one actual, direct effect: Many parents who pay taxes to support the public schools but choose not to use them and who pay tuition to a nonpublic school, as a result of making that choice realize tax savings of up to $150. Thus, the direct and immediate effect of Part 3 is to advance religion. It does so by bestowing a tax savings upon a class of persons more than 90% of whom are members of the class solely because they elect to educate their children in religious institutions. Indeed, approximately 85% of the advantaged class members receive the tax benefit because they choose a particular religious education, Roman Catholic. Except for the few class members who use non-sectarian schools, all are favored as a consequence of a manifestation of their religious preference.

From the tax benefit, to be sure, two other consequences are expected to flow. The tax benefit is intended to induce and encourage its recipients to continue to send their children to nonpublic schools (J.S. 9a; 350 F.Supp. at 660). If they do so, the expected result would be that the enrollment in nonpublic schools would increase, stay level or decrease less than would be the case if no tax benefit were granted. Level, increased or insubstantially decreased enrollment at nonpublic schools would in turn achieve the ultimate expected effect of the statute and

[8] See also *Tilton* v. *Richardson, supra*, 403 U.S. at 685-86, where the Court, quoting from *Walz* v. *Tax Commission*, 397 U.S. 664, 671 (1970), stated, "The 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age.'"

the apparent legislative goal to which it is directed: Keeping the public school population below what it would be if substantial numbers of school children were to shift to public schools and saving the costs involved in educating a larger public school population. If the tax benefit would not substantially influence the size of nonpublic school enrollment, however, these expected consequences would not occur.

The class of persons benefited by the direct and immediate effect of the statute and the classes which would be benefited by each of its other expected consequences differ. The class benefited by the direct and immediate effect, realization of tax savings, is made up of taxpayers who pay tuition to send their children to nonpublic schools. The class benefited by the first of the other expected consequences, maintenance of nonpublic school enrollment, is the nonpublic schools. The class benefited by the second, a saving of educational costs to the State, includes the State and those of its taxpayers who would be taxed to produce the revenues to meet those costs.

The classes benefited by the direct and immediate effect of Part 3 and by its first expected consequence consist, respectively, of taxpayers who choose to send their children to nonpublic schools and of the nonpublic schools themselves. These classes are predominantly sectarian. Only when the class of persons which Part 3 ultimately intends to touch, the general taxpaying public, is reached does the disproportionate slant in favor of religious institutions and persons preferring them diminish. This ultimate result is the apparent purpose of the statute, a hoped-for but not a present effect of its enactment. As such, it does not, we believe, correct or justify the advancement of religion and religious institutions which must actually occur by reason of the statute before any broader secular benefits can be realized.

Parenthetically, this hoped-for ultimate result—saving of educational costs to the State—is apparently unlikely to occur and if it does, any savings would be short-lived. At least this is the view taken by the 1972 Report of New York State Commission appointed by the Governor and the Board of Regents to review the quality, cost and financing of elementary and secondary education in the State.[9] The New York Commission, better known as the Fleischmann Commission, after an in-depth study, concluded that although the per pupil expenditure in the public schools is currently higher than in parochial schools, this differential is rapidly disappearing, largely because of the substitution of lay teachers for religious-order teachers in Catholic Schools (Fleischmann Report, p. 5.4). Moreover, "[t]his trend will certainly accelerate if Catholic teaching personnel come to rely on public aid in support of their wage demands" (*id.*). The Commission further concluded that while Catholic parents are moving away from sending their children to parochial schools, "[t]here is no evidence that tuition increases have significantly affected enrollment" (*id.* at 5.23) and that this decline would continue "even if state aid were provided at levels which would eliminate the need for all tuition payments" (*id.* at 5.4). The Fleischmann Commission summed up these findings in the following terms (*id.*):

> "Thus, over a period of years, the savings which now accrue to the state because of the existence of nonpublic school systems will greatly diminish as increased amounts of state aid are required to maintain those systems."

We submit that the direct and immediate effect of Part 3—the realization of tax benefits by persons 90%

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[9] *Report of the New York State Commission on the Quality, Cost & Financing of Elementary & Secondary Education*, Vol. 1, Chapter 5, "Aid to Nonpublic Schools," pp. 5.1-5.56 (1972) (hereinafter referred to as the *"Fleischmann Report"*).

or more of whom obtain the tax advantage by reason of their support of religious institutions—cannot be considered "incidental" to the hoped-for, religiously neutral consequences. *Tilton* v. *Richardson*, *supra*, 402 U.S. at 679. As indicated, any religiously neutral consequences are speculative and at best are unlikely to occur in other than the short run. The only reasonable conclusion, then, is that the primary and principal effect of this statute, which favors a limited class of persons the overwhelming majority of whom fall on the favored side of the line because they have exercised religious preferences, is to advance religion. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 220-21 (1972): "The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause. . . ."

In Establishment Clause cases holding that a challenged statute did not have as its primary effect the advancement of religion, the class of persons favored by the statute has always been exceedingly broad. The bus transportation provided in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), was made available to all public and nonpublic school pupils. So, too, were the textbooks at issue in *Board of Education* v. *Allen*, 392 U.S. 236 (1968). The tax exemption in *Walz* v. *Tax Commission*, 397 U.S. 664, 673 (1970), applied to a "broad class of property owned by nonprofit, quasi-public corporations, which include[d] hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups," as well as churches.[10]

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[10] The instant case does involve a tax benefit, as did *Walz*. But the cases would be similar only if, in *Walz*, the entities eligible for tax exemption consisted predominantly of religious organizations and if, here, the provision of tax benefits for attendance at nonpublic schools was a long and established practice commonly followed in the several States. *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 676-77. The Court's statement in *Lemon* is equally apt here: "We have no long history of state aid to church-related edu-

And the construction grants considered in *Tilton* v. *Richardson, supra,* applied generally to institutions of higher learning.

In the recent case of *Kosydar* v. *Wolman,* C.A. No. 72-212 (S.D. Ohio, Dec. 29, 1972), *pending on petition for certiorari,* 41 U.S.L.W. 3464 (Dkt. No. 72-1139), *motion to expedite and advance oral argument denied sub. nom. Grit* v. *Wolman,* February 26, 1973, 41 U.S.L.W. 3462, a class of beneficiaries closely similar to the class favored by Part 3 was involved. The three-judge court in *Kosydar* unanimously invalidated on Establishment Clause grounds an Ohio statute providing for tax benefits to a class consisting for the most part of parents who send their children to nonpublic schools.[11]

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cational institutions comparable to 200 years of tax exemptions for churches." *Lemon* v. *Kurtzman, supra,* 403 U.S. at 624. Furthermore, in *Walz* the elimination of the property tax exemption for churches there in issue would have tended "to expand the involvement of government" in affairs of religion rather than to decrease it. *Walz* v. *Tax Commission, supra,* 397 U.S. at 664, 674. Elimination of the tax benefit involved here, however, will lessen the interaction of church and state.

[11] The Ohio statute made the credit available not only to parents whose children attended nonpublic schools, which, as here, were predominantly Catholic or otherwise sectarian, but also to (1) persons enrolled in certain home instruction programs; (2) persons enrolled in certain public adult high school continuation programs, schools for tubercular persons, and vocational and basic literary programs to the extent that tuition was charged such persons and not paid for by local school districts; (3) persons who paid nonresident public school tuition payments; and (4) certain persons who incurred tuition or fee expenses in public or private programs for handicapped children. *Kosydar* v. *Wolman,* slip. op. at 5-6. Based on the limited statistical evidence presented, the court concluded that the aggregate of the non-sectarian beneficiaries under the statute was insignificant in relation to the size of the "overwhelming sectarian subclass of nonpublic school parents in Ohio" and thus the categories of public school parents outlined above "will not alter in a meaningful fashion the sectarian nature of the recipient class taken as a whole." *Kosydar* v. *Wolman,* slip op. at 23.

The court ruled that "[W]here the affected class is predominantly religious or sectarian and the benefits provided are not inherently ideologically neutral, as where the state provides monetary grants to parents or institutions belonging to a class that is essentially religious in character, then, *as a matter of law, the primary effect of such a statute is to advance religion. . . .*" *Kosydar* v. *Wolman*, slip op. at 11 (emphasis supplied).[12]

The idea that a statute cannot have as its primary effect the advancement of religion is grounded, as we have noted, on the principle of neutrality dictated by the Religion Clauses. Mr. Justice Harlan, concurring in *Walz* v. *Tax Commission*, 397 U.S. 664, 696 (1970), discussed the application of this neutrality principle in the following terms:

> "Neutrality in its application requires an equal protection mode of analysis. The Court must survey

[12] To the *Kosydar* court, however, this conclusion did not end the case. It only required that the statute be scrutinized for "possible entanglement effects, primarily in terms of *political* entanglement" (*Kosydar* v. *Wolman*, *supra*, slip op. at 11, emphasis in original). The court found such political entanglement, which it conceded would almost of necessity follow from its finding as to the primary effect of the statute: "It is virtually inconceivable that a law benefiting citizens along religious lines or because of their status as members of religious sects can be placed in the legislative arena without greatly increasing the risk of promoting religious rancor and acrimony" (*id.* at 13). Political entanglement may well be likely where a predominantly sectarian group is the beneficiary of a particular statute. However, this Court has viewed the primary effect of a statute and the entanglement it harbingers as independent grounds for invalidation under the Establishment Clause. See *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971). A gift of a small parcel of state-owned property to a particular religious institution with no strings attached may not produce entanglement of any sort, but its primary, and hence invalidating, effect may be to advance religion. In *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 613-14, the Court invalidated Pennsylvania and Rhode Island statutes solely on entanglement grounds, stating explicitly that it "need not" reach "the principal or primary effect" question. See also *Tilton* v. *Richardson*, 403 U.S. 672, 678 (1971).

> meticulously the circumstances of government categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter."

The effect of Part 3 is the same as that which would result from a religious gerrymander. The class of affected taxpayers—parents of children in nonprofit, nonpublic schools—consists predominantly of parents of children in religious schools. Had Part 3 provided a tax benefit *only* for taxpayers who send their children to religious schools, or to parochial schools, it would be unlawful. The result here is much the same. Instead of a class wholly made up of supporters of religious schools, it is more than 90% so constituted, and about 85% constituted of parents whose children attend parochial schools. Nonpublic schools in New York do not comprise a small segment falling within the "natural perimeter" of a "broad" class since the class itself is overwhelmingly religious by its very nature.

We do not urge that every action of the State which has the primary effect of benefiting believers but not nonbelievers or of favoring one religion above other religions necessarily offends the Establishment Clause. For example, even though in a given municipality all of the people who lived in fine houses were of one religion while all who earned less than $5,000 were of another, the establishment of a real estate tax maximum, or of an income tax exemption for low-income taxpayers, would not be invalid under the Establishment Clause. Members of the favored class would be favored not because of their religion but regardless of it. They would be advantaged without regard to any affirmative exercise of a religious preference. In the instant case, however, the class is

favored *because* its members act to support schools which are religious institutions. To qualify for the tax benefit they must affirmatively exercise religious preferences by sending their children to religious schools.

The fact that the benefit here conferred comes by way of a lower tax bill rather than a direct grant from the State Treasury is of no constitutional significance in determining whether the benefit has as its primary effect the advancement of religion. If this consideration bears on Establishment Clause cases at all, it does so only with respect to the entanglement and sponsorship issues. See *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 675; *id.* at 694 (Harlan J., concurring).

Indeed, to the extent that the use of tax benefits, rather than direct subsidies to the schools themselves, may insulate state action from condemnation as "sponsorship" of religion, see note 5, *supra*, the provisions at issue in this case fall short of the mark. More than 90% of the parents who qualify for the tax benefit under the New York statute do so as a result of paying at least $50 tuition per child to a religious institution. Their maximum tax benefit is in the same amount, $50 per child. Money, of course, is fungible and in substance the parent is a conduit for passing to the parochial school the $50 which the State, but for the statute, would have collected from him. In short, there is no logical distinction between this tax benefit and the tuition reimbursement provisions of Part 2 which the district court found unconstitutional. As pointed out by Circuit Judge Hays in his dissenting opinion:

> "There is no essential difference between a parent's receiving a $50 *reimbursement* for tuition paid to a parochial school and his receiving a $50 *benefit because* he sends his child to a parochial school. In both instances the money involved represents a charge upon the state for the purpose of religious education."

(J.S. 42a-43a, emphasis in original; 350 F. Supp. at 675.)

Tuition reimbursement is merely a way of providing the same economic benefit to less affluent persons that the tax benefit provides to the more affluent. In the only tuition reimbursement statute to come before this Court, the decision of a three-judge district court holding the statute violative of the Establishment Clause was affirmed. *Wolman* v. *Essex*, 342 F. Supp. 399 (E.D. Ohio), *aff'd*, 34 L.Ed.2d 69 (1972).

In sum, the difficulties encountered by the New York Legislature under the Establishment Clause inhere in the predominantly religious makeup of the State's nonpublic schools. The Legislature has sought to save the cost to the State of a public education for numbers of students by making their enrollment in nonpublic schools more attractive economically. Under the Establishment Clause, the State cannot go about this task in a manner which favors and promotes religious schools. Where 90% of the nonpublic schools are religious institutions, the State necessarily favors and promotes such institutions whenever it singles out nonpublic schools for support.

CONCLUSION

For the reasons stated above, the judgment of the district court should be reversed insofar as it upholds the constitutionality of Sections 3, 4 and 5 of Chapter 414 of the New York Laws, 1972.

Respectfully submitted,

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