

No. 09-3994-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**TARA INCANTALUPO, STEPHEN JACKSON, ANDREW LEVEY, STACY SULLIVAN,
and FU-YUN TANG, Individually and as Parents of Minor Children,
and all others similarly situated,
*Plaintiffs-Appellants,***

v.

**LAWRENCE UNION FREE SCHOOL DISTRICT NUMBER 15, the BOARD OF
EDUCATION OF THE LAWRENCE UNION FREE SCHOOL DISTRICT NUMBER 15, and
MURRAY FORMAN, DAVID SUSSMAN, URI KAUFMAN, ASHER MANSDORF,
MICHAEL HATTEN, SOLOMON BLISKO, and NAHUM MARCUS,
Individually and in their Official Capacities as Trustees,
I. *Defendants-Appellees.***

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK

**BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,
in support of *Defendants-Appellees*
Supporting affirmance.**

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INTEREST OF *AMICUS CURIAE*

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, in particular those in New York, are vitally concerned with the outcome of this case because of the impact a case such as this one will have on religious liberty and interpretation of the Establishment Clause.

This brief is filed pursuant to consent from Counsel of Record for the Appellee and pursuant to a Motion for Leave to File a Brief *Amicus Curiae*.

SUMMARY OF THE ARGUMENT

This Brief expands upon one argument made by the Defendant-Appellee (hereinafter “the School District”) and makes one argument not made by the School District (but does not raise any new *issues* not raised by the parties). First, this Brief expands upon the School District’s argument that *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 768 (1973), and *Winn v. Arizona Christian School Tuition Organization*, 586 F.3d 649 (9th Cir. 2009) do not support the Appellants’ (herein after “Incantalupo’s”) position. Incantalupo tries to use *Winn* to distinguish *Nyquist*, but the argument fails because *Winn* was likely wrongly decided. Even if it wasn’t, parts of *Winn* actually demonstrate the constitutionality of the tax lowering plan at issue in this case. Second, this Brief

demonstrates that under the Framers concern to protect *both* religious majorities and minorities from the tyranny of the other, the School District’s plan does not violate the Establishment Clause. The Brief demonstrates that even under Supreme Court precedent, the guiding principles of the Framers provide insight into the proper disposition of this case. Specifically, it is important to distinguish between the acknowledgement of religion, the accommodation of religion, the encouragement of religion, and the establishment of religion.

ARGUMENT

I. NYQUIST AND WINN DO NOT SUPPORT INCANTALUPO’S POSITION BECAUSE WINN HAS BEEN QUESTIONED BY EIGHT JUDGES WITHIN THE NINTH CIRCUIT, BECAUSE INCANTALUPO IGNORED SIGNIFICANT ASPECTS OF WINN, AND BECAUSE THERE ARE SIGNIFICANT FACTUAL DIFFERENCES BETWEEN AND THIS CASE.

In their Brief, Appellees (hereinafter “the School District”) refute Appellants’ (hereinafter “Incantalupo’s”) argument that *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 768 (1973), and *Winn v. Arizona Christian School Tuition Organization*, 586 F.3d 649 (9th Cir. 2009) support Incantalupo’s position. (Appellees’ Br. 28.) This Brief will expand upon that argument by noting that *Winn* was likely wrongly decided and that, even if it was not, certain parts of *Winn* actually demonstrate the constitutionality of the tax lowering plan at issue in this case.

As the School District noted, the Supreme Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), described the tax program at issue in *Nyquist* as one that provides ““a package of benefits *exclusively to private schools and the parents of private school enrollees*” and ‘provides tax benefits . . . *ensuring a windfall to parents of children in religious schools.*’” (Appellees’ Br. 28 (*quoting Zelman*, 536 U.S. at 661 (emphases added in Appellees’ Brief; alteration removed).) Furthermore, the *Zelman* Court explicitly noted that “*Nyquist* does not govern neutral educational assistance programs that . . . offer aid directly to a broad class of individual recipients defined without regard to religion.” 536 U.S. at 661. Nonetheless, Incantalupo tries to distinguish *Nyquist* by relying on *Winn*. (Appellants’ Br. 45-47.)

A. *Winn* is Factually Distinguishable from the Present Case.

This reliance on *Winn* is hard to understand for multiple reasons. First, *Winn*, like *Zelman* and *Nyquist* dealt with legislation (variously, tax credits, tax deductions, and tuition grants) that only provided benefits to some citizens. *Winn*, 586 F.3d at 650; *Zelman*, 536 U.S. at 646; and *Nyquist*, 413 U.S. at 761-62. Unlike these programs which apply only to those who are eligible, the plan at issue here applies to every citizen. Thus, whether *Winn* is more like *Zelman* than it is like *Nyquist* is irrelevant. In both *Winn* and *Zelman*, the issue was whether the program left parents with uncoerced choices as to where to send their children to school, as

opposed to creating a system where parents would be comparatively advantaged by sending their children to religious schools and thus would feel coerced to send their children to such schools. *Winn*, 586 at 656 (discussing both cases). By contrast, in the present case, parents have no choice to make, coerced or uncoerced.

B. *Winn* has been Questioned by Eight Judges of the Ninth Circuit.

But even beyond that, Incantalupo’s use of *Winn* is hard to understand for multiple additional reasons. First, although not stated, the *Winn* opinion that Incantalupo cites—the one also cited so far in this Brief—is not the controlling panel decision. The panel opinion is recorded at *Winn v. Arizona Christian School Tuition Organization*, 562 F.3d 1002 (9th Cir. 2009). Instead Incantalupo cites an opinion concurring in the denial of rehearing *en banc*. *Winn*, 586 F.3d at 650-58 (Nelson, Reinhardt & Fisher, JJ., concurring). This concurrence was co-authored by the members of the original panel. Only one other judge noted agreement with this concurrence. *Id.* at 649 (Pregerson, J. concurring). The purpose of the concurrence was to “fire back” at an opinion dissenting from denial of rehearing *en banc* that was joined by eight judges. *Id.* at 658 (O’Scannlain, J., dissenting).

These eight judges argued that the original panel completely misunderstood *Zelman*. In particular, these judges believed that the *Winn* panel’s opinion, while invoking *Zelman*’s majority decision, actually engaged in the type of analysis advocated by Justice Souter’s *Zelman* dissent. *Id.* at 663 (O’Scannlain, J.,

dissenting). This is significant because the gravamen of Justice Souter’s dissent is that too large a percentage of the schools benefitting from the grant program at issue were religious schools. *Zelman*, 536 U.S. at 703. This, of course, is a variation on Incantalupo’s complaint, which is that “an increasingly large percentage of the District’s budget was being spent on transportation and other costs for private religious school students.” (Appellants’ Br. 6.) The *Zelman* majority made short shrift of this argument relying upon a number of the Court’s precedents:

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

provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.” 463 U.S. at 401.

Zelman, 536 U.S. at 658 (first alteration added; pin cites retained as in original to show the number of sources that support the Court’s point but to avoid confusion with remaining alteration in original).

Indeed, the *Winn* panel did take this approach, noting that the program at issue in its case “channels a disproportionate amount of government aid to sectarian” tuition organizations. *Winn*, 562 F.3d at 1013. The best response that the *Winn en banc* concurring opinion—the one cited by Incantalupo—could must was to opine that

[i]t is true that the majority in *Zelman* rejected Justice Souter’s view that the number of religious and secular schools participating in the Ohio voucher program was relevant to its constitutionality. But before the Court addressed Justice Souter’s concerns, it first identified several features of the Ohio program that made it one of “true private choice . . . , and thus constitutional.”

Winn, 586 F.3d at 652-53 (ellipses original; citation omitted).

Thus, whether the *Winn* panel actually erroneously adopted Justice Souter’s view or whether it distinguished its program from *Zelman*’s program and then gave Justice Souter’s view significant consideration is a debate that need not be settled. Either way, the gist of the *Winn* panel’s opinion is about coerced choice, which, as previously noted, is something not at issue in the present case. Specifically, the *Winn* panel not that “[t]he Supreme Court has ‘drawn a consistent distinction

between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.”
Winn, 562 F.3d at 1005 (quoting *Zelman*, 536 U.S. at 649).

The *Winn* panel believed that, if the allegations in *Winn*’s complaint were true, the program did not provide genuine choice. This would be true because the program at issue

grants income tax credits restricted to taxpayers who make contributions to nonprofit organizations that award private school scholarships to children. Plaintiffs . . . allege that some of the organizations funded under this program restrict the availability of their scholarships to religious schools, and that the program in effect deprives parents, the program’s aid recipients, of a genuine choice between selecting scholarships to private secular schools or religious ones.

Winn, 562 F.3d at 1017. Again, there is simply nothing comparable in the present case.

C. *Winn* Actually Supports the School District’s Position, not Incantalupo’s Position.

A second reason that Incantalupo’s reliance upon *Winn* is hard to understand is that to the extent that the panel correctly analyzed the law, its analysis points towards the constitutionality of the plan in the present case. This is seen clearly in the *Winn* panel’s use of the Supreme Court’s opinion in *Mitchell v. Helms*, 530 U.S. 793 (2000). The panel noted that the *Zelman* Court relied upon Justice

O'Connor's reasonable observer analysis in her concurring opinion in *Mitchell*. *Winn*, 562 F.3d at 1019. However, what the *Winn* panel says about the reasonable observer actually leads to a clear indication of constitutionality in the present case. Yet, as will be demonstrated immediately below, Incantalupo completely ignores this fact.

The *Winn* panel opined that “[t]he Court’s guidance in earlier cases also shed light on two circumstances that seemed particularly important to the reasonable observer analysis in *Zelman*.” 562 F.3d at 1020. Both involve the choices made in the program. Although this Brief has already noted that *no* choice is involved in the present program, some important insights can still be gained by looking at this reasonable observer analysis, especially since these “two circumstances” are completely ignored in Incantalupo’s own reasonable observer argument. (*See* Appellants’ Br. 56-58.)

The first circumstance is “what role the person making the choice occupies in the structure of the program.” *Winn*, 562 F.3d at 1020. What the *Winn* panel had in mind was the case of *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 127 (1982) in which churches were allowed veto power over state-issued liquor licenses. As the Court noted in *Larkin*, such an arrangement involves the “appearance of a joint exercise of legislative authority by Church and State” *Winn*, 562 F.3d at 1020 (*quoting Larkin*, 459 U.S. at 125). In the present case,

there is no such appearance of a joint exercise of authority. The court below in the present case was clear about that. It rejected the arguments “that ‘Orthodox shuls’ somehow controlled the School Board, that the School Board provided public money to ‘shuls,’ that the School Board served as any kind of Jewish religious court or ruling body, or that the School Board imposed sectarian religious rules favored by Orthodox Judaism.” *Incantalupo v. Lawrence Union Free School Dist. No. 15*, 652 F. Supp. 2d 314, 319 (E.D.N.Y 2009). Incantalupo tried to ignore this fact by claiming that the election of several Orthodox Jews proves the “District’s Orthodox community has successfully utilized bloc-voting techniques to accomplish combined religious/political objectives.” (Appellants’ Br. 5.) But as the court below repeatedly noted, such an argument is frivolous.” *Incantalupo*, 652 F. Supp. 2d at 322, 323 & n.7, 327, 329. It also, as will be demonstrated in Part II below, stands in stark contrast to the intention of the Framers of the First Amendment.

The second circumstance a reasonable observer would take into account according to the *Winn* panel is “whether the choice delegation under a program has the effect of promoting, or hindering, the program’s secular purpose.” 562 F.2d at 1021. In other words, the reasonable observer would be able to recognize whether the delegation was a “mask” for an Establishment Clause violation. *Id.* In the present case there is no delegation, of course. Once again, this fact highlights that

there is nothing for the reasonable observer to see through. But again, this consideration is completely ignored in Incantalupo's reasonable observer analysis. (See Appellants' Br. 56-58.)

Not only does the program in the instant case pass muster under current Establishment Clause jurisprudence, but to conclude otherwise would be to add an additional gloss to the constitutional text that would further muddy the waters and would also turn the clock back to the days when the mere holding of political office by people of faith was considered suspect. This Brief will address this problem in the next Part.

II. THIS COURT SHOULD FOLLOW THE LEAD OF THE FRAMERS IN PROTECTING THE RIGHTS OF BOTH THE MAJORITY AND THE MINORITY BY DISTINGUISHING BETWEEN THE ACKNOWLEDGEMENT, ACCOMMODATION, ENCOURAGEMENT, AND ESTABLISHMENT OF RELIGION.

As noted in Part I, no religious body had any involvement in enacting the program at issue here. However, Incantalupo would have this Court declare that because people of faith hold office, their actions should be ascribed to the religious body to which they belong and *ipso facto* their actions—or at least the subset of their actions that benefit their co-religionists—violate the Establishment Clause. This is tantamount to arguing that the only safe way to protect citizens from potential Establishment Clause violations is to ban people of faith from holding elective office.

However, such an approach would itself violate the Constitution, as the court below noted. *Incantalupo*, 652 F. Supp. 2d at 324-25. Indeed, in *McDaniel v. Paty*, 435 U.S. 618 (1978), the Supreme Court struck down a section of Tennessee’s constitution that banned clergymen from running for elective office. Various Justices found the section violative of the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. *Id.* at 620 (plurality); *id.* at 629 (Brennan, J., concurring); *id.* at 642 (Stewart, J., concurring); *id.* at 643 (White, J., concurring).

A. The Rights of Both the Majority and the Minority Must be Protected.

Given the fact that people of faith may run of elective office, it follows that many people of the same faith may run for office. This is what has occurred in the present case. In our system of government, the will of the majority—whether the majority of the citizens or the majority of their elected representatives—should normally prevail. However, the rights of the minority must also be protected to a certain degree.

This balancing of the rights of the majority and the minority must never be a matter of “either/or”; it must always be a matter of “both/and.” Thus, *The Federalist Papers* reflect the concern about the tyranny of the majority over the minority. For example, in *Federalist 51* we read, “[i]f a majority be united by common interest, the rights of the minority will be insecure.” *The Federalist* No.

51, at 161 (James Madison) (Roy P. Fairfield ed., 2d ed. 1981). However, *The Federalist* was equally, if not more, concerned about the tyranny of the minority over the majority. For example, in *Federalist 22*, we read that the “fundamental maxim of republican government . . . requires that the sense of the majority should prevail.” *The Federalist* No. 22, at 52 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981).

Thus, when Incantalupo continually refers to the “Orthodox majority” (*see, e.g.,* Appellants’ Br. 8 (using the term five times)), she—undoubtedly inadvertently—highlights the fact that the sense of that “majority should prevail,” lest the “fundamental maxim of republican government” be violated, *The Federalist* No. 22, at 52. The only exception would be if that sense violated the constitutional protection put in place to protect the minority.

However, as discussed in Part I, the School District’s plan does not violate the Establishment Clause protections when those protections are evaluated under the principles articulated in *Nyquist* and *Zelman*. Nonetheless, because trying to navigate the shoals of Establishment Clause jurisprudence is, to mix a metaphor, like “plung[ing] into a thicket,” *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 402 (2d Cir. 2001), and because we have looked at the views of the Framers with regard to majorities and minorities, it is worth noting why the School

District's plan does not violate the principles originally enshrined in the Establishment Clause.

The Establishment Clause represents a particularized case of the balancing of the rights of the majority and the minority and the protection of each against the tyranny of the other. The Framers were aware of four concepts: the acknowledgement of religion, the accommodation of religion, the encouragement of religion, and the establishment of religion. In deciding how to balance the rights of, and protect against the tyranny of, majorities and minorities, the Framers determined that acknowledge, accommodation, and encouragement of religion would be permitted and that only establishment would be forbidden.

B. True Establishment of Religion is Prohibited.

Because of the present day "thicket," it is important to remember what the original concept of establishment was all about. The Framers were actually aware of three different ways in which religion could be established, as explained by Justice Story:

One, where a government affords aid to a particular religion, leaving all persons free to adopt any other; another, where it creates an ecclesiastical establishment for the propagation of the doctrines of a particular sect of that religion, leaving a like freedom to all others; and a third, where it creates such an establishment, and excludes all persons, not belonging to it, either wholly, or in part, from any participation in the public honours, trusts, emoluments, privileges, and immunities of the state.

Joseph Story, *Commentaries on the Constitution of the United States* §§ 1866 (Arthur E. Sutherland ed. 1970) (1833)).

With such a definition in mind it is easier to distinguish acknowledgement, accommodation, and encouragement on the one hand from establishment on the other hand. Although some of the historical examples of acknowledgement, accommodation, and encouragement do not directly parallel the facts of the present case, it is important to obtain a fairly full-orbed view of these concepts. This Brief will look at each in turn.

C. Acknowledgment of Religion is Permitted.

One of the most famous explications of the meaning of the Establishment Clause is contained in then-Justice Rehnquist's dissent in *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting). There we read the following:

On the day after the House of Representatives voted to adopt the form of the First Amendment Religion Clauses which was ultimately proposed and ratified, Representative Elias Boudinot proposed a resolution asking President George Washington to issue a Thanksgiving Day Proclamation. Boudinot said he "could not think of letting the session pass over without offering an opportunity to all the citizens the United States of joining with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them."

Id. at 100-01 (Rehnquist, J., dissenting) (citation omitted). Justice Rehnquist then documented some of the debate over the resolution, including objections on what today would be called establishment grounds. *Id.* at 101 (Rehnquist, J.,

dissenting). This shows that the First Congress did not simply engage in inconsistent action. Rather, they heard the minority view and rejected it.

Justice Rehnquist then described the action of President Washington:

Within two weeks of this action by the House, George Washington responded to the Joint Resolution which by now had been changed to include the language that the President “recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness.” The Presidential Proclamation was couched in these words:

Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquillity, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us.

And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all,

whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed; to protect and guide all sovereigns and nations (especially such as have shown kindness to us), and to bless them with good governments, peace, and concord; to promote the knowledge and practice of true religion and virtue, and the increase of science among them and us; and, generally, to grant unto all mankind such a degree of temporal prosperity as He alone knows to be best.

Id. at 101-03 (Rehnquist, J., dissenting). The opening words of this same Thanksgiving Proclamation are these: “Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor “
http://avalon.law.yale.edu/18th_century/gwproc01.asp (last visited Feb. 27, 2010).

Justice Rehnquist also noted the views of the eminent constitutional authority, Thomas Cooley:

“But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving his boundless favors, or bowing in contrition when visited with the penalties of his broken laws. No principle of

constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State government. Undoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or sect; but the power to do any of these things does not become unconstitutional simply because of its susceptibility to abuse”

Wallace, 472 U.S. at 105-06 (Rehnquist, J., dissenting) (citation omitted). Here Cooley was addressing the acknowledgment of God Himself. It naturally follows that if government can acknowledge God, it can acknowledge religion; and Justice Rehnquist went on to quote Cooley’s discussion of the “public recognition of religious worship.” *Id.* at 106 (Rehnquist, J., dissenting) (citation omitted).¹

In sum, acknowledgement is not a hard concept. It meant then exactly what it means now—to recognize. Government can recognize the reality of God and the importance of religion.

D. Accommodation of Religion is Permitted.

Government can go a step beyond acknowledging religion. It may accommodate various sects’ religious views and acts. This approach was discussed by George Washington. “[I]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and

¹ (This same quotation from Cooley also supports the concept of encouragement which we will address below.)

desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.” Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), in *George Washington on Religious Liberty and Mutual Understanding* 11 (E. Humphrey ed.1932).

Importantly, this very passage was quoted by Justice O’Connor in her dissent in *City of Boerne v. Flores*. 521 U.S. 507, 562 (1997) (O’Connor, J., dissenting). In *Flores*, Justices O’Connor and Scalia debated whether Washington’s sentiment and similar sentiments expressed during the colonial and early national period demonstrate that accommodation is constitutionally required. *Cf. id.* at 560-64 (O’Connor, J., dissenting).with *id.* at 541-44 (Scalia, J., concurring in part). That is not the concern of this Brief. However, both Justices agreed that many historic practices that continue to the present constitute an accommodation of religion. These practices include exemptions from military service and exemptions from oath taking, among others. *Id.* at 560-64 (O’Connor, J., dissenting); *id.* at 541-44 (Scalia, J., concurring in part).

Like acknowledgement, accommodation is not a hard concept. It simply means that the government changes what it otherwise might do. It generally takes the form of granting exceptions.

E. Encouragement of Religion is Permitted.

Governments can go yet further and encourage religion. Probably the most famous articulation of the encouragement principle is that found in the Northwest Ordinance, which states: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” <http://www.earlyamerica.com/earlyamerica/milestones/ordinance/text.html> (last visited Feb. 27, 2010).

However, the Founders did not just talk about encouraging religion; they actually did so. Here we can return to then-Justice Scalia’s *Wallace v. Jaffree* dissent. There he noted that

[a]s the United States moved from the 18th into the 19th century, Congress appropriated time and again public moneys in support of sectarian Indian education carried on by religious organizations. Typical of these was Jefferson’s treaty with the Kaskaskia Indians, which provided annual cash support for the Tribe’s Roman Catholic priest and church. It was not until 1897, when aid to sectarian education for Indians had reached \$500,000 annually, that Congress decided thereafter to cease appropriating money for education in sectarian schools. This history shows the fallacy of the notion found in *Everson* that “no tax in any amount” may be levied for religious activities in any form.

Wallace, 472 U.S. at 103-04 (Rehnquist, J., dissenting) (footnote and citations omitted).

Justice Rehnquist went on to note even more detail about Jefferson’s treaty:

The treaty stated in part: “*And whereas*, the greater part of said Tribe have been baptized and received into the Catholic church, to

which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion . . . [a]nd . . . three hundred dollars, to assist the said Tribe in the erection of a church.” From 1789 to 1823 the United States Congress had provided a trust endowment of up to 12,000 acres of land “for the Society of the United Brethren, for propagating the Gospel among the Heathen.” The Act creating this endowment was renewed periodically and the renewals were signed into law by Washington, Adams, and Jefferson. Congressional grants for the aid of religion were not limited to Indians. In 1787 Congress provided land to the Ohio Company, including acreage for the support of religion. This grant was reauthorized in 1792. In 1833 Congress authorized the State of Ohio to sell the land set aside for religion and use the proceeds “for the support of religion ... and for no other use or purpose whatsoever”

Id. at 104 n.5 (Rehnquist, J., dissenting).

Thus, encouragement goes beyond acknowledging God and religion. It goes beyond accommodating a religious sects’ request for an accommodation or exception. It even goes beyond pro-actively extending accommodations without being asked. It involves looking for ways to encourage the population to engage in religious pursuits. It certainly includes proclamations that encourage such actions. It also may include governmental spending. Sometimes the vehicle of encouragement will be one sect; sometimes a different one. The Framers truly believed that “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind” Therefore, government could encourage religion.

F. The Historic Concepts Persist in Modern Establishment Clause Jurisprudence.

Although current Establishment Clause jurisprudence has retreated far from some of these last examples, the history lesson sets the stage for an important reality: even though watered down, the concepts of acknowledgement, accommodation, and even encouragement have not fallen out of the Supreme Court's Establishment Clause jurisprudence, despite its thicket-like nature.

For example, both the acknowledgement of God and of the role of religion in society continues to be addressed. In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court upheld Nebraska's legislative chaplaincy program. In so doing the Court noted that "[t]o invoke Divine guidance on a public body entrusted with making the laws is not . . . an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country." *Id.* at 792. This principle was reiterated again in *Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (Rehnquist, C.J., plurality), when Chief Justice Rehnquist quoted from the Court's earlier Establishment Clause case, *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984): "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."

Similarly, the concept of accommodation is alive and well and was discussed as recently as in *Van Orden*. 545 U.S. at 684. And *Lynch v. Donnelly*

speaks to this concept, too: “Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.” 465 U.S. at 673.

Finally, the Supreme Court has famously addressed encouragement: “When the state encourages religious instruction . . . it follows the best of our traditions.” These words first appeared in *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) (garnering the votes of Vinson, C.J., & Reed, Douglas, Burton, Clark, & Minton, JJ.). Since then the words have been quoted in ten other opinions.²

Sometimes the Court has addressed more than one of the concepts together:

When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to

² *Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (Rehnquist, C.J., writing for the plurality, joined by Scalia, Kennedy & Thomas, JJ.), *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400-01 (1993) (Scalia & Thomas, JJ., concurring); *Allegheny County v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, White & Scalia, JJ., & Rehnquist, C.J., concurring in the judgment in part and dissenting in part), *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 554 (1986) (Burger, C.J., & White & Rehnquist, JJ., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O’Connor, J., concurring); *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Burger, C.J., concurring in the judgment in part and dissenting in part); *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Rehnquist & White, JJ., concurring in the judgment in part and dissenting in part); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 813 (1973) (White, J., dissenting, joined in part by Burger, C.J., & Rehnquist, J.) (opinion applying also to two consolidated cases); *Lemon v. Kurtzman*, 403 U.S. 602, 661 (1971) (White, J., concurring in two consolidated cases and dissenting in two consolidated cases); and *Walz v. Tax Com. of New York*, 397 U.S. 664, 671 (1970) (Burger, C.J., & Black, Stewart, White, & Marshall, JJ.). All but Justice O’Connor’s are positive invocations of this proposition. Justice O’Connor noted that the proposition was inapposite as used by appellants.

sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

Zorach v. Clauson, 343 U.S. 306, 313-314 (1952).

G. The School District's Plan Passes Muster.

The point for the present case is obvious, but important: Wherever on the continuum from acknowledgement to accommodation to encouragement this Court might place the School District's plan, that plan does not violate the Framers' principles of establishment.

While this Court is bound by the Supreme Court's modern day precedents, those precedents are not totally divorced from their historic roots. And those roots can help this Court navigate the shoals and emerge from the thicket. If people of faith may run for elective office (and *McDaniel v. Paty* says they can); and if the "fundamental maxim of republican government . . . requires that the sense of the majority should [normally] prevail," (and *The Federalist Papers* tells us this is so); and if the acknowledgment, accommodation, and encouragement of religion are permissible (and the writings and the actions of The Founders demonstrate that they are); then religion cannot possibly be established merely when the majority of a deliberative body is composed of people of faith and that majority votes only to

reduce everyone's taxes, thereby benefitting their co-religionists along with the rest of the population.

CONCLUSION

For the foregoing reasons and for other reasons stated in the School District's Brief, the judgment of the District Court should be affirmed.

Respectfully Submitted
this 1st day of March, 2010

/s/Steven W. Fitschen
Steven W. Fitschen

CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of The National Legal Foundation in the case of *Incantalupo, et al. v. Lawrence Union Free School District, No. 15, et al.*, No. 09-3994-cv, on all required parties by electronic mail and by depositing two paper copies in the United States mail, first class postage, prepaid on March 1, 2010, addressed as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32.2.7(C), the undersigned certifies that this brief complies with the type-volume limitations of F.R.A.P. 32.2.7(B). Exclusive of the exempted portions, this Brief contains 6,010 words in 14 point Times New Roman font. This total was calculated with the Word Count function of Microsoft Office Word 2007.

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March 1, 2010