

**IN THE
United States Court of Appeals
for the Seventh Circuit**

Eugene Winkler et al.,
Plaintiffs-Appellees,
v.
Donald H. Rumsfeld,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Illinois

Brief Amici Curiae of United States Senator Jim DeMint, United States Representatives Jo Ann S. Davis, Robert Aderholt, Todd Akin, J. Gresham Barrett, Roscoe Bartlett, Rob Bishop, Sanford D. Bishop, Jr., Marsha Blackburn, Mary Bono, John Boozman, Kevin Brady, Henry E. Brown, Jr., Steve Buyer, Chris Cannon, Eric Cantor, John R. Carter, Steve Chabot, Chris Chocola, Howard Coble, Tom Cole, Robert E. “Bud” Cramer, Jr., Barbara Cubin, Tom Davis, Nathan Deal, Thelma D. Drake, Jo Ann Emerson, Terry Everett, Tom Feeney, Michael G. Fitzpatrick, Jeff Flake, J. Randy Forbes, Virginia Foxx, Trent Franks, Scott Garrett, Wayne T. Gilchrest, Phil Gingrey, Virgil H. Goode, Jr., Bob Goodlatte, Mark Green, Melissa A. Hart, Doc Hastings, Robin Hayes, J.D. Hayworth, Joel Hefley, Jeb Hensarling, Peter Hoekstra, John N. Hostettler, Kenny C. Hulshof, Bob Inglis, Darrell Issa, W.L. “Bill” Jenkins, Sam Johnson, Walter B. Jones, John Kline, Ron Lewis, Donald A. Manzullo, John M. McHugh, Candice S. Miller, Gary G. Miller, Jeff Miller, Randy Neugebauer, Anne M. Northup, Charlie Norwood, Tom Osborne, Ron Paul, Stevan Pearce, Joseph R. Pitts, Tom Price, George Radanovich, Dennis R. Rehberg, Hal Rogers, Ileana Ros-Lehtinen, Jim Ryun, Jim Saxton, Jean Schmidt, John Shadegg, Rob Simmons, Michael E. Sodrel, Mark E. Souder, Charles H. Taylor, Mac Thornberry, Todd Tiahrt, Michael R. Turner, Lynn A. Westmoreland, Heather Wilson, Joe Wilson, and Frank R. Wolf, and the American Center for Law and Justice in Support of Defendant-Appellant and Urging Reversal

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DISCLOSURE STATEMENT

This disclosure statement contains the information required by F.R.A.P. 26.1 and Circuit Rule 26.1.

Amicus the American Center for Law and Justice is a non-profit corporation. It has no parent corporation and does not issue stock.

Neither the amici nor their counsel represent or have appeared for any party in this case.

The American Center for Law and Justice is the only law firm that is expected to appear for the amici in this case.

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INTEREST OF AMICI

Amici United States Senator Jim DeMint and United States Representatives Jo Ann S. Davis, Robert Aderholt, Todd Akin, J. Gresham Barrett, Roscoe Bartlett, Rob Bishop, Sanford D. Bishop, Jr., Marsha Blackburn, Mary Bono, John Boozman, Kevin Brady, Henry E. Brown, Jr., Steve Buyer, Chris Cannon, Eric Cantor, John R. Carter, Steve Chabot, Chris Chocola, Howard Coble, Tom Cole, Robert E. “Bud” Cramer, Jr., Barbara Cubin, Tom Davis, Nathan Deal, Thelma D. Drake, Jo Ann Emerson, Terry Everett, Tom Feeney, Michael G. Fitzpatrick, Jeff Flake, J. Randy Forbes, Virginia Foxx, Trent Franks, Scott Garrett, Wayne T. Gilchrest, Phil Gingrey, Virgil H. Goode, Jr., Bob Goodlatte, Mark Green, Melissa A. Hart, Doc Hastings, Robin Hayes, J.D. Hayworth, Joel Hefley, Jeb Hensarling, Peter Hoekstra, John N. Hostettler, Kenny C. Hulshof, Bob Inglis, Darrell Issa, W.L. “Bill” Jenkins, Sam Johnson, Walter B. Jones, John Kline, Ron Lewis, Donald A. Manzullo, John M. McHugh, Candice S. Miller, Gary G. Miller, Jeff Miller, Randy Neugebauer, Anne M. Northup, Charlie Norwood, Tom Osborne, Ron Paul, Stevan Pearce, Joseph R. Pitts, Tom Price, George Radanovich, Dennis R. Rehberg, Hal Rogers, Ileana Ros-Lehtinen, Jim Ryun, Jim Saxton, Jean Schmidt, John Shadegg, Rob Simmons, Michael E. Sodrel, Mark E. Souder, Charles H. Taylor, Mac Thornberry, Todd Tiahrt, Michael R. Turner, Lynn A. Westmoreland, Heather Wilson, Joe Wilson, and Frank R. Wolf are currently serving as members of the One Hundred Ninth Congress.

Amicus, American Center for Law and Justice (ACLJ), is a nonprofit, public interest law firm and educational organization specializing in First Amendment litigation. ACLJ attorneys have argued or participated as amicus curiae in numerous cases in the Supreme Court of the United States and other federal courts. *See, e.g., McConnell v. FEC*, 540 U.S. 93 (2003); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Hill v. Colorado*, 530 U.S. 703 (2000); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993); *Westside Comm. Sch. v. Mergens*, 496 U.S. 226 (1990). The ACLJ has developed a special expertise in this area which would be of benefit to the Court.

Amici urge this Court to reverse the United States District Court for the Northern District of Illinois in this case because they are convinced that the District Court’s decision holding the military’s support of the Boy Scouts of America’s National Scout Jamborees unconstitutional is profoundly wrong. While the First Amendment prohibits the federal government from establishing a national religion, it does not preclude the military from promoting important values like patriotism and self-reliance through in-kind support of a unique secular event.

Amici have obtained the consent of all parties to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since 1937, the United States military has provided supplies and services in support of the National Scout Jamboree held every four years by the Boy Scouts of America (“the BSA”). Congress formally recognized this tradition in 1972 by passing 10 U.S.C. § 2554 (“the Jamboree statute”), authorizing the Department of Defense to provide such support for the Jamborees. The military’s support of Jamborees came into question when Eugene Winkler and other federal taxpayers brought the current lawsuit. Winkler sought to enjoin the enforcement of the Jamboree statute and other programs under which the BSA is eligible to receive some form of federal aid. The plaintiffs claimed that the Jamboree and other statutes were laws “respecting an establishment of religion” in violation of the First Amendment to the United States Constitution because the BSA has a religious component to its activities and beliefs. The District Court denied most of the plaintiffs’ claims. *See Winkler v. Chicago Sch. Reform Bd. of Trs.*, No. 99-C-2424 (N.D. Ill. 2005), Memorandum and Order of Mar. 16, 2005, at 53 [*hereinafter Winkler Memorandum*]. The court sustained the challenge to the Jamboree statute, holding that it violated the Establishment Clause because it had the primary effect of advancing religion. *Id.* at 25-27, 37-40 (applying *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)). The District Court relied primarily on *Agostini v. Felton*, 521 U.S. 203 (1997), and *Mitchell v. Helms*, 530 U.S. 793 (2000). *Id.*

The District Court’s holding that the Jamboree statute violated the Establishment Clause was flawed in three respects. First, the District Court failed to give appropriate weight to the context and purpose of the Jamboree statute. The statute is one small part of a much larger statutory and regulatory scheme which allows the military to pursue its own recruiting and public relations interests through involvement with private organizations. In enacting the Jamboree

statute, Congress sought to help the military advance its own goals, not promote BSA’s religious beliefs. Second, the District Court’s extensive reliance on *Agostini* and *Mitchell* was misplaced, as those cases were designed primarily to address the unique issues raised by school aid programs. The “endorsement” test—which has been repeatedly applied by this Court—is most appropriate here and leads to the conclusion that the military’s support of BSA Jamborees is constitutional. Finally, to the extent that *Agostini* and *Mitchell* are relevant to this case, the District Court rigidly applied *Agostini*’s “three primary criteria” as if this were a school aid case without giving adequate consideration to the rationale driving *Agostini* and *Mitchell*.

ARGUMENT

I. VIEWED IN CONTEXT, THE JAMBOREE STATUTE ALLOWS THE MILITARY TO ADVANCE ITS OWN INTERESTS BY PROVIDING NON-RELIGIOUS SUPPLIES AND SERVICES AT BSA JAMBOREES.

The District Court erred in not properly viewing the Jamboree statute in context. The importance of context, history, and a careful case-by-case analysis in Establishment Clause cases has been repeatedly emphasized. *See generally Van Orden v. Perry*, 125 S. Ct. 2854, 2861 (2005); *McCreary County v. ACLU*, 125 S. Ct. 2722, 2736-37 (2005) (“reasonable observers have reasonable memories, and our precedents sensibly forbid an observer to turn a blind eye to the context in which the policy arose.”) (citation omitted); *Books v. Elkhart County*, 401 F.3d 857, 866-68 (7th Cir. 2005). The District Court’s failure to view the Jamboree statute in context effectively blinded that court to important factors relevant to its determination of the challenge.

The Jamboree statute is just one of the many statutes and regulations relevant here. These policies allow the military to partner with government agencies and private groups while advancing its own recruiting, training, and public relations interests. Over the past fifty-eight

years, the BSA's Jamborees have presented the military with a unique opportunity to advance these interests. Viewed in context, it cannot be said that the primary effect of the Jamboree statute is government advancement or indoctrination of religion.

The Department of Defense has promoted its own important interests through interaction with and assistance to various community groups and events. The Department has supported numerous events in addition to the BSA's Jamborees. These include the Goodwill Games, the Special Olympics, political party conventions, and Presidential inaugurations by making its facilities and equipment available. *Winkler v. Chicago Sch. Reform Bd. of Trs.*, No. 99-C-2424 (N.D. Ill. 2005), Defendant Rumsfeld's Statement of Undisputed Material Facts in Support of his Summary Judgment Motion at ¶¶ 26-28 [*hereinafter Winkler Rumsfeld Facts*].

The funds used by the Department to support Jamborees make up only a small portion of the Department's overall funding of special events and activities. *Id.* The BSA is just one of many organizations assisted by the Department; other organizations receiving Department assistance include the Girl Scouts of America, the Boys and Girls Clubs of America, the YMCA and YWCA, the Police Athletic League, and the Campfire Boys and Girls. *Id.* at ¶ 71. Viewed in this light, the Jamboree statute is certainly not an attempt by Congress to enable the military to promote religious views through its support of Jamborees.

Another important aspect of context in this case is the fact that the BSA's Jamborees provide the military with a unique opportunity to advance its own interests. As the Department of Defense has explained, "[t]here is a natural affinity between the military and the Boy Scouts based on the substantially overlapping values of the two groups," and "in terms of its compatibility with military capabilities and interests, there is no event quite like the NSJ nor is

there any organization quite like the Boy Scouts.” *Winkler v. Chicago Sch. Reform Bd. of Trs.*, No. 99-C-2424 (N.D. Ill. 2005), Defendant Rumsfeld’s Memorandum of Law in Support of his Summary Judgment Motion at 16, 21. The BSA has been the preeminent organization of its type for almost a century; it has no peer in terms of size, history, and reputation. The BSA and its Jamborees promote patriotism, good citizenship, and support for the military, values that Congress and the military certainly have a strong interest in promoting. *See id.* at 6-7. Congress has the authority to encourage these important secular values. *See Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (“The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest”).

The context of the Jamboree statute illustrates the District Court’s error in treating this as a school aid case. As the next section explains, *Agostini* and *Mitchell* are school aid cases that are not controlling here. If parallels are to be drawn to those cases, however, the critical differences between the school setting and others must be taken into account. The Supreme Court’s school-related Establishment Clause cases have been shaped by the fact that all instruction that occurs at public schools may be directly attributed to the government because it compels all children to attend school. The Court recently noted that some apparent anomalies in its jurisprudence can be explained by the fact that it has been “particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.” *Van Orden*, 125 S. Ct. at 2863-64 (citation omitted). This partially explains why there are cases striking down Ten Commandments displays and prayers in the school setting but upholding them outside the school setting. *See id.* (discussing the distinction between school and other cases).

There are several key differences between this case and those dealing with schools.

First, attendance at Jamborees and participation in any of the activities that occur there is wholly voluntary. Unlike the public school environment, it cannot be argued that children are subtly coerced by the government to participate in religious activities. *See generally Lee v. Weisman*, 505 U.S. 577 (1992).

Second, unlike classes that may occur at many of the private schools that receive aid under constitutionally permissible programs, Jamborees are not predominantly religious. The military does not promote all of the BSA's beliefs and activities merely by supporting one aspect of Jamborees. *See Winkler Rumsfeld Facts* at ¶ 22 (“DOD does not endorse, sponsor, or contribute to the content of any religious activities that may take place during the Jamboree”).

Another major difference is that Jamborees provide the military with a unique opportunity to interact with thousands of patriotic boys and their families at a large, prominent national event. Any attempt to use the public school system in a similar vein would be much less effective given the fact that schools are primarily run at the local level and there is no analogous large gathering of students across the country at one event. This provides another reason why a comparison of the Jamboree statute to the school aid cases is inappropriate; while voucher programs work because there are numerous public and private schools across the country, there is no large-scale national event that is analogous the BSA's Jamborees.

II. THE JAMBOREE STATUTE IS CONSTITUTIONAL BECAUSE A REASONABLE OBSERVER WOULD CONCLUDE THAT THE MILITARY'S SUPPORT OF JAMBOREES DOES NOT CONVEY A MESSAGE OF ENDORSEMENT OF RELIGION.

The District Court erred by strictly applying *Agostini* and *Mitchell* rather than reviewing the facts under the endorsement test. Under the Supreme Court's three-part “*Lemon test*” for Establishment Clause cases, a court must consider whether a statute: 1) has a secular legislative

purpose; 2) has a primary effect that advances or inhibits religion; and 3) fosters an excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13. Only the effects prong of *Lemon* is at issue here, as the District Court held that the principal effect of the Jamboree statute is government advancement of religion. The *Agostini* and *Mitchell* cases that the District Court relied upon—which set out specific criteria applicable in cases involving financial aid to schools or students—are not controlling here. Where school aid is not at issue, the endorsement test is the applicable standard to determine whether government conduct violates *Lemon*'s effects prong. See generally *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 772-83 (1995) (O'Connor, J., concurring); *Books*, 401 F.3d at 866. The military's provision of secular services in support of BSA Jamborees is constitutional because a reasonable observer would conclude that the military is not endorsing religion.

A. *Agostini* and *Mitchell* are school aid cases and should not be extended to situations not involving schools.

Agostini and *Mitchell* considered whether government aid programs involving schools have the primary effect of advancing religion. The analysis in those decisions was drawn almost exclusively from prior school aid cases, largely because the school environment is so unique. Both the Supreme Court and this Court have properly labeled *Agostini* and *Mitchell* as school aid cases and have largely applied other decisions in Establishment Clause cases not involving schools.

In *Agostini*, the Supreme Court reconsidered its holding in *Aguilar v. Felton*, 473 U.S. 402 (1985), that the Establishment Clause forbids public schools from sending teachers to parochial schools to provide remedial education to disadvantaged children. In so doing, the Court relied heavily on previous school aid cases. See generally *Agostini*, 521 U.S. at 218-235; *Zobrest*

v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Lemon*, 403 U.S. at 602. *But see Bowen v. Kendrick*, 487 U.S. 589 (1988). Both of the later cases in which the Supreme Court applied *Agostini*’s analysis also dealt with school aid. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell*, 530 U.S. at 793.

The *Mitchell* plurality relied on *Agostini* and the school aid cases considered in *Agostini* to determine whether public agencies may lend materials and equipment to public and private schools. *See Mitchell*, 530 U.S. at 807-36 (Thomas, J., plurality). The plurality stated, “in *Agostini* we modified *Lemon* for purposes of evaluating *aid to schools* and examined only the first and second factors.” *Id.* at 807 (emphasis added). The plurality also added, “[a]s we indicated in *Agostini*, and have indicated elsewhere, the question whether governmental *aid to religious schools* results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action.” *Id.* at 809 (emphasis added).

Justice O’Connor’s concurring opinion in *Mitchell* reiterated that the Court’s decision focused on school aid. Justice O’Connor began her analysis by stating, “the plurality announces a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government *school-aid programs*.” *Id.* at 837 (O’Connor, J., concurring). One of her main disagreements with the plurality was that its “treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school-aid programs.” *Id.* Justice O’Connor later added, “[o]ur *school-aid cases*

often pose difficult questions at the intersection of the neutrality and no-aid principles,” and noted “*Agostini* represents our most recent attempt to devise a general framework for approaching questions concerning neutral *school-aid programs*.” *Id.* at 866 (emphasis added).

In *Zelman*, the Supreme Court classified *Agostini* and *Mitchell* as the latest in a long line of school aid cases. The Court cited *Agostini*, *Mitchell*, and several other school aid cases in noting, “our decisions have 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.” *Zelman*, 536 U.S. at 649 (citations omitted) (emphasis added). Justice Thomas cited *Agostini* and *Mitchell* in his concurring opinion when he noted, “[t]his Court has often considered whether efforts to provide children with the best educational resources conflict with constitutional limitations. . . . We have recently decided several cases challenging federal aid programs that include religious schools.” *Id.* at 677 (Thomas, J., concurring).

Over the past several years, this Court has repeatedly recognized that the endorsement test is the appropriate standard in most cases to determine whether government action has the primary effect of advancing religion. In *Books v. Elkhart County*, 401 F.3d 857 (7th Cir. 2005), this Court stated:

The second inquiry of the *Lemon* methodology asks whether the challenged government action has the principal or primary effect of advancing or inhibiting religion. The “effects” prong of *Lemon* has been refined to focus on whether the government action in question has the effect of endorsing religion: The effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.

Id. at 866 (citations omitted). In *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005), this Court analyzed a sale of property under the effects prong by stating, “our focus is not

on the intent of the City, but on whether a reasonable person, apprised of the circumstances surrounding the sale, would conclude that the sale amounted to an endorsement of religion.” *Id.* at 705 (citations omitted). This Court has made similar statements in other cases. *See generally Ind. Civil Liberties Union v. O’Bannon*, 259 F.3d 766, 772 (7th Cir. 2001) (“The question is: would a reasonable person believe that the display amounts to an endorsement of religion?”); *Freedom from Religion Found., Inc. v. Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000).

This Court has only applied the factors stated in *Agostini* and *Mitchell* in a school aid case. *But cf. Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880, 882 (7th Cir. 2003) (citing *Zelman* in comparing a halfway house program to a school voucher program). In *Freedom from Religion Foundation, Inc. v. Bugher*, 249 F.3d 606 (7th Cir. 2001), this Court considered a program which subsidized telecommunications for public and private schools. This Court correctly characterized *Agostini*’s limited applicability by stating, “[i]n *Agostini v. Felton*, 521 U.S. 203 (1997), the Supreme Court modified the Lemon test *in cases involving school aid*, emphasizing the continuing importance of the first two prongs of *Lemon*, but determining that entanglement could be considered as an aspect of the second prong’s ‘effect’ inquiry.” *Id.* at 610-11 (emphasis added).

B. Under a proper application of the endorsement test, the military’s participation in BSA Jamborees is constitutional.

The District Court erroneously applied the *Agostini* and *Mitchell* factors to this case. Although the District Court mentioned and purported to apply the endorsement test, it merely ended its analysis with the conclusion that endorsement of religion had occurred. *See Winkler Memorandum* at 39-40. A more complete endorsement test analysis leads to the conclusion that the military has not violated the Establishment Clause through its support of BSA Jamborees.

In applying the endorsement test, it is important to remember that “an Establishment Clause violation must be moored in *government* action of some sort.” *Pinette*, 515 U.S. at 779 (O’Connor, J., concurring) (emphasis added). Justice O’Connor has noted, “our Establishment Clause jurisprudence must seek to identify the point at which the government becomes responsible . . . for the injection of religion into the political life of the citizenry.” *Id.* Under the endorsement test, “[t]he effect of [government action] is evaluated against an objective, reasonable person standard, not from the standpoint of the hypersensitive or easily offended.” *Books*, 401 F.3d at 867. The “reasonable observer” is aware of the context surrounding the government’s conduct precisely because private religious activity should not easily be attributed to the government. As Justice O’Connor has noted:

[T]he effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion. . . . What is crucial is that a government practice not have the effect of *communicating a message* of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

Lynch v. Donnelly, 465 U.S. 668, 691-92 (1984) (O’Connor, J., concurring). “Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.” *Id.* at 694. The key question is whether the government has actually communicated a message of endorsement of religion. *See id.*; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001); *Pinette*, 515 U.S. at 780 (O’Connor, J., concurring). The ideal reasonable observer will be one “of indeterminate religious affiliation who knows all the facts and circumstances surrounding [the government action at issue].” *Van Orden*, 125 S. Ct. at 2867 (Thomas, J., concurring).

Viewed in context, the military’s support of BSA Jamborees does not convey a message of endorsement of religion. A reasonable observer of the military’s support of Jamborees would consider it part of a larger effort by the military to promote a positive view of itself among members of the general public, and also to support beneficial community activities. *See Zelman*, 536 U.S. at 655 (“[a]ny objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.”). No one could reasonably conclude that, by buying flags and medical supplies, renting “Army” hot air balloons, or setting up Army Adventure Areas at the BSA’s Jamborees, the military has somehow endorsed a religious message or engaged in conduct “respecting an establishment of religion.” *See* U.S. CONST. amend I; *Winkler* Memorandum at 6. A reasonable observer would realize that the military uses its presence at Jamborees as an opportunity to introduce itself to a large number of potential future recruits and portray itself in a positive light. The Jamboree statute would not offend a reasonable observer’s sensibilities since it merely allows the military to support the BSA’s non-religious purposes. *See Mitchell*, 530 U.S. at 840 (O’Connor, J., concurring) (citation omitted) (“our cases have permitted some government funding of secular functions performed by sectarian organizations”). To paraphrase this Court, “a reasonable observer of the [military’s support of Jamborees] will think [patriotism and recruiting], not religion.” *Books*, 401 F.3d at 869.

Justice O’Connor’s application of the endorsement test in the school context in her concurring opinion in *Mitchell* confirms that the Jamboree statute is constitutional. Justice O’Connor stated that, under a direct school aid program:

[I]f the religious school uses the aid to inculcate religion in its students, it is

reasonable to say that the government has communicated a message of endorsement. Because the religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the aid program as government support for the advancement of religion.

Mitchell, 530 U.S. at 843 (O'Connor, J., concurring). On the other hand,

when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, no reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief. . . . Rather, endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid.

Id. In other words, government aid *can* “support[] a school’s religious mission” without conveying a message of endorsement if the aid used for this purpose reaches the school due to the private choice of individuals. The direct-indirect aid distinction may determine the outcome in cases where the school “uses the aid to inculcate religion” because whoever chooses to allocate the aid to the school can reasonably be viewed as endorsing the message the aid is used to promote. This is an application of the general principle that one who sponsors a particular message can reasonably be perceived as supporting its content. *See generally Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996); *Buckley v. Valeo*, 424 U.S. 1 (1976).

Justice O'Connor’s analysis is equally applicable in cases, like this one, where the use of aid does not involve a religious message. The government—like any other sponsor of a message—can only be reasonably viewed as supporting the message that its aid actually promotes. Where the government provides direct aid that is *not* used to “inculcate religion” or support an organization’s “religious mission,” the government *cannot* reasonably be perceived as endorsing religion. In light of the history of and purpose for the military’s support of the BSA’s Jamborees, the only message that the military could reasonably be viewed as sending is that it

supports the organizations’ shared values such as patriotism, self-reliance, loyalty, and honor. The military’s support of Jamborees does not convey a message to the reasonable observer that it is promoting religion.

III. THE JAMBOREE STATUTE IS CONSTITUTIONAL BECAUSE THE AID PROVIDED BY THE MILITARY HAS NOT RESULTED IN ACTUAL GOVERNMENT INDOCTRINATION OF RELIGION.

To the degree that school aid decisions such as *Agostini* and *Mitchell*, if read broadly, may be somewhat analogous to this case, the many critical differences between school and non-school cases must be taken into account. Viewing the Jamboree statute in context and in light of these differences, and considering the concerns underlying the Supreme Court’s reasoning in *Agostini* and *Mitchell*, it is clear that the military’s support of Jamborees does not violate the Establishment Clause. The main concern of the *Agostini* and *Mitchell* Courts—religious indoctrination by the government—is not present in this case.

A. The *Agostini* and *Mitchell* opinions set forth several factors relevant to analyzing school aid; the District Court erred by applying *Agostini* as if it created a rigid, 3-part test.

The District Court misapplied *Agostini* and *Mitchell*; the military’s provision of support to Jamborees does not pose the type of problems that the Supreme Court was concerned about in those cases. After a lengthy discussion of numerous factors that are relevant in school aid cases, the *Agostini* Court concluded its discussion by stating:

To summarize, New York City’s Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.

Agostini, 521 U.S. at 234. The Court called these “three primary criteria” because they summarize a longer list of factors relevant in school aid cases. There are other factors relevant in

considering whether governmental indoctrination of religion has occurred, including whether:

- the aid itself is secular;
- public funds actually reach a school's coffers;
- public funds are used for religious instruction;
- adequate safeguards ensure that public funds are not diverted to religious use;
- any improper use of public funds is *de minimus*;
- the school is "pervasively sectarian;"
- the aid reaches the school due to the private choice of individuals;
- the government's selection of the recipient(s) of aid is religiously neutral; and
- the program requires extensive oversight of religious schools by the government.

See generally Mitchell, 530 U.S. at 807-35 (Thomas, J., plurality); *id.* at 867 (O'Connor, J., concurring) (listing several factors and stating "[r]egardless of whether these factors are constitutional requirements, they are surely sufficient to find that the program at issue here does not have the impermissible effect of advancing religion."); *Agostini*, 521 U.S. at 218-35.

B. The military's support of Jamborees does not constitute religious indoctrination by the government.

By rigidly applying *Agostini* and *Mitchell* to this case, the District Court erroneously held that "the risk exists that . . . one could attribute to the government any indoctrination by the BSA." *Winkler* Memorandum at 38. The District Court failed to note that "attribution of indoctrination is a relative question" that is fact-specific. *Mitchell*, 530 U.S. at 809 (Thomas, J., plurality). As a result, the concern about government indoctrination is directly linked to several other relevant factors. In school aid cases, the relevant question is "whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action." *Id.* More specifically,

[t]he issue is not divertibility of aid but rather *whether the aid itself has an impermissible content*. Where the aid would be suitable for use in a public school, it is also suitable for use in any private school.

Id. at 822 (emphasis added); *see also id.* at 831 (“Chapter 2 satisfies the first *Agostini* criterion because it does not provide to religious schools aid that has an impermissible content.”). The *Agostini* Court noted, “we have assessed a law’s ‘effect’ by examining . . . *the nature of the aid* that the State provided (*e.g.*, whether it was neutral and nonideological).” *Agostini*, 521 U.S. at 232 (emphasis added) (citation omitted). Private organizations like the BSA are free to hold whatever beliefs they choose, *see Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and only the government can violate the Establishment Clause; therefore, the nature of the aid itself is critical in distinguishing private expression from public action.

It is readily apparent that the aid permitted by the Jamboree statute lacks impermissible content because the military itself provides non-religious supplies and services. The military’s rental of forklifts and trucks, transportation of military equipment, restoration of Fort A.P. Hill after the Jamboree, and provision of other secular services is clearly “neutral and nonideological.” *See Winkler* Memorandum at 6. The only possible message that the military’s aid can be viewed as conveying is that patriotism, self-reliance, physical fitness, and support of the military are positive things. *Agostini* foreclosed the argument that military personnel should be presumed to inculcate religion while they carry out their assigned functions at Jamborees solely because the Jamborees have some religious components. *See Agostini*, 521 U.S. at 224 (“[the Court has] expressly rejected the notion . . . that, solely because of her presence on private school property, a public employee will be presumed to inculcate religion in the students.”). What was true in *Agostini*—where public employees entered the private property of religious schools—is certainly no less true here where the event actually occurs on public property. For government action to violate *Lemon*’s effects prong, “it must be fair to say that the *government*

itself has advanced religion through its own activities and influence.” *Charles v. Verhagen*, 348 F.3d 601, 610 (7th Cir. 2003) (citation omitted). Here, there is no doubt that the military’s support of Jamborees does not advance religion or violate the Establishment Clause.

C. The BSA receives no public funds under the Jamboree statute.

The Supreme Court has repeatedly recognized that the method by which government aid is given to private groups has a significant impact on how that aid should be analyzed under the Establishment Clause. There is a critical difference between the government sending money to a religious group for it to use and the government itself providing goods or services. In *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 842 (1995), the Supreme Court noted, “we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions.” In *Mitchell*, both the plurality and Justice O’Connor discussed this distinction in their opinions. *Mitchell*, 530 U.S. at 818-19 (Thomas, J., plurality); *id.* at 843 (O’Connor, J., concurring). The *Mitchell* plurality noted that “direct payments of money are not at issue in this case,” and that “such a form [of distributing aid] creates special risks that governmental aid will have the effect of advancing religion (or, even more, a purpose of doing so).” *Id.* at 820 & n.8. The *Agostini* Court also found it relevant to note that “[n]o Title I funds ever reach the coffers of religious schools.” *Agostini*, 521 U.S. at 228.

The “special Establishment Clause dangers” posed by the payment of money to religious groups are not present in this case. “None of the funds spent by the DOD are given directly to the Scouts as cash; rather, all support provided by the DOD is in-kind support.” *Winkler Memorandum* at 6-7. Like the public agencies in *Agostini*, the military “dispenses services

directly” for the benefit of the aid recipient. *See Agostini*, 521 U.S. at 229. Where the government itself directly provides services, there is little risk that any public funds will be used for religious instruction and, therefore, there is little need for “safeguards.” Also, the Jamboree statute raises no excessive entanglement concerns because governmental oversight of how the BSA spends public money is not required. For this reason, the military’s in-kind support of Jamborees actually raises fewer Establishment Clause concerns than the voucher program upheld in *Zelman*. *See Zelman*, 536 U.S. at 643 (upholding school voucher program under which most of the money was spent at religious schools).

D. Neither the BSA nor its Jamborees are “pervasively sectarian.”

Although “pervasively sectarian” groups are by no means precluded from receiving government aid, fewer Establishment Clause concerns are raised when primarily secular groups—like the BSA—receive public support. The *Agostini* Court stated, “we have assessed a law’s ‘effect’ by examining the character of the institutions benefited (*e.g.*, whether the religious institutions were ‘predominantly religious’).” *Agostini*, 521 U.S. at 232. The *Mitchell* plurality criticized the pervasively sectarian analysis because it was “born of bigotry,” and has been applied to “require[] the exclusion of pervasively sectarian schools from otherwise permissible aid programs.” *Mitchell*, 530 U.S. at 829 (Thomas, J., plurality). In the plurality’s view, “the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government’s secular purpose.” *Id.* at 827.

The military’s support of Jamborees does not raise the concerns addressed by the pervasively sectarian analysis. The BSA is mainly a secular organization that does not receive any public funds under the Jamboree statute, and the Jamborees are not primarily religious

events. *See Winkler Memorandum* at 4-7, 34-36. The Supreme Court’s concern that predominantly religious groups may inevitably use public money for religious purposes is simply not implicated in this case. In this regard, the military’s support of Jamborees poses much less risk of misuse of public funds than the voucher program upheld in *Zelman*. Moreover, it is clear that the BSA “adequately furthers the government’s secular purpose,” namely, to promote shared values like self-reliance and patriotism. *See Mitchell*, 530 U.S. at 827 (Thomas, J., plurality); *Winkler Rumsfeld Facts* at ¶¶ 82-110.

E. The concerns that the Court sought to address in *Agostini* and *Mitchell* with regard to private choice and neutrality in school aid programs are not present in this case.

The District Court’s error in strictly applying the school aid cases to this case was compounded by its misapplication of the Supreme Court’s neutrality analysis. Like most of the other factors relevant in school aid cases, the Court’s consideration of neutrality is designed to help determine whether the government is responsible for religious indoctrination. *See Mitchell*, 530 U.S. at 809 (Thomas, J., plurality) (“In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality . . .”). In *Agostini*, *Mitchell*, and *Zelman*, the Court considered whether religious schools or their students are barred by the Establishment Clause from participating in aid programs that include a broad range of recipients. One reason the Court upheld the program at issue in each case was that the private choice aspect of the programs ensured that the schools’ religious message could not fairly be attributed to the government. As the *Mitchell* plurality explained, “[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has

been done at the behest of the government.” *Id.*

The District Court misread the school aid cases by applying them as if they had created a formalistic test applicable to all Establishment Clause cases. Those cases merely held that one way of ensuring that aid to schools does not have the primary effect of advancing religion by allowing government indoctrination of religion is through a broad-based program of private choice. The recent school aid cases in no way suggest that the *only* way that *any* government action can survive an Establishment Clause challenge is if it is patterned closely after the programs at issue in those cases. To the contrary, the cases foreclose that conclusion. For example, the *Mitchell* plurality described the private choice inquiry as “a way of assuring neutrality” in school aid cases, clearly suggesting that other forms of school aid may be permissible. *Id.* at 810 (emphasis added). The plurality rejected the formalistic argument that aid must literally pass through the hands of individuals before it reaches religious schools, stating “there is no reason why the Establishment Clause requires such a form.” *Id.* at 816. Also, the *Mitchell* plurality restated its neutrality analysis in this manner:

To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, *to all who adequately further that purpose*, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.

Id. (emphasis added) (citation omitted). This passage suggests that, if the government reasonably concludes that one organization is uniquely suited to furthering a legitimate, non-religious government purpose, it may aid that organization’s furtherance of that purpose.

The District Court tried to fit a square peg (a non-school case) into a round hole (the school aid cases); in so doing, it lost sight of context and the fact that support of Jamborees clearly does not result in governmental indoctrination of religion. This error led the District

Court to conclude that the Jamboree statute somehow creates a financial incentive for the BSA to undertake religious indoctrination at Jamborees. *See Winkler Memorandum* at 38 (“The concern about financial incentives is apparent and the risk exists that as a result, one could attribute to the government any indoctrination by the BSA.”). The District Court apparently overlooked the purpose of the financial incentives inquiry: determining whether the government itself can fairly be credited with indoctrinating religion. *See Mitchell*, 530 U.S. at 814 (Thomas, J., plurality) (“When such an incentive does exist, there is a greater risk that one could attribute to the government any indoctrination by the religious schools.”).

The Supreme Court did not suggest that all government programs must be closely modeled after those present in the school aid cases. Rather, it merely noted that private choice school aid programs are less likely to pose constitutional problems than other school aid programs:

[A] financial incentive to undertake religious indoctrination. . . . is not present, however, where the aid is . . . made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, *the aid is less likely* to have the effect of advancing religion.

Agostini, 521 U.S. at 231 (emphasis added). This statement suggests that some private choice school aid programs may still violate Establishment Clause and also implies that some other types of school aid programs may not. The consideration of financial incentives and how a program identifies its beneficiaries is just another small part of the larger inquiry into whether government aid leads to government indoctrination of religion. *See id.* at 230-31. It is inconceivable that the secular supplies and services that the military provides at Jamborees somehow indoctrinate religion or create a financial incentive for the BSA to focus more on the already existing minimal religious components of its Jamborees. The mere fact that the Jamboree

statute allows the BSA to receive a benefit that it would not otherwise receive does not alter this conclusion. *See Mitchell*, 530 U.S. at 814 (Thomas, J., plurality) (“[S]imply because an aid program offers private schools . . . a benefit that they did not previously receive does not mean that the program . . . creates . . . an ‘incentive’ for parents to choose such an education . . .”).

CONCLUSION

For the reasons stated herein and in the Department of Defense brief, this Court should reverse the District Court’s grant of summary judgment in favor of the plaintiffs with respect to the Jamboree statute and grant the Department of Defense’s motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Amici, various members of the United States Congress and the American Center for Law and Justice, hereby certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,392 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in Times New Roman, 12 Point Font.

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PROOF OF SERVICE

The undersigned, counsel for Amici, various members of the United States Congress and the American Center for Law and Justice, hereby certifies that:

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