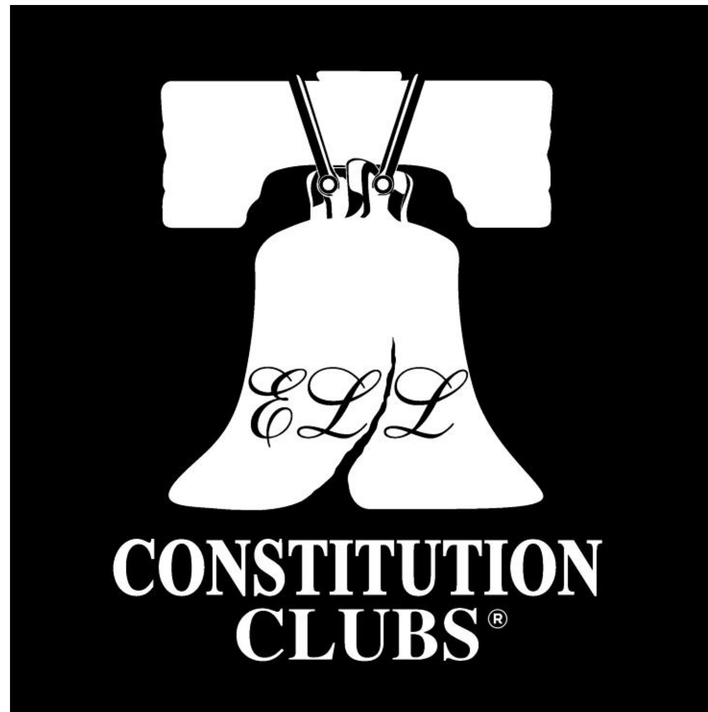

ZOBREST
v.
CATALINA FOOTHILLS SCHOOL DISTRICT
SUPREME COURT OF THE UNITED STATES
509 U.S. 1
June 18, 1993
[5 - 4]

OPINION: REHNQUIST...Petitioner James Zobrest, who has been deaf since birth, asked respondent school district to provide a sign-language interpreter to accompany him to classes at a Roman Catholic high school in Tucson, Arizona, pursuant to the Individuals with Disabilities Education Act (IDEA) and its Arizona counterpart, Ariz.Rev.Stat.Ann. § 15-761. The United States Court of Appeals for the Ninth Circuit decided, however, that provision of such a publicly employed interpreter would violate the Establishment Clause of the First Amendment. We hold that the Establishment Clause does not bar the school district from providing the requested interpreter.

James Zobrest attended grades one through five in a school for the deaf, and grades six through eight in a public school operated by respondent. While he attended public school, respondent furnished him with a sign-language interpreter. For religious reasons, James' parents (also petitioners here) enrolled him for the ninth grade in Salpointe Catholic High School, a sectarian institution. When petitioners requested that respondent supply James with an interpreter at Salpointe, respondent referred the matter to the County Attorney, who concluded that providing an interpreter on the school's premises would violate the United States Constitution. Pursuant to Ariz.Rev.Stat.Ann. § 15-253(B) (1991), the question next was referred to the Arizona Attorney

General, who concurred in the County Attorney's opinion. Respondent accordingly declined to provide the requested interpreter.

Petitioners then instituted this action in the United States District Court for the District of Arizona...Petitioners asserted that the IDEA and the Free Exercise Clause of the First Amendment require respondent to provide James with an interpreter at Salpointe, and that the Establishment Clause does not bar such relief. The complaint sought a preliminary injunction and "such other and further relief as the Court deems just and proper." The District Court denied petitioners' request for a preliminary injunction, finding that the provision of an interpreter at Salpointe would likely offend the Establishment Clause. The court thereafter granted respondent summary judgment, on the ground that "the interpreter would act as a conduit for the religious inculcation of James—thereby, promoting James' religious development at government expense." "That kind of entanglement of church and state," the District Court concluded, "is not allowed."

The Court of Appeals affirmed by a divided vote, applying the three-part test announced in *Lemon v. Kurtzman*[1]. It first found that the IDEA has a clear secular purpose: "to assist States and Localities to provide for the education of all handicapped children." Turning to the second prong of the *Lemon* inquiry, though, the Court of Appeals determined that the IDEA, if applied as petitioners proposed, would have the primary effect of advancing religion and thus would run afoul of the Establishment Clause. "By placing its employee in the sectarian school," the Court of Appeals reasoned, "the government would create the appearance that it was a 'joint sponsor' of the school's activities." This, the court held, would create the "symbolic union of government and religion" found impermissible in *Grand Rapids v. Ball*[2]. In contrast, the dissenting judge argued that "general welfare programs neutrally available to all children," such as the IDEA, pass constitutional muster, "because their benefits diffuse over the entire population." We granted certiorari and now reverse.

Respondent has raised in its brief in opposition to certiorari and in isolated passages in its brief on the merits several issues unrelated to the Establishment Clause question. Respondent first argues that 34 CFR § 76.532(a)(1), a regulation promulgated under the IDEA, precludes it from using federal funds to provide an interpreter to James at Salpointe. In the alternative, respondent claims that even if there is no affirmative bar to the relief, it is not *required* by statute or regulation to furnish interpreters to students at sectarian schools. And respondent adds that providing such a service would offend Art. II, § 12, of the Arizona Constitution...

We have never said that "religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Bowen v. Kendrick*[3]. For if the Establishment Clause did bar religious groups from receiving general government benefits, then "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Widmar v. Vincent*[4]. Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide benefits to a broad

[1] Case 1A-R-042 on this website.
[2] Case 1A-R-070 on this website.
[3] Case 1A-R-081 on this website.
[4] Case 1A-R-059 on this website.

class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit. Nowhere have we stated this principle more clearly than in *Mueller v. Allen*[5] and *Witters v. Washington Dept. of Services for Blind*[6], two cases dealing specifically with government programs offering general educational assistance.

In *Mueller,* we rejected an Establishment Clause challenge to a Minnesota law allowing taxpayers to deduct certain educational expenses in computing their state income tax, even though the vast majority of those deductions (perhaps over 90%) went to parents whose children attended sectarian schools. Two factors, aside from States' traditionally broad taxing authority, informed our decision. *Witters*. We noted that the law "permits *all* parents—whether their children attend public school or private to deduct their children's educational expenses." See *Widmar* ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect"); *Westside v. Mergens*[7]. We also pointed out that under Minnesota's scheme, public funds become available to sectarian schools "only as a result of numerous private choices of individual parents of school-age children," thus distinguishing *Mueller* from our other cases involving "the direct transmission of assistance from the State to the schools themselves."

Witters was premised on virtually identical reasoning. In that case, we upheld against an Establishment Clause challenge the State of Washington's extension of vocational assistance, as part of a general state program, to a blind person studying at a private Christian college to become a pastor, missionary, or youth director. Looking at the statute as a whole, we observed that "any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." The program, we said, "creates no financial incentive for students to undertake sectarian education." We also remarked that, much like the law in *Mueller,* "Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.' " *Witters*. In light of these factors, we held that Washington's program—even as applied to a student who sought state assistance so that he could become a pastor—would not advance religion in a manner inconsistent with the Establishment Clause.

That same reasoning applies with equal force here. The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "handicapped" under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking. Viewed against the backdrop of *Mueller* and *Witters,* then, the Court of Appeals erred in its decision. When the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion," *Witters,* it follows under our prior decisions that provision of that service does not offend the Establishment Clause. See *Wolman v.*

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[5] Case 1A-R-064 on this website.
[6] Case 1A-R-072 on this website.
[7] Case 1A-R-088 on this website.

Walter[8]. Indeed, this is an even easier case than *Mueller* and *Witters* in the sense that, under the IDEA, no funds traceable to the government ever find their way into sectarian schools' coffers. The only indirect economic benefit a sectarian school might receive by dint of the IDEA is the handicapped child's tuition—and that is, of course, assuming that the school makes a profit on each student; that, without an IDEA interpreter, the child would have gone to school elsewhere; and that the school, then, would have been unable to fill that child's spot.

Respondent contends, however, that this case differs from *Mueller* and *Witters,* in that petitioners seek to have a public employee physically present in a sectarian school to assist in James' religious education. In light of this distinction, respondent argues that this case more closely resembles *Meek v. Pittenger*[9] and *Grand Rapids v. Ball*. In *Meek,* we struck down a statute that provided "massive aid" to private schools—more than 75% of which were church related—through a direct loan of teaching material and equipment. The material and equipment covered by the statute included maps, charts, and tape recorders. According to respondent, if the government could not place a tape recorder in a sectarian school in *Meek,* then it surely cannot place an interpreter in Salpointe. The statute in *Meek* also authorized state-paid personnel to furnish "auxiliary services"—which included remedial and accelerated instruction and guidance counseling—on the premises of religious schools. We determined that this part of the statute offended the First Amendment as well. *Ball* similarly involved two public programs that provided services on private school premises; there, public employees taught classes to students in private school classrooms. We found that those programs likewise violated the Constitution, relying largely on *Meek.* According to respondent, if the government could not provide educational services on the premises of sectarian schools in *Meek* and *Ball,* then it surely cannot provide James with an interpreter on the premises of Salpointe.

Respondent's reliance on *Meek* and *Ball* is misplaced for two reasons. First, the programs in *Meek* and *Ball*—through direct grants of government aid—relieved sectarian schools of costs they otherwise would have borne in educating their students. See *Witters* ("The State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State"). For example, the religious schools in *Meek* received teaching material and equipment from the State, relieving them of an otherwise necessary cost of performing their educational function. "Substantial aid to the educational function of such schools," we explained, "necessarily results in aid to the sectarian school enterprise as a whole," and therefore brings about "the direct and substantial advancement of religious activity." So, too, was the case in *Ball:* The programs challenged there, which provided teachers in addition to instructional equipment and material, "in effect subsidized the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." "This kind of direct aid," we determined, "is indistinguishable from the provision of a direct cash subsidy to the religious school." The extension of aid to petitioners, however, does not amount to "an impermissible 'direct subsidy' " of Salpointe. *Witters*. For Salpointe is not relieved of an expense that it otherwise would have assumed in educating its students. And, as we noted above, any attenuated financial benefit that parochial schools do ultimately receive from the IDEA is attributable to "the private choices of individual parents."

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[8] Case 1A-R-054 on this website.
[9] Case 1A-R-051 on this website.

Mueller. Handicapped children, not sectarian schools, are the primary beneficiaries of the IDEA; to the extent sectarian schools benefit at all from the IDEA, they are only incidental beneficiaries. Thus, the function of the IDEA is hardly " 'to provide desired financial support for nonpublic, sectarian institutions.' " *Witters*.

Second, the task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor. Notwithstanding the Court of Appeals' intimations to the contrary, the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school. Such a flat rule, smacking of antiquated notions of "taint," would indeed exalt form over substance. Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole. In fact, ethical guidelines require interpreters to "transmit everything that is said in exactly the same way it was intended." James' parents have chosen of their own free will to place him in a pervasively sectarian environment. The sign-language interpreter they have requested will neither add to nor subtract from that environment, and hence the provision of such assistance is not barred by the Establishment Clause.

The IDEA creates a neutral government program dispensing aid not to schools but to individual handicapped children. If a handicapped child chooses to enroll in a sectarian school, we hold that the Establishment Clause does not prevent the school district from furnishing him with a sign-language interpreter there in order to facilitate his education. The judgment of the Court of Appeals is therefore *Reversed.*

DISSENT: BLACKMUN/SOUTER/STEVENS/O'CONNOR...Today, the Court unnecessarily addresses an important constitutional issue, disregarding longstanding principles of constitutional adjudication. In so doing, the Court holds that placement in a parochial school classroom of a public employee whose duty consists of relaying religious messages does not violate the Establishment Clause of the First Amendment. I disagree both with the Court's decision to reach this question and with its disposition on the merits. I therefore dissent.

I

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."...

II

Despite my disagreement with the majority's decision to reach the constitutional question, its arguments on the merits deserve a response. Until now, the Court never has authorized a public employee to participate directly in religious indoctrination. Yet that is the consequence of today's decision.

Let us be clear about exactly what is going on here. The parties have stipulated to the following facts. Petitioner requested the State to supply him with a sign-language interpreter at Salpointe High School, a private Roman Catholic school operated by the Carmelite Order of the Catholic Church. Salpointe is a "pervasively religious" institution where "the two functions of secular education and advancement of religious values or beliefs are inextricably intertwined."

Salpointe's overriding "objective" is to "instill a sense of Christian values." Its "distinguishing purpose" is "the inculcation in its students of the faith and morals of the Roman Catholic Church." Religion is a required subject at Salpointe, and Catholic students are "strongly encouraged" to attend daily Mass each morning. Salpointe's teachers must sign a Faculty Employment Agreement which requires them to promote the relationship among the religious, the academic, and the extracurricular. They are encouraged to do so by "assisting students in experiencing how the presence of God is manifest in nature, human history, in the struggles for economic and political justice, and other secular areas of the curriculum." The Agreement also sets forth detailed rules of conduct teachers must follow in order to advance the school's Christian mission.

At Salpointe, where the secular and the sectarian are "inextricably intertwined," governmental assistance to the educational function of the school necessarily entails governmental participation in the school's inculcation of religion. A state-employed sign-language interpreter would be required to communicate the material covered in religion class, the nominally secular subjects that are taught from a religious perspective, and the daily Masses at which Salpointe encourages attendance for Catholic students. In an environment so pervaded by discussions of the divine, the interpreter's every gesture would be infused with religious significance. Indeed, petitioners willingly concede this point: "That the interpreter conveys religious messages is a given in the case." By this concession, petitioners would seem to surrender their constitutional claim.

The majority attempts to elude the impact of the record by offering three reasons why this sort of aid to petitioners survives Establishment Clause scrutiny. First, the majority observes that provision of a sign-language interpreter occurs as "part of a general government program that distributes benefits neutrally to any child qualifying as 'handicapped' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic' nature of the school the child attends." Second, the majority finds significant the fact that aid is provided to pupils and their parents, rather than directly to sectarian schools. As a result, "any aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." And, finally, the majority opines that "the task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor."

But the majority's arguments are unavailing. As to the first two, even a general welfare program may have specific applications that are constitutionally forbidden under the Establishment Clause. See *Bowen v. Kendrick* (holding that Adolescent Family Life Act on its face did not violate the Establishment Clause, but remanding for examination of the constitutionality of particular applications). For example, a general program granting remedial assistance to disadvantaged schoolchildren attending public and private, secular and sectarian schools alike would clearly offend the Establishment Clause insofar as it authorized the provision of teachers. See *Aguilar v. Felton*[10]; *Grand Rapids v. Ball*; *Meek v. Pittenger*. Such a program would not be saved simply because it supplied teachers to secular as well as sectarian schools. Nor would the fact that teachers were furnished to pupils and their parents, rather than directly to sectarian schools, immunize such a program from Establishment Clause scrutiny. See *Witters* ("Aid may have unconstitutional effect even though it takes the form of aid to students or parents"); *Wolman*

[10] Case 1A-R-071 on this website.

v. Walter (it would "exalt form over substance if this distinction [between equipment loaned to the pupil or his parent and equipment loaned directly to the school] were found to justify a . . . different" result); *Grand Rapids* (rejecting "fiction that a . . . program could be saved by masking it as aid to individual students"). The majority's decision must turn, then, upon the distinction between a teacher and a sign-language interpreter.

"Although Establishment Clause jurisprudence is characterized by few absolutes," at a minimum "the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." *Grand Rapids*. See *Bowen v. Kendrick* (O'CONNOR, J., concurring) ("*Any* use of public funds to promote religious doctrines violates the Establishment Clause"); *Meek* ("The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion," quoting *Lemon v. Kurtzman*); *Levitt v. Committee for Public Education and Religious Liberty*[11] ("The State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination"). In keeping with this restriction, our cases consistently have rejected the provision by government of any resource capable of advancing a school's religious mission. Although the Court generally has permitted the provision of "secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school," *Meek,* it has always proscribed the provision of benefits that afford even "the opportunity for the transmission of sectarian views." *Wolman*.

Thus, the Court has upheld the use of public school buses to transport children to and from school, *Everson v. Board of Education*[12]*,* while striking down the employment of publicly funded buses for field trips controlled by parochial school teachers. *Wolman*. Similarly, the Court has permitted the provision of secular textbooks whose content is immutable and can be ascertained in advance, *Board of Education v. Allen*[13]*,* while prohibiting the provision of any instructional materials or equipment that could be used to convey a religious message, such as slide projectors, tape recorders, record players, and the like. *Wolman*. State-paid speech and hearing therapists have been allowed to administer diagnostic testing on the premises of parochial schools, *Wolman,* whereas state-paid remedial teachers and counselors have not been authorized to offer their services because of the risk that they may inculcate religious beliefs. *Meek*.

These distinctions perhaps are somewhat fine, but "lines must be drawn." *Grand Rapids*. And our cases make clear that government crosses the boundary when it furnishes the medium for communication of a religious message. If petitioners receive the relief they seek, it is beyond question that a state-employed sign-language interpreter would serve as the conduit for petitioner's religious education, thereby assisting Salpointe in its mission of religious indoctrination. But the Establishment Clause is violated when a sectarian school enlists "the machinery of the State to enforce a religious orthodoxy." *Lee v. Weisman*[14].

Witters and *Mueller v. Allen* are not to the contrary. Those cases dealt with the payment of cash or a tax deduction, where governmental involvement ended with the disbursement of funds or

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[11] Case 1A-R-050 on this website.
[12] Case 1A-R-022 on this website.
[13] Case 1A-R-037 on this website.
[14] Case 1A-R-089 on this website.

lessening of tax. This case, on the other hand, involves ongoing, daily, and intimate governmental participation in the teaching and propagation of religious doctrine. When government dispenses public funds to individuals who employ them to finance private choices, it is difficult to argue that government is actually endorsing religion. But the graphic symbol of the concert of church and state that results when a public employee or instrumentality mouths a religious message is likely to "enlist at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school." *Grand Rapids*. And the union of church and state in pursuit of a common enterprise is likely to place the imprimatur of governmental approval upon the favored religion, conveying a message of exclusion to all those who do not adhere to its tenets.

Moreover, this distinction between the provision of funds and the provision of a human being is not merely one of form. It goes to the heart of the principles animating the Establishment Clause...The provision of a state-paid sign-language interpreter may pose serious problems for the church as well as for the state. Many sectarian schools impose religiously based rules of conduct, as Salpointe has in this case. A traditional Hindu school would be likely to instruct its students and staff to dress modestly, avoiding any display of their bodies. And an orthodox Jewish yeshiva might well forbid all but kosher food upon its premises. To require public employees to obey such rules would impermissibly threaten individual liberty, but to fail to do so might endanger religious autonomy. For such reasons, it long has been feared that "a union of government and religion tends to destroy government and to degrade religion." *Engel v. Vitale*[15]. The Establishment Clause was designed to avert exactly this sort of conflict.

III

The Establishment Clause "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum v. Board of Education*[16]. To this end, our cases have strived to "chart a course that preserves the autonomy and freedom of religious bodies while avoiding any semblance of established religion." *Walz v. Tax Commission*[17]. I would not stray, as the Court does today, from the course set by nearly five decades of Establishment Clause jurisprudence. Accordingly, I dissent.

[15] Case 1A-R-033 on this website.
[16] Case 1A-R-023 on this website.
[17] Case 1A-R-039 on this website.