SUPREME COURT OF THE UNITED STATES

No. 92–94

LARRY ZOBREST, ET UX., ET AL., PETITIONERS *v.* CATALINA FOOTHILLS SCHOOL DISTRICT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 18, 1993]

JUSTICE BLACKMUN, with whom JUSTICE SOUTER joins, and with whom JUSTICE STEVENS and JUSTICE O'CONNOR join as to Part I, dissenting.

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.

“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.” *Specter Motor Service, Inc.,* v. *McLaughlin*, 323 U. S. 101, 105 (1944). See *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 501 (1985); *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring); *Liverpool, New York and Philadelphia S.S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885). This is a “fundamental rule of

judicial restraint," *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 467 U. S. 138, 157 (1984), which has received the sanction of time and experience. It has been described as a "corollary" to the Article III case or controversy requirement, see *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 570 (1947), and is grounded in basic principles regarding the institution of judicial review and this Court's proper role in our federal system. *Ibid*.

Respondent School District makes two arguments that could provide grounds for affirmance, rendering consideration of the constitutional question unnecessary. First, respondent maintains that the Individuals with Disabilities Education Act (IDEA), 20 U. S. C. §1400 *et seq.*, does not require it to furnish petitioner with an interpreter at any private school so long as special education services are made available at a public school. The United States endorses this interpretation of the statute, explaining that "the IDEA itself does not establish an individual entitlement to services for students placed in private schools at their parents' option." Brief for United States as *Amicus Curiae* 13. And several courts have reached the same conclusion. See, *e.g.*, *Goodall* v. *Stafford County School Bd*., 930 F. 2d 363 (CA4), cert. denied, 502 U. S. ___ (1991); *McNair* v. *Cardimone*, 676 F. Supp. 1361 (SD Ohio 1987), aff'd *sub nom. McNair* v. *Oak Hills Local School Dist.*, 872 F. 2d 153 (CA6 1989); *Work* v. *McKenzie*, 661 F. Supp. 225 (DC 1987). Second, respondent contends that 34 CFR §76.532(a)(1) (1992), a regulation promulgated under the IDEA, which forbids the use of federal funds to pay for "[r]eligious worship, instruction, or proselytization," prohibits provision of a sign-language interpreter at a sectarian school. The United States asserts that this regulation does not preclude the relief petitioners seek, Brief for United States as *Amicus Curiae* 23, but at least one federal

court has concluded otherwise. See *Goodall*, *supra*. This Court could easily refrain from deciding the constitutional claim by vacating and remanding the case for consideration of the statutory and regulatory issues. Indeed, the majority's decision does not eliminate the need to resolve these remaining questions. For, regardless of the Court's views on the Establishment Clause, petitioners will not obtain what they seek if the federal statute does not require or the federal regulations prohibit provision of a sign-language interpreter in a sectarian school.[1]

The majority does not deny the existence of these alternative grounds, nor does it dispute the venerable principle that constitutional questions should be avoided when there are nonconstitutional grounds for a decision in the case. Instead, in its zeal to address the constitutional question, the majority casts aside this "time-honored canon of constitutional adjudication," *Specter Motor Service*, 323 U. S., at 105, with the cursory observation that "the prudential rule of avoiding constitutional questions has no application" in light of the "posture" of this case. *Ante*, at 6. Because the parties chose not to litigate the federal statutory issues in the District Court and in the Court of Appeals, the majority blithely proceeds to the merits of their constitutional claim.

But the majority's statements are a *non sequitur*. From the rule against deciding issues not raised or

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[1]Respondent also argues that public provision of a sign-language interpreter would violate the Arizona Constitution. Article II, §12, of the Arizona Constitution provides: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." The Arizona Attorney General concluded that, under this provision, interpreter services could not be furnished to petitioner. See App. 9.

considered below, it does not follow that the Court should consider constitutional issues needlessly. The obligation to avoid unnecessary adjudication of constitutional questions does not depend upon the parties' litigation strategy, but rather is a "self-imposed limitation on the exercise of this Court's jurisdiction [that] has an importance to the institution that transcends the significance of particular controversies." *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283, 294 (1982). It is a rule whose aim is to protect not parties but the law and the adjudicatory process. Indeed, just a few days ago, we expressed concern that "litigants, by agreeing on the legal issue presented, could extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles, an opinion that would be difficult to characterize as anything but advisory." *National Bank of Oregon* v. *Independent Insurance Agents of America, Inc*., ___ U. S. ___, ___ (1993) (slip op., at 7). See *United States* v. *CIO*, 335 U. S. 106, 126 (1948) (Frankfurter, J., concurring).

That the federal statutory and regulatory issues have not been properly briefed or argued does not justify the Court's decision to reach the constitutional claim. The very posture of this case should have alerted the courts that the parties were seeking what amounts to an advisory opinion. After the Arizona Attorney General concluded that provision of a sign-language interpreter would violate the Federal and State Constitutions, the parties bypassed the federal statutes and regulations and proceeded directly to litigate the constitutional issue. Under such circumstances, the weighty nonconstitutional questions that were left unresolved are hardly to be described as "buried in the record." *Ante*, at 6. When federal and state law questions similarly remained open in *Wheeler* v. *Barrera*, 417 U. S. 402 (1974), this Court refused to pass upon the scope or constitutionality of a federal statute that might have required publicly

employed teachers to provide remedial instruction on the premises of sectarian schools. Prudence counsels that the Court follow a similar practice here by vacating and remanding this case for consideration of the nonconstitutional questions, rather than proceeding directly to the merits of the constitutional claim. See *Youakim* v. *Miller*, 425 U. S. 231 (1976) (vacating and remanding for consideration of statutory issues not presented to or considered by lower court); *Escambia County* v. *McMillan*, 466 U. S. 48, 51–52 (1984) (vacating and remanding for lower court to consider statutory issue parties had not briefed and Court of Appeals had not passed upon); *Edward J. DeBartolo Corp.* v. *NLRB*, 463 U. S. 147, 157–158 (1983) (vacating and remanding for consideration of statutory question).

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. App. 90. Salpointe is a “pervasively religious” institution where “[t]he two functions of secular education and advancement of religious values or beliefs are inextricably intertwined.” *Id*., at 92. Salpointe's overriding “objective” is to “instill a sense of Christian values.” *Id*., at 90. 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. *Ibid*. Salpointe's teachers must sign a Faculty Employment Agreement which requires them to promote the relationship among the religious, the academic, and the extracurricular.[2] They are encouraged to do so by "assist[ing] 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." *Id*., at 92. The Agreement also sets forth detailed rules of conduct teachers must follow in order to advance the school's Christian mission.[3]

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[2]The Faculty Employment Agreement provides: "Religious programs are of primary importance in Catholic educational institutions. They are not separate from the academic and extracurricular programs, but are instead interwoven with them and each is believed to promote the other." App. 90–91.

[3]The Faculty Employment Agreement sets forth the following detailed rules of conduct:

"1. Teacher shall at all times present a Christian image to the students by promoting and living the school philosophy stated herein, in the School's Faculty Handbook, the School Catalog and other published statements of this School. In this role the teacher shall support all aspects of the School from its religious programs to its academic and social functions. It is through these areas that a teacher administers to mind, body and spirit of the young men and women who attend Salpointe Catholic High School.

. . . . .

"3. The School believes that faithful adherence to its philosophical principles by its teachers is essential to the School's mission and purpose. Teachers will therefore be expected to assist in the implementation of the philosophical policies of the School, and to

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." Brief for Petitioners 22. 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." *Ante*, at 8. 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, "`[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.'" *Ante*, at 7, quoting *Witters* v. *Washington Department of Services for the*

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compel proper conduct on the part of the students in the areas of general behavior, language, dress and attitude toward the Christian ideal." *Id*., at 91.

Blind, 474 U. S. 481, 487 (1986). 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." *Ante*, at 11.

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*, 487 U. S. 589 (1988) (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*, 473 U. S. 402, 410 (1985); *Grand Rapids School District* v. *Ball*, 473 U. S. 373, 385 (1985); *Meek* v. *Pittenger*, 421 U. S. 349, 371 (1975). 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*, 474 U. S., at 487 ("Aid may have [unconstitutional] effect even though it takes the form of aid to students or parents"); *Wolman* v. *Walter*, 433 U. S. 229, 250 (1977) (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*, 473 U. S., at 395 (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*, 473 U. S., at 385. See *Bowen* v. *Kendrick*, 487 U. S., at 623 (O'CONNOR, J., concurring) ("*[A]ny* use of public funds to promote religious doctrines violates the Establishment Clause") (emphasis in original); *Meek*, 421 U. S., at 371 ("`The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion,'" quoting *Lemon* v. *Kurtzman*, 403 U. S. 602, 619 (1971)); *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U. S. 472, 480 (1973) ("[T]he 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*, 421 U. S., at 364, it has always proscribed the provision of benefits that afford even "the opportunity for the transmission of sectarian views," *Wolman*, 433 U. S., at 244.

Thus, the Court has upheld the use of public school buses to transport children to and from school, *Everson* v. *Board of Education*, 330 U. S. 1 (1947), while striking down the employment of publicly funded buses for field trips controlled by parochial school teachers, *Wolman*, 433 U. S., at 254. 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*, 392 U. S. 236 (1968), 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*, 433 U. S., at 249. State-paid speech and hearing therapists have been allowed to administer diagnostic testing on the premises of parochial schools, *Wolman*, 433 U. S., at 241–242, 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*, 421 U. S., at 371.

These distinctions perhaps are somewhat fine, but "`lines must be drawn.'" *Grand Rapids*, 473 U. S., at 398 (citation omitted). 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*, ___ U. S. ___, ___ (1992).

Witters, *supra*, and *Mueller* v. *Allen*, 463 U. S. 388 (1983), 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 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 "enlis[t] — at least in the eyes of impressionable youngsters — the powers of government to the

support of the religious denomination operating the school." *Grand Rapids*, 473 U. S., at 385. 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. As *Amicus* Council on Religious Freedom points out, 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*, 370 U. S. 421, 431 (1962). The Establishment Clause was designed to avert exactly this sort of conflict.

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*, 333 U. S. 203, 212 (1948). To this end, our cases have strived to "chart a course that preserve[s] the autonomy and freedom of religious bodies while avoiding any semblance of

established religion." *Walz* v. *Tax Commission*, 397 U. S. 664, 672 (1970). I would not stray, as the Court does today, from the course set by nearly five decades of Establishment Clause jurisprudence. Accordingly, I dissent.