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]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

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), 20 U. S. C. §1400 *et seq*., and its Arizona counterpart, Ariz. Rev. Stat. Ann. §15–761 *et seq*. (1991 and Supp. 1992). 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.[1] When

[1]The parties have stipulated: "The two functions of secular education and advancement of religious values or beliefs are inextricably intertwined

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. App. 10–18. 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. App. to Pet. for Cert. A–137. Respondent accordingly declined to provide the requested interpreter.

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throughout the operations of Salpointe." App. 92.

Petitioners then instituted this action in the United States District Court for the District of Arizona under 20 U. S. C. §1415(e)(4)(A), which grants the district courts jurisdiction over disputes regarding the services due disabled children under the IDEA.[2] 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." App. 25.[3] 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. *Id.*, at 52–53. The court thereafter granted respondent summary judgment, on the ground that "[t]he interpreter would act as a conduit for the religious inculcation of James—thereby, promoting James' religious development at government expense." App. to Pet. for Cert. A–35. "That kind of entanglement of church and state," the District Court concluded, "is not allowed." *Ibid.*

The Court of Appeals affirmed by a divided vote, 963 F. 2d 1190 (CA9 1992), applying the three-part test announced in *Lemon* v. *Kurtzman*, 403 U. S. 602, 613 (1971). It first found that the IDEA has a clear secular purpose: "`to assist States and Localities to provide for the education of all handicapped

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[2]The parties agreed that exhaustion of administrative remedies would be futile here. *Id.,* at 94–95.

[3]During the pendency of this litigation, James completed his high school studies and graduated from Salpointe on May 16, 1992. This case nonetheless presents a continuing controversy, since petitioners seek reimbursement for the cost they incurred in hiring their own interpreter, more than $7,000 per year. *Id.,* at 65.

children.'" 963 F. 2d, at 1193 (quoting 20 U. S. C. §1400(c)).[4] 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." 963 F. 2d, at 1194–1195. This, the court held, would create the "symbolic union of government and religion" found impermissible in *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 392 (1985).[5] In contrast, the dissenting judge argued that "[g]eneral welfare programs neutrally available to all children," such as the IDEA, pass constitutional muster, "because their benefits diffuse over the entire population." 963 F. 2d, at 1199 (Tang, J., dissenting). We granted certiorari, 506 U. S. —— (1992), 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.[6] Respondent first argues that 34 CFR §76.532(a)(1), a regulation promulgated under the IDEA, precludes it from using federal funds to

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[4]Respondent now concedes that "the IDEA has an appropriate `secular purpose.'" Brief for Respondent 16.

[5]The Court of Appeals also rejected petitioners' Free Exercise Clause claim. 963 F. 2d 1190, 1196–1197 (CA9 1992). Petitioners have not challenged that part of the decision below. Pet. for Cert. 10, n. 9.

[6]Respondent may well have waived these other defenses. For in response to an interrogatory asking why it had refused to provide the requested service, respondent referred only to the putative Establishment Clause bar. App. 59–60.

provide an interpreter to James at Salpointe. Brief in Opposition 13.[7] 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. Brief for Respondent 4, n. 4.[8] And respondent adds that providing such a service would offend Art. II, §12, of the Arizona Constitution. Tr. of Oral Arg. 28.

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[7]That regulation prohibits the use of federal funds to pay for "[r]eligious worship, instruction, or proselytization." 34 CFR §76.532(a)(1) (1992). The United States asserts that the regulation merely implements the
Secretary of Education's understanding of (and thus is coextensive with) the requirements of the Establishment Clause. Brief for United States as *Amicus Curiae* 23; see also Brief for United States as *Amicus Curiae* in *Witters* v. *Dept. of Services for Blind*, O. T. 1985, No. 84–1070, p. 21, n. 11 ("These regulations are based on the Department's interpretation of constitutional requirements"). This interpretation seems persuasive to us. The only authority cited by the Secretary for issuance of the regulation is his general rulemaking power. See 34 CFR §76.532 (citing 20 U. S. C. §§1221e-3(a)(1), 2831(a), and 2974(b)). Though the Fourth Circuit placed a different interpretation on §76.532 in *Goodall* v. *Stafford County School Board*, 930 F. 2d 363, 369 (holding that the regulation prohibits the provision of an interpreter to a student in a sectarian school), cert. denied, 502 U. S. —— (1991), that court did not have the benefit of the United States' views.

[8]In our view, this belated contention is entitled to little, if any, weight here given respondent's repeated concession that, but for the perceived federal constitutional bar, it would have willingly provided James with an interpreter at Salpointe as a matter of local policy. See, *e.g.*, Tr. of Oral Arg. 31 ("We don't

It is a familiar principle of our jurisprudence that federal courts will not pass on the constitutionality of an Act of Congress if a construction of the Act is fairly possible by which the constitutional question can be avoided. See, *e.g.*, *United States* v. *Locke*, 471 U. S. 84, 92 (1985), and cases cited therein. In *Locke*, a case coming here by appeal under 28 U. S. C. §1252 (1982 ed.), we said that such an appeal "brings before this Court not merely the constitutional question decided below, but the entire case." 471 U. S., at 92. "The entire case," we explained, "includes nonconstitutional questions actually decided by the lower court as well as nonconstitutional grounds presented to, but not passed on, by the lower court." *Ibid.* Therefore, in that case, we turned "first to the nonconstitutional questions pressed below." *Ibid.*

Here, in contrast to *Locke*, and other cases applying the prudential rule of avoiding constitutional questions, only First Amendment questions were pressed in the Court of Appeals. In the opening paragraph of its opinion, the Court of Appeals noted that petitioners' appeal raised only First Amendment issues:

> "The Zobrests appeal the district court's ruling that provision of a state-paid sign language interpreter to James Zobrest while he attends a sectarian high school would violate the Establishment Clause. The Zobrests also argue that denial of such assistance violates the Free Exercise Clause." 963 F. 2d, at 1191.

Respondent did not urge any statutory grounds for affirmance upon the Court of Appeals, and thus the Court of Appeals decided only the federal constitutional claims raised by petitioners. In the

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deny that . . . we would have voluntarily done that. The only concern that came up at the time was the Establishment Clause concern").

District Court, too, the parties chose to litigate the case on the federal constitutional issues alone. "Both parties' motions for summary judgment raised only federal constitutional issues." Brief for Respondent 4, n. 4. Accordingly, the District Court's order granting respondent summary judgment addressed only the Establishment Clause question. App. to Pet. for Cert. A–35.

Given this posture of the case, we think the prudential rule of avoiding constitutional questions has no application. The fact that there may be buried in the record a nonconstitutional ground for decision is not by itself enough to invoke this rule. See, *e.g.*, *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 572 (1987). "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 147, n. 2 (1970). We therefore turn to the merits of the constitutional claim.

We have never said that "religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Bowen* v. *Kendrick*, 487 U. S. 589, 609 (1988). 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*, 454 U. S. 263, 274–275 (1981) (internal quotation marks omitted). 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 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*, 463 U. S. 388 (1983), and *Witters* v.

Washington Dept. of Services for Blind, 474 U. S. 481 (1986), 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. See 463 U. S., at 401; *id.*, at 405 (Marshall, J., dissenting). Two factors, aside from States' traditionally broad taxing authority, informed our decision. See *Witters*, *supra*, at 491 (Powell, J., concurring) (discussing *Mueller*). We noted that the law "permits *all* parents—whether their children attend public school or private—to deduct their children's educational expenses." 463 U. S., at 398 (emphasis in original). See also *Widmar*, *supra*, at 274 ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect"); *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 248 (1990) (plurality opinion) (same). 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." 463 U. S., at 399.

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 "[a]ny 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." 474 U. S., at 487. The program, we said, "creates no financial incentive for students to undertake sectarian education." *Id.*, at 488. 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, supra*, at 487 (quoting *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U. S. 756, 782–783, n. 38 (1973)). 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. *Witters*, *supra*, at 489.

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 decision-making. 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*, *supra*, at 488, it follows

under our prior decisions that provision of that service does not offend the Establishment Clause. See *Wolman* v. *Walter*, 433 U. S. 229, 244 (1977). 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*, 421 U. S. 349 (1975), and *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373 (1985). In *Meek*, we struck down a statute that, *inter alia*, provided "massive aid" to private schools—more than 75% of which were church related—through a direct loan of teaching material and equipment. 421 U. S., at 364–365. The material and equipment covered by the statute included maps, charts, and tape recorders. *Id.*, at 355. 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. *Id.*, at 372. *Ball* similarly involved two public programs that provided services on private school

premises; there, public employees taught classes to students in private school classrooms.[9] 473 U. S., at 375. We found that those programs likewise violated the Constitution, relying largely on *Meek*. 473 U. S., at 386–389. 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*, *supra*, at 487 ("[T]he 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") (quoting *Ball*, *supra*, at 394). 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. 421 U. S., at 365–366. "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." *Id.*, at 366. So, too, was the case in *Ball*: The programs challenged there, which provided teachers in addition to instructional equipment and material, "in effect subsidize[d] the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." 473 U. S., at 397. "This kind of direct aid," we determined, "is indistinguishable from the provision

[9]Forty of the forty-one private schools involved in *Ball* were pervasively sectarian. 473 U. S., at 384–385.

of a direct cash subsidy to the religious school." *Id.*, at 395. The extension of aid to petitioners, however, does not amount to "an impermissible `direct subsidy'" of Salpointe. *Witters*, 474 U. S., at 487. 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." *Mueller*, 463 U. S., at 400. 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.'" *Id.*, at 488 (quoting *Nyquist*, 413 U. S., at 783).

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, see 963 F. 2d, at 1195, the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school.[10] Such a flat rule, smacking of antiquated notions of "taint," would indeed exalt form over substance.[11] Nothing in this record suggests that

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[10]For instance, in *Wolman* v. *Walter*, 433 U. S. 229, 242 (1977), we made clear that "the provision of health services to all schoolchildren—public and nonpublic—does not have the primary effect of aiding religion," even when those services are provided within sectarian schools. We accordingly rejected a First Amendment challenge to the State's providing diagnostic speech and hearing services on sectarian school premises. *Id*., at 244; see also *Meek* v. *Pittenger*, 421 U. S. 349, 371, n. 21 (1975).

[11]Indeed, respondent readily admits, as it must, 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." App. 73. 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.

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there would be no problem under the Establishment Clause if the IDEA funds instead went directly to James' parents, who, in turn, hired the interpreter themselves. Brief for Respondent 11 ("If such were the case, then the sign language interpreter would be the student's employee, not the School District's, and governmental involvement in the enterprise would end with the disbursement of funds").