SUPREME COURT OF THE UNITED STATES

Nos. 93–517, 93–527 AND 93–539

BOARD OF EDUCATION OF KIRYAS JOEL VILLAGE SCHOOL DISTRICT, PETITIONER
93–517 *v.*
LOUIS GRUMET ET AL.

BOARD OF EDUCATION OF MONROE-WOODBURY CENTRAL SCHOOL DISTRICT, PETITIONER
93–527 *v.*
LOUIS GRUMET ET AL.

ATTORNEY GENERAL OF NEW YORK, PETITIONER
93–539 *v.*
LOUIS GRUMET ET AL.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

[June 27, 1994]

JUSTICE KENNEDY, concurring in the judgment.

The Court's ruling that the Kiryas Joel Village School District violates the Establishment Clause is in my view correct, but my reservations about what the Court's reasoning implies for religious accommodations in general are sufficient to require a separate writing. As the Court recognizes, a legislative accommodation that discriminates among religions may become an establishment of religion. But the Court's opinion can be interpreted to say that an accommodation for a particular religious group is invalid because of the risk that the legislature will not grant the same accommodation to another religious group suffering some similar burden. This rationale seems to me without grounding in our precedents and a needless restriction upon the legislature's ability to respond to the unique problems of a particular religious group. The real vice of the school district, in my estimation, is that New York created it

by drawing political boundaries on the basis of religion. I would decide the issue we confront upon this narrower theory, though in accord with many of the Court's general observations about the State's actions in this case.

This is not a case in which the government has granted a benefit to a general class of recipients of which religious groups are just one part. See *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. ___ (1993); *Bowen* v. *Kendrick*, 487 U. S. 589 (1988); *Witters* v. *Washington Dept. of Services for the Blind*, 474 U. S. 481 (1986); *Mueller* v. *Allen*, 463 U. S. 388 (1983). It is rather a case in which the government seeks to alleviate a specific burden on the religious practices of a particular religious group. I agree that a religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or discriminate against other religions as to become an establishment. I disagree, however, with the suggestion that the Kiryas Joel Village School District contravenes these basic constitutional commands. But for the forbidden manner in which the New York Legislature sought to go about it, the State's attempt to accommodate the special needs of the handicapped Satmar children would have been valid.

"Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage." *Allegheny County* v. *Greater Pittsburgh ACLU*, 492 U. S. 573, 657 (1989) (KENNEDY, J., concurring in judgment in part and dissenting in part). Before the Revolution, colonial governments made a frequent practice of exempting religious objectors from general laws. See McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1466–1473 (1990) (recounting colonial exemptions from oath requirements, compulsory military service, religious assessments, and other general legislation). As early as 1691, for instance, New York allowed Quakers to testify by affirmation rather than oath in civil court cases. T. Curry, The First Freedoms: Church and State

in America to the Passage of the First Amendment 64 (1986). Later, during the American Revolution, the Continental Congress exempted religious objectors from military conscription. Resolution of July 18, 1775, reprinted in 2 Journals of the Continental Congress 187, 189 (1905) ("As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences . . ."). And since the framing of the Constitution, this Court has approved legislative accommodations for a variety of religious practices. See, *e.g.*, *Selective Draft Law Cases*, 245 U. S. 366, 389–390 (1918) (military draft exemption for religious objectors); *Zorach* v. *Clausen*, 343 U. S. 306 (1952) (New York City program permitting public school children to leave school for one hour a week for religious observance and instruction); *Gillette* v. *United States*, 401 U. S. 437 (1971) (military draft exemption for religious objectors); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327 (1987) (exemption of religious organizations from Title VII's prohibition of religious discrimination); *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 890 (1990) (exemption from drug laws for sacramental peyote use) (dicta).

New York's object in creating the Kiryas Joel Village School District—to accommodate the religious practices of the handicapped Satmar children—is validated by the principles that emerge from these precedents. First, by creating the district, New York sought to alleviate a specific and identifiable burden on the Satmars' religious practice. The Satmars' way of life, which springs out of their strict religious beliefs, conflicts in many respects with mainstream American culture. They do not watch television or listen to radio; they speak Yiddish in their homes and do not read English-language publications; and they have a distinctive hairstyle and dress. Attending the

Monroe-Woodbury public schools, where they were exposed to much different ways of life, caused the handicapped Satmar children understandable anxiety and distress. New York was entitled to relieve these significant burdens, even though mainstream public schooling does not conflict with any specific tenet of the Satmars' religious faith. The Title VII exemption upheld in *Corporation of Presiding Bishop*, *supra*, for example, covers religious groups who may not believe themselves obliged to employ co-religionists in every instance. See also *Walz* v. *Tax Comm'n of New York*, 397 U. S. 664, 673 (1970) ("The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause"); accord, *Smith*, *supra*, at 890 (legislatures may grant accommodations even when courts may not).

Second, by creating the district, New York did not impose or increase any burden on non-Satmars, compared to the burden it lifted from the Satmars, that might disqualify the District as a genuine accommodation. In *Gillette*, *supra*, the Court upheld a military draft exemption, even though the burden on those without religious objection to war (the increased chance of being drafted and forced to risk one's life in battle) was substantial. And in *Corporation of Presiding Bishop*, the Court upheld the Title VII exemption even though it permitted employment discrimination against nonpractitioners of the religious organization's faith. There is a point, to be sure, at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment. See, *e.g.*, *Estate of Thornton* v. *Caldor, Inc.*, 472 U. S. 703, 709–710 (1985) (invalidating mandatory Sabbath day off because it provided "no exception when honoring the dictates of Sabbath observers would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant

burdens on other employees required to work in place of the Sabbath observers"). This case has not been argued, however, on the theory that non-Satmars suffer any special burdens from the existence of the Kiryas Joel Village School District.

Third, the creation of the school district to alleviate the special burdens born by the handicapped Satmar children cannot be said, for that reason alone, to favor the Satmar religion to the exclusion of any other. "The clearest command of the Establishment Clause," of course, "is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U. S. 228, 244 (1982); accord, *Smith*, *supra*, 494 U. S., at 886, n. 3. I disagree, however, with the Court's conclusion that the school district breaches this command. The Court insists that religious favoritism is a danger here, because the "anomalously case-specific nature of the legislature's exercise of state authority in creating this district for a religious community leaves the Court without any direct way to review such state action" to ensure interdenominational neutrality. *Ante*, at 15. "Because the religious community of Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law," the Court maintains, "we have no assurance that the next similarly situated group seeking a school district of its own will receive one; . . . a legislature's failure to enact a special law is itself unreviewable." *Ante,* at 15–16 (footnote omitted).

This reasoning reverses the usual presumption that a statute is constitutional and, in essence, adjudges the New York Legislature guilty until it proves itself innocent. No party has adduced any evidence that the legislature has denied another religious community like the Satmars its own school district under analogous circumstances. The legislature, like the judiciary, is sworn to uphold the Constitution, and

we have no reason to presume that the New York Legislature would not grant the same accommodation in a similar future case. The fact that New York singled out the Satmars for this special treatment indicates nothing other than the uniqueness of the handicapped Satmar children's plight. It is normal for legislatures to respond to problems as they arise—no less so when the issue is religious accommodation. Most accommodations cover particular religious practices. See, *e.g.*, 21 CFR §1307.31 (1993) ("The listing of peyote as a controlled substance . . . does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church"); 25 CFR §11.87H (1993) ("[I]t shall not be unlawful for any member of the Native American Church to transport into Navajo country, buy, sell, possess, or use peyote in any form in connection with the religious practices, sacraments or services of the Native American Church"); Dept. of Air Force, Reg. 35–10, ¶2–28(b)(2) (Apr. 1989) ("Religious head coverings are authorized for wear while in uniform when military headgear is not authorized. . . . Religious head coverings may be worn underneath military headgear if they do not interfere with the proper wearing, functioning, or appearance of the prescribed headgear . . . . For example, Jewish yarmulkes meet this requirement if they do not exceed 6 inches in diameter"); National Prohibition Act, §3, 41 Stat. 308 ("Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed"), repealed by Liquor Law Repeal and Enforcement Act, §1, 49 Stat. 872. They do not thereby become invalid.

Nor is it true that New York's failure to accommodate another religious community facing similar burdens would be insulated from challenge in the courts. The burdened community could sue the

State of New York, contending that New York's discriminatory treatment of the two religious communities violated the Establishment Clause. To resolve this claim, the court would have only to determine whether the community does indeed bear the same burden on its religious practice as did the Satmars in Kiryas Joel. See *Olsen* v. *Drug Enforcement Admin.*, 878 F. 2d 1458, 1463–1465 (CADC 1989) (R. B. Ginsburg, J.) (rejecting claim that the members of the Ethiopian Zion Coptic Church were entitled to an exemption from the marijuana laws on the same terms as the peyote exemption for the Native American Church); *Olsen* v. *Iowa*, 808 F. 2d 652 (CA8 1986) (same). While a finding of discrimination would then raise a difficult question of relief, compare *Olsen*, 878 F. 2d, at 1464 ("Faced with the choice between invalidation and extension of any controlled-substances religious exemption, which would the political branches choose? It would take a court bolder than this one to predict . . . that extension, not invalidation, would be the probable choice"), with *Califano* v. *Westcott*, 443 U. S. 76, 89–93 (1979) (curing gender discrimination in the AFDC program by extending benefits to children of unemployed mothers instead of denying benefits to children of unemployed fathers), the discrimination itself would not be beyond judicial remedy.

The Kiryas Joel Village School District thus does not suffer any of the typical infirmities that might invalidate an attempted legislative accommodation. In the ordinary case, the fact that New York has chosen to accommodate the burdens unique to one religious group would raise no constitutional problems. Without further evidence that New York has denied the same accommodation to religious groups bearing similar burdens, we could not presume from the particularity of the accommodation

that the New York Legislature acted with discriminatory intent.

This particularity takes on a different cast, however, when the accommodation requires the government to draw political or electoral boundaries. "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause," *Lee* v. *Weisman*, 505 U. S. ___, ___ (1992) (slip op., at 8), and in my view one such fundamental limitation is that government may not use religion as a criterion to draw political or electoral lines. Whether or not the purpose is accommodation and whether or not the government provides similar gerrymanders to people of all religious faiths, the Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial. Justice Douglas put it well in a statement this Court quoted with approval just last Term:

> "When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here." *Wright* v. *Rockefeller*, 376 U. S. 52, 67 (1964) (Douglas, J., dissenting) (quoted in *Shaw* v. *Reno*, 509 U. S. ___, ___ (1993) (slip op., at 17)).

I agree with the Court insofar as it invalidates the school district for being drawn along religious lines.

As the plurality observes, *ante*, at 11, the New York Legislature knew that everyone within the village was Satmar when it drew the school district along the village lines, and it determined who was to be included in the district by imposing, in effect, a religious test. There is no serious question that the legislature configured the school district, with purpose and precision, along a religious line. This explicit religious gerrymandering violates the First Amendment Establishment Clause.

It is important to recognize the limits of this principle. We do not confront the constitutionality of the Kiryas Joel Village itself, and the formation of the village appears to differ from the formation of the school district in one critical respect. As the Court notes, *ante*, at 15, n. 7, the village was formed pursuant to a religion-neutral self-incorporation scheme. Under New York law, a territory with at least 500 residents and not more than five square miles may be incorporated upon petition by at least 20 percent of the voting residents of that territory or by the owners of more than 50 percent of the territory's real property. N. Y. Village Law §§2–200, 2–202 (McKinney 1973 and Supp. 1994). Aside from ensuring that the petition complies with certain procedural requirements, the supervisor of the town in which the territory is located has no discretion to reject the petition. §2–206; see Decision on Sufficiency of Petition, in App. 8, 14 ("[T]he hollow provisions of the Village Law . . . allow me only to review the procedural niceties of the petition itself"). The residents of the town then vote upon the incorporation petition in a special election. N. Y. Village Law §2–212 (McKinney 1973). By contrast, the Kiryas Joel Village School District was created by state legislation. The State of New York had complete discretion not to enact it. The State thus had a direct hand in accomplishing the religious segregation.

As the plurality indicates, the Establishment Clause

does not invalidate a town or a state "whose boundaries are derived according to neutral historical and geographic criteria, but whose population happens to comprise coreligionists." *Ante*, at 14, n. 6. People who share a common religious belief or lifestyle may live together without sacrificing the basic rights of self-governance that all American citizens enjoy, so long as they do not use those rights to establish their religious faith. Religion flourishes in community, and the Establishment Clause must not be construed as some sort of homogenizing solvent that forces unconventional religious groups to choose between assimilating to mainstream American culture or losing their political rights. There is more than a fine line, however, between the voluntary association that leads to a political community comprised of people who share a common religious faith, and the forced separation that occurs when the government draws explicit political boundaries on the basis of peoples' faith. In creating the Kiryas Joel Village School District, New York crossed that line, and so we must hold the district invalid.

This is an unusual case, for it is rare to see a State exert such documented care to carve out territory for people of a particular religious faith. It is also unusual in that the problem to which the Kiryas Joel Village School District was addressed is attributable in no small measure to what I believe were unfortunate rulings by this Court.

Before 1985, the handicapped Satmar children of Kiryas Joel attended the private religious schools within the village that the other Satmar children attended. Because their handicaps were in some cases acute (ranging from mental retardation and deafness to spina bifida and cerebral palsy), the State of New York provided public funds for special education of these children at annexes to the

religious schools. Then came the companion cases of *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373 (1985), and *Aguilar* v. *Felton*, 473 U. S. 402 (1985). In *Grand Rapids*, the Court invalidated a program in which public school teachers would offer supplemental classes at private schools, including religious schools, at the end of the regular school day. And in *Aguilar*, the Court invalidated New York City's use of Title I funding to pay the salaries of public school teachers who taught educationally deprived children of low-income families at parochial schools in the city. After these cases, the Monroe-Woodbury School District suspended its special education program at the Kiryas Joel religious schools, and the Kiryas Joel parents were forced to enroll their handicapped children at the Monroe-Woodbury public schools in order for the children to receive special education. The ensuing difficulties, as the Court recounts, *ante*, at 2, led to the creation of the Kiryas Joel Village School District.

The decisions in *Grand Rapids* and *Aguilar* may have been erroneous. In light of the case before us, and in the interest of sound elaboration of constitutional doctrine, it may be necessary for us to reconsider them at a later date. A neutral aid scheme, available to religious and nonreligious alike, is the preferable way to address problems such as the Satmar handicapped children have suffered. See *Witters*, 474 U. S., at 490–492 (Powell, J., concurring). But for *Grand Rapids* and *Aguilar*, the Satmars would have had no need to seek special accommodations or their own school district. Our decisions led them to choose that unfortunate course, with the deficiencies I have described.

One misjudgment is no excuse, however, for compounding it with another. We must confront this case as it comes before us, without bending rules to free the Satmars from a predicament into which we put them. The Establishment Clause forbids the

government to draw political boundaries on the basis of religious faith. For this reason, I concur in the judgment of the Court.