

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   GARY LOCKE, GOVERNOR OF           :

4   WASHINGTON, ET AL. ,           :

5                   Petitioner           :

6           v.                           :   No. 02- 1315

7   JOSHUA DAVEY                   :

8   - - - - - X

9                                       Washington, D. C.

10                                      Tuesday, December 2, 2003

11           The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United  
13   States at 10:11 a.m

14   APPEARANCES

15   NARDA PIERCE, ESQ., Solicitor General, Olympia,  
16   Washington; on behalf of the Petitioners.

17   JAY SEKULOW, ESQ., Washington, D. C.; on behalf of the  
18   Respondent.

19   GEN. THEODORE B. OLSON, ESQ., Solicitor General,  
20   Department of Justice, Washington, D. C.; as amicus  
21   curiae, supporting the Respondent.

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P R O C E E D I N G S

(10: 11 a. m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 02-1315, Gary Locke v. Joshua Davey.

Ms. Pierce.

ORAL ARGUMENT OF NARDA PIERCE  
ON BEHALF OF THE PETITIONERS

MS. PIERCE: Mr. Chief Justice, and may it please the Court:

To preserve freedom of conscience for all its citizens in matters of religious faith and belief, Washington's constitution limits the involvement of government. It limits both the ability to regulate religious activities and to fund religious activities.

QUESTION: Do you think the fact that that provision is in Washington's constitution makes it different than, say, if it were in a -- simply in a statute?

MS. PIERCE: Mr. Chief Justice, the recognition that this Court has given to a state constitution, as opposed to a statute, is that it is adopted by all of the voters of the state. However, both the constitution and the state laws are subject

1 to Federal constitutional provisions. At issue today  
2 is our --

3 QUESTION: Is -- is it a program at issue  
4 here that provides basically money to the student to  
5 be spent as the student wishes? Is it like a voucher  
6 program in that sense?

7 MS. PIERCE: Justice O'Connor, the Promise  
8 Scholarship is to be provided to the student for  
9 purposes of educational expenses and they're required  
10 to use it for certain educational expenses. The  
11 purpose of the Promise Scholarship established by the  
12 legislature is to strengthen the link between --  
13 the link between K-12 education and higher education,  
14 and in a recognition --

15 QUESTION: Well, I'm just trying to find  
16 out how it works, whether it's like a voucher  
17 program, you give the money to the student and the  
18 student decides how to use it.

19 MS. PIERCE: It -- it works like a voucher  
20 program to the extent that it's for educational  
21 expenses. I'm not familiar with the specifics of  
22 voucher programs, but the student is required to use  
23 it for those educational expenses.

24 It is not, for example, like a paycheck,  
25 where a person has those funds as their private funds

1 and can dedicate those to any uses that they choose.  
2 And that's a key point under the Washington  
3 constitution, because article I, section 11 says that  
4 public funds shall not be applied to religious  
5 worship, exercise, or instruction --

6 QUESTION: How -- how many states have  
7 similar provisions in their constitutions or laws?

8 MS. PIERCE: It varies, Justice O'Connor,  
9 according to the particular provisions. This  
10 provision refers to not using public funds for  
11 religious instruction. We also have a provision that  
12 no public funds shall be spent at schools under  
13 sectarian influence. I - I believe it's something in  
14 the neighborhood of 36 states who have some  
15 provisions relating to use of public funds for  
16 religious instruction, but those vary.

17 QUESTION: They were all adopted at about  
18 the same time, weren't these so-called Blaine  
19 Amendments?

20 MS. PIERCE: Your Honor, this is not the  
21 Blaine Amendment. The so-called Blaine Amendment are  
22 those that refer to use of public funds in schools  
23 under sectarian control. That's a different  
24 provision of the Washington constitution. That's  
25 article IX, section 4, and that was required by the

1 enabling act that provided for our statehood, but  
2 this is a different provision. It's a provision that  
3 was separate and apart, that was debated, that was  
4 added to Washington's constitution as a separate  
5 provision.

6 QUESTION: And was that --

7 QUESTION: So this was add -- this was  
8 added after Washington was admitted in 1889?

9 MS. PIERCE: No, Your -- Mr. Chief  
10 Justice, I'm sorry -- it was at the same time of  
11 adoption, but it was not the provision that was  
12 required by the --

13 QUESTION: The enabling.

14 MS. PIERCE: -- enabling act. It was not  
15 in the original proposed constitution set before the  
16 framers. And during the course of that  
17 constitutional convention, that's where this language  
18 was added.

19 And I know, referring to the Blaine  
20 Amendments, there's been much made in the briefs of  
21 whether or not those amendments stemmed from  
22 anti-Catholic motivation. There's certainly no  
23 evidence in Washington that there was any discussion,  
24 any evidence of anti-Catholic motive.

25 In Washington, both article I, section 11

1 and article IX, section 4, which is -- more directly  
2 stems from the Blaine Amendment, Federal level,  
3 they've always been implemented in a  
4 non-discriminatory manner, prohibiting both the  
5 practice of any religion of any sort in our public  
6 schools, as well as any funding for private sectarian  
7 schools.

8 QUESTION: But what if -- what if a state  
9 prohibited only the study of theology from a Catholic  
10 perspective? Would that survive?

11 MS. PIERCE: No, Your Honor, we don't  
12 believe it would. But what the state has done here  
13 is prohibited public funds for religious instruction  
14 wherever it occurs, including in a college --

15 QUESTION: Wait. How -- how do you  
16 reconcile that? That's what I don't understand. It  
17 seems to me that if you say it does not violate the  
18 religion clauses to prohibit the use for any  
19 religious instruction whatever, you would also have  
20 to say that it does not violate the religion clauses  
21 to say no public funds shall be spent for Jewish  
22 theology studies.

23 Why -- why -- I mean, the state is not  
24 permitted to discriminate between religious sects,  
25 but it's just as much not permitted to discriminate

1 between religion in general and non-religion. So how  
2 can you possibly -- I mean, if we say that -- that  
3 you can do this, it seems to me, we have to say you  
4 -- you can also prohibit Jewish studies.

5 MS. PIERCE: No, Justice Scalia --

6 QUESTION: Why not?

7 MS. PIERCE: -- I don't believe that  
8 follows. The line between funds for secular purposes  
9 and for religious purposes is a line that's been  
10 recognized by this Court in various funding cases and  
11 in reviewing government activities. It's a line that  
12 recognizes both the values of the Establishment  
13 Clause and the values of the Free Exercise Clause.

14 Here, simply because the State of  
15 Washington is extending those values of the  
16 Establishment Clause beyond direct funding into  
17 indirect funding does not convert those values into  
18 hostility. There's still the values --

19 QUESTION: It's -- it's treating --

20 MS. PIERCE: -- of protecting religious  
21 freedom

22 QUESTION: -- it's treating religion  
23 differently from non-religion. You can study  
24 anything you like and get it subsidized except  
25 religion. Why is that not violating the principle of



1 neutrality?

2 MS. PIERCE: It is treating religion  
3 different from a realm in which religion -- religious  
4 belief or non-belief does not enter what we refer to  
5 as secular studies. It's --

6 QUESTION: You're making the -- are you --  
7 are you making the -- or is Washington making the  
8 distinction between training in how to be religious,  
9 training as it were in the practice of some -- of a  
10 religion that leads to the truth, on the one hand,  
11 and study about what people believe on the other  
12 hand. I thought that was the distinction, how to be  
13 religious versus what religions believe. Is that the  
14 distinction?

15 MS. PIERCE: Yes, Your Honor.

16 QUESTION: Okay.

17 MS. PIERCE: And that was the distinction  
18 I meant to articulate.

19 QUESTION: So, I take it, then, if it  
20 that's the distinction, you would -- you would agree  
21 that if Washington funded a school of atheism, but  
22 wouldn't fund a school like this one, that there  
23 would be a violation of one or both of the clauses?

24 MS. PIERCE: Yes, Justice Souter, because  
25 whenever you enter into the realm of faith or belief,

1 whenever you try to affect someone's belief in that  
2 realm, that has been a particularly protected realm  
3 of individual conscience, that becomes religious,  
4 whether it's non-belief or belief. It's when you --

5 QUESTION: But it's the difference between  
6 being religious and studying religion. That's your  
7 line, isn't it?

8 MS. PIERCE: Yes, Your Honor, and I  
9 believe that's the Court's line. It's the line  
10 that's been drawn in many of the direct funding cases  
11 of this Court, to teach about religion --

12 QUESTION: Can -- can you not study  
13 atheism under this statute? Suppose there is a  
14 course debunking, debunking all religious belief.  
15 Would that be prohibited? Would that be funded under  
16 this statute? I don't see any -- any prohibition of  
17 the funding of that?

18 MS. PIERCE: Justice Scalia, I think when  
19 the statute is read in conjunction with Washington  
20 case law, and particularly the Calvary Bible  
21 Presbyterian Church case, that the definition --

22 QUESTION: What does the statute say? I  
23 don't see how it can possibly apply to that. What  
24 does it say?

25 MS. PIERCE: Well, the statute says that

1 no aid shall be awarded to any student pursuing a  
2 degree in theology.

3 QUESTION: In theology.

4 MS. PIERCE: But --

5 QUESTION: Now, is -- is a degree in  
6 atheism a degree in theology?

7 MS. PIERCE: I believe it would be under  
8 the interpretation --

9 QUESTION: That would be a question, would  
10 it not, for the state supreme court to decide? It  
11 may decide it needs to carry that limitation in order  
12 to be compatible with the Free Exercise Clause.

13 MS. PIERCE: I --

14 QUESTION: And I think that certainly the  
15 Free Exercise Clause answers the question, can you  
16 give it to the Catholics but not to the Jews. So  
17 that's -- that's not an issue.

18 MS. PIERCE: Yes, Justice Ginsburg, and I  
19 think that the Washington Supreme Court would  
20 interpret it that way, not only to be consistent with  
21 the Free Exercise Clause, but to be consistent with  
22 its own state constitutional provision and its  
23 purposes, which is to not use public funds for  
24 instruction in the realm of faith and belief and --

25 QUESTION: What cases do you cite for the

1 proposition that you're asserting that the -- that  
2 the Free Exercise Clause or the Establishment Clause  
3 applies differently to discrimination between  
4 different religions than it does to discrimination  
5 between religion in general and non-religion? What  
6 -- what cases do you cite for that distinction?

7 MS. PIERCE: What we cite, Your Honor, is  
8 that line between the secular and the religious  
9 activity. I believe it's the line that was drawn in  
10 the Schempp case, referring to the study about  
11 religion versus the study of religion, which is not,  
12 in our view, discrimination in the classic sense of  
13 that word.

14 QUESTION: No, but that doesn't -- that --  
15 the issue there was whether you were discriminating  
16 against religion or not. And since you are not  
17 prohibiting study about religion, that isn't the  
18 question here.

19 The question is, assuming you are  
20 discriminating between religion and non-religion, you  
21 can't study theology but you can study anything else,  
22 what is there in our cases that says that is okay,  
23 although it would not be okay to distinguish between  
24 Jewish studies or Catholic studies or Protestant  
25 studies and other studies?

1           I don't know a single case that says the  
2 principle of neutrality somehow applies differently  
3 so long as you're discriminating against all religion  
4 than it does when you're just discriminating against  
5 one denomination. Did you have a case?

6           MS. PIERCE: Well, Your Honor, in the  
7 context of this Court's aid to education under the  
8 Establishment Clause, and Mitchell v. Helms is a  
9 classic example, there's a distinction between  
10 providing materials, educational materials that are  
11 to be used in secular education, as opposed to those  
12 materials that might be diverted to religious,  
13 ideological education and --

14           QUESTION: But that's -- that's the  
15 Establishment Clause, isn't it, in Mitchell against  
16 Helms?

17           MS. PIERCE: Yes, it is, Your Honor, and  
18 -- and we believe the same -- many of the same values  
19 underlie the Washington constitution. And we don't  
20 believe that the distinction is made invalid because  
21 it is extended to indirect funding and doesn't apply  
22 only to direct funding.

23           QUESTION: Well, I wanted to ask you about  
24 these values. As I understand, this student could  
25 have done exactly what he in fact did if only he did

1 not declare a double major. He could have taken all  
2 of these religious perspective courses, if only he'd  
3 called his major business administration, which in  
4 fact it was because he had the credits for that, too.  
5 That would have been permissible. Is that correct,  
6 or am I incorrect?

7 MS. PIERCE: Well, the statute focuses on  
8 whether a student is pursuing a degree in theology  
9 and -- and --

10 QUESTION: If -- suppose that he pursued a  
11 degree in business administration and yet, ancillary  
12 to that or as options, took all of these other  
13 courses. Could he have had the aid that he seeks?

14 MS. PIERCE: Yes, Your Honor, we think  
15 that could have happened, but it's an unlikely --

16 QUESTION: All right. What is the state's  
17 interest in denying him aid simply because he  
18 declares a double major?

19 MS. PIERCE: I believe the reason the  
20 legislature has focused on the nature of the degree  
21 program is because it's an inherently religious  
22 program, and if they were to --

23 QUESTION: What is the state's interest in  
24 denying him funds simply because of the way he labels  
25 the major he chooses, if all the other instructions,

1 all the other elements of the case are the same? He  
2 takes all the same courses, he has all the same  
3 commitment as a Christian, and yet he's denied the  
4 relief in one case and given it -- the subsidy in one  
5 case, and given it in the other. What is the state's  
6 interest in doing that?

7 MS. PIERCE: Justice Kennedy, I think the  
8 state's interest is not in that particular student,  
9 but in how you administer it overall. And the way  
10 the state administers it overall, in order to avoid a  
11 class-by-class, student-by-student determination, is  
12 to look at the degree programs that are inherently  
13 religious that have, or ask the universities actually  
14 to do that --

15 QUESTION: Ms. Pierce, I thought that the  
16 --

17 QUESTION: Well, what is the state's  
18 interest in -- in denying aid for programs that are  
19 inherently religious? What is that interest? Is it  
20 a compelling interest?

21 MS. PIERCE: Yes, Your Honor, we believe  
22 it is. The interest is --

23 QUESTION: May I ask you just to clarify  
24 what I thought was the purpose of this, was that the  
25 state has decided it does not want to fund the

1 training of clergymen, and it cites a long history of  
2 that. And it's tried to be as accommodating as it  
3 can with that limitation.

4 I mean, certainly if what you're doing is  
5 vulnerable, it would be no less vulnerable if the  
6 state said, well, we won't fund that school at all  
7 because it's an evangelical school.

8 MS. PIERCE: Justice Ginsburg -- excuse me  
9 -- the focus is on the religious nature of the  
10 instruction. If someone had a career goal to enter  
11 the clergy and yet took a secular course of  
12 education, they would not be denied funding.

13 Certainly one of the underlying values of  
14 our Freedom of Religion Clauses at the Federal and  
15 state level is not to require people to support the  
16 promotion of a doctrine or religious belief with  
17 which they may not agree, and that, returning to  
18 Justice Kennedy's question, is -- is the interest.

19 The way it's implemented by Washington,  
20 and it has been by Congress and by other states in  
21 other contexts, is to look at that core course of  
22 study because --

23 QUESTION: But we've decided in *Witters*  
24 that it's unnecessary to do that to conform to the  
25 Establishment Clause.



1 MS. PIERCE: Yes, Justice Kennedy --

2 QUESTION: So, after -- after that, then  
3 what is the state's interest at this point?

4 MS. PIERCE: Well, the state's --

5 QUESTION: Is the state's interest in  
6 redefining the Establishment Clause?

7 MS. PIERCE: No, Your Honor, but the state  
8 has a different, although somewhat concurrent, scheme  
9 for religious freedom, and that involves not just  
10 avoiding a government endorsement of religion, which  
11 is what the Establishment Clause primarily turns and  
12 focuses on --

13 QUESTION: But Witters said there is no  
14 endorsement.

15 MS. PIERCE: And -- and --

16 QUESTION: So you can't use that.

17 MS. PIERCE: No, and I'm not trying to.

18 QUESTION: I still don't see what your  
19 interest is, and once you do define it, I want you to  
20 tell me if it's compelling, rational basis.

21 MS. PIERCE: Okay. Washington's interest  
22 expressed in 1889 was to protect the freedom of  
23 conscience of all its citizens, and that included not  
24 compelling its citizens to provide enforced public  
25 funds to support the promotion of religious beliefs

1 with which they may or may not agree. I think --

2 QUESTION: Does that mean that the state  
3 can decline to provide fire protection to churches  
4 and synagogues?

5 MS. PIERCE: No, Your Honor, and that  
6 distinction has been made.

7 QUESTION: And Washington doesn't do that,  
8 does it?

9 MS. PIERCE: It does not decline that, and  
10 there's --

11 QUESTION: So that -- that general public  
12 benefit is extended to both religious and  
13 non-religious institutions equivalently, and people  
14 don't get upset about that, do they?

15 MS. PIERCE: No, Your Honor. I think  
16 providing the essential services that include people  
17 as part of our civilized community has been  
18 distinguished from other kind of funding when these  
19 questions are asked.

20 QUESTION: Well, Washington's position, I  
21 take it, is that, although it -- it will certainly  
22 put out the fire in the church, it won't spend money  
23 for the purpose of persuading people that they ought  
24 to be inside the church. Is that the -- the point  
25 you're making?

1 MS. PIERCE: Yes, Justice Souter. There  
2 is a distinction there and it's a distinction that's  
3 been made in a variety of contexts, but --

4 QUESTION: And you're saying that even  
5 though it would not offend the Establishment Clause  
6 if the state did provide this sort of funding, there  
7 is still, I think your point is, there is still an  
8 area within which it has a choice, even though that  
9 choice may not be determined by the Establishment  
10 Clause?

11 MS. PIERCE: Yes, Your Honor, because the  
12 purpose of the state constitution, which of course,  
13 when it was adopted in 1889, was not viewed as  
14 greater than the Establishment Clause, it was viewed  
15 as the only protection for religious freedom at the  
16 state level, since it wasn't until 1947 that the  
17 Establishment Clause was held to apply to the states.

18 And to return to your question, Justice  
19 Souter, the distinction between providing police and  
20 fire services to an organization and providing  
21 funding to assist in the educational purpose of that  
22 organization was made in *Norwood v. Harrison* in this  
23 Court. In the very different circumstance, but for  
24 -- for similar reasons, this Court held that  
25 textbooks could not be provided to segregated schools

1 because that would aid the discrimination of those  
2 schools in violation of --

3 QUESTION: Well, isn't that an  
4 Establishment Clause issue?

5 MS. PIERCE: In that particular --

6 QUESTION: It's been litigated under the  
7 Establishment Clause, right?

8 MS. PIERCE: The provision of the -- the  
9 aid --

10 QUESTION: Providing textbooks or other  
11 aid to religious schools. Those have been  
12 Establishment Clause challenges, and we had a -- the  
13 Witters case from your state, and determined that the  
14 Establishment Clause is not violated by giving aid to  
15 the blind, which is used then to study for the  
16 ministry, right?

17 MS. PIERCE: Yes, Justice O'Connor, and  
18 that's because under the Establishment Clause, the  
19 question is, is the government endorsing religion?  
20 Under Washington's article I, section 11, the  
21 question is, is -- are public funds being used for  
22 the promotion or -- of religious belief or disbelief  
23 and --

24 QUESTION: But do you -- do you think that  
25 --

1                   QUESTION: Ms. Pierce, may I ask you a  
2 question there on how you draw the line? Because I  
3 want to get clear on one thing, and it was raised in  
4 effect by the questions earlier about the Blaine  
5 Amendment, I guess, but is my understanding correct  
6 that the State of -- that this clause that we are  
7 dealing with here, and nothing else for that matter  
8 in the Washington law, forbids the state from paying  
9 -- we'll call it a tuition voucher here -- that is  
10 going to a sectarian school like this one, so long as  
11 it's not being used for theological education?

12                   MS. PIERCE: Justice Souter, there's a  
13 distinction in our state constitution --

14                   QUESTION: No, but isn't the answer, there  
15 is nothing that forbids that? In other words, going  
16 back to Justice Kennedy's question, if this same  
17 student said, I want to study business and I want to  
18 study it at this sectarian school, there would be no  
19 impediment in Washington law to paying him the -- or  
20 giving him the voucher or whatever you call it and  
21 letting him spend it at this sectarian school? Is  
22 that correct?

23                   MS. PIERCE: That's true at the higher  
24 education level.

25                   QUESTION: Okay.

1                   QUESTION: But isn't it also true he could  
2 even take the same courses and get it as long as he  
3 didn't declare his major until he was a junior?

4                   MS. PIERCE: Your Honor, we -- the statute  
5 says pursuing a degree in theology, so I think it  
6 should be properly read and is properly read by  
7 Northwest College as a student who is, during the  
8 academic terms that are funded, working toward that  
9 degree in theology.

10                  QUESTION: But I -- I just want to be sure  
11 I understand how it works in response to Justice  
12 Kennedy's inquiry. Is it not true that he could have  
13 taken all or most of the religious courses he did  
14 take if he'd only declared a different major, or  
15 postponed the time when he declared his major?

16                  MS. PIERCE: I believe he --

17                  QUESTION: Which has a double aspect. In  
18 one hand, as Justice Kennedy points out, the state  
19 interest doesn't seem all that compelling there, but  
20 on the other hand, the burden on him is also pretty  
21 slight, because all he had to was take a -- just  
22 manage his curriculum a little differently.

23                  MS. PIERCE: Yes, Your Honor. I --

24                  QUESTION: And -- and I just want to know,  
25 am I correct that he could have taken either all or

1 substantially all of the religion -- religious  
2 courses and qualified for the scholarship if he just  
3 declared a different major?

4 MS. PIERCE: You're partially correct,  
5 Justice Stevens. I think he could have taken some of  
6 the same religion courses. I don't think just simply  
7 declaring your major later is what meets the purpose  
8 of the statute. The statute says are you pursuing --

9 QUESTION: Wasn't he counseled -- wasn't  
10 he counseled specifically by the school to be honest?

11 MS. PIERCE: Yes, Justice Ginsburg.

12 QUESTION: And not try to hide what his  
13 purpose was, which he was perfectly open about?

14 MS. PIERCE: Yes, Justice Ginsburg.

15 QUESTION: And, of course, if -- if you  
16 take a whole bunch of religious courses, it may be  
17 they can't be counted for some other major other than  
18 the -- the theology.

19 MS. PIERCE: Well, the theology degree,  
20 Your Honor, does require, I believe at Northwest, 125  
21 credits, and 79 of those credits are required to be  
22 in various Bible and theological courses, so I think  
23 it is -- it would be possible, but unusual, for  
24 another student to have those same courses and not  
25 being pursuing a degree in theology.

1                   QUESTION: Could we go back to Justice  
2 Kennedy's second part of what he was asking, because  
3 it's bothering me, too. I think it's absolutely  
4 well-established, whether there's a case or not, that  
5 people have thought it's different when what the  
6 Federal government or state government says is, what  
7 we have here is a secular program, we're paying for  
8 secular programs, whether it's schools or social  
9 services or any one of a million things, or if it  
10 were to say, well, it's a Baptist program, but not a  
11 Catholic program

12                   I think if they said the second, they'd  
13 have to pass something like strict scrutiny as far as  
14 their reasons are concerned. I think if they said  
15 the first, so far I don't think they would have to  
16 pass anything like that kind of test, but that's the  
17 question.

18                   And I think that Justice Kennedy was  
19 saying, very well, what is the test? What kind of  
20 scrutiny should you give under the Equal Protection  
21 Clause, where what the state has done is said we have  
22 a secular spending program. Now, leave the atheist,  
23 because if the atheist is a program which concerns  
24 principles that in the mind of the atheist are  
25 similar to those that are religious in the mind of a



1 religious person, I'm willing to call that a  
2 religious program That's not what I'm talking  
3 about.

4 I'm talking about just a regular secular  
5 aid program What do we judge that distinction on  
6 the basis of? What kind of a test?

7 MS. PIERCE: Justice Breyer, I believe it  
8 is a rational basis test, that is, it is a neutral  
9 line, it's a recognized line between the secular that  
10 does not involve the realm of belief and faith, and a  
11 religious that does.

12 QUESTION: I didn't think this was an  
13 Equal Protection Clause case at all. I thought it  
14 was -- the challenge was freedom of religion.

15 MS. PIERCE: Yes, Mr. Chief Justice, it  
16 is, and --

17 QUESTION: The Free Exercise Clause of the  
18 First Amendment?

19 MS. PIERCE: That is the question on which  
20 cert was granted, and --

21 QUESTION: Right.

22 MS. PIERCE: -- because it is a neutral  
23 line --

24 QUESTION: Well, I'm thinking of free  
25 exercise, but I'm thinking this is a discrimination

1 case, so maybe it's totally different under free  
2 exercise, but you see the question.

3 MS. PIERCE: Yes, and Justice Breyer --

4 QUESTION: And your answer's rational  
5 basis.

6 MS. PIERCE: Yes.

7 QUESTION: Rational -- you -- you think  
8 there's a difference in free exercise if what the  
9 state says is, we are burdening the free exercise of  
10 all religions, as opposed to, we are burdening the  
11 free exercise of one particular religion. You think  
12 there's a different -- a different standard? Again,  
13 I would ask for the case that -- that suggests that.

14 MS. PIERCE: Justice Scalia, in the first  
15 instance, this case involves application of public  
16 funds in a funding program, and we believe that the  
17 principle that a state's decision not to fund the  
18 exercise of a fundamental right is not a burden on  
19 that right, it's not an infringement on that right.  
20 All that the State of Washington has done here is  
21 decline to fund theology studies --

22 QUESTION: Certainly in our -- in our  
23 Rosenberger case there was a rational basis for what  
24 the University of Virginia did, but we held it  
25 violated the Free Exercise Clause.

1 MS. PIERCE: Yes, Mr. Chief Justice, and  
2 the purpose of the public forum principles that were  
3 applied in Rosenberger are to protect the open public  
4 forum. There the Court specifically acknowledged  
5 that that was a forum for the publication, for the  
6 expression of ideas, and that the expression of those  
7 ideas in that open public forum would be incomplete  
8 if certain viewpoints were excluded.

9 But certainly the purpose of the Promise  
10 Scholarship is not to open a public forum. It's more  
11 akin to the American Library Association case, where  
12 Internet access was provided, not to provide a forum  
13 for the Web publishers, but to promote education and  
14 learning.

15 QUESTION: You think there is a -- a  
16 rational basis suffices for the state to prohibit  
17 this student from declaring one of his legitimate  
18 majors?

19 MS. PIERCE: We believe -- yes, Your  
20 Honor, we believe there is a rational basis to not  
21 fund religious instruction wherever it occurs,  
22 including a theology course.

23 QUESTION: Is it essentially your position  
24 that not everything that is compatible with the  
25 Establishment Clause, not everything that the state

1 could do under the Establishment Clause, it must do  
2 under the Free Exercise? And if that's your  
3 position, how do you define the space in between  
4 those two where the state has a choice?

5 MS. PIERCE: That is our position. We  
6 don't think states should be in constitutional  
7 pincers where whatever they're allowed to do under  
8 the Establishment Clause or required to do,  
9 particularly given the history that states have come  
10 to their own path to religious freedom

11 And I think applying the various  
12 principles on when you burden the exercise of  
13 religious freedom leads you to the latitude in this  
14 area. Here, not providing funding does not infringe  
15 or burden a fundamental right, and that's all that  
16 the state has done. Mr. Chief Justice, I'd --

17 QUESTION: Thank you, Ms. Pierce. You're  
18 reserving your time.

19 Mr. Sekulow.

20 ORAL ARGUMENT OF JAY A. SEKULOW

21 ON BEHALF OF THE RESPONDENT

22 MR. SEKULOW: Mr. Chief Justice, and may  
23 it please the Court:

24 In the free exercise context, this Court  
25 has held that the minimum requirement of neutrality

1 is that a law not discriminate on its face. That's  
2 clearly what is taking place here, and I'd like to  
3 put in context exactly how the implementation of the  
4 statutory program works. Washington, when they  
5 adopted the Promise Scholarship program and how it's  
6 applied, works this way.

7           A student applies for this general grant.  
8 In this particular case, Josh Davey applied for the  
9 grant when he was aware of it in the summer, was  
10 notified by the state that he was qualified and  
11 accepted in the program in August. At that point he  
12 enrolled at Northwest College, which is an accredited  
13 and eligible institution. It was not until -- and he  
14 declared his major, the dual major, at that point in  
15 business administration and the pastoral ministries  
16 degree.

17           Two months later, it was two months until  
18 he was notified by the financial aid office through a  
19 memorandum that the state circulated that after  
20 reviewing the Promise Scholarship program, the state  
21 then decided that in fact there would be a  
22 prohibition put in place on pursuing a degree in  
23 theology and that state has interpreted that to mean  
24 pursuing a degree in theology from a religious  
25 perspective.

1                   The check, Justice O'Connor, is sent  
2 directly to the student. The school is the -- in the  
3 sense the school gets the check and hands it to the  
4 student. It's not written to the school. The school  
5 cannot use it for -- to -- a private institution  
6 cannot use it at all for any expenditure. They can't  
7 credit, they can't debit the account. The school  
8 merely verifies that the student's enrolled. The  
9 check then goes to the student. It can be used for  
10 any --

11                   QUESTION: So it wouldn't violate the  
12 Establishment Clause, but I guess what we're  
13 addressing is whether there's a free exercise  
14 violation.

15                   MR. SEKULOW: Right.

16                   QUESTION: How does this violate the  
17 student's right to free exercise of religion? Maybe  
18 it's more expensive to go to school, but why does  
19 that violate his free exercise of religion right?

20                   MR. SEKULOW: Joshua Davey, and the state  
21 has acknowledged this, of course, has the free  
22 exercise right to pursue a degree in theology. The  
23 question here is the burden that's placed on it. Of  
24 course, two responses. With regard to the actual  
25 burden, here a general benefit was available to a

1 student and a religious classification was utilized  
2 to deny the student access to those funds. He met  
3 the criteria.

4 QUESTION: Well, let me ask you this.

5 MR. SEKULOW: Sure.

6 QUESTION: Suppose a state has a school  
7 voucher program such as the Court indicated could be  
8 upheld in the Zelman case. Now, if the state decides  
9 not to give school vouchers for use in religious or  
10 parochial schools, do you take the position it must,  
11 that it has to do one or the other? It can have a  
12 voucher program, but if it does, it has to fund all  
13 private and religious schools with a voucher program?

14 MR. SEKULOW: No, I think --

15 QUESTION: Is that your position?

16 MR. SEKULOW: No. The state --

17 QUESTION: Well, why not? I mean, why  
18 wouldn't it follow from what you are saying today?

19 MR. SEKULOW: For this reason. The state  
20 can set neutral and eligible criteria for admission  
21 as an eligible institution. Here it was  
22 accreditation. Now, if the religious school, the  
23 school that was affiliated with the religious  
24 denomination met the general neutral eligibility  
25 requirement, and there was no countervailing

1 Establishment Clause problems, yes, then it should --

2 QUESTION: I -- I don't know what you  
3 mean. The state says all schools were going to have  
4 a program to give vouchers for use in all schools of  
5 a certain grade level, assuming the teachers are  
6 qualified to be teachers.

7 MR. SEKULOW: That --

8 QUESTION: Can they refrain from making  
9 that program available for use in religious schools?

10 MR. SEKULOW: I -- I would think not. I  
11 think once it would go towards the private schools,  
12 as long as the eligibility --

13 QUESTION: So what you're urging here  
14 would have a major impact, then, would it not, on --  
15 on voucher programs?

16 MR. SEKULOW: Well, it would. I think a  
17 voucher program could be established that has a  
18 neutral criteria and if the private schools meet that  
19 criteria, including the private religious schools and  
20 there is no countervailing Establishment Clause  
21 problem, I wouldn't see any reason --

22 QUESTION: Well, but the only criteria  
23 that they have --

24 QUESTION: Sure -- surely, the state can  
25 decide to fund only public schools.



1           MR. SEKULOW: Absolutely.

2           QUESTION: And it's only when it starts  
3 funding some private schools that you get into the  
4 religious question.

5           MR. SEKULOW: That's correct.

6           QUESTION: But I'm -- I'm concerned --

7           QUESTION: But you say if they publish any  
8 private school they must publish -- they must support  
9 all religious schools as well.

10          MR. SEKULOW: No. Again, I think if they  
11 meet the accreditation standard, if the program were  
12 to --

13          QUESTION: But they could not just say we  
14 -- we will publish all private schools except  
15 sectarian schools.

16          MR. SEKULOW: I don't think they could do  
17 that. No, I think it would be --

18          QUESTION: That's the issue here, yeah.

19          QUESTION: Even though there -- there are  
20 quite a few state laws and constitutional provisions  
21 around the country that -- that provide just that,  
22 aren't there?

23          MR. SEKULOW: There are. Thirty-seven  
24 states have --

25          QUESTION: Yeah. So the decision here

1 could have very broad impact, I assume.

2 MR. SEKULOW: Interesting, Justice  
3 O'Connor, and admittedly, this is a bit of a moving  
4 target because state policies change, but there are  
5 approximately 37 states that have this type of  
6 amendment. Twenty-five of those states have programs  
7 of aid that do not have a discriminatory basis upon  
8 religion. It's given to any accredited --

9 QUESTION: Mr. Sekulow?

10 MR. SEKULOW: Yes.

11 QUESTION: May I ask you the question that  
12 I asked Ms. Pierce, because I think this is really  
13 what the case turns on. Is there any space between  
14 what one, what a state is permitted to do, what it's  
15 permitted to fund under the Establishment Clause and  
16 what it must fund under the Free Exercise Clause, and  
17 if so, what fills that space? You've been candid in  
18 saying voucher, no. If you -- going to give to any  
19 private school, you can't leave out the parochial  
20 schools. You certainly said that about this program

21 MR. SEKULOW: Yes.

22 QUESTION: Suppose the -- the state would  
23 say, we are going to fund professional education,  
24 lawyers, doctors, architects, engineers, but we're  
25 not going to fund people who are -- who are in a

1 divinity program Would that qualify or would that  
2 fall also?

3 MR. SEKULOW: Well, I think a program that  
4 were to just limit it to specific professions would  
5 not necessarily have to go towards theology. For  
6 instance, in a lot of states using that example,  
7 Justice Ginsburg, there is a shortage of nurses right  
8 now. And if the state were to adopt a program to  
9 fund education for nurses that included public and  
10 private schools, they don't have to bring theology --

11 QUESTION: No, but it would include -- my  
12 program includes all professions, save one, and --  
13 and that is ministry.

14 MR. SEKULOW: Well, if it was as you  
15 described it, I would be here arguing the same point  
16 in this context. The idea that you would list all of  
17 the professions and then say we are going to fund  
18 everything but those students studying theology would  
19 be again that religious classification, and I would  
20 think unless the state could establish its compelling  
21 governmental interest --

22 QUESTION: As I -- as I understand your  
23 answer to Justice O'Connor, if we decide in your  
24 favor, we necessarily commit ourselves to the  
25 proposition that an elementary and secondary school

1 voucher program must include religious schools if it  
2 includes any other private schools. It -- it seems  
3 to me that your case can be resolved on a much  
4 narrower issue than that. Here we have a -- a  
5 college student who is being required to surrender  
6 his -- his conscientious beliefs by declaring a major  
7 which otherwise would have been completely funded by  
8 the school, and I -- I just don't see any interest in  
9 doing that. It seems to me a -- a very severe  
10 violation of -- of religious conscience. I think  
11 that's quite different from an overall neutrality  
12 principle, which would foreclose this Court on the  
13 voucher issue.

14 MR. SEKULOW: Well, I don't think -- I  
15 agree, Justice Kennedy. I don't think the Court has  
16 to go that far here.

17 QUESTION: But why isn't --

18 QUESTION: But certainly that's what  
19 you're arguing. I mean, your -- your brief and your  
20 presentation certainly urges us to go that route.

21 MR. SEKULOW: If --

22 QUESTION: Now, have we -- have we, in  
23 looking at funding issues, have we dealt differently  
24 with the requirement of funding something out of  
25 public funds than for other purposes?

1                   MR. SEKULOW: Well -- well, certainly in  
2 the -- in the direct aid cases and in the  
3 Establishment Clause context, but this is very  
4 similar to the Witters program, so there is not the  
5 countervailing Establishment Clause issue, and that's  
6 what I was going to address, Justice Kennedy.  
7 Depending on how the voucher program is established  
8 would depend on whether the religious institutions  
9 would be included. For instance, again I go to the  
10 eligibility issue. Here, Northwest College was an  
11 accredited institution --

12                   QUESTION: Okay. Let's assume that all  
13 the public schools and all the private schools,  
14 including all religious private schools are -- are  
15 accredited in whatever way the state accredits them,  
16 and that the criterion, apart from religious  
17 education, is simply that the ultimate recipient of  
18 the voucher has to be an accredited school. It seems  
19 to me, following Justice O'Connor's question, that  
20 the argument that would be made in any case in which  
21 a state says we will -- we will allow a voucher to be  
22 spent in a private school, but not a private  
23 religious school is the same argument that Justice  
24 Kennedy was suggesting a moment ago, and that is that  
25 the religious student must somehow surrender a

1 conscientious belief and go from a religious school  
2 and seek to be enrolled in a non-religious private  
3 school or a public one to get the voucher. And I  
4 don't see why that argument would not be just as  
5 applicable there as the argument that you are making  
6 here.

7 MR. SEKULOW: Justice Souter, in this  
8 particular -- using that example, here the school is  
9 a qualified school. The Northwest College, which  
10 admittedly has a religious affiliation, it isn't --

11 QUESTION: Sure. That's a wash.  
12 Everybody agrees.

13 MR. SEKULOW: It's their major.

14 QUESTION: Everybody -- the only criterion  
15 is, will we fund religious training in how to be  
16 religion -- religious -- or will we not? And in  
17 fact, a -- a similar argument would be made as  
18 between the -- the religious school that teaches  
19 religion, and the private school that doesn't teach  
20 religion.

21 MR. SEKULOW: In this context, the way the  
22 program is implemented within that hypothetical and  
23 within the facts here, here students can take these  
24 very same courses in religion that Josh Davey --

25 QUESTION: Well, that may show that the

1 state draws a kind of a funny line. Maybe it was a  
2 -- a bad job of line drawing, and I -- I have to  
3 admit, I'm not quite sure why they draw it the way  
4 they do, but on -- on the -- on the basic proposition  
5 that the state raises as -- as its position here,  
6 that it will not fund ministerial education or  
7 education in how to be religious versus funding other  
8 kinds of training, the argument, it seems to me, from  
9 the Free Exercise Clause would be the same in the  
10 voucher case as the argument that you are making  
11 here.

12 MR. SEKULOW: If in fact the programs were  
13 put forward this way with the accreditation as you  
14 suggested, and there is no countervailing  
15 Establishment Clause issue and the eligibility issue  
16 of the school is met, yes, I wouldn't see the --

17 QUESTION: All right.

18 MR. SEKULOW: -- justification to exclude a  
19 particular major here in this particular case, a  
20 submajor from a religious viewpoint.

21 QUESTION: Mr. Sekulow --

22 QUESTION: Well, how many states do that,  
23 do you know? You're knowledgeable on these things.  
24 How many states have voucher programs which -- which  
25 would allow students to go to any private school, you

1 know, an elite academy, but not allow them to go to  
2 religious schools?

3 MR. SEKULOW: Twenty-five states have  
4 voucher-type programs that have no restrictions at  
5 all as long as it's an accredited institution, so  
6 that's the -- usually the standard. They can go to  
7 any school that's accredited. There are some states,  
8 and it's about a half-dozen, as I said, Justice  
9 Scalia, it's a little bit of a moving target because  
10 policies change, that actually have this prohibition  
11 for religious education, and even within some of  
12 those states, the programs are inconsistent. They'll  
13 have different type of financial aid programs here.

14 In this particular situation, and the way  
15 this particular program is implemented, though,  
16 Joshua Davey had already made, Justice Stevens, his  
17 declaration of a major before he was notified he was  
18 disqualified. The state didn't do the formal  
19 notification until October, some two months after he  
20 rolled -- enrolled.

21 QUESTION: But I suppose he could have  
22 changed his mind and taken another major in most of  
23 the courses and then postponed that decision. As a  
24 matter of conscience, he didn't do it.

25 MR. SEKULOW: It -- it was a matter of



1 conscience. There were some students at the school  
2 that did change their mind. There were two that did  
3 not. Joshua Davey was one that -- and the counselor,  
4 the financial aid counselor, did state in the joint  
5 appendix that she cautioned them if they are in fact  
6 going to major in a degree that would be pursuing a  
7 theology to tell the truth, which he clearly did  
8 here. So his implementation of the decision was  
9 already made in the sense that the state came back  
10 afterwards and said oh, by the way, these group of  
11 students don't qualify for this.

12 QUESTION: But wouldn't it be --

13 QUESTION: Am I -- am I correct or  
14 incorrect that the state would fund a student who  
15 majored in literature at a institution which was  
16 sectarian and had instructors who taught literature  
17 from a religious perspective or -- am I correct about  
18 that?

19 QUESTION: Yes.

20 QUESTION: Well, but the state is saying,  
21 I don't know if we can escape the broader ground, the  
22 state's saying, look, we understand that, you know,  
23 applying our standard there'll be all kinds of  
24 anomalies that you can get. Maybe this case is one.  
25 But what we're doing by and large is to say, we don't

1 want to spend too much of our state money in this  
2 program, we'll do it subsidiary, you know, the odd  
3 example doesn't matter, but people who major in  
4 philosophy are likely to become priests or at least  
5 spend a lot of time studying theology. If they major  
6 in theology, or they spend a lot of time studying  
7 theology, that's going too far. So this is, like  
8 many administrative lines, a very crude effort to  
9 identify those people who are taking too much of  
10 their time in totally religiously-oriented matters.

11 Now, of course that's unconstitutional if  
12 we accept your argument that the state must treat the  
13 religious study the same way as any other. That's  
14 your broad ground. But if we reject the broad  
15 ground, I don't quite see at the moment how we can  
16 accept the narrow one, which turns on these details  
17 of the administrability of the line.

18 MR. SEKULOW: Well, the reason that I want  
19 -- let me address the latter, if I might, Justice  
20 Breyer. The reason those details matter because the  
21 line drawing albeit may be crude on the State of  
22 Washington, here is within the context of the Free  
23 Exercise Clause, because here the school is an  
24 eligible institution, so that's not even at issue.  
25 There is no countervailing Establishment Clause issue

1 here. Witters foreclosed that. So all we are  
2 dealing with is a statute which on its face states  
3 that a student who qualifies based on academic  
4 excellence and economic need makes the decision for  
5 him or herself where they're going to go to school  
6 and what they're going to major in, and they can  
7 major in literally the universe of courses. There is  
8 only one exclusion. It's not even, Justice Ginsburg,  
9 a situation with a number of majors. It's one.

10 QUESTION: Mr. Sekulow, I think that  
11 Justice Breyer is getting at the same point I tried  
12 to get at, and it's in part the other flip side of  
13 what Justice Kennedy asked you. Certainly, you are  
14 not standing here to tell us that, oh, if they were  
15 more restrictive, if they said we're simply not going  
16 to fund scholarships to students who go to sectarian  
17 schools, that that might be all right. I mean, you  
18 don't want to win on the ground of the school was too  
19 generous in what it did fund.

20 MR. SEKULOW: Well, two responses. First,  
21 the -- on the issue of the state and their  
22 obligation, to recast this as a -- the state is being  
23 required to fund Joshua Davey's education, I think is  
24 -- is a miscast of the issue. The state has decided  
25 to employ, to develop a scholarship program that's

1 very broad-based and in that program they have given  
2 the student the ultimate choice of where they could  
3 go to school as long as it's within Washington state  
4 and accredited and literally they can major in any  
5 major except for one, and that is a theology  
6 exclusion.

7 QUESTION: Wouldn't be any better if they  
8 said, you can go to any school except a -- a church  
9 school.

10 MR. SEKULOW: No. I think it would raise,  
11 if it's accredited I think it would raise the same  
12 problem. But it's not to say that the state  
13 universities don't teach courses in theology and  
14 religion. On pages 66 and 74 of the joint appendix,  
15 there's a listing of the courses offered at the  
16 University of Washington, and it covers a broad array  
17 of religious courses, albeit from --

18 QUESTION: You -- you don't know of any  
19 case that says that the less significant the interest  
20 the state has is the more latitude it has in  
21 discriminating against religion. You don't know of  
22 any case that said that?

23 MR. SEKULOW: No. That -- that would --

24 QUESTION: I hope you don't, yeah.

25 MR. SEKULOW: No. And hopefully this

1 won't be that one.

2 (Laughter.)

3 QUESTION: May I ask -- ask you a broader  
4 question? A number of the briefs discussed the  
5 breathing space between the Establishment Clause and  
6 the Free Exercise Clause. Do you take the position,  
7 or just what is your position on whether or not there  
8 is such a breathing space?

9 MR. SEKULOW: The play in the joints as  
10 it's referred to.

11 QUESTION: Yeah.

12 MR. SEKULOW: I -- I think the play in the  
13 joints gives the state broad flexibility in  
14 establishing the programs and -- or not establishing  
15 a program at all, but to use the play in the joints  
16 to not accommodate religion but rather to target  
17 religion as an exclusion I think is a misuse in my  
18 view of what the Court has at this point --

19 QUESTION: Give me an example, any  
20 example.

21 QUESTION: But do you go so far as to  
22 contend that any violation, any time there is no  
23 violation of the Establishment Clause that then the  
24 Free Exercise Clause would necessarily kick in?

25 MR. SEKULOW: No, absolutely not. And let

1 me --

2 QUESTION: But that's what I was looking  
3 for.

4 QUESTION: Do you want to reserve the rest  
5 of your time, Mr. Sekulow?

6 MR. SEKULOW: I don't have -- I only have  
7 20 minutes, so I cannot reserve any more time.  
8 That's okay. But I would normally be happy to.

9 (Laughter.)

10 QUESTION: If -- if you can give me an  
11 example of a case where the state can say we know we  
12 can give this funding to religious schools if we want  
13 to, but we don't want to? Can you give any example  
14 where that would be legitimate on your view of free  
15 exercise?

16 MR. SEKULOW: Sure. There's -- I don't  
17 think there is any affirmative obligation, Justice  
18 Ginsburg, for the state, even if the Establishment  
19 Clause -- I'll give an example. The Center Moriches  
20 School District in Lamb's Chapel, while this Court  
21 held that the Establishment Clause did not --  
22 required them that they open their facilities to  
23 comply with the First Amendment viewpoint neutrality  
24 issues, they're not -- they were not required to open  
25 their facilities up. The State of Washington could

1 develop programs for specific majors.

2 QUESTION: No, but if they opened it up at  
3 all, there was no play in the joints between the  
4 religion clauses that said you can't open it up to  
5 this particular religious presentation. Isn't that  
6 correct?

7 MR. SEKULOW: No, I think that --

8 QUESTION: So I think -- let me just --

9 MR. SEKULOW: Please.

10 QUESTION: -- say what I think your  
11 position is and then you -- I think your position is  
12 that, although certain religious funding may not  
13 violate the Establishment Clause, it does not follow  
14 that the state must fund it. But if the state has a  
15 general program for funding instruction, and this is  
16 religious instruction, it's got to fund religious  
17 instruction and there's no middle ground, there's no  
18 play in the joints there. Is that correct?

19 MR. SEKULOW: Under the latter  
20 hypothetical, that -- that would be our position,  
21 that once you have gone into the private schools and  
22 the school meets the neutral secular criteria, our  
23 view would be at that point the state should be equal  
24 and not target out religion for an exclusion, which  
25 is precisely the viewpoint neutrality issue that we

1 think should apply and, of course, within the free  
2 exercise context, the minimum requirement of  
3 neutrality is law not discriminate on its face. This  
4 one does. If there are no further questions, thank  
5 you, Mr. Chief Justice.

6 QUESTION: Thank you, Mr. Sekulow.

7 General Olson, we'll hear from you.

8 ORAL ARGUMENT OF GEN. THEODORE B. OLSON

9 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

10 SUPPORTING THE RESPONDENT

11 MR. OLSON: Mr. Chief Justice, and may it  
12 please the Court:

13 The Promise Scholarship program practices  
14 the plainest form of religious discrimination. It  
15 disqualifies the one course of study that is taught  
16 from a religious perspective. The clear and  
17 unmistakable message is that religion and preparation  
18 for a career in the ministry is disfavored and  
19 discouraged.

20 QUESTION: Well, but of course, there's  
21 been a couple of centuries of practice in this  
22 country of not funding religious instruction by tax  
23 money. I mean, that's -- that's as old as the  
24 country itself, isn't it?

25 MR. OLSON: Well, yes, it is. But there



1 is the other tradition that is as old as the country  
2 itself, is the free exercise component of the  
3 religion clauses, which this Court has said  
4 repeatedly mandates neutrality.

5 QUESTION: But how is his free exercise  
6 chilled at all? Can't he practice his religion just  
7 as he always would and become a minister?

8 MR. OLSON: Well, it's --

9 QUESTION: He just has to pay for it.

10 MR. OLSON: Justice -- well, Justice  
11 Stevens, the individual that was disqualified in  
12 Tennessee from being a member of a delegate to the  
13 Constitutional Convention because he was a minister  
14 --

15 QUESTION: He was prohibited from doing  
16 something every other citizen can do.

17 MR. OLSON: Well, the same -- the Court  
18 would have come out the same way, I submit, if it  
19 said that ministers will not have their expenses  
20 paid, but everybody else will. The language of the  
21 decision and the language of *Sherbert v. Verner* and  
22 *Fowler v. Rhode Island* is that to the extent that a  
23 religion --

24 QUESTION: But you're still not addressing  
25 the question of how his -- his freedom to practice

1 the religion he wants to practice is impaired at all.

2 MR. OLSON: Well, he can practice it, but  
3 he practices it at a price. Studying of theology as  
4 the --

5 QUESTION: He practices it without a  
6 subsidy.

7 MR. OLSON: He practices it without the  
8 same subsidy that is made available to every other  
9 citizen except someone who wants to study to be a  
10 minister. If it was discrimination against a  
11 minister in -- in the -- in the case involving  
12 Tennessee, this is a discrimination against a person  
13 who aspires to be a minister. He is given less of an  
14 advantage than all --

15 QUESTION: If it -- if it -- if it isn't  
16 coercion of -- of his religion, I suppose it would be  
17 okay to limit this -- this exclusion to Jewish  
18 theology or to Catholic theology, because the  
19 response would be it doesn't -- it doesn't coerce his  
20 religion at all.

21 MR. OLSON: We submit that the teachings  
22 of the decision of this Court --

23 QUESTION: But isn't the difference that  
24 that would plainly violate the Establishment Clause,  
25 and here we have a Free Exercise Clause issue.

1                   MR. OLSON: What this Court has said,  
2 Justice Stevens, is that in -- in many respects the  
3 Establishment Clause and the Free Exercise Clause are  
4 components of the same principle that is --

5                   QUESTION: So you take the position  
6 there's no breathing space between the two?

7                   MR. OLSON: Well, there is -- there may be  
8 breathing space, especially with respect to the  
9 Establishment Clause area, where this Court will not  
10 find entanglement or endorsement under certain  
11 programs that may not be required, but what this  
12 Court has said is that discriminating -- that  
13 discriminating against Catholics and discriminating  
14 against people who are religious generally and even  
15 people who are anti-religious generally violates the  
16 twin components of equality and neutrality that are  
17 -- that are mandated by the religion clauses.

18                  QUESTION: What -- what is your response  
19 to the following concern that's been brought up a few  
20 times but I'd like you to address it directly. This  
21 case is perhaps a small matter of a distinction that  
22 doesn't make all that much sense, but makes some.  
23 But the implications of this case are breathtaking,  
24 that it would mean if your side wins, that every  
25 program, not just educational programs, but nursing

1 programs, hospital programs, social welfare programs,  
2 contracting programs throughout the governments would  
3 go over, you'd have to go over each of them and  
4 there'd be a claim in each instance that they cannot  
5 be purely secular, that they must fund all religions  
6 who want to do the same thing, and that those  
7 religions, by the way, though it may be an excellent  
8 principle, may get into fights with each other about  
9 billions and billions of dollars, so -- which is  
10 something about which I have written about, which you  
11 know. All right. So, I'd like you to address that.

12 MR. OLSON: Yes, Justice Breyer. It is  
13 not a major step at all in this Court's jurisprudence  
14 to say that those funding programs for medicine,  
15 doctors, nurses, cannot distinguish and not  
16 discriminate against a person who decides to go to a  
17 Catholic nurse or to a Catholic doctor. If money is  
18 made available for individuals in the Medicare  
19 program to exclude people that want to go to  
20 religious hospitals for their heart surgery, that  
21 would violate the Free Exercise Clause.

22 QUESTION: So do you agree, do you take  
23 the position that if we affirm the court of appeals  
24 and accept your position, that the Court is committed  
25 on the school voucher issue if, say, a school voucher

1 program excludes parochial schools?

2 MR. OLSON: It would depend, I suppose, on  
3 how the program was structured, what the inquiry  
4 involving a compelling government -- strict scrutiny  
5 would entail. There may be a difference, for  
6 example, with respect to funding that's associated  
7 with institutions, as opposed to individual  
8 conscience. This is the plainest form of religious  
9 discrimination because the person who wants to  
10 believe in God or wants to have a position of  
11 religious leadership is the one that's singled out  
12 for discriminatory treatment.

13 The Court has said before that  
14 distinction, religious tests for governmental  
15 benefits violate the Free Exercise Clause. This is a  
16 religious test. If the person wants to take a  
17 program in theology, he's disqualified.

18 QUESTION: What are the practical  
19 implications?

20 QUESTION: May I ask you --

21 QUESTION: Just want a sentence on the  
22 practical implication. Is it as far-reaching as my  
23 tone of voice suggested?

24 MR. OLSON: I would say that the -- it is  
25 not as far-reaching as the -- the sense of doom that

1 your question suggested.

2 (Laughter.)

3 QUESTION: Maybe a good thing I'm not --  
4 don't --

5 MR. OLSON: The idea that this country  
6 when it -- when it provides tax exemptions or cash to  
7 citizens to educate their children, cannot single out  
8 for discriminatory treatment the Catholic or the  
9 religious person is not a far-reaching -- well, it  
10 may have been far-reaching at the time, and thank  
11 heavens that it is, that this principle as the -- I  
12 think one of the questions, I think it was Justice  
13 O'Connor's question, asked with respect to the  
14 funding cases and this Court dealt specifically with  
15 that in the Maher v. Roe case when it said the  
16 funding cases do not control the significantly  
17 different context in which a funding decision  
18 impinges upon the constitutionally-imposed government  
19 obligation of neutrality required by the religion  
20 clauses. So those funding cases are completely  
21 distinguishable --

22 QUESTION: General, may I ask you this  
23 question? I mean, the whole argument for neutrality  
24 comes down to an argument, I think, about the  
25 following.

1                   MR. OLSON: About --

2                   QUESTION: About the following

3 distinction. The other side says, Washington says,  
4 look, there is a line to be drawn, not between  
5 funding Catholics and Protestants or atheists or  
6 what-not. The line to be drawn is the line between  
7 funding education about a religion, education that  
8 says this is what Catholics believe, this is what  
9 atheists believe, and on the other hand, education  
10 that says, this belief is valid, and you ought to go  
11 out and persuade other people to hold this belief.  
12 They say, that is the distinction we are trying to  
13 draw. Why is that distinction invalid under a  
14 neutrality criteria?

15                  MR. OLSON: For the reason that the same  
16 argument was rejected in the Rosenberger case, that  
17 the notion of --

18                  QUESTION: But Rosenberger was not said --  
19 the opinion in Rosenberger said these people are not  
20 proselytizing. And -- and the distinction that they  
21 are drawing is a distinction between believing in  
22 proselytizing on the one hand, how to do it, why it's  
23 valid, and instruction on what people believe as a  
24 fact on the other. And I -- Rosenberger is an  
25 authority for -- for the rejection of that

1 distinction.

2 MR. OLSON: I -- I respectfully submit  
3 that it is, that the students in the Rosenberger that  
4 were publishing those articles were publishing  
5 articles that advocated belief in God.

6 QUESTION: Oh, look, you're writing my  
7 dissent. I -- I agree, but my -- my --

8 (Laughter.)

9 MR. OLSON: That was --

10 QUESTION: I -- I couldn't -- I couldn't  
11 get four colleagues to agree with me on that, and  
12 they went off on -- on another -- another course.

13 MR. OLSON: Yeah, but the Court went on to  
14 say that this was a free exercise violation as well  
15 as a First Amendment violation.

16 The other point that I think is very, very  
17 important with respect to that, if the state starts  
18 to distinguishing between discussion of a subject and  
19 proselytizing, the entanglement problem is going to  
20 be enormous. The program will have to be looked at  
21 to see how persuasive it is. We know today that --

22 QUESTION: If that argument is good, why  
23 do we even bother with the -- the criterion of direct  
24 funding of religion?

25 MR. OLSON: Well, because --



1                   QUESTION: Because we -- we could have  
2 drawn the line there.

3                   MR. OLSON: No, because the line has been  
4 drawn by individuals, individuals making genuinely  
5 free, independent choices to make a dispensation.  
6 It's like the Court's example in those cases of an  
7 individual receiving a check and then deciding  
8 exactly how to spend it so there's a great difference  
9 between those kind of cases. This is no different  
10 than the example that Justice Scalia raised as  
11 providing fire protection or -- or providing tax  
12 deductions. Thank you.

13                   QUESTION: Thank you, General Olson.

14                   MS. PIERCE, you have three minutes  
15 remaining.

16                   REBUTTAL ARGUMENT OF NARDA PIERCE

17                   ON BEHALF OF THE PETITIONERS

18                   MS. PIERCE: I would like to return to  
19 three points. One, on the statute that says no aid  
20 shall be awarded to a student pursuing a degree in  
21 theology. A question was asked saying that for  
22 administrative ease the state uses this legislative  
23 approach, their constitutional command. But it's not  
24 just administrative ease. I think it's a question of  
25 entanglement. Should the state be involved in a

1 class-by-class assessment of whether it -- it  
2 individually, it should be categorized as religious  
3 instruction or not.

4 QUESTION: But we've held in *Witters* that  
5 there is no problem with that -- with that kind --  
6 with that kind of subsidy.

7 MS. PIERCE: For purposes of the  
8 Establishment Clause. And I just wanted to point out  
9 that our state supreme court has questioned in a  
10 dissent in the *Gallway v. Grimm* case, some justices  
11 of our state supreme court have asked, is focusing on  
12 the degree program sufficient for our state  
13 constitution? But we believe there are good reasons  
14 for it that's not yet been addressed by our court,  
15 and that's to avoid that kind of class-by-class  
16 determination, not necessary in *Witters* because there  
17 the focus is, does the Establishment Clause -- is it  
18 violated by government endorsement?

19 But Washington does take a different  
20 approach to both prongs, both twin prongs of  
21 religious freedom, and this is my second point. For  
22 purposes of funding, it looks beyond government  
23 endorsement and looks to the freedom of conscience in  
24 religious matters of a broader range of citizens,  
25 including citizens who may not want to have their

1 compelled tax payments used for religious  
2 instruction.

3           So it's the same principle. It doesn't  
4 become hostility to religion just because it extends  
5 that one principle beyond what the Establishment  
6 Clause requires. On the other hand, the State of  
7 Washington also puts greater restrictions on  
8 government where their regulations may impact  
9 someone's free exercise of their religion so that  
10 unless a state -- the state can show a substantial  
11 need, certain regulatory laws cannot be applied in a  
12 fashion that burdened the free exercise.

13           The *Munns v. Martin* case is a classic  
14 example that we have cited to the Court. It's a case  
15 where historic landmark laws could not prevent a  
16 church from building a pastoral center because the  
17 historic landmark laws were deemed not to be  
18 substantially needed by the state to protect the  
19 public.

20           So we do think there is wide latitude, and  
21 my final point, Mr. Chief Justice, is that this Court  
22 has accorded the states wide latitude in funding  
23 decisions for the states to make their own policy  
24 judgments. Here, all the state has done has been to  
25 decline to fund religious instruction wherever it

1 occurs, including in a theology degree program We  
2 have not overstepped our bounds by imposing an  
3 unconstitutional condition on Mr. Davey as a  
4 recipient. In the overall picture, we're not  
5 suppressing --

6 QUESTION: It -- it -- it will fund  
7 religious instruction. So long as he doesn't major  
8 in theology, he can take the same courses and get --  
9 get instructed in religion, can't he?

10 MS. PIERCE: Yes, Scalia, that --

11 QUESTION: So what you say is just not  
12 true?

13 MS. PIERCE: Yes, Justice -- well, that  
14 can happen in a rare circumstance. We believe that  
15 there's a good reason to use that --

16 QUESTION: Everybody who takes a theology  
17 course has to major in theology? I don't think it's  
18 rare at all. Probably most of the students at  
19 Northwest College take theology courses. It's --  
20 it's a religious institution, and that's perfectly  
21 okay, and the state is willing to fund that.

22 MS. PIERCE: That's what the statute  
23 permits now. Some justices of our state supreme  
24 court have expressed the same question whether that  
25 is possible. Thank you, Mr. --

1                   CHIEF JUSTICE REHNQUIST: Thank you,  
2 Ms. Pierce. The case is submitted.  
3                   (Whereupon, at 11:11 a.m., the case in the  
4 above-entitled matter was submitted.)

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