OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1070

TITLE LARRY WITTERS, Petitioner V. WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND

PLACE Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

LARRY WITTERS,

Petitioner

V. No. 84-1070

WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND

Washington, D.C.

Wednesday, November 6, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

MICHAEL P. FARRIS, ESQ., Washington, D.C.; on behalf of the Petitioner.

TIMOTHY R. MALONE, ESQ., Assistant Attorney General of Washington, Olympia, Washington; on behalf of the Respondent.

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C O N T E N T S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Witters against the Washington Department of Services for the Blind.

Mr. Farris, you may proceed whenever you are ready.

ORAL ARGUMENT OF MICHAEL P. FARRIS, ESQ.

ON BEHALF OF THE PETITIONER

MR. FARRIS: Mr. Chief Justice, and may it please the Court:

This morning the Court has before it a Religion Clause case involving a vocational rehabilitation program for the blind.

It is important to note that it is a neutral program and that it is broadly available to all blind citizens of the State of Washington.

This is not an occasion where the State of Washington's legislature has attempted to subterfuge the decisions of this Court and go around and find a clever way to get state aid through religious schools. Nor is this case where it can be claimed that it is not really aid to individuals, but is a transparent fiction of aid to religious schools.

QUESTION: Mr. Farris, before you proceed, has Mr. Witters completed his training for the ministry?

MR. FARRIS: No, Your Honor, he was required to drop out because of lack of financial ability.

QUESTION: I see.

QUESTION: Well, was he an undergraduate or a graduate student?

MR. FARRIS: He was in Bible School which was leading to a B.A. Degree, which was an undergraduate program, which would have qualified him by itself for certain ministerial positions.

QUESTION: I take it if he were eligible he would pursue his education for the ministry under this State of Washington program?

MR. FARRIS: That is correct, Your Honor. It is his desire to return to the program and to finish his education.

QUESTION: Is he pursuing some other educational degree at the moment?

MR. FARRIS: No, Your Honor, he is washing dishes in a medical laboratory.

It is our position in this case that there is no justification under the Establishment Clause to single out ministerial students for exclusion from participation in a broad government program.

We would also argue that the Free Exercise Clause indeed forbids such exclusion.

The guiding principle that this Court has used in its Religion Clause cases is the principle of religious neutrality and we think that the government does not have to

discriminate against religious persons in order to prove how neutral it is.

Ministerial students do no have to be quarantined from the access to public benefits nor to demonstrate that the church is committed to a course of religious -- or the state is committed to a course of religious neutrality.

On the first half of our argument, we will deal with the Establishment Clause and we must deal both with the position of the State Supreme Court and the State Department of the Blind, because the state -- Department, although they support the result below, they have switched positions and now have abandoned the reasoning below and are making a new line of argument. First, we will deal with the State Supreme Court.

That Court held that flatly the government may never fund the training of ministers. Now, the problem with this is, of course, that it endangers not only this federal program but the G.I. Bill, Social Security recipients who use their benefits to train for the ministry, and programs like the Federally Insured Student Loan Program.

QUESTION: How does the Social Security -- Would you explain that? How does that get in the picture?

MR. FARRIS: If a person's father, for example, passes away while they are going to college, they would be eligible for certain dependent's benefits under the Social Security program which they could use for various forms of training,

including ministerial training among others.

QUESTION: They could use it to start a filling station too if they wanted, couldn't they? There is no limit on what they could do.

MR. FARRIS: The benefits that I was referring to were educational benefits that you are entitled to as a student under certain Social Security programs.

The position of the State Supreme Court, we contend, is not in accordance with this Court's rulings. This Court has never struck down a neutral program that is broadly available to all citizens. This Court has indeed said that such a program is not readily subject to an Establishment Clause challenge.

The State Supreme Court held that the primary effect of the aid to Witters was to advance religion. Now, the error in this analysis is that they looked solely at Witters, rather than looking at the primary effect of the entire program.

It is our contention that the proper judge of the primary effect prong of the Court's tripartite test under Lemon versus Kurtzman -- They should have looked at the entire program, not simply the aid of Witters.

QUESTION: Mr. Farris, do you concede that the State of Washington could, if they chose, have a vocational rehabilitation program which expressly excludes any educational funding for the ministry?

MR. FARRIS: We would concede, Your Honor, that this

would be a much more difficult case here. We would think that --

QUESTION: Well, do you think it would be valid under the Establishment Clause for the state to have such an express provision?

MR. FARRIS: It would be valid under the Establishment Clause. The problem would be with the Free Exercise Clause.

QUESTION: Would it be valid under the Free Exercise Clause?

MR. FARRIS: I don't believe that it would under this Court's holdings in Sherbert and Thomas. I think that such an express exclusion for religious persons only would run counter to that, but that is a more difficult case to --

QUESTION: So, it is your position that if the state wants to fund educational aid for students, it must include educational aid for religious students of study.

MR. FARRIS: I think there is a difference between educational aid perhaps and vocational rehabilitation which is career training. This is job placement kind of aid and under the State of Washington's law, this comes under the Public Assistance Code, not the Education Code.

And, this Court's ruling --

QUESTION: Should it matter what code the legislature enacts it under for a constitutional inquiry?

MR. FARRIS: It shouldn't, but this Court's decisions

seem to have treated various sections differently. Sherbert and Thomas stand as examples of public assistance benefits which have overturned exclusions based on religion.

QUESTION: It just seems to me that your argument would lead inevitably to conclude that a state could not withhold funding for religious education at any level and in any program.

MR. FARRIS: I don't think that we are required to go that far, Your Honor. That, perhaps, is our position. But, this Court's position, as it has said many times, to draw lines and we think that there is no occasion to say that the line should be drawn on the other side of this case to exclude Mr. Witters from participation.

We would --

QUESTION: Has this Court ever funded religious education before?

MR. FARRIS: No, this Court does not appropriate funds. That is the job of the legislature.

QUESTION: Well, I don't mean that, of course, obviously. Has it ever approved the funding of religious education in any decided case heretofore?

MR. FARRIS: Yes, Your Honor, it has. In the case of Everson versus the Board, this Court held that the education in that case was pervasively religious and it was the central mission of the Catholic church in that case in particular

to religiously educate their children. That is religious education.

And, this Court permitted an indirect benefit to that education in the form of transportation benefits. In many other cases, the aid to religion cases that this Court have held have often times involved institutions that admittedly were giving religious education in. Various forms of indirect state aid of those religious institutions have been permitted by this Court in a number of instances.

QUESTION: Mr. Farris, does Mr. Witters urge that his religious beliefs and practices require him to study theology?

MR. FARRIS: Your Honor, his position is that he feels a religious call to the ministry, much as Rev. McDaniel did in the case of McDaniel versus Paty, and that is a personal religious call, it is not something the belief system per se requires. It is more of a private direction between him and God as he perceives it.

QUESTION: What about veterans' benefits after the various wars we have been in? Are there any limitations placed by Congress on what studies the veterans could pursue?

MR. FARRIS: No. All parties in this case, including Respondent and the Solicitor General's office, concede that the G.I. Bill has been used for decades to allow persons to train for the ministry, including a number of seminaries and

rabbinical schools that are eligible currently for the use of such G.I. benefits.

It is our argument today that this case is constitutionally indistinguishable from such a program.

Now, the state, Department for the Blind's position, their new position that they have switched from, is based, first of all, on arguments that are outside the record and facts that are outside the record. They, among other things, are attacking for the first time in this Court the constitutionality of the entire federal program, although that issue was never raised in any court below and neither was the fact to give some potential relevancy to this federal program introduced below and that is this is the federal program in question. There is no factual proof of that and counsel for the Petitioner has no knowledge of whether that is true or not.

In any event, these new arguments and these new facts are very easily answered. The federal statutes and regulations in question require the state, according to their argument, to evaluate, to counsel, and to approve the program of the blind individual who comes into participation in the vocational rehabilitation scheme.

This can be done, we would contend, objectively. In fact, the statutes and the regulations in contest require objectivity. 29 U.S.C. Section 722(b)(4) that is in the

Appendix of the Respondent's brief, requires objective criteria in an evaluation procedure. And 34 Code of Federal Regulations, 361.33(b) lists those objective criteria such as educational achievement and work experience.

There is nothing in this record before this Court to give rise to any basis for speculating as to the way the actual program works under the federal guidelines; that there is some violation under the imprimatur test or the excessive entanglement test.

They simply would be speculation on the part of Respondent that would even get us into these questions and there is nothing in the record to support such speculation.

As we have argued in our reply brief, we think the perfect analogy to this situation is a building inspector who is required to approve a church's building plans. Now, that building inspector must evaluate the plans, sometimes must counsel the church's architect or church's builder or carpenters on the appropriateness of their plan, the placement of the pews, the placement of the baptistry, the location of the altar, perhaps for safety reasons, and they must ultimately approve those church building plans. We contend that that is the same kind of situation that is at hand today.

Both situations are hands-on in the analogy or the criteria that is advanced by the state in this case. They have said hands-on funding of ministerial programs are

unconstitutional, while hands-off programs like the G.I. Bill are appropriately constitutional.

These may provide neat labels but there is no constitutional justification for these labels.

Our position is that all citizens and all buildings must be treated equally. Church buildings are treated just like any other assembly building. Blind ministerial students must be treated equally just like all other blind students.

The Respondent, however, does not distance himself from the central fallacy of the State Supreme Court, although they try to basically repudiate that Court's decision; that is they still continue to focus on just ministerial students to make their analysis of the primary effect test and the excessive entanglement test.

This Court, in the case of Mueller and Widmar, held that provisions of benefits to a broad spectrum of groups is an important index of secular effect and the state chooses to ignore the fact that this has been the case here; that there is a broad spectrum of groups of all blind students, of all careers, that are entitled to participate in a program.

We would suggest that there is no imprimatur of government approval for religious institutions in this circumstance. Equal treatment has never been held by this Court to be an unconstitutional -- to create an unconstitutional imprimatur under the terms of Widmar versus Vincent and a

number of other cases. There is no fatal symbolism in this case as would be suggested by the state. In fact, we would say the public would perceive this more as an anti-discrimination kind of law rather than an endorsement of religion kind of law that this Court has found to be fatally violating the First Amendment.

In the case of McDaniel versus Paty, this Court rejected an idea that is central to the state's position and that is that ministers as symbols of the church somehow justify disparate treatment of those ministers. Of course, we are dealing here with ministerial students rather than those who have accomplished their training and have reached their desired career objective. There is no constitutional distinguishment between those two statuses. Simply because Larry Witters wants to be a minister the state feels there is some symbolic violation of the First Amendment here.

QUESTION: You would make the same argument if he were studying, what, Hinduism or Moslem or Confucianism.

MR. FARRIS: It would not make a difference to our theory --

QUESTION: To be a clergyman in those respective faiths?

MR. FARRIS: Yes. The leaders of those faiths would be equally entitled to participate or the leaders of secular faiths that this Court has recognized in certain of its cases.

We would contend that there is no excessive entanglement here in the counseling program that the state has suggested must take place. The requirements are --

QUESTION: Mr. Farris, I gather the Supreme Court didn't reach the entanglement question.

MR. FARRIS: No. It found the entanglement analysis ill-suited to this case and it found a lack of facts in the record to do that. We think that the Supreme Court of the State of Washington was right on those points, saying that the state did not build its record to bring an entanglement argument.

QUESTION: If we thought that issue was still open, what should we do, send it back?

MR. FARRIS: Well, it would only be open, Your Honor, if the state is allowed to proceed into its new argument and I think that the face of the record is pretty certain. At the worst case, it should be sent back rather than saying -- holding that the excessive entanglement doctrine has been violated here.

QUESTION: But, the state is entitled to present that position, I suppose. It was presented to the Washington Supreme Court and just wasn't ruled on.

MR. FARRIS: They did not argue, Your Honor, at the Washington Supreme Court level or at any level below that the program violated the First Amendment. It was their contention

always before that the First Amendment was always irrelevant. So, it would seem --

QUESTION: Well, nevertheless, the Washington Supreme Court thought there was an entanglement issue, but it just put it aside. And, I suppose the state may argue for affirmance based on -- It may be an infirm argument, but they are entitled to argue it.

MR. FARRIS: They are entitled to argue it certainly.

QUESTION: Is it also possible the Supreme Court of the state thought there was so little to the argument that it didn't deserve any comment at all?

MR. FARRIS: I think that would be more in line with our position, Your Honor, but, in any event, the State Supreme Court said that -- Rather than there was an entanglement issue, they thought that the analysis was ill-suited to the case and there was no record. I think they basically just said the primary effect test was the one that was --

QUESTION: Mr. Farris, is that a fair statement, what they did? They said that because they relied upon the effect of the second prong they didn't have to reach the third. That is all they said. They didn't have to reach the entanglement issue.

MR. FARRIS: They did use the phrase, Your Honor, that the --

QUESTION: It is unnecessary for us to attempt --

I guess they said a strained analysis of the entanglement effect, but they had already decided the case.

MR. FARRIS: That is correct. They would have been appropriate to -- Even if they thought there was an Establishment Clause -- An entanglement problem, to not decided the issue, but I don't read their opinion as suggesting that they really thought there was one there.

QUESTION: I guess Justice Utter's dissent rejected the entanglement argument.

MR. FARRIS: Yes. Justice Utter made a very thorough analysis and we are in strong support of his position in this case and we rely on it greatly.

Thomas Jefferson once wrote, and this Court has quoted it before, that the clergy here in this country seem to have relinguished all pretentions to privilege and to stand on the footing with lawyers, physicians, etc. They ought, therefore, to possess the same rights. That is the central theme of our Establishment Clause argument, that ministers ought to possess the same rights in the Department for the Blind as in every other department that is appropriately involved with ministers in the State of Washington.

Under the Free Exercise portion of our argument, one of the -- before we get into the merits of that, we must address the issue of whether this Court should decide the issue now or remand it for a decision of the state constitutional

issue. Some of the amici, most particularly the Solicitor General's office, has raised the suggestion that this case be remanded for a decision of the state constitutional issue since it would be, in all fairness, to say that the Supreme Court of Washington hinted at the result but ducked the issue.

QUESTION: You mean remand it after this Court disposes of the issues that the Supreme Court of Washington did decide?

MR. FARRIS: That is correct, Your Honor.

And, although the Solicitor's office does not cite the case, some of the other amici cite the case of Rescue Army against Municipal Court. We rely on Widmar versus Vincent to counter this argument.

In the Rescue Army case, there was a complex statutory scheme that was not fully interpreted by the California courts. And, this Court held that remand is appropriate under circumstances where state law is highly ambiguous or if a state law construction is fairly possible to avoid the federal constitutional issues.

This Court also said in the Rescue Army case that discretion would be exercised depending upon the degree of uncertainty about the state law issue.

In this case, there is no ambiguity, there is no uncertainty in this case. If there is a discretionary spectrum involved, this case is as far at the end of the uncertainty

side as can possibly be.

It is our contention, as we argued in our reply brief, that there is no difference between this case and Widmar as far as this issue is concerned.

QUESTION: So, you don't think that even if -- For instance, you said it would not be an establishment, that you think the Washington -- the State of Washington would have to extend it; that it just couldn't say, well, whether this is an establishment or not, we prefer not to furnish aid to this kind of religious education.

MR. FARRIS: That would be our position, Your Honor, but that is not this case. This case is that the legislature of the State of Washington chose to fund this kind of aid. And, it is our position that this Court ought to permit, both under the Establishment Clause and the Free Exercise Clause, the enforcement of that legislative will.

QUESTION: I suppose the Commission thought that extending the aid would violate the state Constitution.

MR. FARRIS: That is correct.

QUESTION: What are you going to do about that?

MR. FARRIS: Well, it is our position that the state constitutional provision as so applied is unconstitutional as applied just like --

QUESTION: So, you have to get to your free exercise argument.

MR. FARRIS: That is correct, Your Honor.

QUESTION: And, you have to win on it really in the long run to do any good.

MR. FARRIS: That is absolutely correct, Your Honor.

QUESTION: And, in fact, if it is correct that the state Constitution prohibits this kind of state aid, then we do have the case that I posed to you and Justice White posed to you in the question. We would have a situation where the state says you can't provide this kind of aid in a vocational rehabilitation or any other kind of a program.

MR. FARRIS: It would be analogous to Sherbert and Thomas in that kind of situation, yes, Your Honor.

QUESTION: But, we don't have that case at the present time, do we?

MR. FARRIS: It is my position that you do not, because there has been a distinction between applying a constitutional pro ision -- I think there is a distinction between applying the state constitutional provision and the policymakers of the state saying we want to fund this aid. Now, the state --

QUESTION: There is no question that the State of Washington legislature passed a statute which is construed by the Supreme Court of Washington, said we want to fund this aid. The Supreme Court of Washington then says, no, you can't because of the First Amendment of the United States Constitution.

Now, if this Court were to hold that was wrong, then

down the road there might be the case where the Supreme Court of Washington would say, well, it violated the state Constitution, but it hasn't said that at this stage of the litigation.

MR. FARRIS: It has not directly said. It has hinted at it broadly.

QUESTION: Well, is that the whole picture? Are there not state administrative regulations in this very program that make it clear that aid will not be furnished, payments won't be made to pay for religious study?

MR. FARRIS: There is a policy that has been advanced but it is not a form of a regulation. It is simply a letter ruling in effect and it does not give -- It is not in the state Administrative Code, so there is a state informal policy.

QUESTION: There is an adjudication.

MR. FARRIS: And, there is an adjudication.

QUESTION: Adjudication that is reviewable, I suppose.

MR. FARRIS: That is correct. And, it was reviewable at the State Supreme Court and they chose not to review it.

QUESTION: That is the way an awful lot of the law is made, by adjudication.

MR. FARRIS: That is correct, Your Honor.

QUESTION: Mr. Farris, may I just review one thing with you? Is it not correct that if we should agree with you on the Establishment Clause issue as a federal constitutional matter and if we should be in doubt as to what the state might

do with its own Constitution, then we could remand without ever reaching the free exercise issue?

MR. FARRIS: That is correct, Your Honor. But, we would contend that there is no doubt --

QUESTION: Well, at least two members of the State Supreme Court thought it did not violate the state Constitution, is that not correct?

MR. FARRIS: That is correct.

QUESTION: And, they actually addressed the issue.

MR. FARRIS: That is correct. But, we think the language adopted by the seven-member majority was so clear as to their intent of what they would do if they had to reach the issue. They said, in effect, our state Constitution requires a far stricter separation of church and state which I have described in our reply brief as an anvil-like hint of what they were going to do if they actually reached the state constitutional issue.

QUESTION: There is a lot of difference between anvil-like hints when you misinterpret the federal Constitution and actually deciding it.

MR. FARRIS: That is correct.

QUESTION: I am not suggesting they did misinterpret it, but it is a little different.

MR. FARRIS: That is correct, Your Honor.

But, under the Rescue Army criteria of is there

ambiguity, is there uncertainty, we would suggest there is no uncertainty in the State Supreme Court's position on this.

QUESTION: Well, there certainly is no ambiguity or uncertainty about the state's policy as interpreted by the state's highest court and the state's policy is not to fund this kind of education.

MR. FARRIS: That is the State Supreme Court's --

QUESTION: So, we don't have to be concerned about what the state Constitution says because, as a matter of state policy as interpreted by the state court, they don't fund it.

MR. FARRIS: I think that that --

QUESTION: And, you take the position that the Free Exercise Clause of the federal Constitution requires them to fund it against their will.

MR. FARRIS: Well, I would not characterize it as state policy, Your Honor. State policy, in my view, is made by the legislature. Policy is not made by the courts. The courts are there to interpret the law, not to make policy. So, in my theory of the case, there is a difference between policy and constitutional adjudication.

QUESTION: Well, let's explore this a little bit further. I realize you probably have other things you want to get on to, but is there a state policy which says this kind of education will not be funded even though the legislature has said it should be unless there is some constitutional

difficulty with the funding?

MR. FARRIS: I don't know of any such policy, Your Honor. In fact, we cite in our opening brief another program of higher education that was granting aid to all private schools in the State of Washington, private college students, and in there there was an exclusion for those pursuing a theological course of study.

And, it is our argument that if the state legislature wants to exclude these kinds of people it knows how to do it and it has done so in the past.

And, the argument about state policy, I think, is made difficult because the state constitutional provisions have been interpreted to prohibit aid of any kind to religious colleges at all.

QUESTION: What precisely is the source of this state policy to which you referred in answering Justice O'Connor's question?

MR. FARRIS: My understanding of what constitutes state policy for constitutional purposes --

QUESTION: I mean in this particular case the question was raised there is a state policy against it. Now, what is the -- how does that policy manifest itself? Who said so?

MR. FARRIS: Well, Your Honor, I don't think there is a broad thing that we can call state policy. We have state statutes and we have the state Constitution and we have court

interpretations. I think that the policy analysis ascribes to -- must be penned upon some legal document, some legal process, and I don't see one here.

QUESTION: We are not talking about some administrator who intransigently refuses to carry out the will of the legislature, even though there are no constitutional impediments to him doing so.

MR. FARRIS: That is correct, Your Honor.

QUESTION: And, the only policy the Supreme Court of Washington purported to be expressing was a federal constitutiona policy.

MR. FARRIS: And, that is also correct, Your Honor. We think that they were obviously in error.

Briefly, in the free exercise arguments raised by Respondent, they argued that this is a case like Harris versus McRae and this Court should not find against the legislative will.

As we have argued already, we are not asking this Court to override the legislative will. In fact, both Congress and the State of Washington's legislature where the source in this case have said it is okay for ministerial students to participate. We think this case is indistinguishable from McDaniel, Thomas, Sherbert, and the other cases of this Court and would ask this Court to reverse the decision of the court below.

CHIEF JUSTICE BURGER: Very well.

Mr. Malone?

ORAL ARGUMENT OF TIMOTHY R. MALONE, ESQ.

ON BEHALF OF THE RESPONDENT

MR. MALONE: Mr. Chief Justice, and may it please the Court:

I wish to address four points. First, I wish to discuss why this particular vocational rehabilitation program is not like the G.I. Bill or, and this is saying the same thing, why it is not like the program involved in Mueller versus Allen and I wish to discuss why this difference is critical constitutionally.

Second, I wish to touch on this question that has been referred to in counsel's argument as to the statutory source of the federal funding and supposed deficiencies of the record on this question, because that bears upon whether or not I should have been making my first point at all.

Thirdly, I wish to examine how this question of our submission differs from that of the court below and what difference, if any, it makes.

And, fourthly, I wish to step back and ask what role does the Free Exercise Clause play in all of this?

I think by now it is apparent that it is important indeed and that the Petitioner is trying to use the Free Exercise Clause not only to invalid the religion clauses of our state

Constitution, but also to have the Free Exercise Clause swallow up a large part, I would suggest, of the Establishment Clause jurisprudence of this Court as well.

Before turning to our first point though, I want to take up this question of state policy. We have two constitutional provisions that are relevant in this case.

QUESTION: In which Constitution?

MR. MALONE: The state Constitition. Article I, Section 11, says no public money shall be applied to any religious instruction.

Article IX, Section 4, says all schools maintained or supported, wholly or in part by public funds, shall be ever free from sectarian control.

In Weiss versus Bruno, a decision of our State Supreme Court, which was referred to in the decision below in this very case, the Court made it clear that it takes -- under those religion clauses the funding restrictions for religious instruction for church-affiliated schools are even more strict than those established by this Court under the Establishment Clause.

Now, that is the source of the policy that we are talking about. That policy --

QUESTION: It is a state constitutional policy?

MR. MALONE: The state Constitution. Now, that policy in the state Constitution was embodied in a written policy

statement applicable to this particular program which said we cannot fund ministerial students. But, Justice Rehnquist is absolutely right. That policy is embodied right in the Constitution.

Secondly, I would suggest that there is nothing in the state statutes involving this program which are contrary to that policy. The state statutes or the state statute which we used have -- it was changed somewhat in 1983 -- said the Commission for the Blind may maintain or cause to be maintained a program of services to assist visually handicapped people. Under such program the Commission may provide for special education or training in professions, businesses, etc.

The new statute for all practical purposes is quite similar in this respect, that it is discretionary. I do not read in there a legislative determination that, boy, we want to fund ministerial training.

So, again, we have the basic policy established in our Constitution which the Petitioner wishes to have invalidated and we do not have a clear legislative declaration that it wants to override that policy.

QUESTION: General Malone, that certainly isn't the position taken by the Supreme Court of Washington. I realize that you differ from the Supreme Court of Washington, but certainly the easy way out for the Supreme Court of Washington in this case would be to say, well, this statute doesn't

authorize what the Plaintiff wants, so we don't have to get to any constitutional --

MR. MALONE: I am not saying the statute doesn't authorize it. I am saying the statute does not -- that the statute is ambiguous and the statute shows the legislature did not specifically address the question, do we fund ministerial training or don't we?

QUESTION: But, the Supreme Court of Washington certainly took the position that ministerial training was going to be funded unless there was a constitutional objection to it, don't you think?

MR. MALONE: Let me put it this way. They certainly took the position that it was okay for the Department of Services to the Blind to put blind people through the program, including the program of ministerial training unless there was a constitutional objection to it, yes.

With that, I would like to --

QUESTION: Mr. Malone, is it our function to try to construe the state Constitution here when the Supreme Court did not --

MR. MALONE: No. All I am trying -- Mr. Justice Burger, absolutely not. I am trying to point out what the source of this state policy is and how it goes right back to our Constitution. And, even more importantly, I --

QUESTION: Well, Mr. Malone, under your version,

the applicable Washington law, would it be perfectly all right to have funded Mr. Witters' education at Inland School if he wanted to study history, for example?

MR. MALONE: If he wanted to study solely history, yes.

QUESTION: He could do that in a religious school?

MR. MALONE: Yes. Indeed --

QUESTION: And, it would be all right under the state Constitution as well as the federal to pay the tuition.

MR. MALONE: Not certainly the federal, probably the state at least if he wants to be a historian, if he wants that to be his profession.

I would like to discuss then why this vocational rehabilitation program is simply not like the G.I. Bill and why that difference is constitutionally critical.

Now, what I might call the normal rule seems to be that in cases such as this one must separate out the secular from the sectarian and fund only the secular, not the sectarian. However, there is apparently an exception, what you might call the delivery system, which embodies a hands-off, passive role on the part of the government, and if the program in terms of beneficiaries is sufficiently broad-based, apparently one does not need to make this separation.

I would suggest that is the rationale which was applied in Mueller. I would suggest that that is the rationale

which would justify the application of the G.I. Bill to ministerial training.

Now, there is, of course, in this case no effort whatsoever to make any such separation.

So, the effort must be to come within what we might call the Mueller G.I. Bill exception. The Solicitor General and the Petitioner in his opening brief argued exactly that. This program was just like the G.I. Bill and the Mueller rationale applied.

Now, we say that it is not like the G.I. Bill. The Mueller rationale does not apply. Let me illustrate in terms of the G.I. Bill itself.

Under the G.I. Bill the government really just cares that the veteran is in an accredited school and that is it. The specific school that he goes to, as long as it is accredited -- and by the way, the federal government doesn't even do the accreditation. The specific school is of no concern to the government. What courses he takes are of no concern to the government. Whether the student has made any sort of career source is of no concern to the government. He could take Sanskrit and spend the rest of his time wandering around in Indian, say, and that is of no concern to the government at all.

But, let's change things. Let's suppose that the government amended the G.I. Bill and said you have to make

a career choice now and we have to approve that career choice.

In light of that career choice, we also have to approve the school and the courses you want to select to make sure that it all fits.

Now, let's set aside for the moment the question of how the government goes about making those decisions, what criteria to use to approve or not approve those choices. The mere fact of need for approval, it seems to me, changes the delivery system, if you will, and takes the program out of the Mueller rationale, the Mueller G. I. Bill exception, and back into the normal rule of leading, of having to bring about that submission.

And, I suggest that the vocational rehabilitation program we have here is exactly like that new G.I. Bill and, therefore, it cannot fall within the Mueller rationale, the Mueller exception, and the normal rule that you have to make the separation.

QUESTION: Mr. Malone, are you asking that we focus on the fact that in order to get the aid Mr. Witters must subject himself to state regulation, is that your concern, or is it that it advances religion in your view because Mr. Witters wants to become a minister? Which is it?

MR. MALONE: Both. I focus on both, so to speak, what is delivered, what the state is buying, Justice O'Connor.

QUESTION: Do you think the Court normally looks

at the program as a whole rather than focusing on the individual receiving the aid in these cases?

MR. MALONE: It is precisely -- Yes. It is precisely there that we part company somewhat with the court below.

QUESTION: Well, do you think this Court generally has given a broader focus to the inquiry rather than just looking to the individual? For example, suppose the state has a welfare program and hands out welfare money to someone who tells you I am going to give part of this money to the church on Sunday. Is that okay?

MR. MALONE: Absolutely -- Of course, yes. Absolutely no problem there.

But, what is the difference from that situation and the situation here? The situation you have here is, I suggest, this: Mr. Witters wants to the state to buy for him ministerial training. Now, that is not a good start under the Free Exercise Clause, and, indeed, our State Supreme Court would say that fact in and of itself is fatal.

We suggest, though it is not a good start, it is not the end of the inquiry, precisely, Justice O'Connor, because of the point you just raised. You have to look not only at what is provided, what is delivered, you have to look at the nature of the delivery system, at the breadth of the types of beneficiaries, the overall scope of the program, and also in looking at the overall program you also have to look at

the role of the state in that program in order to see whether or not it embodies a hands-off policy, such as I suggest you had in Mueller, or whether it -- And, such as I suggest you also have in the G.I. Bill.

Our basic submission is that if you do not have that hands-off policy, then you are back under the normal rule. You have to separate out the religious and the secular.

QUESTION: General Malone, was this Inland Empire Bible School, was that an undergraduate institution?

MR. MALONE: I believe that it was.

QUESTION: And, if Mr. Witters had qualified under the G.I. Bill, could he have done -- taken just the courses and enrolled for just what he proposed to enroll under the G.I. Bill.

MR. MALONE: I believe he could have as I understand the G.I. Bill.

And, again, the reason we say he can't use our money for that or he can't use this program for that is because of the difference in the delivery system between the G.I. Bill and this program.

Now, the Petitioner says that this question of state involvement under this program is being exaggerated and that we can make approval decisions on the basis of objective criterion and that somehow this solves the problem. Well, I suggest that it does not solve the problem at all.

The state has to approve, first of all, the career choice. I think we are all agreed on that. Let's see how objective criteria might work in that respect.

Suppose again, on the basis of objective criteria, say Department of Labor data, the Episcopal Church, we find, has a surplus of priests and the Catholic Church has a shortage or there is a great need for Lutheran ministers but there doesn't seem to be much need at all for denominational ministers.

Now, the vocational educational counselor then, right at the start, is going to have to say, I am sorry, I can't help you if you want to be Episcopalian, if you want to be an Episcopal priest, or a non-denomination minister, but if you want to be a Lutheran minister or a Catholic priest, yes. On the basis of these objective criteria, I can help you.

Suppose one particular seminary or bible college has a great success rate in its placement of its graduates and suppose another one has a low success rate. So, the voc/rehab counselor has to say to the student, though you really want to go to Seminary X. I am sorry, if you want to be a minister or priest, you have to go to Seminary Y.

Suppose we had something like an objective test, say, put out by Educational Testing Service up in Princeton, similar to the LSAT for ministerial students. Counselor or at least some state official is going to have to decide on

a cut-off point as to who, you know, passes and who flunks. And, he is going to have to say to one student, okay, we will pay for your ministerial training and he is going to have to say to another, we won't pay for yours. The test indicates to us you are too low, you are not going to be a success, either in school or you are not going to be a success in the ministry.

Now, I think that -- I dare say that the likelihood of these things happening even under the so-called objective criteria which the Petitioner would have you rely on, it seems to me the likelihood of these things happening should be very disturbing, whether we focus on either the second or the third prong of the Lemon test.

QUESTION: General Malone, what is there in the record to tell us anything about the likelihood that any of these things might happen?

MR. MALONE: In terms of the actual operation -- Well, let me put it another way. We do know that this is 80 percent federally funded. The record does not say where that federal funding comes from.

The Solicitor General at page -- I forget which page -- But, in Footnote 11 it says it is the 1973 Rehabilitation Act.

QUESTION: Did you, at the trial level in this case, have an adequate opportunity to present evidence of this kind

of problem that might develop in this case?

MR. MALONE: Yes and no and let me explain that answer. Through the trial court level and, indeed, through the argument before the State Supreme Court the only thing we were talking about were the state constitutional provisions that I mentioned at the beginning of my argument. So, there was no need to focus at all upon the Establishment Clause problem at all or the entanglement problem in particular.

QUESTION: Whether you elected to rely on the federal Constitution in defending your oponent's claim was certainly within your control, not within your adversary's.

MR. MALONE: Certainly. Were this issue, Justice --

QUESTION: Let me ask one other question. Supposing, as has been suggested, that we thought there was no merit to the primary effects defense, but maybe there is problem with the entanglement as you argue today.

MR. MALONE: Yes.

QUESTION: And, they haven't decided it and say we send it back and decide the entanglement issue. Couldn't you then develop the record that would support this argument?

MR. MALONE: Certainly, certainly, Mr. Justice Stevens. On the one hand, I realize the difficulties which come from just relying upon the federal regulations, the federal statutes, the federal regulations. I understand those difficulties.

QUESTION: Your hypotheticals have triggered a question

in my mind I would like to put to you if I may. You talked about employment opportunities in different denominations. Supposing you had an unemployed assistant pastor of the Lutheran Church or something and he went in for unemployment compensation. Would he be denied unemployment compensation?

MR. MALONE: No, no. And, let me put to you another case.

QUESTION: Would he have to prove that he had really been a minister and that he was eligible and all that sort of stuff?

MR. MALONE: One, would he have to be denied unemployment compensation under the Establishment Clause? No.

Would he be under the religion provisions of our state Constitution? I would suggest no, which raises another question.

Let's suppose, Justice Stevens -- Let's suppose that he is a minister and he happens to be going blind and so he needs to learn Braille. Now, I am touching upon the Free Exercise issue. And, suppose he comes to the Department of Services for the Blind and says I am not going to be able to perform my functions as a minister unless I get this training in Braille, will you give it to me? And, my answer would be the Free Exercise Clause would require that we give it to him. The Establishment Clause would not prohibit it, nor would the religion clauses of our State

Constitution. Why? Because Braille is not religion-specific. That is to say is something which somebody could well want for purposes having nothing to do with religion.

Now, what I am suggesting, and this gets back to Justice O'Connor's question as to the scope of the Free Exercise Clause here, it seems to me that under such cases as McDaniel v. Paty and Sherbert versus Verner, what was involved there were benefits or rights or whatever that were not religion-specific.

What Mr. Witters wants here is to use the Free Exercise Clause to require the state to give him something that is religion-specific. McDaniel v. Paty does not require that.

QUESTION: It all depends on the lens with which you view it. If you look at the whole program and say what we have here is educational funding for vocational rehabilitation, then it isn't religious-specific. If you focus just on Mr. Witters, it is. The same in Sherbert, the same in Thomas. It depends on how you look at it.

MR. MALONE: I am using the religion-specific/not religion-specific distinction, Justice O'Connor, as a distinction which should be embodied in applying the Free Exercise Clause.

When you get to the Establishment Clause question, I suggest that, indeed, the question is how do you look to it and I suggest that the critical question is under what

circumstances do you have to make this separation which clearly is not being made here.

I am suggesting that this case does not present the circumstances under which you have the G.I. Bill or the Mueller type exception.

I would suggest then that these objective criteria are going to produce very strange results which I should suggest this Court should find very disturbing under the Establishment Clause.

Now, this counselor that I was talking about quite possibly might find some way out of this, might say, well, I am getting over my head.

QUESTION: General Malone, I notice there were hearings first before an initial hearing officer and then a review within the administrative agency. Was any evidence as to how the program works or whether there would be counselors involved brought out there?

MR. MALONE: None of what I am discussing now was brought out at those administrative proceedings, because again, Justice Rehnquist, what we were focusing on was at that stage all the way up until the Supreme Court of the State of Washington issued its opinion, all we were focusing on were the state religion clauses.

For my discussion here as to entanglement, I am relying upon the federal regulations and the state regulations

which pretty much track this.

QUESTION: Mr. Malone, what would you say about a foundation that was created to grant scholarships, only one purpose to grant scholarships to students studying for the priesthood of the Roman Catholic Church. Would it be entitled to 501(c)(3), if that is the right section, exemption from --

MR. MALONE: Yes, and I believe that it would, and I believe that it would under the reasoning of this Court in Walz. The answer would be yes.

QUESTION: It wouldn't make any difference. It would be obvious then that if it were for all religions it would be equally good.

MR. MALONE: Yes. I see no problem with 501(c)(3), but again, 501(c)(3) involves a hands-off delivery system as did the tax deduction -- I am sorry.

QUESTION: Do you think that is like the tax case in the New York situation?

MR. MALONE: No, the tax case in Mueller.

QUESTION: I beg your pardon?

MR. MALONE: I am referring to Mueller when I say the 501(c)(3) is like the --

QUESTION: Well, is it not also comparable to the general rule which has been laid down that churches are not to be taxed?

MR. MALONE: Oh, Walz as well, yes.

QUESTION: In other words, 501(c)(3) merely implements that --

MR. MALONE: Yes. I could justify 501(c)(3), Mr. Chief Justice, both under the type of Mueller rationale and under the Walz rationale, which I think are quite similar.

To get back to my counselor who is worried about the types of results that would come out under these co-called objective criteria, that counselor might well say, well, I am over my head, I don't know anything about this, and I am in an area that is religiously sensitive, I am going to get out of it, I am going to rely on the experts. I will let them tell me whether or not this person has the aptitudes for the ministry, whether this school is the best school for this type of ministry, so on and so forth.

But, I would suggest who are those experts? Those experts have to be church and seminary or bible school officials themselves.

So, once our counselor decides to do that, then it seems to me you walk right into a Grendel's den type of problem. You have a type of delegation.

So, it seems to me that however much you try, given the federal regulations and the state regulations that govern this program, there is no way to get out of this swamp. There is no way to get out of this entanglement.

With respect to the Free Exercise Clause issue, again, I would just emphasize that a state should have the option under this Court's jurisprudence to say we do not want to fund ministerial students. That is what we have said in the religion clauses of our state Constitution. And, I suggest that there is nothing in the Free Exercise Clause decisions of this Court which invalidate those decisions of the State of Washington as embodied in their Constitution.

Thank you.

CHIEF JUSTICE BURGER: Very well. Do you have anything further, Mr. Farris?

MR. FARRIS: Yes.

ORAL ARGUMENT OF MICHAEL P. FARRIS, ESQ.

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. FARRIS: In response to the arguments raised by the Respondent in this case, I would point out, first of all, that the G.I. Bill, unlike the contentions of the Respondent, is concerned with the career choice selected by the recipients of that Bill.

As we pointed out in Footnote 20 of our opening brief, 38 U.S.C., Section 1673, lists a number of courses of study in career objectives which are excluded from the Bill's coverage, including any course in bartending, personality development, sales courses, etc., are types of courses that the G.I. Bill excludes. So, there is concern there by the

Congress, just as there is concern by the state legislature, that people will pursue career choices that will lead to legitimate kinds of employment.

Also to answer the Chief Justice's inquiry, the Solicitor's brief points out in Footnote 3 that Inland Empire School of the Bible is an eligible institution for people to enroll in the G.I. Bill.

Turning to the meat of the Respondent's argument, they have argued based on speculation, as we suggested in our opening argument, about various kinds of things that might happen, could have happened, might happen under the career counseling that takes place, but they did not put any kind of this evidence in the record below.

If they thought the federal Constitution or the federal statutes or the federal regulations came them a source of defense of this claim, they could have and should have, we would submit, put the evidence in the record below and their failure to put that evidence in should not be charged to our account at this point.

We think this case should be decided on the record and it should not be sent back for development of more facts, and, moreover, it should not be decided at all on speculation as engaged in by Respondent.

QUESTION: But, if we just reverse -- Our usual mandate says reversed and the case is remanded for further

proceedings not inconsistent with this judgment. Then it would just be up to the Washington Supreme Court. If it thought the case was over, the case was over, but if it wanted to decide the entanglement question, I don't suppose we could say that it was forbidden to do so.

MR. FARRIS: I suppose not, Your Honor, but I think if this Court held we were correct on the Free Exercise Clause issue, that would foreclose the other inquiry in all likelihood.

QUESTION: So, you really think we must decide the Free Exercise Clause?

MR. FARRIS: It is our desire that this Court would and we think --

QUESTION: I know desire. I know what you desire.

(Laughter)

QUESTION: But, you don't really think we have to, that it really is an issue that is required to be decided to reverse the Washington Supreme Court.

MR. FARRIS: It is not required absolutely, but if there is no prudential consideration of the Rescue Army type of criteria for failing to do so, we would urge this Court to decide the Free Exercise Clause issue.

QUESTION: Of course, if it went back to the State Supreme Court and the State Supreme Court went against you, conceivably you might be up on a Free Exercise claim or you might try to get up on a Free Exercise claim here.

MR. FARRIS: That would be correct, Your Honor.

The state, we would say, importantly fails to give us any distinctions between the kind of approval process that they speculate about here and the approval process that is inherent in a building permit project by a church. And, we think that is a fatal error on their part.

Finally, we would turn to the issue of the state policy, the term that has been used this morning. We would contend that there is no clear-cut state policy that prohibits the kind of aid that is in question.

The state decisions before of Weiss versus Bruno which they rely on and which the State Supreme Court relied on said that you couldn't go to a religious college for any purpose using state monies. But, today the Attorney General has conceded that a blind student can go to Inland Empire School of the Bible or other religious colleges as long as he wants to have a secular career choice. Where is the clear-cut source of the state policy in such a circumstance?

CHIEF JUSTICE BURGER: Your time has expired now, counsel.

MR. FARRIS: Thank you, Your Honor.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:58 a.m., the case in the above-entitled matter was submitted.)

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BY Paul A. Richardson

(REPORTER)