# SUPREME COURT
# OF THE UNITED STATES



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| In the Matter of: | ) | |
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| OTIS R. BOWEN, SECRETARY OF HEALTH | ) | No. 87-253 |
| AND HUMAN SERVICES, Appellant, v. | ) | |
| | ) | |
| CHAN KENDRICK, ET AL.; | ) | |
| | ) | |
| OTIS R. BOWEN, SECRETARY OF HEALTH | ) | No. 87-431 |
| AND HUMAN SERVICES, Appellant, v. | ) | |
| | ) | |
| CHAN KENDRICK, ET AL.; | ) | |
| | ) | |
| CHAN KENDRICK, ET AL., Appellants, v. | ) | No. 87-462 |
| | ) | |
| OTIS R. BOWEN, SECRETARY OF HEALTH | ) | |
| AND HUMAN SERVICES, ET AL.; and | ) | |
| | ) | |
| UNITED FAMILIES OF AMERICA, Appellant, v. | ) | No. 87-775 |
| | ) | |
| CHAN KENDRICK, ET AL. | ) | |
| | ) | |

Pages: 1 through 44

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IN THE SUPREME COURT OF THE UNITED STATES

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Appellant
v. : No. 87-253
CHAN KENDRICK, ET AL.;

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OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.; and

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UNITED FAMILIES OF AMERICA,
Appellant
v. : No. 87-775
CHAN KENDRICK, ET AL.

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Washington, D.C.

Wednesday, March 30, 1988

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

APPEARANCES:

CHARLES FRIED, ESQ., Solicitor General, United States Department of Justice, Washington, D.C.; on behalf of the Federal Appellant.

MICHAEL W. McCONNELL, ESQ., Chicago, Illinois; on behalf of Appellant United Families.

JANET BENSHOOF, ESQ., New York, New York; on behalf of Appellees.

C O N T E N T S

P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 87-253, Otis Bowen v. Chan Kendrick, 87-431, Bowen v. Kendrick, 87-462, Kendrick v. Bowen, 87-775, United Families of America v. Kendrick.

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

ORAL ARGUMENT OF CHARLES FRIED

ON BEHALF OF FEDERAL APPELLANT

MR. FRIED: Thank you, Mr. Chief Justice, and may it please the Court:

In 1981 Congress passed the Adolescent and Family Life Act in response to what it considered the grave social, economic, and health consequences of early adolescent pregnancy and childbirth.

It undertook to enlist the aid of a wide variety of community groups to combat this problem in providing the assistance of federal grants for two kinds of services: prevention services, aimed at discouraging adolescent sexual relations, and care services, directed principally at pregnant adolescents, and intended to give among other things, services of the following kind: pregnancy testing, health services, prenatal and postnatal care, venereal disease screening, psychological and nutritional counseling, and a wide variety of other services.

Congress sought to draw on the widest possible range

of community resources, and therefore specifically provided that among the class of grantees should be included religiously affiliated organizations where appropriate.

Though religiously affiliated organizations have participated without question throughout our history in the care and counseling services funded at all levels of government in areas such as juvenile delinquency, runaways, drug addiction, physical and mental health, foster care, adoption, and aging, the District Court struck down -- on its face and as applied as violating the Establishment Clause -- this Act insofar as it specifically adverted to the inclusion of religiously affiliated organizations within the class of permissable grantees.

The District Court's standard and reasoning was such that I think no one in this Court -- not us and not the Plaintiffs and their Amici -- defend it. The District Court found a valid secular purpose here, and properly so, but found that the Act had the primary effect of advancing religion, thereby failing the second prong of the Lemon test, because -- and I am quoting here -- of its use of religious organizations for education and counselling of teenagers on matters relating to religious doctrine.

We pressed on the District Court and renew the argument here that the correct standard for determining whether a law has the effect of advancing religion has been set out many times in the decisions of this Court, and perhaps most

neatly in the decision of Hunt v. McNair, where it was said that aid has the effect of advancing religion if, and I quote, "it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subserved in the religious mission, or if it funds a specifically religious activity in an otherwise substantially secular setting."

And I suppose examples of that would be Stone v. Graham or Abington School District v. Schempp. Instead of applying this familiar test, the District Court held that its quite original and unprecedented test should be applied, at least where, as in this act, this statute explicitly adverts to religion.

The District Court thereby was able to reach its conclusion that the Act was unconstitutional without making any of the findings of fact which would be necessitated by the established decisions of this Court, because it found that its, and I quote, "more neatly put test" allows it to strike this statute down on summary judgment on its face and on the pleadings.

This odd state of affairs explains the unusual, I believe unusual submissions of this Court on the part of the Plaintiff and their amici.

QUESTION: Mr. Fried, is it possible that as applied this statute would meet the Hunt v. McNair standard that you want us to apply?

MR. FRIED: It certainly is possible. It is

certainly possible that this statute could provide for grants to religiously affiliated organizations which, nonetheless, like the religiously affiliated organizations in Hunt, in Tilton, in Roemer, nevertheless were not pervasively sectarian.

It is quite possible that the grants which are funded would be grants which, unlike the activities in Schempp or Stone v. Graham, are not specifically religious activities. Both of those things are entirely possible, and indeed not only possible, in our view on proper fact finding it would be demonstrated they were what happened.

QUESTION: Well, what do our cases tell us we should do if we think a statute might be constitutional on its face but not as applied, and if the evidence is there, to establish that?

MR. FRIED: That is it constitutionally applied.

QUESTION: That it is unconstitutionally applied.

MR. FRIED: If it is unconstitutionally applied, then I think the question becomes, is it capable of being constitutionally applied? Well, plainly, by answering the first question in the affirmative, then what must be done is that the relevant authorities must be directed to cease applying the statute in an inappropriate way.

That is what has happened with Title I --

QUESTION: Is that how the Court has handled aid to parochial schools?

MR. FRIED: I believe if you look at the most recent

instances, Aguilar and Grand Rapids, Title I, here was a general program which, it turns out, a number of states were not applying in an appropriate way. The Court so found those applications inappropriate.

And what has happened is those applications were condemned, and now Title I is still alive and well, and it is being applied differently, for instance, at this time. Those remedial services which this Court said could not be provided within parochial schools by public school teachers coming in, are being provided on premises separate from the parochial schools to parochial school children.

Now those cases are also in litigation, but nevertheless, the Secretary believes that he is acting faithfully to the dictates of this Court. So that, I think, is how matters have proceeded.

There are certain programs, and I think Schempp would be a perfect example, but also programs which have provided for aid to, quote, "private schools" in contexts where the Court has found 92 per cent, 85 per cent, very large percentages of the eligible schools were so pervasively sectarian that, really, there was no room for constitutional applications, or no substantial room.

That, I think, is how the matter has proceeded in the decisions of this Court, and that is how I think it should proceed in this case.

QUESTION: Were there any findings in the District

Court where you would concede in this case that there were some unconstitutional applications?

MR. FRIED: In our brief we said that there were some departures, but I don't think, Justice Kennedy, it is correct to say there were any findings of any sort in the District Court.

This was on summary judgment, and what we had is a sort of comprehensive wave of the hand in the direction of some of the often quite disputed evidence. But that, I don't think, constitutes conscientious fact finding such as Congress is entitled to before one of its statutes is struck down.

The departures to which we are referring are noted on page 41 of our brief. We do not dispute that there may well have been departures.

QUESTION: You concede that all of those departures were not just departures from the regulation, but were unconstitutional?

MR. FRIED: Well, I think --

QUESTION: Because in that respect I think you diverge from the private Appellant here.

MR. FRIED: I think that some of those departures are departures not only from what the Secretary was directing, but also departures from a fairly tight reading of some of the decisions of this Court.

It is not the easiest thing in the world to arrive at an entirely comprehensive test based on everything that this

Court has said in all of these many cases, and therefore you can read the cases tightly, or you can read them in a way that is a little bit more generous.

We are proscribing a perfectly conservative reading of the decisions of this Court. And under the conservative reading we say, these are indeed constitutionally troublesome, and we don't seek to defend them, and the Secretary did not seek to authorize them.

We don't think that is what is part of what we are here defending.

QUESTION: But there have been no findings by the District Court on which to sort the ones that are constitutionally suspect and those that are not.

MR. FRIED: Plainly not. Plainly not. We simply don't want to overstate the state of the record, Justice White. The record is very voluminous here, and for us to tell you that it does not contain some things which are questionable and perhaps over the line would be an impermissible exaggeration, and it's entirely unnecessary to our case to indulge in it.

QUESTION: Is it available to us to make any additional factual findings that are necessary? There were a lot of facts put in down there.

MR. FRIED: It would be most unusual; this is not an original action. I can't imagine why it would be appropriate for this Court to make findings.

Indeed, I have considerable sympathy for the

situation of the Plaintiffs in this case, because unable, I believe, to defend the judgment below on the basis of the court's more neatly put rule -- that is to say, the rule which it invented -- it is forced, really, to ask this Court to make the necessary factual findings which would support a judgment in their favor under the more familiar standards which this Court has set out.

I think that is what explains the fact that the Appellee's brief is so largely devoted to fact, and why they return to the facts in a document which I can only describe as their reply to our reply brief.

We cannot get into those facts, and we don't think it is appropriate for the Court to do so either.

QUESTION: Mr. Fried, can I ask you one question about the procedure? I guess there were cross motions for summary judgment, were there not?

MR. FRIED: There were.

QUESTION: And I did not understand you to be arguing that the case should be sent back for trial, but rather that the record is adequate to decide the case one way or the other.

MR. FRIED: If that is your impression, we have mislead you, Justice Stevens. Our view is that the summary judgment should be reversed. We did not appeal from the denial of our own motion of summary judgment.

If the summary judgment is reversed, the case then will proceed in the ordinary course to fact findings and

judgments and, I hope, a judgment guided --

QUESTION: Is it your view, then, that some of the facts that the District Court thought were undisputed are, in fact, disputed?

MR. FRIED: Absolutely.

QUESTION: I see.

MR. FRIED: Most definitely so. If the Court wishes, I could detail at considerable length where the court has simply acted most inappropriately in finding things undisputed which were vigorously disputed.

QUESTION: That shouldn't be too hard to identify, shouldn't it? The District Court, like most district courts, has a rule that requires, in a motion for summary judgment, that the party making it set forth those facts that that party believes to be undisputed.

MR. FRIED: Well, that was done, and we then set forth in our motion for summary judgment those facts that we thought were disputed. Now, the District Court absolved itself from the further labors that an extensive file would have entailed by saying that we had not mentioned the matters in dispute with sufficient particularity.

It is very embarrassing to bring a matter like this to this Court, a dispute as to whether a local rule was followed or not. In ordinary course this is a matter which a Court of Appeals would take care of rather readily.

Unfortunately, we did not have the luxury of asking a

Court of Appeals to direct the District Court to perform its functions in a proper and conscientious fashion. Unfortunately, that is a task which we cannot help but ask this Court to perform, because the direct appeal is our only recourse. Otherwise, the statute falls.

Now, in our view the statute is plainly constitutional on its face. As I pointed out in my answer to Justice O'Connor, there is no reason in the world why religiously affiliated organizations are necessarily pervasively sectarian.

If that were so then Roemer, Hunt, and Tilton would have been wrongly decided. There is one particular equation which the District Court leapt to which must be corrected, and that is the notion that the activities here are specifically religious because the counselling and the care -- which would be given by the religiously affiliated organizations, though for a proper secular purpose and though without any reference to religion -- is for those religious persons inspired by their own religious convictions.

That, surely, is a novel and very dangerous proposition, and one which I don't think can be seriously entertained. I suppose that the Society of Friends, when it performs services for refugees and seeks to further the cause of world peace, does so because of their religious inspiration, and yet nobody would think that assisting some of that work would violate the Establishment Clause because it could not be

done in an appropriately secular way simply because those doing it are doing it with a personal religious inspiration.

If I may, I would like to reserve the balance of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Mr. McConnell, we will hear now from you.

ORAL ARGUMENT OF MICHAEL W. McCONNELL

ON BEHALF OF APPELLANT UNITED FAMILIES

MR. McCONNELL: Thank you, Mr. Chief Justice, and may it please the Court:

The single most important point I wish to make this morning in my brief ten minutes is to clarify precisely what the legal question in this case is, because I agree with Solicitor General Fried that the many factual allegations are not appropriately before this Court on an appeal.

The legal question is whether otherwise qualified private organizations must be excluded from the Adolescent Family Life program solely on the basis of their religious affiliation or inspiration.

Our position is that the Establishment Clause does not require and the Free Exercise Clause does not permit religious belief or affiliation to be the basis for a civil disability. AFLA grantees must be judged according to their conduct and their performance, and not according to their beliefs.

I would have thought that Cantwell v. Connecticut was

sufficient authority to establish that proposition. Thus the issue is not whether some grantees may have violated the terms of the grant or even whether the terms of the grant are binding on them; those are not disputed questions among any of the parties in this Court.

If the District Court had held only that grantees who use AFLA funds to teach or promote religion must be disciplined, and in appropriate cases perhaps excluded, we would not be here.

QUESTION: Well, Mr. McConnell, do our cases support the view that public funds may be used to teach secular subjects in parochial schools to teenagers?

MR. McCONNELL: No, Your Honor. This Court has consistently held that programs of aid to parochial schools -- which are predominantly sectarian institutions, in most of the cases before this Court over 95 per cent of them being sectarian -- is not a neutral program of secular education.

The reason for that seems quite evident. Even though the description of the program -- private education -- may sound neutral on its face, in fact everyone understands that the institutions involved are predominantly, almost exclusively religious.

QUESTION: Does this statute, in your view, contemplate that parochial schools, for instance, could be grantees in these programs?

MR. McCONNELL: I suppose so, Your Honor, so long as

the class of potential grantees includes a much wider category than just parochial schools. The problem with the parochial school cases is that the aid was targeted --

QUESTION: But it would contemplate that a parochial school, for instance, could be a grantee and teach these subjects in pregnancy prevention with federal funds.

MR. McCONNELL: None of the grantees, in fact, have been parochial schools, but I am not aware of any reason why they would be excluded as one of a much broader range of potential grantees under the program.

QUESTION: And it is your position that as so interpreted, it can be upheld under our precedents?

MR. McCONNELL: Yes, Your Honor.

QUESTION: Should the Court, on remand, determine whether any of these organizations are pervasively sectarian, or is that an improper test?

MR. McCONNELL: We have no quarrel with the test of pervasively sectarian, and for this reason: under this Court's definitions -- which were, frankly, ignored by the District Court -- a pervasively sectarian institution is one that is simply incapable -- by virtue of being so permeated with religion -- of distinguishing between the teaching or promotion of religion on the one hand, and the carrying out of secular purposes on the other.

Such an institution would be unable to comply with the terms of the grant, which are legally binding in this case.

Thus the exclusion of a pervasively sectarian organization is not on the basis of its belief or affiliation, but on the basis of a conclusion about its conduct.

And that is the fundamental point which I wish to make this morning, which is that it is the conduct of the grantees and not their tie to religion or their inspiration of religion that has to be the basis for judgment.

We agree that religious organizations, like everyone else, has to comply with the terms of the grant. There is nothing non-neutral about that, but neutrality, again, is the key. This is a program in which Congress intended and then the Secretary has administered in a way so as not to either favor or disfavor religious organizations as such.

It seems rather clear to us that the way in which to be neutral in these matters is to insist upon objective, secular, neutral criteria for the selection of grantees, and not to either grant a grant to someone because they are religious, or to deny the grant to the same organization because they are religious.

How they are going to perform the secular functions of the program has to be the key. That is the way in which we can see through to neutrality in a case like this.

I would like, if I could, to run briefly through how this case ought to be viewed under the Lemon test, because I think that the court below quite misunderstood the Lemon test in this context. Now, the court did find that this program has

a secular purpose, and I don't want to belabor the point, because obviously we agree with the District Court on this point. However it is important to note Appellee's position.

While they do not directly contradict the notion that this statute is secular in purpose, their view that for the government to support an approach to sex education and care for pregnant adolescents that support sexual self-discipline as opposed to, say, contraception as a means of family planning, and that promote adoption and care as opposed to abortion, they believe that that is itself an impermissible purpose because those beliefs are also associated with the views of some prominent religions.

Now, that point of view was rejected in Maher v. Rowe, and more pointedly in Harris v. McRae, and I don't want to repeat that. The important things is that if that is correct, it would also be true that the opposite kind of sex education program would be equally impermissible under the Constitution.

If it is impermissible for the government to fund sex education with a view to sexual self-discipline, it would be equally unconstitutional for the government to fund -- as it does in the Title X program -- sex education with a view toward contraception. We do not take this position, the government does not take this position, and I cannot really believe that the Appellees support the logical conclusion of this argument

about purpose.

Now, as to effect, the important thing, according to the Lemon test, is whether the program as a whole seeks to advance or infringe religion. Here the question is does the program -- taken as a whole, not concentrating just on the religious aspects, the religious grantees, but the program as a whole, does it favor religion over non-religion, or does it favor non-religion over religion.

The point is for it to be neutral, not for it be stacked in favor of secular grantees. It infringes the rights of religious organizations to be included simply on the basis of religious affiliation, just as it would infringe the rights of non-religious organizations if religious organizations were granted a preference.

As to the issue of entanglement, here I would like to emphasize that this Court has always used the term excessive entanglement. And this is because any interaction between government and religious organizations inevitably have some degree of entanglement. The question is excessive in comparison to what.

In Walz v. Tax Commission, being the first case of this Court that invoked the notion of entanglement, is a good place to begin, because the Court there noted that there were problems both ways -- either including religious organizations for tax exemptions or excluding them -- and the question was which way leads to the least damaging constitutional

consequences.

Here Appellees' position has presented us with a choice. Either we can exclude all organizations solely on the basis of their religious affiliation, or some degree of monitoring to ensure that they are judged on the basis of their conduct is necessary.

It is our belief that it is not excessive entanglement for a program to be administered in a way so as to avoid the more serious constitutional violation of a flat out discrimination on the basis of religious affiliation or belief, which could not be a plainer violation of the Free Exercise Clause.

If Congress had passed a statute that says grants are going to be available to all voluntary and charitable organizations except for those who have religious beliefs, this Court would not have any hesitation in declaring such a statute unconstitutional, either under the Free Exercise Clause or under the equal protection component of the --

QUESTION: But Mr. McConnell, is that different from a grant that says it can go to religious organizations provided the religious beliefs are of a certain kind?

MR. McCONNELL: I do believe that those are quite different situations, and it is simply not true that this program gives grants only to organizations with beliefs of a certain kind.

An organization that believes in abortion, for

example, is perfectly eligible to put on an AFLA program. It simply may not urge or facilitate abortions in the context of the program itself. It is free to do with its own money and in its other operations whatever it cares to do.

The contrast here is with the District Court's judgment, which prevents the organization from pursuing its religious purposes even with its own funds, and in its own way, and ways that are not promoted by the AFLA grant itself.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. McConnell.

We'll hear now from you, Ms. Benshoof.

ORAL ARGUMENT OF JANET BENSHOOF

ON BEHALF OF APPELLEES KENDRICK, ET AL.

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

I would first like to address the answer to Justice O'Connor's question, because I believe that the answer the Solicitor gave was dead wrong. Her question was what do we do when we are shown some unconstitutional applications of a statute, which most certainly has happened in this case, probably more than any other case reviewed by this Court.

This is a facial challenge, and facial assessments have been the rule of this Court even when statutes have been applied for ten or twenty years, and even when trial courts have upheld them on as applied grounds, as the trial court did in Meek v. Pittenger.

In fact, out of over thirty cases heard by this Court

since 1947, only one was labeled a narrow, as applied holding, and that was Hunt v. McNair. Justice Powell said, I am only calling it as applied in this case because the South Carolina legislature hasn't worked out the details of the statute yet.

Nevertheless, despite the fact that the Court has always looked at the facial assessments, it's done so because the standard in Establishment Clause cases is different than in other kinds of constitutional cases.

You can look at the language of the First Amendment to see that difference. The language says laws respecting an establishment of religion, and therefore this Court has always looked for the certainty that it will not so advance religion, or the risk and potential in a statute.

QUESTION: So you say, Ms. Benshoof, that one would judge this statute after ten years of operation just the same way you would judge it on the day it was enacted?

MS. BENSHOOF: I think after ten years of operation you would have stronger proof that it is certain to do so. In fact, only last term in --

QUESTION: You say you would, then, judge it the same way after ten years of operation as you would on the day it was enacted?

MS. BENSHOOF: Yes. You might have stronger proof after ten years. In Houston v. Hill last term, this Court struck down a statute on its face, and the same issue came up that is before the questions today -- the questions to the

Solicitor. And that was, what do we do with the evidence of the actual application when we are looking at a facial statute.

This Court specifically said the Court of Appeals was right in that case in looking at whether the statute was overbroad. In looking at the evidence in concluding that how the statute had been enforced demonstrated a significant potential for the unconstitutional application of the statute.

QUESTION: But you can't look at that evidence to demonstrate that it doesn't have a significant unconstitutional application.

MS. BENSHOOF: That's right.

QUESTION: Sort of a one way look at subsequent practice: it can hurt you but it can't help you.

MS. BENSHOOF: That's right. In the Establishment Clause area, it is a one way look for a very particular reason. As this Court pointed out in Aguilar v. Felton, there are a lot of factors that would hide the risk or potential. For example, who is going to bring up the unconstitutional applications when a program is in being, the parochial school children, the parents, the people who are getting the money?

QUESTION: It seems to me if we can look to the practice and the application of it in order to determine that it is unconstitutional, we ought to be able to look to them to determine that it is constitutional as well. I don't see any basis for looking at only the evidence on one side.

MS. BENSHOOF: Well, the basis was described by this

Court in your majority opinions both in Grand Rapids and in Aguilar, where you said the fact that there had been no proof in 18 years of unconstitutional application, that didn't mean that there wasn't a high risk, and that there were certain factors mitigating against those kinds of unconstitutional applications being brought to the forefront.

I would also like to address the question about the fact finding, because I think some misstatements were made to this Court. In the District Court there were cross motions for summary judgment. The government never argued that there were any disputed facts. The Plaintiff submitted 1,251 undisputed material facts backed up by a plethora of deposition evidence taken around the country.

Sixty per cent of these were written, admitted, by the government, right on the face, and only 29 of those facts did the government dispute and put in any kind of evidence, and those were not found legally relevant by the District Court. So this is not a question where there are disputed facts.

And Rule 52 makes it very clear that in cross motions for summary judgment it is not up to the trial court to decide disputed facts and make findings of fact. In fact, that is an improper role. Nevertheless, that doesn't make our whole list of undisputed facts irrelevant to this Court. They are there in the record. The District Court judge said he found that they were properly put in the record, they were backed up by evidence, and they are sitting in the record for whatever

relevance they may be. They are certainly cumulative.

QUESTION: May I ask, because your brief has a good deal of factual material in it that the District Court did not refer to, do you refer to any of those 29 disputed facts, or do you rest entirely on the undisputed?

MS. BENSHOOF: We rest entirely on the undisputed facts. We could have rested on 20 per cent of the facts that we put in. I mean, we showed such unconstitutional --

QUESTION: But what you are telling me -- just to make sure -- is that what you described as factual in your brief is within the limits of those that the District Court regarded as undisputed?

MS. BENSHOOF: Absolutely. The District Court regarded 1,215 facts as undisputed, and I don't think we put in a quarter of those in our brief.

QUESTION: Ms. Benshoof, do you think that the statute would survive, in your view, if there were additional statutory or administrative proscriptions against the misuse of government for non-secular purposes?

MS. BENSHOOF: No, I don't think so for three reasons. First of all, this is a unique demonstration project by Congress. They wanted to try something new, and they said there are certain limitations of the government in dealing with moral issues, let's try something new. And it calls for religious participation explicitly in four places.

Now, we argue that the statutory language requires

all applicants to involve religions, even if you are secular. And although this is --

QUESTION: It says, as appropriate.

MS. BENSHOOF: Yes, although this is disputed by the government, the District Court, HHS, grant applicants themselves, and the 1984 Senate committee all agreed with our interpretation.

However, our argument on the constitutionality of the statute doesn't hinge on whether it is mandatory or optional. It is absolutely clear that religious organizations are eligible for grants, and they are listed as desirable participants.

QUESTION: As appropriate.

MS. BENSHOOF: Well, we agree it is as appropriate in the delivery of their services, not whether or not they want to have them. We think it is whether or not where they want to put them in, and every applicant we investigated, secular or religious, had it in there, and we put that evidence before the Court.

And in fact, if you look back at the 1981 legislative history, they said, what is a model program? And a model program was one where public school children would be released from school to go to churches to receive federally funded sex education. That was the kind of model program Congress envisioned.

As you see, there was certainly a joint endorsement

between religion and churches that Congress envisioned.

QUESTION: Ms. Benshoof, let me ask you this: you don't contest, I don't think, that Congress can lawfully adopt, as a purpose, encouraging and inculcating in the young sexual self-restraint? That is not your --

MS. BENSHOOF: Absolutely not. Of course they could adopt self-restraint. They just can't do it by ways of -- for example, one grantee teaching young girls to pretend that Jesus is their date.

QUESTION: Now, let me put the worst case scenario to you that was suggested by Justice O'Connor. Suppose the government explicitly decided to do this by funding programs in the schools? Do you think the Constitution requires that the government can fund such programs in all public schools, but cannot fund them in any sectarian schools? The same programs inculcating sexual restraint.

MS. BENSHOOF: When we are talking about teaching itself, this Court has always said that the entanglement problems -- even if you had a statute that separated the sectarian from the secular, which this statute doesn't -- are too much, particularly with these kinds of religiously sensitive values.

I would like to point out that the government admitted below all of our expert affidavits from religious theologians saying that these values could be secular. When you put the values of chastity, intercourse, masturbation,

marriage into the hands of religious authority, it is going to be very hard, and I think we proved impossible, for religious organizations to teach them in a secular way.

QUESTION: You can have other organizations who have the opposite values that can teach those values, even if the people that are teaching them are religiously motivated. That is, if they say, well, use contraception, or use birth control, or use abortion, that's all right.

MS. BENSHOOF: Obviously, our public schools teach a lot of values; we all know that. We also feel that there is a lot of interplay in the public school situation that leads to democratic pluralism: different school boards, public libraries, no dictates on the care.

That is a good example, because I think if the public schools want to teach, for example, AIDS education, and abstinence would be a major factor in that, but if they would give that to religious authorities, and religious authorities would not mention condoms or, as some of our programs do, say such things as condoms cause birth defects, in order to discourage teenagers from learning about condoms, that that would certainly would be a religious rule that prevented secular teaching on abstinence.

We are not saying that chastity cannot be a secular value. It certainly can be, and there are very good secular reasons to teach it. But in the hands of religious authority there is not just a possibility that it might be misused, we

have certainly proven that it has been misused.

QUESTION: Is the Covenant House a religious authority? That is the institute that takes care of 15,000 homeless a year in about six major cities.

MS. BENSHOOF: We did extensive discovery on the 1981 and the 1982 grantees. The Covenant House was not one of our grantees. Whether or not that --

QUESTION: Well, as you know they are founded by the Franciscans, but they are open to all people, and the District Court's rationale, as I understood it from page 34 of the record, was that this is a religious organization that may not give this kind of program.

MS. BENSHOOF: The District Court said that you should use a functional definition of a religious organization. Whether the YMCA and Harvard University are still religious --

QUESTION: What about the Covenant House? They filed an amicus brief here. Are they a religious organization, in your view?

MS. BENSHOOF: They might have filed a -- I don't know. The District Court judge -- they were not in his opinion because they were not a grantee at the time. There is no discovery --

QUESTION: They are founded by the Franciscans, and suppose they are supervised by Franciscan fathers.

MS. BENSHOOF: If they have religious dictates on the kind of care funded under this, if they counsel teenage girls,

but they will not give information that even the statute allows you to give because of religious reasons, if there is a religious override on their secular care, and they do educational programs that are governed by religious dictates, yes, they are. But that is no before the Court today.

QUESTION: Can they do drug counselling?

MS. BENSHOOF: That would depend what statute they are doing the drug counselling under, whether the secular and the sectarian are separate --

QUESTION: Suppose it is simply a statute that is designed to discourage drug use and encourage abstinence and avoidance of drugs.

MS. BENSHOOF: If they have religious guidelines on how they discourage drug use, such as tell people, as one grantee did in this program, that using drugs means the devil is wasting your body, that Satan will strike you down, most certainly they could not.

QUESTION: Do you agree with the District Court when it said that to presume that counsellors from religious organizations can put their beliefs aside when counselling an adolescent on matters that are a part of religious doctrine is simply unrealistic?

MS. BENSHOOF: Absolutely, because every religious organization that got funding when we did discovery was operating under religious dictates whether they were religious themselves or not.

For example, in St. Margaret's Hospital, all the employees of this program had to sign a statement that they would follow religious dictates. One midwife who was counselling teenage girls, for example, who asked her, may I have sex during pregnancy, she thought that was a medical question and she said yes.

She was chastised and almost lost her job because she was told that she was supposed to give a religious answer to the medical question.

So certainly, funding most hospitals would be absolutely constitutional, but if you funded a hospital run by the Jehovah's Witnesses to counsel for a hemophiliac ward, in which they would counsel against blood transfusions and not offer them -- not send them elsewhere, that would raise some very serious Establishment Clause questions.

QUESTION: What if the chief executive officer of a sectarian hospital was personally very religiously motivated? Would that prevent him from playing any part in the administration of a grant that the hospital got?

MS. BENSHOOF: Absolutely not. We are not talking about the personal beliefs of people. Obviously, public school teachers may be very religious.

QUESTION: But only people have beliefs in the long run. I mean, buildings don't have beliefs, organizations without people don't have beliefs.

MS. BENSHOOF: But people operate under religious

dictates that they may or may not believe in. The evidence of this case shows that many of the employees in these programs did not operate under the beliefs that they were forced to force on teenage girls, who didn't share those beliefs either.

QUESTION: That could be the imposed belief of the director as well as the imposed belief of the institution. I mean, you are just referring to the fact that there are superiors and inferiors in any organization.

What the Chief Justice is asking is why does the fact that the superiority is an institutional superiority rather than just a personal superiority, which everything boils down to -- why should that be crucial?

MS. BENSHOOF: It depends whether or not that affects the degree of the religious delivery of services or not. Obviously, there could be many secular universities that are run by very religious people, but that doesn't affect their eligibility for federal aid, and we are not claiming that it would.

QUESTION: If the religious belief affects the ability of the organization to implement the program properly, now, that certainly is a different question, as in your drug testing example. But you are not limiting it to that.

You are saying that even if the religious belief does not at all impede the good counselling under the program, simply because one person is counselling out of religious conviction and another person is counselling the same thing not

out of religious conviction, that makes the difference.

MS. BENSHOOF: No, you misconstrue my answer. Obviously, there is going to be religious counselling whether you fund a drug program for just secular grantees or sectarian grantees. But when you are funding a religiously affiliated organization to do teaching and counselling, and they happen to have religious mandates on that very same issue, that's the kind of danger that raises the risk or potential or advancing religion which the Establishment Clause prohibits.

But I think another things is very important to consider in the answer to that question, and that is that we are dealing with a statute -- your questions all rest on some hypothetical statute that's not before the Court.

If you look at the congressional history, they wanted a union between government and religion, it calls for religious participation, and it has nothing in the statute that precludes the teaching or advancing of religion. Now, this is all the more telling in the fact that there are 25 other prohibitions and limitations on grantees in the statute.

I don't know of any other federal statute that funds educational institutions, both sectarian and secular, that doesn't have even one statutory guarantee. In fact, the Solicitor was mentioning about Title I, which Aguilar was not an as applied case, because this Court didn't even take it under 1252 jurisdiction, it was only a challenge to the program in New York. Title I on its face was never challenged in

Aguilar.

But Title I itself, in which only four per cent of $4 billion went to sectarian organizations, had on its face of the statute four statutory guarantees trying to see that when we fund an educational program, that taxpayers money doesn't go to fund a sectarian enterprise.

QUESTION: I think there is an administrative prohibition of use for religious purposes, isn't there?

MS. BENSHOOF: Absolutely, and that is deficient for four reasons.

QUESTION: Well, does that fact that it is administrative rather than statutory affect your judgment of the program?

MS. BENSHOOF: Yes, it does, and I think it has affected this Court's judgment in the past. For example, in Tilton v. Richardson there was a prohibition that eight members of this Court struck out that said after 20 years we are going to take out keeping the secular from the sectarian, and you struck out that provision and said it had to be in the statute.

If it could just be an administrative regulation, or if it was constitutionally required so that you could just read it in, it wouldn't have been necessary to strike that down.

Similarly, in another college aid case, Roemer, in footnote 23 this Court cited approvingly the fact that the Maryland statute had been amended to put the statutory prohibitions in the statute and not in the regulation.

QUESTION: Do you think the Court meant that the case would have come out differently had the statute not been amended?

MS. BENSHOOF: Yes, and in fact, Justice White, when he wrote the opinion in Regan upholding a New York statute that gave parochial schools reimbursement for state mandated tests, that case took care of a problem that this Court had struck down in Levitt where there were no statutory guarantees, and Justice White made it quite clear that if those kinds of guarantees were not in the face of the statute, the outcome of the case would have been different.

QUESTION: Did the opinion there say that had they only been administrative and not statutory, the result would have been different?

MS. BENSHOOF: No, they didn't, but I would like to point out that this isn't even really administrative. That this is not a regulation, it's not a guideline, it's not in the statute, and yet 25 other things are in the statute.

All it is is a grant condition that was put in after we filed the lawsuit and after we wrote a brief saying that this was necessary, then the government put it in, and it has never enforced it.

In fact, in the motion for summary judgment by the government, they put 726 facts before the District Court, and only four of them had anything to do with monitoring a statutory condition.

QUESTION: Ms. Benshoof, in the First Amendment area we have certainly upheld legislative schemes that do not contain in the statutes sufficient standards to guide the administrator's discretion. Where those standards are supplied by a regulation -- a law that doesn't say that the mayor has to make his determination on such and such a basis, but there is a regulation that sets forth clear statutory standards, we have allowed that to satisfy the First Amendment Free Speech Clause, why wouldn't it satisfy the Establishment Clause of the First Amendment?

MS. BENSHOOF: You have never upheld that in the Establishment Clause area, and I believe it is because of the very --

QUESTION: We have never had occasion to address it in the Establishment Clause area

MS. BENSHOOF: Well, in a sense you have, because in cases such as Levitt when it wasn't clear that the state mandated test would -- when you gave the money to the parochial school, it would only be used for that. You could have inferred that in or remanded it for a regulation, but instead you made the New York state legislature decide it, it came back, and then you upheld it in the Regan decision.

So you have had chances to infer it in and have never inferred in regulations or given that discretion. I think that is because of the words of the First Amendment Establishment Clause itself, and because your standard has always been, we

must have certainty that there is no risk or potential.

QUESTION: We are not talking here about inferring a regulation; we are not talking about speculating that a regulation could be adopted; we have one, and in those other cases we didn't have any.

MS. BENSHOOF: Well, the problem with dwelling on the fact -- I think the importance of the fact of the administrative regulation for this case is not that it would constitutionalize anything, but its importance is to show how inadequate it has been.

In fact, although it says you shall not teach or promote or religion, they never once defunded or not funded an organization because of that. When St. Margaret's Hospital taught Catholic doctrine in parochial schools for a year and a half -- and we caught them at that during the deposition -- all that happened was that HHS wrote them a letter and said that your teaching Catholic doctrine on religion is susceptible under the Establishment Clause of advancing religion, take out the words Catholic and you can use the curriculum in the public schools, and then they got a total of $2 million, almost, in aid.

Secondly, the Solicitor seems to feel that pervasively sectarian is a major problem as to what the institutions are, and yet not once in seven, not once did HHS ever question the religiosity of any institution receiving aid under the statute.

In fact, Brigham Young University, they submitted 26 facts on showing what they were going to do with their $2 million, but not one fact on whether or not that institution was so pervasively sectarian it shouldn't get any aid at all. And not only that, they admitted all of Plaintiff's evidence on how Brigham Young University lowered tuition for students who were Mormons, required Mormon classes for everybody who went there --

QUESTION: Ms. Benshoof, the government suggests that you do not really defend the standard that the District Court used, is that right?

MS. BENSHOOF: That is absolutely incorrect. The District Court --

QUESTION: What standard do you think the District Court applied here?

MS. BENSHOOF: The District Court said that this statute violated the primary effects doctrine in five ways, and it violated the entanglement doctrine in two ways.

The five ways, it said, was that, first of all, because on the face of the statute it calls forward for religious participation and encouragement giving religious applicants an edge. From the face of the statute there is a direct and immediate effect.

It said there is an endorsement which again should invalidate it under primary effects. It said that there is no statutory guarantees on the face of the statute keeping the

sectarian from the secular, and that is another way it violates the primary effect.

It says because the nature of the aid is so close to religious doctrine, that is, teaching chastity -- premarital chastity, that is -- and marriage, masturbation, abortion, because that is so close to religious doctrine that's another reason.

QUESTION: Suppose none of the grants had ever been to religiously affiliated organizations that were pervasively religious. The District Court would still have struck the statute down, wouldn't it?

MS. BENSHOOF: Yes, because the pervasively sectarian doctrine developed by this Court in the college aid case is certainly not the heart of the Establishment Clause jurisprudence, it is only a shorthand way to know it you should go ahead and look at other factors.

I mean, the other factors are what is the nature of the aid and what is the relationship between the government and the program that is being created here. And certainly, inspecting curriculums on chastity and sexuality is much more of an invasive relationship than in Tilton, where you had to just audit to see if they used a construction grant.

QUESTION: So your submission here is that it just doesn't make any difference whether these religiously affiliated organizations were pervasively religious or not?

MS. BENSHOOF: It doesn't make a difference, but I

think that the government has also used a wrong definition. I think when you look at whether or not an institution is pervasively sectarian, you have to look at a functional definition. You know, what does it mean in the context of this program.

Obviously, in 1899, when this Court upheld funding Bradford Hospital for a diphtheria ward, nobody would really have said that is a pervasively sectarian hospital. But when there are religious dictates on what they can say and do on these particular items funded under this act, reproductive health care and sex education, when you look at those dictates on this portion of the hospital program, then the pervasively sectarian certainly takes on a different tenor.

I would just like to point out that the Senate committee report stated that Congress' reason for doing this was that religion doesn't suffer some of the limitations of government in dealing with the problem that has such complex moral dimensions.

In other words, religion can help us shape the morals of citizens. Well, this was precisely the reason in 1784 that Patrick Henry wanted to tax Christian teachers. He said we should pay the salary because the diffusion of Christian knowledge has a tendency to correct the morals of men in this country.

Now, this proposal, of course, was soundly rebutted in Madison's memorial and remonstrance. Twenty-five years ago

in Abington v. Schempp, this Court equally rejected the rationale of the state of Pennsylvania that said that Bible reading would serve that same secular purpose, that Bible reading would promote moral values of citizens and contradict the materialistic trends of our times.

For over 200 years this country has ensured religious liberty, protected religious pluralism, and minimized political divisiveness -- and this is a very competitive program -- by rigorously enforcing the First Amendment.

By finding the Adolescent and Family Life Act unconstitutional, this Court furthers the original intent of the framers, that religious instruction and indoctrination are not within the scope of Congress' power to tax and spend for the general welfare.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Benshoof.

General Fried, you have three minutes remaining.

ORAL ARGUMENT BY CHARLES FRIED

ON BEHALF OF FEDERAL APPELLANT -- REBUTTAL

MR. FRIED: I would like to just briefly indicate that the joint appendix, Justice Kennedy, has an affidavit from Father Bruce Ritter, who is the president of Covenant House and an AFLA grantee, setting out the programs, and that was available to the District Court on the summary judgment motions.

I think the heart of the difference between Ms.

Benshoof and ourselves came out pretty clearly. I think the Plaintiffs are distressed at the abortion and family planning limitations in this act. That is what troubles them. They do not accept the judgment of this Court in Maher and Harris.

That is the heart of the difficulty, because from that premise, which is, of course, an inadmissable one, they conclude that any organization, if religiously affiliated, while it might otherwise not become pervasively sectarian, it becomes pervasively sectarian if that religious organization has doctrinal limitations which coincide with the limitations which Congress put into this act.

Therefore, a hospital becomes pervasively sectarian in the mind of the Plaintiffs because it has doctrinal limitations on abortion and family planning methods, which coincide with limitations which this Court had said Congress may put on the provisions of those very same services by any federal grantee.

Now --

QUESTION: In fairness, General Fried, I think it is more than that. I think that they would say not just the limitations but even the affirmative goals of the program, if those goals are pursued for religious reasons, that that would be disqualifying.

In other words, it's quite all right to say you should not have premarital sex, but it is not all right to say you should not have premarital sex because it is a sin.

MR. FRIED: It is not all right with federal money to say you may not have premarital sex because it is a sin. I agree with that.

CHIEF JUSTICE REHNQUIST: Thank you, General Fried, the case is submitted.

(Whereupon, at 11:01 o'clock a.m., the case in the above-entitled matter was submitted.)

REPORTERS' CERTIFICATE

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I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the UNITED STATES SUPREME COURT.

Date: 30 March 1988

Margaret Daly

Official Reporter

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