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PROCEEDINGS BEFORE

THE SUPREME COURT

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WASHINGTON, D.C. 20543

UNITED STATES

CAPTION: LARRY ZOBREST, ET UX., ET AL.

Petitioners, v. CATALINA FOOTHILLS SCHOOL

DISTRICT

CASE NO: 92-94

PLACE: Washington, D.C.

DATE: Wednesday, February 24, 1993

PAGES: 1 - 49

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IN THE SUPREME COURT OF THE UNITED STATES

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3 LARRY ZOBREST, ET UX., ET AL. :

4 Petitioners :

5 v. : No. 92-94

6 CATALINA FOOTHILLS SCHOOL :

7 DISTRICT :

8 - - - - - X

9 Washington, D.C.

10 Wednesday, February 24, 1993

11 The above-entitled matter came on for oral argument
12 before the Supreme Court of the United States at 11:06 a.m.

13 APPEARANCES:

14 WILLIAM B. BALL, ESQ., Harrisburg, Pennsylvania; on behalf
15 of the Petitioners.

16 WILLIAM C. BRYSON, ESQ., Acting Solicitor General,
17 Department of Justice, Washington, D.C.; on behalf of the
18 United States, as amicus curiae, supporting
19 Petitioners.

20 JOHN C. RICHARDSON, ESQ., Tucson, Arizona; on behalf of
21 the Respondent.

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C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	WILLIAM B. BALL, ESQ.	
4	On behalf of the Petitioners	3
5	WILLIAM C. BRYSON, ESQ.	
6	On behalf of the United States,	
7	as amicus curiae, supporting the	
8	Petitioners	18
9	JOHN C. RICHARDSON, ESQ.	
10	On behalf of the Respondent	26
11	REBUTTAL ARGUMENT OF	
12	WILLIAM B. BALL, ESQ.	
13	On behalf of the Petitioners	52
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

P R O C E E D I N G S

(11:06 a.m.)

1
2
3 CHIEF JUSTICE REHNQUIST: We'll hear argument next in
4 No. 92-94, Larry Zobrest v. the Catalina Foothills School
5 District.

6 Mr. Ball, you may proceed.

7 ORAL ARGUMENT OF WILLIAM B. BALL

8 ON BEHALF OF THE PETITIONERS

9 MR. BALL: Chief Justice Rehnquist, may it please the
10 Court:

11 The important issue posed by this case is whether Jim
12 Zobrest, the petitioner, a profoundly deaf boy, would have to
13 have forsaken education in the State-qualified religious
14 school of his parents' conscientious choice if he were to
15 participate in a program designed by the Congress of the
16 United States to aid the education of all handicapped
17 children, including children in public and religious --
18 including public and private and religious schools.

19 Now, the courts below answered that question by saying
20 yes, and that is the respondent's position and that of the
21 respondent's amici.

22 Now, Jim, in order to be educated, had to have the
23 service of a certified sign language interpreter, a related
24 service under the Education of the Handicapped Act. He had to
25 have it on the place where his education was going to happen,

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1 and the place where his education was going to happen was
2 Salpointe Catholic High School, a high school which meets the
3 requirements of Arizona's compulsory attendance law and which
4 is accredited as a college preparatory school by the North
5 Central Association of Colleges and Schools.

6 But it's also a school which is pervasively religious,
7 and on the ground, the sole ground that to afford Jim a sign
8 language interpreter, on the premises of a pervasively
9 religious school, would violate the Establishment Clause, the
10 court -- the respondent school district denied him the
11 service.

12 QUESTION: Mr. Ball, before you get too far, just
13 clarify one point for me. Under the statute, could -- does
14 the statute only provide for in-kind furnishing of services?
15 Would the statute not permit the parents to hire their own
16 sign language interpreter and be reimbursed?

17 MR. BALL: Yes, Your Honor. We don't find any authority
18 in the statute for the school district, for example, to have
19 paid the parents money so they could go and hire the
20 interpreter. In fact, there is a -- under section 1415 -- the
21 subsection I can't recall -- it seems -- would seem to
22 preclude that. All the funds therefore -- funds therefore
23 could not be disbursed to the parents for that purpose.

24 QUESTION: 1415 is what --

25 MR. BALL: Yes.

1 QUESTION: Let me ask you a different question about
2 what may just positively be prohibited. At any point have you
3 litigated the effect of the Arizona constitution or the effect
4 of the statute and the regulations on the ultimate question of
5 entitlement here?

6 MR. BALL: We have never -- in this case because solely
7 the Federal Establishment Clause was raised, we have not in
8 any way gone into the Arizona constitutional question.

9 QUESTION: And you haven't litigated the legal as
10 distinct from the constitutional issue.

11 MR. BALL: I'm sorry?

12 QUESTION: You haven't litigated the question of legal
13 entitlement, entitlement under the law and the regulations, as
14 distinct from the constitutional issue.

15 MR. BALL: Well, we have not litigated it because, in
16 fact, the process had already gone a great distance. The
17 school district at the --

18 QUESTION: No, I'm not necessarily faulting you for it.
19 I just want to make sure that I am right that the record
20 simply does not contain determinations on these two issues.

21 MR. BALL: No, Justice Souter, but I think it's
22 important that I add there the fact that at the time the
23 parents applied for EHA help to the school district, the --
24 Jim was already enrolled at Salpointe Catholic High School,
25 and the issuance of the individualized education program to

1 him took place in the context of the fact that that's where he
2 was and that the sole problem -- the sole problem -- and this
3 appears in the individualized education report itself. The
4 sole problem was the Establishment Clause.

5 Now, the key issue, as we see --

6 QUESTION: Have you taken a look at the statutory
7 provision and the regulations here, and are you -- would you
8 conclude that they clearly require the provision of the
9 services in private schools?

10 MR. BALL: Yes. The -- to begin with, section 1415(a) -
11 -

12 QUESTION: Or does it leave it open to the State to
13 decide?

14 MR. BALL: Well, they don't leave the -- the statute
15 doesn't leave it open to the State to decide whether private
16 school children will be included, and the statute also
17 provides and the regulations provide that there will be
18 provision made for the education of children enrolled in all
19 private schools. And the regulations, the -- under 30 of the
20 Code of Federal Regulations -- specify even parochial schools.
21 They use that term, and the only question then is where and
22 under what circumstances those services would be provided.

23 But there has to be afforded the child in the private
24 school, including a parochial school, a genuine opportunity.
25 He must be furnished or she must be furnished services of the

1 same scope and quality as those provided for public school
2 children.

3 QUESTION: Did the school district ever raise any
4 objection based on the regulations or the statute?

5 MR. BALL: None whatever. Their sole -- Chief Justice,
6 their sole objection throughout was the Establishment Clause.
7 In fact, throughout the proceedings before the district court
8 and before the court of appeals, they insisted that Jim would
9 be provided -- would be required to be provided the services
10 by them on the premises of a public school or of any -- any -
11 - nonsectarian private school.

12 Now, the key issue, as we see it, is whether the --
13 furnishing of an interpreter to Jim would have had a primary
14 effect advancing religion. We are regarding the entanglement
15 problem raised as a lesser issue. If time permits, I will
16 cover that or if, of course, I'm asked.

17 The respondent give three reasons why they believe it
18 has a primary effect advancing religion. One is that it would
19 constitute support for a religious institution. I think we
20 can dispose of that rather quickly. Salpointe Catholic High
21 School has no interest in the case. It would get nothing in
22 the money -- in the way of money or materials by accommodating
23 and taking on the burden of accommodating an interpreter, a
24 certified sign language interpreter, for one boy. They have
25 no program.

1 QUESTION: Yes, but -- may I just -- perhaps it's too
2 minor, but at least they will have him paying his tuition
3 there. If he can't get the interpreter, he'd have to go to
4 school someplace else.

5 MR. BALL: No. The tuition would not be paid for at all
6 by the school district.

7 QUESTION: No, no, no, but his parents are paying the
8 tuition now.

9 MR. BALL: They did, indeed.

10 QUESTION: But they will not be paying that tuition to
11 the school if he goes to school someplace else.

12 MR. BALL: The parents will pay the tuition to the
13 school where their child is enrolled.

14 QUESTION: That's right, so that if he doesn't get the
15 interpreter, he won't attend the school, and they won't get
16 that particular tuition. That's all I'm saying. It's perhaps
17 a small point.

18 But is it not true that he needs an interpreter wherever
19 he goes to school?

20 MR. BALL: Absolutely so.

21 QUESTION: And if he can't get it here, he'll have to go
22 to school elsewhere.

23 MR. BALL: Yes. Then he'd have to give up the religious
24 education.

25 QUESTION: And the school would lose that amount of

1 tuition.

2 MR. BALL: The school would lose that amount of tuition

3 --

4 QUESTION: Maybe that's not significant.

5 MR. BALL: -- for one child.

6 QUESTION: But they will lose at least that much.

7 MR. BALL: With all respect, Your Honor, I think it is
8 not significant.

9 QUESTION: Well, it's probably more than the cost of the
10 interpreter, isn't it?

11 MR. BALL: It is more than the cost of the interpreter,
12 but here's a school with many children. This is one
13 interpreter for one child. We're speaking of one school, and
14 --

15 QUESTION: And unless the school loses money on each
16 child, which a lot of schools do --

17 MR. BALL: Yes.

18 QUESTION: -- and the deficit made up out of
19 contributions.

20 MR. BALL: They had no program for the deaf. There's no
21 real market to bring in deaf children. Sign language
22 interpreters who are certified are very, very scarce.

23 The second reason which the respondent attempts to
24 advance is that a certified sign language interpreter will
25 inadvertently or intentionally inculcate religion in the

1 children. Here I think the respondents totally misconceives
2 what certification of a sign language interpreter amounts to.

3
4 Under -- in Arizona, an interpreter must be qualified
5 under the interpreter quality assurance system. He is a
6 member of the registry, the national registry of interpreters
7 for the deaf, and thus is bound to a very strict code as to
8 what the interpreter's function is. It's simply to translate
9 American sign language into spoken English, spoken English
10 into American sign language, and that's it.

11 QUESTION: Mr. Ball, isn't there a slightly different
12 argument which has greater strength here, and that is not that
13 the interpreter is going to inject a religious element that is
14 not there, but that the interpreter is, as I understand it, a
15 kind of necessary functionary for the religious message to get
16 through? And, therefore, the interpreter is -- in effect, is
17 just as necessary as having the teacher or the priest or
18 whatnot there and, therefore, is just as much an integral part
19 of the conveyance of the religious message as some of the
20 equipment, for example, which was denied to schools under our
21 prior cases under Meek and Wolman on the theory that they
22 might be used for that purpose.

23 MR. BALL: Well, in the first place, the interpreter is,
24 indeed, a -- the window of communication of religion in the
25 schools. He will be conveying religion. No doubt about it.

1 It's a given in the case.

2 The fact that he does that does not put him -- does not
3 create an image of authority to him in any sense that a
4 teacher has. He -- the respondents have said that he becomes
5 part of a teaching team integrated, as you were saying, into
6 the teaching apparatus of the school. In fact, he's not a
7 member of -- if he's a member of the team, he's a member as
8 interpreter. He doesn't come under the strictures of Lemon -
9 - of Wolman and Meek in terms of the -- in terms of his
10 function.

11 QUESTION: Yes, but tape recorders, or whatever the
12 equipment --

13 MR. BALL: Yes.

14 QUESTION: -- was in those cases, I suppose didn't
15 acquire any such aura either, and yet their potential use for
16 the purpose of this kind of communication was forbidden. And
17 why isn't this interpreter, even if we assume the kind of
18 neutrality of the role that you describe, in the same boat
19 with the equipment?

20 MR. BALL: Well, you bring me back to Meek, Justice
21 Souter. In Meek, I find nothing by which the Court said that
22 a hearing aid, for example, could not be loaned or provided to
23 a -- for the use of a child in a religious school.

24 QUESTION: Well, how about a hearing aid that is only
25 used during school hours when the school's purpose is

1 religious? That would have been a different case, wouldn't
2 it?

3 MR. BALL: Well, in our case it's used -- the
4 interpreter is used for the whole educational program, and
5 there we get to the question of whether the fact that he is
6 used for religious purposes, as well as secular purposes,
7 results in a primary effect advancing religion.

8 QUESTION: Well, only because the school has secular, as
9 well as religious, purposes.

10 MR. BALL: Exactly.

11 QUESTION: And what I was trying to suggest is that it
12 seems to me that the interpreter here is pretty much in the
13 category not of the hearing aid that's used during all waking
14 hours and outside the school, but in the position of the
15 equipment which is used only during the school, which was the
16 problem in Meek and --

17 MR. BALL: But it was a problem in Meek, if I may say
18 this, only because the -- of the massive size of the program.
19 I well realize what the Court said in Meek about the fact that
20 the inanimate object could be turned to religious uses.

21 But as I've reread Meek very, very carefully, it's quite
22 clear that in an effort to distinguish the Meek situation from
23 what the Court faced in Allen v. Board of Education, the Court
24 was saying, well, here you're into a massive program of
25 supplying materials and supplies and equipment to parochial

1 school systems.

2 I think the interpreter -- I think if the boy must be
3 denied this -- the service of an interpreter here because it
4 would be like the hearing aid and that the hearing aid was
5 forbidden in Meek, I don't think it becomes a realistic
6 application of Meek.

7 QUESTION: Mr. Ball, you're not really going to try to
8 reconcile all our entanglement cases, are you, or anything?

9 (Laughter.)

10 QUESTION: Are you going to tell us why a globe is okay,
11 but a book isn't and you know?

12 MR. BALL: The answer is that --

13 QUESTION: Senator Moynihan's question, what about a map
14 and a book?

15 MR. BALL: The answer is that I will not, Your Honor.

16 (Laughter.)

17 QUESTION: You couldn't.

18 (Laughter.)

19 MR. BALL: The next reason given by the respondent --
20 and this was the reasoning -- one reason of the court of
21 appeals why the furnishing of the sign language interpreter to
22 Jim would have had a primary effect advancing religion -- is
23 that it would have created a symbolic union of church and
24 state. And this can be -- and the respondent addresses this
25 under two headings.

1 One refers the -- the first heading refers to the
2 impressionable youngsters, Jim's peers, who would be -- who
3 would see that interpreter as symbolizing a union of church
4 and state, as an endorsement by the school district of a
5 Catholic school. I can only stretch my imagination so far,
6 but it goes to the breaking point when I'm thinking of Jim's
7 peers, these impressionable youngsters, saying something like,
8 guys, you see that fellow who's making those signs. Well,
9 it's like awesome. Right here in chem lab we're seeing a
10 violation of the Establishment Clause --

11 (Laughter.)

12 MR. BALL: -- of the First Amendment.

13 QUESTION: I thought the argument was for establishment
14 that here is the State furnishing directly financial support
15 for a sectarian purpose.

16 MR. BALL: Yes, but --

17 QUESTION: None of that symbolism business. It's just
18 that they're -- you're not supposed to furnish money to a --
19 you think the State could -- under our cases could just pay
20 for the -- pay for -- contribute to the sectarian schools the
21 amount of that to the extent they are furnishing a secular
22 education?

23 MR. BALL: I was dealing only with the question of a
24 symbol, an image of endorsement, in the eyes of impressionable
25 youngsters, and I simply don't think that it -- that that

1 flies, that these children would do -- would have any
2 particular impression of it. If they did, they might say the
3 school district is helping Jim. Well, that's neat. I would
4 think that would be a far more likely image that the kids
5 would have.

6 Secondly, they say that furnishing the interpreter would
7 create the image of a joint enterprise of church and state.
8 This again -- here they rely on Ball v. Grand Rapids School
9 District, but there you had 40 sectarian schools. You had a
10 massive infiltration of teachers, public teachers, into
11 religious schools. You had leasing arrangements. Nothing
12 like the image that one boy with one interpreter in one school
13 can conceivably provide to the public.

14 The --

15 QUESTION: Would the case be different if we were
16 dealing with a tutor for a homebound student in a parochial
17 school, someone who had to convey their own views of the
18 materials to --

19 MR. BALL: Oh, very much so.

20 QUESTION: -- instruct the child?

21 MR. BALL: Very much so, yes. Here the -- sign language
22 interpreters have been described to me as regarding themselves
23 as nonpersons, which gets us very close to the hearing aid
24 example that Justice Souter raised.

25 I think the primary effect that this furnishing of the

1 interpreter would have is simply to enable a youngster to get
2 an education in the general branches of learning. The
3 respondent says that the -- that one reason why you can see a
4 primary effect advancing religion here is that the parents
5 chose a religious school, and their motivation was to get him
6 a religious education. Of course, it was, but was there not a
7 far more obvious reason, namely, to get this boy equipped for
8 the business of life by getting an education in the general
9 branches of learning, learning the same math that will be
10 learned in a public school, the same modern foreign languages,
11 the same computer literacy, everything that he would get in a
12 public school in order to enable him to become independent, to
13 become self-sustaining, and to survive in a world not always
14 hospitable to deaf people?

15 There has been much talk in the media about whether we
16 are seeking an overruling in this case of Lemon v. Kurtzman.
17 Nothing in Lemon bars, as we see it, the providing of this
18 service to this boy. I think, however, that the respondents
19 and their supporting amici come perilously close themselves to
20 seeking an overruling of Lemon because they appear to ask this
21 Court to strike the primary effects test from the Lemon test,
22 and instead of saying primary effect, advancing religion, they
23 seem to be urging the Court to say any effect accommodating
24 religion.

25 I'll reserve what time I have left for rebuttal.

1 QUESTION: Thank you, Mr. Ball.

2 Mr. Bryson, we'll hear from you.

3 ORAL ARGUMENT OF WILLIAM C. BRYSON

4 ON BEHALF OF THE UNITED STATES,

5 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

6 MR. BRYSON: Mr. Chief Justice, and may it please the
7 Court:

8 We agree with Mr. Ball that the principal issue in this
9 case is whether the second test from Lemon is satisfied, and
10 we submit that the primary effect in this case of the benefit
11 that was conferred is not to advance religion and that the
12 second test in Lemon, therefore, would indicate that this is
13 not an establishment of religion.

14 I think it's useful to look at perhaps the most succinct
15 statement of the test under Lemon, the succinct -- most
16 succinct recent statement that this Court has made, and that
17 comes in a concurring opinion of Justice Powell -- excuse me --
18 - which was joined by two other members of the Court and was
19 endorsed by yet another two members of the Court. So, in a
20 sense, it speaks for a majority of the Court in the Witters
21 case.

22 And he said, quote, State programs that are wholly
23 neutral in offering education assistance to a class, defined
24 without reference to religion, do not violate the second part
25 of the Lemon test because any aid to religion results from the

1 private choices of individual beneficiaries. Now, that is
2 this case, as we see it. This --

3 QUESTION: I'm a little concerned about the interpreter
4 here. He's a public employee, isn't he?

5 MR. BRYSON: Yes.

6 QUESTION: And he is directed to go to a Catholic school
7 and listen to sectarian theology and then impart it to -- I
8 assume he has to listen to it and understand it before he can
9 translate it. Right? Doesn't that trouble you? It troubles
10 me a bit.

11 MR. BRYSON: He has to understand the words. I'm not
12 sure he has to understand the --

13 QUESTION: Well, he has to listen to it.

14 MR. BRYSON: Yes. Oh, yes.

15 QUESTION: He has to listen to it. I mean, what if he's
16 a -- you know, an adamant anti-Catholic? Can he turn down the
17 assignment?

18 MR. BRYSON: Well, of course, he could turn down the
19 assignment for any reason he chose. He could turn down the
20 assignment because he had to drive too far. But typically
21 with sign language interpreters --

22 QUESTION: This is -- does the Federal Government let
23 you do that? I mean, it's a --

24 (Laughter.)

25 MR. BRYSON: Well, he -- this is a State government,

1 Your Honor.

2 (Laughter.)

3 QUESTION: A State government.

4 (Laughter.)

5 MR. BRYSON: He could -- typically sign language
6 interpreters have many occasions in which they will hear
7 things that they disagree with and will sign them nonetheless.
8 That's just part of the job. They are not expected to agree
9 or disagree with whatever they're signing, and they're not
10 expected to change, by virtue of their own predilections,
11 anything that they hear.

12 Now, the themes that I think that you can trace through
13 this Court's Establishment Clause cases, in the aid to schools
14 area at least, that we can tease out from Justice Powell's
15 statement are as follows.

16 First, where the service is made available directly to
17 the individual as opposed to the school, you will ordinarily
18 not find an Establishment Clause violation.

19 Similarly, where there's a broad class that is the
20 recipient of the service that is not based on religion -- in
21 this case, everyone who is the subject of a disability was a
22 student -- that also indicates no Establishment Clause
23 problem.

24 Third, where the school gets no financial benefit out of
25 the arrangement. And here, I think in answer to Justice

1 Stevens' point that the school does, after all, get the
2 tuition, this Court has been very clear in cases going back to
3 Everson, which was the bus transportation case, and going
4 through the Allen case and the Mueller case, the tax deduction
5 case, and Witters, Witters in particular, that the fact that
6 the school gets another student and the associated tuition is
7 not enough to constitute a primary effect for Lemon, the
8 second part of the Lemon test, purposes.

9 So, there's no financial benefit here. Salpointe is
10 essentially in a position of just being a stakeholder with
11 respect to the financial impact of this arrangement.

12 And finally, that -- you have to ask the question of
13 whether there is any expression of endorsement or support for
14 the religious view that is being put forward or for religion
15 at all. And here again, we submit that there is neither any
16 implicit support on the part of the State for anything that's
17 being said here in the religious school merely by virtue of
18 the fact that the State is providing the child a means to hear
19 what's being said, nor is there any sense in which the State
20 is somehow endorsing the message of Salpointe High School in
21 general by providing an interpreter there.

22 The interpreter is serving as this child's ears. This
23 interpreter is doing nothing more than performing at the
24 State's behest the service of enabling this child to hear
25 whatever it is that --

1 QUESTION: Mr. Bryson, may I ask whether it is clear
2 here that the statute and regulations require the State to
3 provide this service?

4 MR. BRYSON: The statutes and regulations, Your Honor,
5 do not require it. The statute operates essentially as this.
6 The statute gives local educational agencies a great deal of
7 freedom to design programs as they will. That may mean in
8 some cases that the local educational agency will say we are
9 going to provide certain services, but only in the public
10 schools because it's just impractical to do it. There's
11 nothing that compels.

12 QUESTION: That would be consistent with the Federal
13 scheme.

14 MR. BRYSON: That's right. That's right.

15 QUESTION: And if Arizona's constitution, for example,
16 prohibited the furnishing of a -- of services like this, that
17 wouldn't interfere with the Federal scheme at all.

18 MR. BRYSON: Well, there's a provision -- the short
19 answer is no, it wouldn't.

20 The somewhat longer answer is there is a provision in
21 the statute that allows what's called bypass, which is to say,
22 if there's something about local law that generally precludes
23 a certain type of service, then you can go directly to the
24 Federal bypass provision and you can get aid directly from the
25 Federal Government. So, there is a provision in the statute

1 that deals with that problem.

2 But the way this case comes to the Court is that it was
3 conceded all the way along that this service would be
4 available to this child except for the fact that he was in a
5 religious school and only then, not because of the choice of
6 the school district, but only because the school district felt
7 compelled by the Establishment Clause to say no. This case
8 has been purely an Establishment Clause defense to what
9 otherwise would be the school district's conceded
10 acknowledgement that under their own policies they would
11 provide the service to the child in place.

12 Now, the school district --

13 QUESTION: Mr. Bryson, may I just keep you interrupted
14 for a moment more and go back to your point on the primary
15 effects test? If you accept the premise, which I think we all
16 do, that the interpreter is necessary in order to communicate
17 or to hear, however you want to put it, the message, and if
18 you also accept the premise, which is that, I understand it,
19 of the school, that the intertwining of the religious and the
20 secular messages are -- is inextricable --

21 MR. BRYSON: Yes.

22 QUESTION: -- that is, that is really the point of the
23 school as they run it -- does it make any sense to try to
24 apply a primary effects test here?

25 The fact is the entirety of the message is going to have

1 a religious content, a religious overlay, a religious
2 reference, and there's no way to communicate or to hear
3 anything without communicating or hearing the religion. Under
4 those circumstances, does the primary effects test make any
5 sense?

6 MR. BRYSON: I think it does, Your Honor, and that is
7 because what we're concerned with is asking -- is, does this
8 benefit itself actually have the primary effect of advancing
9 religion?

10 Here, the State has acknowledged that he can get an
11 education at this school that satisfies the State's
12 requirements. So, they have defined this institution as a
13 valid secondary school for Arizona purposes.

14 QUESTION: There's no question it has a secular function
15 too.

16 MR. BRYSON: That's right.

17 QUESTION: Yes.

18 MR. BRYSON: You would apply primary effect to this case
19 just as you would to the bus driver case or a case in which,
20 for example, the school district provided -- suppose we had a
21 severely paralyzed child who needed a nurse to wheel him in a
22 wheel chair from one class to another, including religion
23 classes. We submit that that would not have the primary
24 effect of advancing religion because although the nurse's
25 availability would be necessary to his getting his education

1 and in this place, the State would not be in any way promoting
2 religion. It would be making it possible, it is true, for him
3 to have a religious education.

4 QUESTION: But the nurse would have no role in the
5 communication of the message.

6 MR. BRYSON: Well, it would have the effect, just as the
7 bus driver -- the availability of a bus driver to drive him to
8 school would make it possible for him --

9 QUESTION: But it is not --

10 MR. BRYSON: -- to receive the message.

11 QUESTION: I'm sorry. But at least in those hypos, the
12 functionary was not inextricably bound up with the
13 communication of the message itself.

14 MR. BRYSON: Well, I think that the only difference,
15 Your Honor, is that in this case the State employee is
16 actually mouthing words as opposed to performing some other
17 service that's inextricably associated with the receipt of the
18 message.

19 Take, for example, another hypothetical, a technician on
20 a computer that serves to translate written materials into
21 spoken materials, and there are such computers for someone
22 who's blind. Well, the technician isn't actually speaking the
23 words. It's not like a blind reader, but the technician is
24 equally central, essential to the operation of communication.
25 And we would say that that is perfectly all right under the

1 Establishment Clause.

2 Thank you.

3 QUESTION: Thank you, Mr. Bryson.

4 Mr. Richardson, we'll hear now from you.

5 ORAL ARGUMENT OF JOHN C. RICHARDSON

6 ON BEHALF OF THE RESPONDENT

7 MR. RICHARDSON: Mr. Chief Justice, and may it please
8 the Court:

9 The constitutional question presented in this case is
10 whether Federal law can require a public school district to
11 hire and place in a parochial school classroom an employee to
12 actively participate in a student's religious education. The
13 First Amendment answer to this question is no.

14 In 1970 --

15 QUESTION: -- if the money from the school district went
16 directly to the parents to hire a -- an interpreter?

17 MR. RICHARDSON: We would not, Your Honor.

18 QUESTION: Why not?

19 MR. RICHARDSON: Because this Court's decision in
20 Witters case has indicated that there's a difference --and we
21 think there is a crucial difference -- between a public
22 employee, standing as a public employee in the classroom and
23 in -- and conveying religious information to James than if the
24 State on a one-time payment pays his family for a service that
25 he needs because in that case, the person in the classroom

1 conveying religious information is a -- is the Zobrest's
2 employee, not the school district.

3 QUESTION: So, a public -- suppose the interpreter, the
4 sign language interpreter, in a public school is paid on a
5 piecework basis and the -- and but that same public person is
6 paid by the parents on a piecework basis to go over to the
7 parochial school. Would that bother you?

8 MR. RICHARDSON: I'm not sure I understand the question,
9 but I think the critical distinction is, if I understand the
10 question, is -- to me is whether the person in the classroom
11 that's transmitting the religious information is or is not a
12 public employee functioning at public expense.

13 We think in Witters, this Court carved out an exception
14 that said when the State provides money to a student or his
15 family and then takes a hands-off approach -- and that's a
16 second condition that we think would be necessary that is not
17 present in this case also -- takes a hands-off approach, other
18 than saying here's what it's for, but after that, you go get
19 the service, if Mr. Witters in the State of Washington is
20 going to go out and receive education to become a pastor, we
21 don't see why Mr. and Mrs. Zobrest could not go out and
22 purchase this --

23 QUESTION: Well, what about the school district just
24 giving money to the parochial school to hire a sign language
25 interpreter?

1 MR. RICHARDSON: Of course, that's a different scenario
2 between giving money to the school and the parent, but I will
3 address that one.

4 We don't think we could give money to the school. We
5 only think we could constitutionally, under Witters, give it
6 to the parent or student. But there are two reasons why that
7 doesn't happen.

8 First, the Individuals with Disabilities and Education
9 Act does not permit us to, and second, the petitioners in this
10 case have made it very clear that they are not seeking money.
11 They are seeking a service. They have made it unambiguous,
12 but what they want is a public employee standing in that
13 parochial classroom and informing James Zobrest, after hearing
14 it from the teacher, that there's life after death. That's
15 make a critical distinction.

16 QUESTION: Mr. Richardson, what is the Arizona program
17 here? Does it provide interpreters for deaf children in
18 private schools in Arizona? Is that Arizona's policy?

19 MR. RICHARDSON: Across the board? We don't know
20 because we haven't gotten there. I am not aware of any
21 situation where a deaf person -- a deaf student has been in a
22 private school.

23 One of the reasons -- the way this case arose --

24 QUESTION: What is -- what policy are we looking at
25 then?

1 MR. RICHARDSON: We are looking --

2 QUESTION: The policy of the school district, this
3 particular school district in Catalina Foothills.

4 MR. RICHARDSON: We're not even looking at a school-
5 wide policy because these things are so -- this particular
6 application is so unusual. The school district -- the State
7 policy is to provide generally related services in special
8 education. It doesn't get defined down to a fine tune, but it
9 is not on a student-by-student basis. It's just overall.

10 One of the difficulties in these kind of cases --

11 QUESTION: But do you -- was it conceded below that
12 Arizona and the school district are required to provide an
13 interpreter to a deaf child?

14 MR. RICHARDSON: We think it is not conceded, and we
15 disagree with respondents in this -- in the position --

16 QUESTION: Why wasn't that ever raised or discussed or
17 dealt with? I don't understand.

18 MR. RICHARDSON: We'll explain why. We think there are
19 three potential bases why this case could have been decided.
20 And we, in our summary judgment, rose only the Federal
21 constitutional issues, and that's why the case has come to
22 this point. We also think there's a statutory argument to be
23 made, and we think there's a State constitutional argument to
24 be made.

25 QUESTION: But the respondent never made the statutory

1 argument?

2 MR. RICHARDSON: We did not yet in the case.

3 QUESTION: Or the State constitutional argument.

4 MR. RICHARDSON: We did not yet because we can choose to
5 bring a motion for summary judgment on a particular issue. We
6 brought it on one issue. It did not -- and we won on that
7 particular issue. We stated expressly in our briefs that we
8 think the remaining issues would remain adjudicated.

9 QUESTION: Well, counsel, at page 34 of the joint
10 appendix, it recites your opposition to the motion for
11 preliminary injunction.

12 MR. RICHARDSON: Yes.

13 QUESTION: And it says the district admits that the EHA
14 requires it to provide for James, as part of a free,
15 appropriate public education, the services of a sign language
16 interpreter so long as James is educated in a nonparochial
17 setting.

18 Now, it seems to me that that is a very, very clear
19 concession on your part, and I could point you to two or three
20 similar statements you've made in the answers to the
21 interrogatories and in your brief to the Ninth Circuit on this
22 point.

23 MR. RICHARDSON: Okay. That -- well, I agree that --
24 this case was filed on August 1. In the rush of the
25 preliminary injunction hearing, we made that statement in the

1 opposition, and that statement is legally incorrect. We do
2 not think we have any judicial estoppel from that legal
3 conclusion. We think that if the district court thinks so,
4 fine, but we don't think the district court will think so.

5 There was no argument in this case --

6 QUESTION: Well, the Ninth Circuit made a finding that -
7 - made a finding error, at least proceeded on the explicit
8 assumption that this was your position.

9 MR. RICHARDSON: My --

10 QUESTION: And it seems to me that you're putting the
11 Ninth Circuit and this Court in a very difficult position by
12 trying now to tell us that the argument is still open.

13 MR. RICHARDSON: I understand that the Ninth Circuit
14 made that statement and that surprised me. In our brief in
15 the Ninth Circuit, we state expressly on page 6, footnote 3 of
16 that brief that it has never technically been necessary to
17 litigate the statutory issue.

18 We did admit -- and I think is where the Ninth Circuit
19 made its error in that statement. We did admit and will admit
20 today that James -- if James Zobrest had attended a private,
21 nonparochial school, we would have provided it. There's a
22 difference between would have provided it and would have been
23 required to provide it under the statute.

24 QUESTION: But you --

25 MR. RICHARDSON: We have always admitted that.

1 QUESTION: The only reason that you didn't provide it to
2 him was because he was going to a parochial school.

3 MR. RICHARDSON: That's correct.

4 QUESTION: Any other private school, you would have
5 provided it.

6 MR. RICHARDSON: We would -- we would have provided it,
7 but I think there's a distinction there between would have
8 legally been required to provide it and would have.

9 QUESTION: But the only reason you did not provide it to
10 him at a private was -- at a private parochial school, as
11 opposed to another private school, was your concern about the
12 Establishment Clause.

13 MR. RICHARDSON: That -- that's correct. We don't deny
14 that, that we would have voluntarily done that. The only
15 concern that came up at the time was the Establishment Clause
16 concern, and that's true. And we're admitting that. We knew
17 --

18 QUESTION: Well, isn't it also the case that you have
19 not stipulated or agreed that you are required to provide it
20 in a parochial school?

21 MR. RICHARDSON: That's correct. The stipulation --
22 once we got past that preliminary injunction hearing, we very
23 carefully stipulated in the stipulation of facts --

24 QUESTION: Well, even before that. I mean, you never
25 stipulated at the injunction hearing that you were required to

1 provide it in the parochial setting, did you?

2 MR. RICHARDSON: That's absolutely correct. There has
3 never been a statement ever made by the respondent school
4 district that we would be legally required. We would have,
5 but not legally required.

6 QUESTION: You would have done it.

7 MR. RICHARDSON: We would have.

8 QUESTION: The only reason you didn't do it was because
9 it was --

10 MR. RICHARDSON: Yes.

11 QUESTION: And had this been a private school, it would
12 have been done.

13 MR. RICHARDSON: That's right. James Zobrest is --

14 QUESTION: Well, before you go on with that, may I ask
15 you this? Don't you understand there to be at least a
16 potential difference under the regulations between what you
17 may be provided or, indeed, permitted to do with respect to a
18 child in a parochial school and one who is in a private, but
19 nonreligious school? Isn't there a potential distinction at
20 least there?

21 MR. RICHARDSON: I think that you can -- there's a
22 potential distinction, but I think the bigger distinction is
23 between public and private in general. I think the United
24 States --

25 QUESTION: Well, I don't want to put too --

1 MR. RICHARDSON: -- amicus brief makes very clear --

2 QUESTION: Well, I don't want to put too fine a point on
3 it, but I'm looking at the regulation, which is set out on
4 page 45a of the Government's brief, which I assume is
5 applicable here, that no State may use its grant -- and I'm
6 skipping inessential language -- to pay for religious
7 instruction. Doesn't that have an effect in distinguishing
8 between church and nonchurch private schools?

9 MR. RICHARDSON: Absolutely, and let's use an example.
10 Many students under the IDEA have mental disabilities. They
11 need the services of a one-on-one aid to assist them
12 academically in the classroom. Now, in many cases, when a
13 student attends a nonparochial school, a private nonparochial
14 school, we may choose to give that aid because all they're
15 going to do is assist the student in a secular education. But
16 if you take that exact situation and put it in a parochial
17 school, you would have an employee whose job it would be to
18 reinforce educational doctrine.

19 James Zobrest himself, when he went to junior high
20 school at Catalina Foothills School District, was not only
21 provided with a sign language interpreter, not only provided
22 with speech therapy, but he -- but the IEP, which is in the
23 record, states that he was provided academic classroom
24 assistance.

25 Now, I can think of few situations that would be more

1 counter to the First Amendment than to think of an employee
2 sitting in a parochial classroom not even mechanically
3 signing, but assisting in his required class on religion and
4 the other classes --

5 QUESTION: Well, now, you said a moment ago that except
6 for the Establishment Clause, you would have been willing to
7 furnish this service.

8 MR. RICHARDSON: Yes.

9 QUESTION: Apparently you thought that the Federal
10 Government -- the act and the regulations would have permitted
11 you to do so.

12 MR. RICHARDSON: No, not for this service. For other
13 services. We continue to provide him speech therapy services
14 because those are unrelated. We would not --

15 QUESTION: Yes, but do you think the regulations under
16 the act would have permitted you to -- without any thought of
17 the constitutional issue, do you think the regulations would
18 have permitted you to do this at the parochial school?

19 MR. RICHARDSON: No, because those regulations have what
20 they term the Edgar regulations, that have been discussed in
21 the brief, that prohibit any of these program monies to go for
22 religious instruction.

23 QUESTION: Why didn't you raise this statutory argument?

24 MR. RICHARDSON: Because it was not raised --because
25 that --

1 QUESTION: Why didn't you raise it?

2 MR. RICHARDSON: Because the reality of dealing with the
3 statute is that you have to look statewide, because it's going
4 to take a long, expensive trial because the answer isn't a
5 simple yes or no like I probably just told you, but it would
6 depend on the number of statewide students in private schools
7 who have disabilities. The United States has consistently
8 taken the position in these cases that whether a particular
9 private school student is entitled to a particular service
10 requires you to look statewide at all the private school
11 students with disabilities and whether they're generally
12 provided equitable opportunities.

13 QUESTION: Well, I'm surprised the United States
14 argument here is with the petitioner, and I would have thought
15 they wouldn't be there if they thought that the Federal act
16 would have forbidden you to furnish these services.

17 MR. RICHARDSON: Well, they don't because they think
18 Edgar is -- these regs are consistent with the First
19 Amendment, and they don't think the First Amendment is
20 violated. We think the First Amendment is violated, and even
21 if we accept their premise that the Edgar regulations merely
22 restate the First Amendment, we obviously think, since the
23 First Amendment is violated, so is Edgar. So --

24 QUESTION: I'm sorry. May I ask you to clarify one
25 thing for me? In your response to Justice White, you spoke

1 about the need to make a judgment statewide about the
2 appropriateness of your providing this kind of service in a
3 private school and so on.

4 MR. RICHARDSON: Yes.

5 QUESTION: Aren't you addressing in that answer a
6 different regulation from the one that I mentioned? Aren't
7 you addressing the regulation that -- I couldn't possibly
8 quote it, but it speaks something about its being equitable to
9 provide these kinds of services in a private school setting?

10 MR. RICHARDSON: Yes.

11 QUESTION: All right. Now, that -- but that's a
12 different regulation from the one that I mentioned.

13 MR. RICHARDSON: Yes.

14 QUESTION: And I presume -- and I'm not suggesting that
15 you take a final position on this any more than I would, but I
16 assume that in any argument, based on the statute and the
17 regulations issued under it, you would also have based an
18 argument on the section that I quoted a moment ago, which has
19 nothing to do with statewide practice, does it?

20 MR. RICHARDSON: Yes. We had already been informed,
21 however, that that just mirrors the First Amendment, and so
22 the United States had taken positions before with the
23 Department of Education in letter rulings that those two are
24 coextensive. So, the Court ends up always looking at the
25 constitutional issue to define that.

1 Now --

2 QUESTION: So, basically you wanted to keep the United
3 States off your back, and you realized you were not going to
4 have any trouble with the United States on that issue. And
5 that's why it was not litigated.

6 MR. RICHARDSON: Yes.

7 QUESTION: Okay.

8 MR. RICHARDSON: I mean, our funds have eventually come
9 -- at least 11 and a half percent of them -- from the United
10 States, and if we take a distinction -- a variance between that
11 statute and the Establishment Clause, we aren't going to be
12 considered in compliance.

13 QUESTION: Mr. Richardson, if what the State provided
14 for a student was simply a hearing aid so the student could go
15 to the parochial school and hear the instruction, is that
16 prohibited by the First Amendment?

17 MR. RICHARDSON: It depends how the hearing aid is
18 provided. I think the relevant distinction was made in the
19 earlier argument. If a hearing aid is provided for an
20 individual's general use, I think there is no constitutional
21 concern.

22 QUESTION: What if it's available only for use in
23 school?

24 MR. RICHARDSON: And if we add the fact, under the
25 Individuals with Disabilities Education Act under 34 C.F.R.

1 76-652, that the State must have continuing administration,
2 control over that property, I think this Court's lessons in
3 Meek and Wolman would say that is not permitted.

4 QUESTION: You would rely on Meek.

5 MR. RICHARDSON: Yes, I would rely on Meek and Wolman,
6 plus the added fact that under this particular statutory
7 scheme, the State for that property -- again, it's unlike the
8 money. They can't just give it to the student and say now
9 it's yours. They must maintain continuing control over that
10 property. But we also --

11 QUESTION: So, if the State just loaned it to the
12 student.

13 MR. RICHARDSON: Well, if they loaned it and could take
14 a hands-off, that would probably provide a different answer,
15 but that's not what's permitted under the IDEA.

16 QUESTION: Why should there be that sort of difference?

17 MR. RICHARDSON: Because --

18 QUESTION: Now, you're talking about a difference for
19 First Amendment purposes? If they loan it and don't undertake
20 to repair it, it's okay under the First Amendment, but if they
21 loan it and undertake to maintain it, it's not?

22 MR. RICHARDSON: It's not just the repair, but it's the
23 continuing jurisdiction and control, and maybe simply a loan
24 isn't enough. Maybe they'd have to completely give it. But
25 they can give money to a student. Perhaps they could give the

1 hearing aid too. It takes the State issue out of it because
2 is it the State's hearing aid in the classroom, or is it James
3 Zobrest's hearing aid? If it's James Zobrest's hearing aid, I
4 have no concern.

5 QUESTION: And the First Amendment turns on that sort of
6 fine spun distinction?

7 MR. RICHARDSON: Well, look at what we have in Witters.
8 The State is able to give --

9 QUESTION: Maybe the answer is yes.

10 MR. RICHARDSON: Yes, it is.

11 (Laughter.)

12 MR. RICHARDSON: I mean, the answer is yes because,
13 look, they can give Mr. Witters the money and he can go learn
14 to be a pastor with it, but they couldn't pay the thing to --

15

16 QUESTION: Maybe it's time we tried to straighten out
17 some of that.

18 MR. RICHARDSON: That would be fine, but I also think
19 what you have is a situation --

20 QUESTION: You want to be careful.

21 (Laughter.)

22 MR. RICHARDSON: I also think you have a situation where
23 we think there is a critical distinction between a machine and
24 a human being, and they like to equate it to a hearing aid.
25 But you're never going to consider a hearing aid part of the

1 educational team.

2 You look at exhibit A to the Arizona School Boards
3 Association amicus brief. It's a document entitled
4 Educational Interpreting for Deaf Students: A National Task
5 Force. The professionals in the area say an interpreter is -
6 - should properly be considered part of the educational team
7 working in close cooperation with the school teacher to impart
8 the educational lessons of the teacher.

9 In this case, those educational lessons are spiritual as
10 well as secular. You're never going to say that the hearing
11 aid is part of the team.

12 QUESTION: If somebody had invented a robot that could
13 listen and then give -- make these signs, sign language, sort
14 of like simultaneous translations in the U.N., you wouldn't be
15 here I suppose.

16 MR. RICHARDSON: Well, no, I think that presents a much
17 more difficult situation than ours, but under Meek v. Wolman,
18 if you -- I see no difference between that and a tape
19 recorder. And also, in Meek v. Wolman --

20 QUESTION: But it wouldn't be a --

21 MR. RICHARDSON: -- they only had the potential to be
22 used for --

23 QUESTION: It wouldn't be a public employee.

24 MR. RICHARDSON: It would not be a public employee.
25 That's right. But either is a tape recorder, and right now

1 the tape recorder is constitutionally prohibited.

2 And the only distinction that Mr. Ball makes is the
3 massive size. But I think that's a distinction without a
4 difference. How can we provide, you know, 1 Bible to a
5 student as opposed to 500? Where do draw the line? How many
6 mechanical devices would we have to give to assist parochial
7 school students in their parochial education before it would
8 become a massive program?

9 QUESTION: Can the public provide a hall at which a
10 religious ceremony is conducted?

11 (Laughter.)

12 MR. RICHARDSON: Absolutely.

13 QUESTION: Absolutely.

14 MR. RICHARDSON: Passive accommodation.

15 QUESTION: But not the loud speakers.

16 MR. RICHARDSON: I think that's still passive
17 accommodation to rent --

18 QUESTION: Oh, the loud speakers are okay.

19 MR. RICHARDSON: To rent the loud speakers.

20 QUESTION: But when we get into tape recorders, that's
21 bad.

22 MR. RICHARDSON: There's a difference between engaging
23 in a religious activity. In 1970, what we started out -- even
24 before Lemon, this Court said that there are three evils that
25 the First Amendment seeks to prevent: sponsorship, financial

1 support, and active involvement of the sovereign in a
2 religious activity.

3 I do not believe that merely rental or fair market value
4 is anything more than passive accommodation. I don't think
5 that's active involvement in the sovereign even if they rent
6 the whole hall. But I think when you take a public employee,
7 and you ask that public employee to go to work and during that
8 person's job duties to convey to James Zobrest that Jesus
9 Christ was the son of God or that he died to save his sins, I
10 think that's active involvement in a religious activity.

11 QUESTION: What about a public employee driving James to
12 the school where he's going to learn about God?

13 MR. RICHARDSON: I have no problem with that at all.

14 QUESTION: That's okay, though.

15 MR. RICHARDSON: Because that does not involve them in
16 the delivery of the religious message.

17 We provided James Zobrest speech therapy services
18 throughout his four years at Salpointe, and we had no
19 objection to doing so. And if that made James Zobrest more
20 successful in his education at Salpointe, so be it. We don't
21 -- we have no problem with providing related services that
22 don't make the public employee become integrally involved in
23 the religious indoctrination that occurs in a parochial school
24 classroom.

25 We even had an example about someone pushing someone

1 around in a wheel chair. I think that's a substantially
2 different case. You just can't make it -- the only thing they
3 try to -- because the wheelchair pusher is not going to be
4 involved --

5 QUESTION: Like the bus driver.

6 MR. RICHARDSON: Absolutely. Those are very different.

7 But what they try to do is make the distinction that
8 because this person operates mechanically, therefore, per se,
9 he cannot be -- he or she can't be involved in a religious
10 activity. Therefore, that follows.

11 Well, let's look at another example. Let's look at an
12 altar boy in church. An altar boy moves the missal from one
13 side of the altar to the other. He takes the wine and the
14 water to the priest to assist in preparation of communion. He
15 lights and put -- puts out candle. Every activity that altar
16 boy undertakes is choreographed in advance. Every genuflect
17 has been done the same way for 10 years. The altar boy
18 exercises no discretion at all, but is there any doubt that
19 that person is involved in a religious activity during those
20 activities during Sunday mass? Of course, not. The same is
21 true with the interpreter in this case.

22 There are many, many related services that the school
23 district can give that will not involve the employee in the
24 direct religious indoctrination process. The school district
25 has no problem with --

1 QUESTION: What is the objection to the involvement?
2 That it will be seen as sponsorship by the State?

3 MR. RICHARDSON: Absolutely. It is not even just
4 sponsorship.

5 QUESTION: Well, does it depend on the reasonable
6 perception of the reasonable observer?

7 MR. RICHARDSON: Yes, but you know, in this -- and it
8 does. But when you look at -- it has to be both a subjective
9 -- as Justice O'Connor said in her concurring opinion in
10 Lynch, there has to be both a subjective and an objective
11 determination in that regard.

12 And as this Court's opinion said last term in Lee v.
13 Weisman, it is beyond dispute that at a minimum the
14 Constitution guarantees the Government may not coerce anyone
15 to support or participate in religion or its exercise. Even
16 the Justices that dissented in Lee v. Weisman stated expressly
17 that they agreed with that proposition.

18 QUESTION: Mr. Richardson, if that is the problem, if
19 there is some difficulty, symbolic or otherwise, about having
20 a public official in this context, then don't you think maybe
21 the State has some other -- some obligation in some other
22 fashion not to impose upon a family with a deaf child a
23 disincentive to go to a religious school? The child is, in
24 effect, told go to any school you want. You will have an
25 interpreter. But if you go to a religious school, no

1 interpreter. Now, is that consistent with neutrality?

2 MR. RICHARDSON: I believe it is in this situation
3 because let's say James needed a tutor to help him
4 academically. We would say the same thing because if you go
5 to any school other than this -- than a parochial school, it
6 would -- we don't have to do anything but provide you a
7 secular education.

8 QUESTION: But you just repeated it. Why does that make
9 it fair? I mean --

10 MR. RICHARDSON: It makes it fair --

11 QUESTION: Tell me why --

12 MR. RICHARDSON: -- because this Court has always
13 acknowledged a limitation on what we have to do when it
14 transcends the Establishment Clause.

15 QUESTION: The only limitation -- but you -- but there
16 are other ways to get around it. If that does violate the
17 Establishment Clause, then pay cash money to the parents.

18 MR. RICHARDSON: We'd be --

19 QUESTION: But there should not be a disincentive to the
20 parents to send their child to the parochial school, should
21 it?

22 MR. RICHARDSON: And if Congress wants to amend the
23 statute to permit that option, that would be fine.

24 QUESTION: No. I'm saying maybe one option or the other
25 must be given.

1 MR. RICHARDSON: We don't have any authority to give
2 another option. We don't have authority, statutory authority,
3 in Arizona to pay the parents directly, and that -- it's like
4 books. I mean, you know, if he chooses to go to the public
5 school, he gets all his books for free. He doesn't get all
6 his books for free when he chooses to go to a parochial
7 school. And certainly you could provide free secular
8 textbooks, but it's still just a disincentive that he'd have
9 to pay for his religious texts.

10 QUESTION: But that's different. I mean, that's -- you
11 go to the public school or not. But this is saying even if
12 you don't go the public school, you can go to any other school
13 and get the interpreter, but not to a religious school.

14 MR. RICHARDSON: The same way with field trip
15 transportation.

16 QUESTION: And that's neutrality.

17 MR. RICHARDSON: That is neutrality as this Court has
18 defined it because we have the limitation of the Establishment
19 Clause that public employees shouldn't become involved in
20 religious activities. I mean, if we provide it, if we --

21 QUESTION: You don't have to get them involved in
22 religious activities. You could pay for the services.

23 MR. RICHARDSON: Okay. We cannot pay for the services
24 as the Federal law is established, and all we're saying is in
25 this particular application, under the Individuals with

1 Disabilities Education Act, we can't provide the particular
2 service. It only allows us to provide the service because it
3 would make us become directly involved in a religious activity
4 or, as we said last term, in the support of religion or its
5 exercise because what is going on in that classroom is the
6 exercise of religion. And that limitation has always been.

7 Even the States that said we will give you secular
8 textbooks still didn't give them all the textbooks. Even the
9 ones that said we'll give you bus transportation still doesn't
10 give parochial students field trip bus transportation because
11 that's --

12 QUESTION: Do you like that distinction?

13 MR. RICHARDSON: I like the distinction --

14 QUESTION: That has never struck me as one of the better
15 ones.

16 (Laughter.)

17 MR. RICHARDSON: I like the distinction that public
18 employees cannot be involved in religious activities. You --
19 you know, if this Court wants to reanalyze whether bus
20 transportation is that, so be it.

21 QUESTION: -- religious activity, busing them to the zoo
22 for a field trip?

23 MR. RICHARDSON: I don't believe so.

24 QUESTION: Yes, I don't think so.

25 MR. RICHARDSON: But I think the interpreter's activity

1 of informing James Zobrest whether there's everlasting life is
2 and I think that's the importance in this case.

3 In summary, the school district has no objection to the
4 fact that Congress requires it under the IDEA to provide
5 public school students special education and related services
6 and even, under some circumstances, to private school
7 students. We have no objection to the fact that James
8 Zobrest, who's an outstanding young man, chose to attend
9 Salpointe. We gladly provided him speech therapy services,
10 and you can't use the but for analysis that the Government
11 would. If that speech therapy allowed him to perform his
12 academic -- to do academically better, so be it.

13 We draw the line in only one place. When that Federal
14 law -- when someone tells us that that Federal law makes us
15 take a public employee and put them in a parochial school
16 classroom to have daily essential involvement in the religious
17 educational process in that classroom, under those
18 circumstances, the governing board members must be able to
19 assure themselves and their taxpaying constituents and their
20 employees that their monies and that their efforts are not
21 being used to religiously indoctrinate a student. The school
22 board asks nothing more, and the First Amendment commands no
23 less.

24 Thank you.

25 QUESTION: Thank you, Mr. Richardson.

1 Mr. Ball, you have 1 minute remaining.

2 REBUTTAL ARGUMENT OF WILLIAM B. BALL

3 ON BEHALF OF THE PETITIONERS

4 MR. BALL: Thank you, Your Honor.

5 I was interested that Mr. Richardson referred to the
6 Arizona School Boards Association brief amicus curiae in
7 connection with his argument that the interpreter will fulfill
8 a teacher's function. Exhibit -- or the first appendix to the
9 Arizona School Boards' brief amicus is the report of the
10 National Task Force on Educational Interpreting, and it says
11 that the interpreter's task in a school is interpreting.
12 That's his priority. It goes on to say that the role of the
13 educational interpreter should not include classroom
14 management, that is to say, formal instruction and classroom
15 supervision.

16 The Court in Meek spoke of teachers and said the teacher
17 remains a teacher. Well, the interpreter remains an
18 interpreter very, very clearly under the ethical code.

19 My second point is --

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ball.

21 The case is submitted.

22 (Whereupon, at 12:06 p.m., the case in the above-
23 entitled matter was submitted.)

24

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

Larry Zobrest, et ux., et al., Petitioners v. Catalina Foothill

School District Case No: 92-94

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Lona M. May*

(REPORTER)