1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GARY LOCKE, GOVERNOR OF :

4 WASHINGTON, ET AL., :

5 Petitioner :

6 v. : No. 02-1315

7 JOSHUA DAVEY :

8 - - - - - - - - - - - - - - - X

9 Washington, D.C.

10 Tuesday, December 2, 2003

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United

13 States at 10:11 a.m.

14 APPEARANCES

15 NARDA PIERCE, ESQ., Solicitor General, Olympia,

16 Washington; on behalf of the Petitioners.

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

18 Respondent.

19 GEN. THEODORE B. OLSON, ESQ., Solicitor General,

20 Department of Justice, Washington, D.C.; as amicus

21 curiae, supporting the Respondent.

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1 P R O C E E D I N G S

2 (10:11 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear

4 argument now in No. 02-1315, Gary Locke v. Joshua

5 Davey.

6 Ms. Pierce.

7 ORAL ARGUMENT OF NARDA PIERCE

8 ON BEHALF OF THE PETITIONERS

9 MS. PIERCE: Mr. Chief Justice, and may it

10 please the Court:

11 To preserve freedom of conscience for all

12 its citizens in matters of religious faith and

13 belief, Washington's constitution limits the

14 involvement of government. It limits both the

15 ability to regulate religious activities and to fund

16 religious activities.

17 QUESTION: Do you think the fact that that

18 provision is in Washington's constitution makes it

19 different than, say, if it were in a -- simply in a

20 statute?

21 MS. PIERCE: Mr. Chief Justice, the

22 recognition that this Court has given to a state

23 constitution, as opposed to a statute, is that it is

24 adopted by all of the voters of the state. However,

25 both the constitution and the state laws are subject

1 to Federal constitutional provisions. At issue today
2 is our --
3 QUESTION: Is -- is it a program at issue
4 here that provides basically money to the student to
5 be spent as the student wishes? Is it like a voucher
6 program in that sense?
7 MS. PIERCE: Justice O'Connor, the Promise
8 Scholarship is to be provided to the student for
9 purposes of educational expenses and they're required
10 to use it for certain educational expenses. The
11 purpose of the Promise Scholarship established by the
12 legislature is to strengthen the length between --
13 the link between K-12 education and higher education,
14 and in a recognition --
15 QUESTION: Well, I'm just trying to find
16 out how it works, whether it's like a voucher
17 program, you give the money to the student and the
18 student decides how to use it.
19 MS. PIERCE: It -- it works like a voucher
20 program to the extent that it's for educational
21 expenses. I'm not familiar with the specifics of
22 voucher programs, but the student is required to use
23 it for those educational expenses.
24 It is not, for example, like a paycheck,
25 where a person has those funds as their private funds

1 and can dedicate those to any uses that they choose.
2 And that's a key point under the Washington
3 constitution, because article I, section 11 says that
4 public funds shall not be applied to religious
5 worship, exercise, or instruction --
6 QUESTION: How -- how many states have
7 similar provisions in their constitutions or laws?
8 MS. PIERCE: It varies, Justice O'Connor,
9 according to the particular provisions. This
10 provision refers to not using public funds for
11 religious instruction. We also have a provision that
12 no public funds shall be spent at schools under
13 sectarian influence. I - I believe it's something in
14 the neighborhood of 36 states who have some
15 provisions relating to use of public funds for
16 religious instruction, but those vary.
17 QUESTION: They were all adopted at about
18 the same time, weren't these so-called Blaine
19 Amendments?
20 MS. PIERCE: Your Honor, this is not the
21 Blaine Amendment. The so-called Blaine Amendment are
22 those that refer to use of public funds in schools
23 under sectarian control. That's a different
24 provision of the Washington constitution. That's
25 article IX, section 4, and that was required by the

1 enabling act that provided for our statehood, but
2 this is a different provision. It's a provision that
3 was separate and apart, that was debated, that was
4 added to Washington's constitution as a separate
5 provision.
6 QUESTION: And was that --
7 QUESTION: So this was add -- this was
8 added after Washington was admitted in 1889?
9 MS. PIERCE: No, Your -- Mr. Chief
10 Justice, I'm sorry -- it was at the same time of
11 adoption, but it was not the provision that was
12 required by the --
13 QUESTION: The enabling.
14 MS. PIERCE: -- enabling act. It was not
15 in the original proposed constitution set before the
16 framers. And during the course of that
17 constitutional convention, that's where this language
18 was added.
19 And I know, referring to the Blaine
20 Amendments, there's been much made in the briefs of
21 whether or not those amendments stemmed from
22 anti-Catholic motivation. There's certainly no
23 evidence in Washington that there was any discussion,
24 any evidence of anti-Catholic motive.
25 In Washington, both article I, section 11

1 and article IX, section 4, which is -- more directly
2 stems from the Blaine Amendment, Federal level,
3 they've always been implemented in a
4 non-discriminatory manner, prohibiting both the
5 practice of any religion of any sort in our public
6 schools, as well as any funding for private sectarian
7 schools.
8 QUESTION: But what if -- what if a state
9 prohibited only the study of theology from a Catholic
10 perspective? Would that survive?
11 MS. PIERCE: No, Your Honor, we don't
12 believe it would. But what the state has done here
13 is prohibited public funds for religious instruction
14 wherever it occurs, including in a college --
15 QUESTION: Wait. How -- how do you
16 reconcile that? That's what I don't understand. It
17 seems to me that if you say it does not violate the
18 religion clauses to prohibit the use for any
19 religious instruction whatever, you would also have
20 to say that it does not violate the religion clauses
21 to say no public funds shall be spent for Jewish
22 theology studies.
23 Why -- why -- I mean, the state is not
24 permitted to discriminate between religious sects,
25 but it's just as much not permitted to discriminate

1 between religion in general and non-religion. So how
2 can you possibly -- I mean, if we say that -- that
3 you can do this, it seems to me, we have to say you
4 -- you can also prohibit Jewish studies.
5 MS. PIERCE: No, Justice Scalia --
6 QUESTION: Why not?
7 MS. PIERCE: -- I don't believe that
8 follows. The line between funds for secular purposes
9 and for religious purposes is a line that's been
10 recognized by this Court in various funding cases and
11 in reviewing government activities. It's a line that
12 recognizes both the values of the Establishment
13 Clause and the values of the Free Exercise Clause.
14 Here, simply because the State of
15 Washington is extending those values of the
16 Establishment Clause beyond direct funding into
17 indirect funding does not convert those values into
18 hostility. There's still the values --
19 QUESTION: It's -- it's treating --
20 MS. PIERCE: -- of protecting religious
21 freedom.
22 QUESTION: -- it's treating religion
23 differently from non-religion. You can study
24 anything you like and get it subsidized except
25 religion. Why is that not violating the principle of

1 neutrality?

2 MS. PIERCE: It is treating religion

3 different from a realm in which religion -- religious

4 belief or non-belief does not enter what we refer to

5 as secular studies. It's --

6 QUESTION: You're making the -- are you --

7 are you making the -- or is Washington making the

8 distinction between training in how to be religious,

9 training as it were in the practice of some -- of a

10 religion that leads to the truth, on the one hand,

11 and study about what people believe on the other

12 hand. I thought that was the distinction, how to be

13 religious versus what religions believe. Is that the

14 distinction?

15 MS. PIERCE: Yes, Your Honor.

16 QUESTION: Okay.

17 MS. PIERCE: And that was the distinction

18 I meant to articulate.

19 QUESTION: So, I take it, then, if it

20 that's the distinction, you would -- you would agree

21 that if Washington funded a school of atheism, but

22 wouldn't fund a school like this one, that there

23 would be a violation of one or both of the clauses?

24 MS. PIERCE: Yes, Justice Souter, because

25 whenever you enter into the realm of faith or belief,

1 whenever you try to affect someone's belief in that
2 realm, that has been a particularly protected realm
3 of individual conscience, that becomes religious,
4 whether it's non-belief or belief. It's when you --
5 QUESTION: But it's the difference between
6 being religious and studying religion. That's your
7 line, isn't it?
8 MS. PIERCE: Yes, Your Honor, and I
9 believe that's the Court's line. It's the line
10 that's been drawn in many of the direct funding cases
11 of this Court, to teach about religion --
12 QUESTION: Can -- can you not study
13 atheism under this statute? Suppose there is a
14 course debunking, debunking all religious belief.
15 Would that be prohibited? Would that be funded under
16 this statute? I don't see any -- any prohibition of
17 the funding of that?
18 MS. PIERCE: Justice Scalia, I think when
19 the statute is read in conjunction with Washington
20 case law, and particularly the Calvary Bible
21 Presbyterian Church case, that the definition --
22 QUESTION: What does the statute say? I
23 don't see how it can possibly apply to that. What
24 does it say?
25 MS. PIERCE: Well, the statute says that

1 no aid shall be awarded to any student pursuing a
2 degree in theology.
3 QUESTION: In theology.
4 MS. PIERCE: But --
5 QUESTION: Now, is -- is a degree in
6 atheism a degree in theology?
7 MS. PIERCE: I believe it would be under
8 the interpretation --
9 QUESTION: That would be a question, would
10 it not, for the state supreme court to decide? It
11 may decide it needs to carry that limitation in order
12 to be compatible with the Free Exercise Clause.
13 MS. PIERCE: I --
14 QUESTION: And I think that certainly the
15 Free Exercise Clause answers the question, can you
16 give it to the Catholics but not to the Jews. So
17 that's -- that's not an issue.
18 MS. PIERCE: Yes, Justice Ginsburg, and I
19 think that the Washington Supreme Court would
20 interpret it that way, not only to be consistent with
21 the Free Exercise Clause, but to be consistent with
22 its own state constitutional provision and its
23 purposes, which is to not use public funds for
24 instruction in the realm of faith and belief and --
25 QUESTION: What cases do you cite for the

1 proposition that you're asserting that the -- that
2 the Free Exercise Clause or the Establishment Clause
3 applies differently to discrimination between
4 different religions than it does to discrimination
5 between religion in general and non-religion? What
6 -- what cases do you cite for that distinction?
7 MS. PIERCE: What we cite, Your Honor, is
8 that line between the secular and the religious
9 activity. I believe it's the line that was drawn in
10 the Schempp case, referring to the study about
11 religion versus the study of religion, which is not,
12 in our view, discrimination in the classic sense of
13 that word.
14 QUESTION: No, but that doesn't -- that --
15 the issue there was whether you were discriminating
16 against religion or not. And since you are not
17 prohibiting study about religion, that isn't the
18 question here.
19 The question is, assuming you are
20 discriminating between religion and non-religion, you
21 can't study theology but you can study anything else,
22 what is there in our cases that says that is okay,
23 although it would not be okay to distinguish between
24 Jewish studies or Catholic studies or Protestant
25 studies and other studies?

1 I don't know a single case that says the
2 principle of neutrality somehow applies differently
3 so long as you're discriminating against all religion
4 than it does when you're just discriminating against
5 one denomination. Did you have a case?
6 MS. PIERCE: Well, Your Honor, in the
7 context of this Court's aid to education under the
8 Establishment Clause, and Mitchell v. Helms is a
9 classic example, there's a distinction between
10 providing materials, educational materials that are
11 to be used in secular education, as opposed to those
12 materials that might be diverted to religious,
13 ideological education and --
14 QUESTION: But that's -- that's the
15 Establishment Clause, isn't it, in Mitchell against
16 Helms?
17 MS. PIERCE: Yes, it is, Your Honor, and
18 -- and we believe the same -- many of the same values
19 underlie the Washington constitution. And we don't
20 believe that the distinction is made invalid because
21 it is extended to indirect funding and doesn't apply
22 only to direct funding.
23 QUESTION: Well, I wanted to ask you about
24 these values. As I understand, this student could
25 have done exactly what he in fact did if only he did

1 not declare a double major. He could have taken all
2 of these religious perspective courses, if only he'd
3 called his major business administration, which in
4 fact it was because he had the credits for that, too.
5 That would have been permissible. Is that correct,
6 or am I incorrect?
7 MS. PIERCE: Well, the statute focuses on
8 whether a student is pursuing a degree in theology
9 and -- and --
10 QUESTION: If -- suppose that he pursued a
11 degree in business administration and yet, ancillary
12 to that or as options, took all of these other
13 courses. Could he have had the aid that he seeks?
14 MS. PIERCE: Yes, Your Honor, we think
15 that could have happened, but it's an unlikely --
16 QUESTION: All right. What is the state's
17 interest in denying him aid simply because he
18 declares a double major?
19 MS. PIERCE: I believe the reason the
20 legislature has focused on the nature of the degree
21 program is because it's an inherently religious
22 program, and if they were to --
23 QUESTION: What is the state's interest in
24 denying him funds simply because of the way he labels
25 the major he chooses, if all the other instructions,

1 all the other elements of the case are the same? He
2 takes all the same courses, he has all the same
3 commitment as a Christian, and yet he's denied the
4 relief in one case and given it -- the subsidy in one
5 case, and given it in the other. What is the state's
6 interest in doing that?
7 MS. PIERCE: Justice Kennedy, I think the
8 state's interest is not in that particular student,
9 but in how you administer it overall. And the way
10 the state administers it overall, in order to avoid a
11 class-by-class, student-by-student determination, is
12 to look at the degree programs that are inherently
13 religious that have, or ask the universities actually
14 to do that --
15 QUESTION: Ms. Pierce, I thought that the
16 --
17 QUESTION: Well, what is the state's
18 interest in -- in denying aid for programs that are
19 inherently religious? What is that interest? Is it
20 a compelling interest?
21 MS. PIERCE: Yes, Your Honor, we believe
22 it is. The interest is --
23 QUESTION: May I ask you just to clarify
24 what I thought was the purpose of this, was that the
25 state has decided it does not want to fund the

1 training of clergymen, and it cites a long history of
2 that. And it's tried to be as accommodating as it
3 can with that limitation.
4 I mean, certainly if what you're doing is
5 vulnerable, it would be no less vulnerable if the
6 state said, well, we won't fund that school at all
7 because it's an evangelical school.
8 MS. PIERCE: Justice Ginsburg -- excuse me
9 -- the focus is on the religious nature of the
10 instruction. If someone had a career goal to enter
11 the clergy and yet took a secular course of
12 education, they would not be denied funding.
13 Certainly one of the underlying values of
14 our Freedom of Religion Clauses at the Federal and
15 state level is not to require people to support the
16 promotion of a doctrine or religious belief with
17 which they may not agree, and that, returning to
18 Justice Kennedy's question, is -- is the interest.
19 The way it's implemented by Washington,
20 and it has been by Congress and by other states in
21 other contexts, is to look at that core course of
22 study because --
23 QUESTION: But we've decided in Witters
24 that it's unnecessary to do that to conform to the
25 Establishment Clause.

1 MS. PIERCE: Yes, Justice Kennedy --

2 QUESTION: So, after -- after that, then

3 what is the state's interest at this point?

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

5 QUESTION: Is the state's interest in

6 redefining the Establishment Clause?

7 MS. PIERCE: No, Your Honor, but the state

8 has a different, although somewhat concurrent, scheme

9 for religious freedom, and that involves not just

10 avoiding a government endorsement of religion, which

11 is what the Establishment Clause primarily turns and

12 focuses on --

13 QUESTION: But Witters said there is no

14 endorsement.

15 MS. PIERCE: And -- and --

16 QUESTION: So you can't use that.

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

18 QUESTION: I still don't see what your

19 interest is, and once you do define it, I want you to

20 tell me if it's compelling, rational basis.

21 MS. PIERCE: Okay. Washington's interest

22 expressed in 1889 was to protect the freedom of

23 conscience of all its citizens, and that included not

24 compelling its citizens to provide enforced public

25 funds to support the promotion of religious beliefs

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

2 QUESTION: Does that mean that the state

3 can decline to provide fire protection to churches

4 and synagogues?

5 MS. PIERCE: No, Your Honor, and that

6 distinction has been made.

7 QUESTION: And Washington doesn't do that,

8 does it?

9 MS. PIERCE: It does not decline that, and

10 there's --

11 QUESTION: So that -- that general public

12 benefit is extended to both religious and

13 non-religious institutions equivalently, and people

14 don't get upset about that, do they?

15 MS. PIERCE: No, Your Honor. I think

16 providing the essential services that include people

17 as part of our civilized community has been

18 distinguished from other kind of funding when these

19 questions are asked.

20 QUESTION: Well, Washington's position, I

21 take it, is that, although it -- it will certainly

22 put out the fire in the church, it won't spend money

23 for the purpose of persuading people that they ought

24 to be inside the church. Is that the -- the point

25 you're making?

1 MS. PIERCE: Yes, Justice Souter. There
2 is a distinction there and it's a distinction that's
3 been made in a variety of contexts, but --
4 QUESTION: And you're saying that even
5 though it would not offend the Establishment Clause
6 if the state did provide this sort of funding, there
7 is still, I think your point is, there is still an
8 area within which it has a choice, even though that
9 choice may not be determined by the Establishment
10 Clause?
11 MS. PIERCE: Yes, Your Honor, because the
12 purpose of the state constitution, which of course,
13 when it was adopted in 1889, was not viewed as
14 greater than the Establishment Clause, it was viewed
15 as the only protection for religious freedom at the
16 state level, since it wasn't until 1947 that the
17 Establishment Clause was held to apply to the states.
18 And to return to your question, Justice
19 Souter, the distinction between providing police and
20 fire services to an organization and providing
21 funding to assist in the educational purpose of that
22 organization was made in Norwood v. Harrison in this
23 Court. In the very different circumstance, but for
24 -- for similar reasons, this Court held that
25 textbooks could not be provided to segregated schools

1 because that would aid the discrimination of those
2 schools in violation of --
3 QUESTION: Well, isn't that an
4 Establishment Clause issue?
5 MS. PIERCE: In that particular --
6 QUESTION: It's been litigated under the
7 Establishment Clause, right?
8 MS. PIERCE: The provision of the -- the
9 aid --
10 QUESTION: Providing textbooks or other
11 aid to religious schools. Those have been
12 Establishment Clause challenges, and we had a -- the
13 Witters case from your state, and determined that the
14 Establishment Clause is not violated by giving aid to
15 the blind, which is used then to study for the
16 ministry, right?
17 MS. PIERCE: Yes, Justice O'Connor, and
18 that's because under the Establishment Clause, the
19 question is, is the government endorsing religion?
20 Under Washington's article I, section 11, the
21 question is, is -- are public funds being used for
22 the promotion or -- of religious belief or disbelief
23 and --
24 QUESTION: But do you -- do you think that
25 --

1 QUESTION: Ms. Pierce, may I ask you a
2 question there on how you draw the line? Because I
3 want to get clear on one thing, and it was raised in
4 effect by the questions earlier about the Blaine
5 Amendment, I guess, but is my understanding correct
6 that the State of -- that this clause that we are
7 dealing with here, and nothing else for that matter
8 in the Washington law, forbids the state from paying
9 -- we'll call it a tuition voucher here -- that is
10 going to a sectarian school like this one, so long as
11 it's not being used for theological education?
12 MS. PIERCE: Justice Souter, there's a
13 distinction in our state constitution --
14 QUESTION: No, but isn't the answer, there
15 is nothing that forbids that? In other words, going
16 back to Justice Kennedy's question, if this same
17 student said, I want to study business and I want to
18 study it at this sectarian school, there would be no
19 impediment in Washington law to paying him the -- or
20 giving him the voucher or whatever you call it and
21 letting him spend it at this sectarian school? Is
22 that correct?
23 MS. PIERCE: That's true at the higher
24 education level.
25 QUESTION: Okay.

1 QUESTION: But isn't it also true he could
2 even take the same courses and get it as long as he
3 didn't declare his major until he was a junior?
4 MS. PIERCE: Your Honor, we -- the statute
5 says pursuing a degree in theology, so I think it
6 should be properly read and is properly read by
7 Northwest College as a student who is, during the
8 academic terms that are funded, working toward that
9 degree in theology.
10 QUESTION: But I -- I just want to be sure
11 I understand how it works in response to Justice
12 Kennedy's inquiry. Is it not true that he could have
13 taken all or most of the religious courses he did
14 take if he'd only declared a different major or
15 postponed the time when he declared his major?
16 MS. PIERCE: I believe he --
17 QUESTION: Which has a double aspect. In
18 one hand, as Justice Kennedy points out, the state
19 interest doesn't seem all that compelling there, but
20 on the other hand, the burden on him is also pretty
21 slight, because all he had to was take a -- just
22 manage his curriculum a little differently.
23 MS. PIERCE: Yes, Your Honor. I --
24 QUESTION: And -- and I just want to know,
25 am I correct that he could have taken either all or

1 substantially all of the religion -- religious
2 courses and qualified for the scholarship if he just
3 declared a different major?
4 MS. PIERCE: You're partially correct,
5 Justice Stevens. I think he could have taken some of
6 the same religion courses. I don't think just simply
7 declaring your major later is what meets the purpose
8 of the statute. The statute says are you pursuing --
9 QUESTION: Wasn't he counseled -- wasn't
10 he counseled specifically by the school to be honest?
11 MS. PIERCE: Yes, Justice Ginsburg.
12 QUESTION: And not try to hide what his
13 purpose was, which he was perfectly open about?
14 MS. PIERCE: Yes, Justice Ginsburg.
15 QUESTION: And, of course, if -- if you
16 take a whole bunch of religious courses, it may be
17 they can't be counted for some other major other than
18 the -- the theology.
19 MS. PIERCE: Well, the theology degree,
20 Your Honor, does require, I believe at Northwest, 125
21 credits, and 79 of those credits are required to be
22 in various Bible and theological courses, so I think
23 it is -- it would be possible, but unusual, for
24 another student to have those same courses and not
25 being pursuing a degree in theology.

1 QUESTION: Could we go back to Justice
2 Kennedy's second part of what he was asking, because
3 it's bothering me, too. I think it's absolutely
4 well-established, whether there's a case or not, that
5 people have thought it's different when what the
6 Federal government or state government says is, what
7 we have here is a secular program, we're paying for
8 secular programs, whether it's schools or social
9 services or any one of a million things, or if it
10 were to say, well, it's a Baptist program, but not a
11 Catholic program.
12 I think if they said the second, they'd
13 have to pass something like strict scrutiny as far as
14 their reasons are concerned. I think if they said
15 the first, so far I don't think they would have to
16 pass anything like that kind of test, but that's the
17 question.
18 And I think that Justice Kennedy was
19 saying, very well, what is the test? What kind of
20 scrutiny should you give under the Equal Protection
21 Clause, where what the state has done is said we have
22 a secular spending program. Now, leave the atheist,
23 because if the atheist is a program which concerns
24 principles that in the mind of the atheist are
25 similar to those that are religious in the mind of a

1 religious person, I'm willing to call that a
2 religious program. That's not what I'm talking
3 about.
4 I'm talking about just a regular secular
5 aid program. What do we judge that distinction on
6 the basis of? What kind of a test?
7 MS. PIERCE: Justice Breyer, I believe it
8 is a rational basis test, that is, it is a neutral
9 line, it's a recognized line between the secular that
10 does not involve the realm of belief and faith, and a
11 religious that does.
12 QUESTION: I didn't think this was an
13 Equal Protection Clause case at all. I thought it
14 was -- the challenge was freedom of religion.
15 MS. PIERCE: Yes, Mr. Chief Justice, it
16 is, and --
17 QUESTION: The Free Exercise Clause of the
18 First Amendment?
19 MS. PIERCE: That is the question on which
20 cert was granted, and --
21 QUESTION: Right.
22 MS. PIERCE: -- because it is a neutral
23 line --
24 QUESTION: Well, I'm thinking of free
25 exercise, but I'm thinking this is a discrimination

1 case, so maybe it's totally different under free
2 exercise, but you see the question.
3 MS. PIERCE: Yes, and Justice Breyer --
4 QUESTION: And your answer's rational
5 basis.
6 MS. PIERCE: Yes.
7 QUESTION: Rational -- you -- you think
8 there's a difference in free exercise if what the
9 state says is, we are burdening the free exercise of
10 all religions, as opposed to, we are burdening the
11 free exercise of one particular religion. You think
12 there's a different -- a different standard? Again,
13 I would ask for the case that -- that suggests that.
14 MS. PIERCE: Justice Scalia, in the first
15 instance, this case involves application of public
16 funds in a funding program, and we believe that the
17 principle that a state's decision not to fund the
18 exercise of a fundamental right is not a burden on
19 that right, it's not an infringement on that right.
20 All that the State of Washington has done here is
21 decline to fund theology studies --
22 QUESTION: Certainly in our -- in our
23 Rosenberger case there was a rational basis for what
24 the University of Virginia did, but we held it
25 violated the Free Exercise Clause.

1 MS. PIERCE: Yes, Mr. Chief Justice, and
2 the purpose of the public forum principles that were
3 applied in Rosenberger are to protect the open public
4 forum. There the Court specifically acknowledged
5 that that was a forum for the publication, for the
6 expression of ideas, and that the expression of those
7 ideas in that open public forum would be incomplete
8 if certain viewpoints were excluded.
9 But certainly the purpose of the Promise
10 Scholarship is not to open a public forum. It's more
11 akin to the American Library Association case, where
12 Internet access was provided, not to provide a forum
13 for the Web publishers, but to promote education and
14 learning.
15 QUESTION: You think there is a -- a
16 rational basis suffices for the state to prohibit
17 this student from declaring one of his legitimate
18 majors?
19 MS. PIERCE: We believe -- yes, Your
20 Honor, we believe there is a rational basis to not
21 fund religious instruction wherever it occurs,
22 including a theology course.
23 QUESTION: Is it essentially your position
24 that not everything that is compatible with the
25 Establishment Clause, not everything that the state

1 could do under the Establishment Clause, it must do
2 under the Free Exercise? And if that's your
3 position, how do you define the space in between
4 those two where the state has a choice?
5 MS. PIERCE: That is our position. We
6 don't think states should be in constitutional
7 pincers where whatever they're allowed to do under
8 the Establishment Clause or required to do,
9 particularly given the history that states have come
10 to their own path to religious freedom.
11 And I think applying the various
12 principles on when you burden the exercise of
13 religious freedom leads you to the latitude in this
14 area. Here, not providing funding does not infringe
15 or burden a fundamental right, and that's all that
16 the state has done. Mr. Chief Justice, I'd --
17 QUESTION: Thank you, Ms. Pierce. You're
18 reserving your time.
19 Mr. Sekulow.
20 ORAL ARGUMENT OF JAY A. SEKULOW
21 ON BEHALF OF THE RESPONDENT
22 MR. SEKULOW: Mr. Chief Justice, and may
23 it please the Court:
24 In the free exercise context, this Court
25 has held that the minimum requirement of neutrality

1 is that a law not discriminate on its face. That's
2 clearly what is taking place here, and I'd like to
3 put in context exactly how the implementation of the
4 statutory program works. Washington, when they
5 adopted the Promise Scholarship program and how it's
6 applied, works this way.
7 A student applies for this general grant.
8 In this particular case, Josh Davey applied for the
9 grant when he was aware of it in the summer, was
10 notified by the state that he was qualified and
11 accepted in the program in August. At that point he
12 enrolled at Northwest College, which is an accredited
13 and eligible institution. It was not until -- and he
14 declared his major, the dual major, at that point in
15 business administration and the pastoral ministries
16 degree.
17 Two months later, it was two months until
18 he was notified by the financial aid office through a
19 memorandum that the state circulated that after
20 reviewing the Promise Scholarship program, the state
21 then decided that in fact there would be a
22 prohibition put in place on pursuing a degree in
23 theology and that state has interpreted that to mean
24 pursuing a degree in theology from a religious
25 perspective.

1 The check, Justice O'Connor, is sent
2 directly to the student. The school is the -- in the
3 sense the school gets the check and hands it to the
4 student. It's not written to the school. The school
5 cannot use it for -- to -- a private institution
6 cannot use it at all for any expenditure. They can't
7 credit, they can't debit the account. The school
8 merely verifies that the student's enrolled. The
9 check then goes to the student. It can be used for
10 any --
11 QUESTION: So it wouldn't violate the
12 Establishment Clause, but I guess what we're
13 addressing is whether there's a free exercise
14 violation.
15 MR. SEKULOW: Right.
16 QUESTION: How does this violate the
17 student's right to free exercise of religion? Maybe
18 it's more expensive to go to school, but why does
19 that violate his free exercise of religion right?
20 MR. SEKULOW: Joshua Davey, and the state
21 has acknowledged this, of course, has the free
22 exercise right to pursue a degree in theology. The
23 question here is the burden that's placed on it. Of
24 course, two responses. With regard to the actual
25 burden, here a general benefit was available to a

1 student and a religious classification was utilized
2 to deny the student access to those funds. He met
3 the criteria.
4 QUESTION: Well, let me ask you this.
5 MR. SEKULOW: Sure.
6 QUESTION: Suppose a state has a school
7 voucher program such as the Court indicated could be
8 upheld in the Zelman case. Now, if the state decides
9 not to give school vouchers for use in religious or
10 parochial schools, do you take the position it must,
11 that it has to do one or the other? It can have a
12 voucher program, but if it does, it has to fund all
13 private and religious schools with a voucher program?
14 MR. SEKULOW: No, I think --
15 QUESTION: Is that your position?
16 MR. SEKULOW: No. The state --
17 QUESTION: Well, why not? I mean, why
18 wouldn't it follow from what you are saying today?
19 MR. SEKULOW: For this reason. The state
20 can set neutral and eligible criteria for admission
21 as an eligible institution. Here it was
22 accreditation. Now, if the religious school, the
23 school that was affiliated with the religious
24 denomination met the general neutral eligibility
25 requirement, and there was no countervailing

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

2 QUESTION: I -- I don't know what you

3 mean. The state says all schools were going to have

4 a program to give vouchers for use in all schools of

5 a certain grade level, assuming the teachers are

6 qualified to be teachers.

7 MR. SEKULOW: That --

8 QUESTION: Can they refrain from making

9 that program available for use in religious schools?

10 MR. SEKULOW: I -- I would think not. I

11 think once it would go towards the private schools,

12 as long as the eligibility --

13 QUESTION: So what you're urging here

14 would have a major impact, then, would it not, on --

15 on voucher programs?

16 MR. SEKULOW: Well, it would. I think a

17 voucher program could be established that has a

18 neutral criteria and if the private schools meet that

19 criteria, including the private religious schools and

20 there is no countervailing Establishment Clause

21 problem, I wouldn't see any reason --

22 QUESTION: Well, but the only criteria

23 that they have --

24 QUESTION: Sure -- surely, the state can

25 decide to fund only public schools.

1 MR. SEKULOW: Absolutely.

2 QUESTION: And it's only when it starts

3 funding some private schools that you get into the

4 religious question.

5 MR. SEKULOW: That's correct.

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

7 QUESTION: But you say if they publish any

8 private school they must publish -- they must support

9 all religious schools as well.

10 MR. SEKULOW: No. Again, I think if they

11 meet the accreditation standard, if the program were

12 to --

13 QUESTION: But they could not just say we

14 -- we will publish all private schools except

15 sectarian schools.

16 MR. SEKULOW: I don't think they could do

17 that. No, I think it would be --

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

19 QUESTION: Even though there -- there are

20 quite a few state laws and constitutional provisions

21 around the country that -- that provide just that,

22 aren't there?

23 MR. SEKULOW: There are. Thirty-seven

24 states have --

25 QUESTION: Yeah. So the decision here

1 could have very broad impact, I assume.

2 MR. SEKULOW: Interesting, Justice

3 O'Connor, and admittedly, this is a bit of a moving

4 target because state policies change, but there are

5 approximately 37 states that have this type of

6 amendment. Twenty-five of those states have programs

7 of aid that do not have a discriminatory basis upon

8 religion. It's given to any accredited --

9 QUESTION: Mr. Sekulow?

10 MR. SEKULOW: Yes.

11 QUESTION: May I ask you the question that

12 I asked Ms. Pierce, because I think this is really

13 what the case turns on. Is there any space between

14 what one, what a state is permitted to do, what it's

15 permitted to fund under the Establishment Clause and

16 what it must fund under the Free Exercise Clause, and

17 if so, what fills that space? You've been candid in

18 saying voucher, no. If you -- going to give to any

19 private school, you can't leave out the parochial

20 schools. You certainly said that about this program.

21 MR. SEKULOW: Yes.

22 QUESTION: Suppose the -- the state would

23 say, we are going to fund professional education,

24 lawyers, doctors, architects, engineers, but we're

25 not going to fund people who are -- who are in a

1 divinity program. Would that qualify or would that
2 fall also?
3 MR. SEKULOW: Well, I think a program that
4 were to just limit it to specific professions would
5 not necessarily have to go towards theology. For
6 instance, in a lot of states using that example,
7 Justice Ginsburg, there is a shortage of nurses right
8 now. And if the state were to adopt a program to
9 fund education for nurses that included public and
10 private schools, they don't have to bring theology --
11 QUESTION: No, but it would include -- my
12 program includes all professions, save one, and --
13 and that is ministry.
14 MR. SEKULOW: Well, if it was as you
15 described it, I would be here arguing the same point
16 in this context. The idea that you would list all of
17 the professions and then say we are going to fund
18 everything but those students studying theology would
19 be again that religious classification, and I would
20 think unless the state could establish its compelling
21 governmental interest --
22 QUESTION: As I -- as I understand your
23 answer to Justice O'Connor, if we decide in your
24 favor, we necessarily commit ourselves to the
25 proposition that an elementary and secondary school

1 voucher program must include religious schools if it
2 includes any other private schools. It -- it seems
3 to me that your case can be resolved on a much
4 narrower issue than that. Here we have a -- a
5 college student who is being required to surrender
6 his -- his conscientious beliefs by declaring a major
7 which otherwise would have been completely funded by
8 the school, and I -- I just don't see any interest in
9 doing that. It seems to me a -- a very severe
10 violation of -- of religious conscience. I think
11 that's quite different from an overall neutrality
12 principle, which would foreclose this Court on the
13 voucher issue.
14 MR. SEKULOW: Well, I don't think -- I
15 agree, Justice Kennedy. I don't think the Court has
16 to go that far here.
17 QUESTION: But why isn't --
18 QUESTION: But certainly that's what
19 you're arguing. I mean, your -- your brief and your
20 presentation certainly urges us to go that route.
21 MR. SEKULOW: If --
22 QUESTION: Now, have we -- have we, in
23 looking at funding issues, have we dealt differently
24 with the requirement of funding something out of
25 public funds than for other purposes?

1 MR. SEKULOW: Well -- well, certainly in
2 the -- in the direct aid cases and in the
3 Establishment Clause context, but this is very
4 similar to the Witters program, so there is not the
5 countervailing Establishment Clause issue, and that's
6 what I was going to address, Justice Kennedy.
7 Depending on how the voucher program is established
8 would depend on whether the religious institutions
9 would be included. For instance, again I go to the
10 eligibility issue. Here, Northwest College was an
11 accredited institution --
12 QUESTION: Okay. Let's assume that all
13 the public schools and all the private schools,
14 including all religious private schools are -- are
15 accredited in whatever way the state accredits them,
16 and that the criterion, apart from religious
17 education, is simply that the ultimate recipient of
18 the voucher has to be an accredited school. It seems
19 to me, following Justice O'Connor's question, that
20 the argument that would be made in any case in which
21 a state says we will -- we will allow a voucher to be
22 spent in a private school, but not a private
23 religious school is the same argument that Justice
24 Kennedy was suggesting a moment ago, and that is that
25 the religious student must somehow surrender a

1 conscientious belief and go from a religious school
2 and seek to be enrolled in a non-religious private
3 school or a public one to get the voucher. And I
4 don't see why that argument would not be just as
5 applicable there as the argument that you are making
6 here.
7 MR. SEKULOW: Justice Souter, in this
8 particular -- using that example, here the school is
9 a qualified school. The Northwest College, which
10 admittedly has a religious affiliation, it isn't --
11 QUESTION: Sure. That's a wash.
12 Everybody agrees.
13 MR. SEKULOW: It's their major.
14 QUESTION: Everybody -- the only criterion
15 is, will we fund religious training in how to be
16 religion -- religious -- or will we not? And in
17 fact, a -- a similar argument would be made as
18 between the -- the religious school that teaches
19 religion, and the private school that doesn't teach
20 religion.
21 MR. SEKULOW: In this context, the way the
22 program is implemented within that hypothetical and
23 within the facts here, here students can take these
24 very same courses in religion that Josh Davey --
25 QUESTION: Well, that may show that the

1 state draws a kind of a funny line. Maybe it was a
2 -- a bad job of line drawing, and I -- I have to
3 admit, I'm not quite sure why they draw it the way
4 they do, but on -- on the -- on the basic proposition
5 that the state raises as -- as its position here,
6 that it will not fund ministerial education or
7 education in how to be religious versus funding other
8 kinds of training, the argument, it seems to me, from
9 the Free Exercise Clause would be the same in the
10 voucher case as the argument that you are making
11 here.
12 MR. SEKULOW: If in fact the programs were
13 put forward this way with the accreditation as you
14 suggested, and there is no countervailing
15 Establishment Clause issue and the eligibility issue
16 of the school is met, yes, I wouldn't see the --
17 QUESTION: All right.
18 MR. SEKULOW: -- justification to exclude a
19 particular major here in this particular case, a
20 submajor from a religious viewpoint.
21 QUESTION: Mr. Sekulow --
22 QUESTION: Well, how many states do that,
23 do you know? You're knowledgeable on these things.
24 How many states have voucher programs which -- which
25 would allow students to go to any private school, you

1 know, an elite academy, but not allow them to go to
2 religious schools?
3 MR. SEKULOW: Twenty-five states have
4 voucher-type programs that have no restrictions at
5 all as long as it's an accredited institution, so
6 that's the -- usually the standard. They can go to
7 any school that's accredited. There are some states,
8 and it's about a half-dozen, as I said, Justice
9 Scalia, it's a little bit of a moving target because
10 policies change, that actually have this prohibition
11 for religious education, and even within some of
12 those states, the programs are inconsistent. They'll
13 have different type of financial aid programs here.
14 In this particular situation, and the way
15 this particular program is implemented, though,
16 Joshua Davey had already made, Justice Stevens, his
17 declaration of a major before he was notified he was
18 disqualified. The state didn't do the formal
19 notification until October, some two months after he
20 rolled -- enrolled.
21 QUESTION: But I suppose he could have
22 changed his mind and taken another major in most of
23 the courses and then postponed that decision. As a
24 matter of conscience, he didn't do it.
25 MR. SEKULOW: It -- it was a matter of

1 conscience. There were some students at the school
2 that did change their mind. There were two that did
3 not. Joshua Davey was one that -- and the counselor,
4 the financial aid counselor, did state in the joint
5 appendix that she cautioned them if they are in fact
6 going to major in a degree that would be pursuing a
7 theology to tell the truth, which he clearly did
8 here. So his implementation of the decision was
9 already made in the sense that the state came back
10 afterwards and said oh, by the way, these group of
11 students don't qualify for this.
12 QUESTION: But wouldn't it be --
13 QUESTION: Am I -- am I correct or
14 incorrect that the state would fund a student who
15 majored in literature at a institution which was
16 sectarian and had instructors who taught literature
17 from a religious perspective or -- am I correct about
18 that?
19 QUESTION: Yes.
20 QUESTION: Well, but the state is saying,
21 I don't know if we can escape the broader ground, the
22 state's saying, look, we understand that, you know,
23 applying our standard there'll be all kinds of
24 anomalies that you can get. Maybe this case is one.
25 But what we're doing by and large is to say, we don't

1 want to spend too much of our state money in this
2 program, we'll do it subsidiary, you know, the odd
3 example doesn't matter, but people who major in
4 philosophy are likely to become priests or at least
5 spend a lot of time studying theology. If they major
6 in theology, or they spend a lot of time studying
7 theology, that's going too far. So this is, like
8 many administrative lines, a very crude effort to
9 identify those people who are taking too much of
10 their time in totally religiously-oriented matters.
11 Now, of course that's unconstitutional if
12 we accept your argument that the state must treat the
13 religious study the same way as any other. That's
14 your broad ground. But if we reject the broad
15 ground, I don't quite see at the moment how we can
16 accept the narrow one, which turns on these details
17 of the administrability of the line.
18 MR. SEKULOW: Well, the reason that I want
19 -- let me address the latter, if I might, Justice
20 Breyer. The reason those details matter because the
21 line drawing albeit may be crude on the State of
22 Washington, here is within the context of the Free
23 Exercise Clause, because here the school is an
24 eligible institution, so that's not even at issue.
25 There is no countervailing Establishment Clause issue

1 here. Witters foreclosed that. So all we are
2 dealing with is a statute which on its face states
3 that a student who qualifies based on academic
4 excellence and economic need makes the decision for
5 him or herself where they're going to go to school
6 and what they're going to major in, and they can
7 major in literally the universe of courses. There is
8 only one exclusion. It's not even, Justice Ginsburg,
9 a situation with a number of majors.
10 QUESTION: Mr. Sekulow, I think that
11 Justice Breyer is getting at the same point I tried
12 to get at, and it's in part the other flip side of
13 what Justice Kennedy asked you. Certainly, you are
14 not standing here to tell us that, oh, if they were
15 more restrictive, if they said we're simply not going
16 to fund scholarships to students who go to sectarian
17 schools, that that might be all right. I mean, you
18 don't want to win on the ground of the school was too
19 generous in what it did fund.
20 MR. SEKULOW: Well, two responses. First,
21 the -- on the issue of the state and their
22 obligation, to recast this as a -- the state is being
23 required to fund Joshua Davey's education, I think is
24 -- is a miscast of the issue. The state has decided
25 to employ, to develop a scholarship program that's

1 very broad-based and in that program they have given
2 the student the ultimate choice of where they could
3 go to school as long as it's within Washington state
4 and accredited and literally they can major in any
5 major except for one, and that is a theology
6 exclusion.
7 QUESTION: Wouldn't be any better if they
8 said, you can go to any school except a -- a church
9 school.
10 MR. SEKULOW: No. I think it would raise,
11 if it's accredited I think it would raise the same
12 problem. But it's not to say that the state
13 universities don't teach courses in theology and
14 religion. On pages 66 and 74 of the joint appendix,
15 there's a listing of the courses offered at the
16 University of Washington, and it covers a broad array
17 of religious courses, albeit from --
18 QUESTION: You -- you don't know of any
19 case that says that the less significant the interest
20 the state has is the more latitude it has in
21 discriminating against religion. You don't know of
22 any case that said that?
23 MR. SEKULOW: No. That -- that would --
24 QUESTION: I hope you don't, yeah.
25 MR. SEKULOW: No. And hopefully this

1 won't be that one.

2 (Laughter.)

3 QUESTION: May I ask -- ask you a broader

4 question? A number of the briefs discussed the

5 breathing space between the Establishment Clause and

6 the Free Exercise Clause. Do you take the position,

7 or just what is your position on whether or not there

8 is such a breathing space?

9 MR. SEKULOW: The play in the joints as

10 it's referred to.

11 QUESTION: Yeah.

12 MR. SEKULOW: I -- I think the play in the

13 joints gives the state broad flexibility in

14 establishing the programs and -- or not establishing

15 a program at all, but to use the play in the joints

16 to not accommodate religion but rather to target

17 religion as an exclusion I think is a misuse in my

18 view of what the Court has at this point --

19 QUESTION: Give me an example, any

20 example.

21 QUESTION: But do you go so far as to

22 contend that any violation, any time there is no

23 violation of the Establishment Clause that then the

24 Free Exercise Clause would necessarily kick in?

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

1 me --

2 QUESTION: But that's what I was looking

3 for.

4 QUESTION: Do you want to reserve the rest

5 of your time, Mr. Sekulow?

6 MR. SEKULOW: I don't have -- I only have

7 20 minutes, so I cannot reserve any more time.

8 That's okay. But I would normally be happy to.

9 (Laughter.)

10 QUESTION: If -- if you can give me an

11 example of a case where the state can say we know we

12 can give this funding to religious schools if we want

13 to, but we don't want to? Can you give any example

14 where that would be legitimate on your view of free

15 exercise?

16 MR. SEKULOW: Sure. There's -- I don't

17 think there is any affirmative obligation, Justice

18 Ginsburg, for the state, even if the Establishment

19 Clause -- I'll give an example. The Center Moriches

20 School District in Lamb's Chapel, while this Court

21 held that the Establishment Clause did not --

22 required them that they open their facilities to

23 comply with the First Amendment viewpoint neutrality

24 issues, they're not -- they were not required to open

25 their facilities up. The State of Washington could

1 develop programs for specific majors.

2 QUESTION: No, but if they opened it up at

3 all, there was no play in the joints between the

4 religion clauses that said you can't open it up to

5 this particular religious presentation. Isn't that

6 correct?

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

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

9 MR. SEKULOW: Please.

10 QUESTION: -- say what I think your

11 position is and then you -- I think your position is

12 that, although certain religious funding may not

13 violate the Establishment Clause, it does not follow

14 that the state must fund it. But if the state has a

15 general program for funding instruction, and this is

16 religious instruction, it's got to fund religious

17 instruction and there's no middle ground, there's no

18 play in the joints there. Is that correct?

19 MR. SEKULOW: Under the latter

20 hypothetical, that -- that would be our position,

21 that once you have gone into the private schools and

22 the school meets the neutral secular criteria, our

23 view would be at that point the state should be equal

24 and not target out religion for an exclusion, which

25 is precisely the viewpoint neutrality issue that we

1 think should apply and, of course, within the free
2 exercise context, the minimum requirement of
3 neutrality is law not discriminate on its face. This
4 one does. If there are no further questions, thank
5 you, Mr. Chief Justice.
6 QUESTION: Thank you, Mr. Sekulow.
7 General Olson, we'll hear from you.
8 ORAL ARGUMENT OF GEN. THEODORE B. OLSON
9 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE
10 SUPPORTING THE RESPONDENT
11 MR. OLSON: Mr. Chief Justice, and may it
12 please the Court:
13 The Promise Scholarship program practices
14 the plainest form of religious discrimination. It
15 disqualifies the one course of study that is taught
16 from a religious perspective. The clear and
17 unmistakable message is that religion and preparation
18 for a career in the ministry is disfavored and
19 discouraged.
20 QUESTION: Well, but of course, there's
21 been a couple of centuries of practice in this
22 country of not funding religious instruction by tax
23 money. I mean, that's -- that's as old as the
24 country itself, isn't it?
25 MR. OLSON: Well, yes, it is. But there

1 is the other tradition that is as old as the country
2 itself, is the free exercise component of the
3 religion clauses, which this Court has said
4 repeatedly mandates neutrality.
5 QUESTION: But how is his free exercise
6 chilled at all? Can't he practice his religion just
7 as he always would and become a minister?
8 MR. OLSON: Well, it's --
9 QUESTION: He just has to pay for it.
10 MR. OLSON: Justice -- well, Justice
11 Stevens, the individual that was disqualified in
12 Tennessee from being a member of a delegate to the
13 Constitutional Convention because he was a minister
14 --
15 QUESTION: He was prohibited from doing
16 something every other citizen can do.
17 MR. OLSON: Well, the same -- the Court
18 would have come out the same way, I submit, if it
19 said that ministers will not have their expenses
20 paid, but everybody else will. The language of the
21 decision and the language of Sherbert v. Verner and
22 Fowler v. Rhode Island is that to the extent that a
23 religion --
24 QUESTION: But you're still not addressing
25 the question of how his -- his freedom to practice

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

2 MR. OLSON: Well, he can practice it, but

3 he practices it at a price. Studying of theology as

4 the --

5 QUESTION: He practices it without a

6 subsidy.

7 MR. OLSON: He practices it without the

8 same subsidy that is made available to every other

9 citizen except someone who wants to study to be a

10 minister. If it was discrimination against a

11 minister in -- in the -- in the case involving

12 Tennessee, this is a discrimination against a person

13 who aspires to be a minister. He is given less of an

14 advantage than all --

15 QUESTION: If it -- if it -- if it isn't

16 coercion of -- of his religion, I suppose it would be

17 okay to limit this -- this exclusion to Jewish

18 theology or to Catholic theology, because the

19 response would be it doesn't -- it doesn't coerce his

20 religion at all.

21 MR. OLSON: We submit that the teachings

22 of the decision of this Court --

23 QUESTION: But isn't the difference that

24 that would plainly violate the Establishment Clause,

25 and here we have a Free Exercise Clause issue.

1 MR. OLSON: What this Court has said,
2 Justice Stevens, is that in -- in many respects the
3 Establishment Clause and the Free Exercise Clause are
4 components of the same principle that is --
5 QUESTION: So you take the position
6 there's no breathing space between the two?
7 MR. OLSON: Well, there is -- there may be
8 breathing space, especially with respect to the
9 Establishment Clause area, where this Court will not
10 find entanglement or endorsement under certain
11 programs that may not be required, but what this
12 Court has said is that distinguishing -- that
13 discriminating against Catholics and discriminating
14 against people who are religious generally and even
15 people who are anti-religious generally violates the
16 twin components of equality and neutrality that are
17 -- that are mandated by the religion clauses.
18 QUESTION: What -- what is your response
19 to the following concern that's been brought up a few
20 times but I'd like you to address it directly. This
21 case is perhaps a small matter of a distinction that
22 doesn't make all that much sense, but makes some.
23 But the implications of this case are breathtaking,
24 that it would mean if your side wins, that every
25 program, not just educational programs, but nursing

1 programs, hospital programs, social welfare programs,
2 contracting programs throughout the governments would
3 go over, you'd have to go over each of them and
4 there'd be a claim in each instance that they cannot
5 be purely secular, that they must fund all religions
6 who want to do the same thing, and that those
7 religions, by the way, though it may be an excellent
8 principle, may get into fights with each other about
9 billions and billions of dollars, so -- which is
10 something about which I have written about, which you
11 know. All right. So, I'd like you to address that.
12 MR. OLSON: Yes, Justice Breyer. It is
13 not a major step at all in this Court's jurisprudence
14 to say that those funding programs for medicine,
15 doctors, nurses, cannot distinguish and not
16 discriminate against a person who decides to go to a
17 Catholic nurse or to a Catholic doctor. If money is
18 made available for individuals in the Medicare
19 program to exclude people that want to go to
20 religious hospitals for their heart surgery, that
21 would violate the Free Exercise Clause.
22 QUESTION: So do you agree, do you take
23 the position that if we affirm the court of appeals
24 and accept your position, that the Court is committed
25 on the school voucher issue if, say, a school voucher

1 program excludes parochial schools?

2 MR. OLSON: It would depend, I suppose, on

3 how the program was structured, what the inquiry

4 involving a compelling government -- strict scrutiny

5 would entail. There may be a difference, for

6 example, with respect to funding that's associated

7 with institutions, as opposed to individual

8 conscience. This is the plainest form of religious

9 discrimination because the person who wants to

10 believe in God or wants to have a position of

11 religious leadership is the one that's singled out

12 for discriminatory treatment.

13 The Court has said before that

14 distinction, religious tests for governmental

15 benefits violate the Free Exercise Clause. This is a

16 religious test. If the person wants to take a

17 program in theology, he's disqualified.

18 QUESTION: What are the practical

19 implications?

20 QUESTION: May I ask you --

21 QUESTION: Just want a sentence on the

22 practical implication. Is it as far-reaching as my

23 tone of voice suggested?

24 MR. OLSON: I would say that the -- it is

25 not as far-reaching as the -- the sense of doom that

1 your question suggested.

2 (Laughter.)

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

4 don't --

5 MR. OLSON: The idea that this country

6 when it -- when it provides tax exemptions or cash to

7 citizens to educate their children, cannot single out

8 for discriminatory treatment the Catholic or the

9 religious person is not a far-reaching -- well, it

10 may have been far-reaching at the time, and thank

11 heavens that it is, that this principle as the -- I

12 think one of the questions, I think it was Justice

13 O'Connor's question, asked with respect to the

14 funding cases and this Court dealt specifically with

15 that in the Maher v. Roe case when it said the

16 funding cases do not control the significantly

17 different context in which a funding decision

18 impinges upon the constitutionally-imposed government

19 obligation of neutrality required by the religion

20 clauses. So those funding cases are completely

21 distinguishable --

22 QUESTION: General, may I ask you this

23 question? I mean, the whole argument for neutrality

24 comes down to an argument, I think, about the

25 following.

1 MR. OLSON: About --

2 QUESTION: About the following

3 distinction. The other side says, Washington says,

4 look, there is a line to be drawn, not between

5 funding Catholics and Protestants or atheists or

6 what-not. The line to be drawn is the line between

7 funding education about a religion, education that

8 says this is what Catholics believe, this is what

9 atheists believe, and on the other hand, education

10 that says, this belief is valid, and you ought to go

11 out and persuade other people to hold this belief.

12 They say, that is the distinction we are trying to

13 draw. Why is that distinction invalid under a

14 neutrality criteria?

15 MR. OLSON: For the reason that the same

16 argument was rejected in the Rosenberger case, that

17 the notion of --

18 QUESTION: But Rosenberger was not said --

19 the opinion in Rosenberger said these people are not

20 proselytizing. And -- and the distinction that they

21 are drawing is a distinction between believing in

22 proselytizing on the one hand, how to do it, why it's

23 valid, and instruction on what people believe as a

24 fact on the other. And I -- Rosenberger is an

25 authority for -- for the rejection of that

1 distinction.

2 MR. OLSON: I -- I respectfully submit

3 that it is, that the students in the Rosenberger that

4 were publishing those articles were publishing

5 articles that advocated belief in God.

6 QUESTION: Oh, look, you're writing my

7 dissent. I -- I agree, but my -- my --

8 (Laughter.)

9 MR. OLSON: That was --

10 QUESTION: I -- I couldn't -- I couldn't

11 get four colleagues to agree with me on that, and

12 they went off on -- on another -- another course.

13 MR. OLSON: Yeah, but the Court went on to

14 say that this was a free exercise violation as well

15 as a First Amendment violation.

16 The other point that I think is very, very

17 important with respect to that, if the state starts

18 to distinguishing between discussion of a subject and

19 proselytizing, the entanglement problem is going to

20 be enormous. The program will have to be looked at

21 to see how persuasive it is. We know today that --

22 QUESTION: If that argument is good, why

23 do we even bother with the -- the criterion of direct

24 funding of religion?

25 MR. OLSON: Well, because --

1 QUESTION: Because we -- we could have
2 drawn the line there.
3 MR. OLSON: No, because the line has been
4 drawn by individuals, individuals making genuinely
5 free, independent choices to make a dispensation.
6 It's like the Court's example in those cases of an
7 individual receiving a check and then deciding
8 exactly how to spend it so there's a great difference
9 between those kind of cases. This is no different
10 than the example that Justice Scalia raised as
11 providing fire protection or -- or providing tax
12 deductions. Thank you.
13 QUESTION: Thank you, General Olson.
14 Ms. Pierce, you have three minutes
15 remaining.
16 REBUTTAL ARGUMENT OF NARDA PIERCE
17 ON BEHALF OF THE PETITIONERS
18 MS. PIERCE: I would like to return to
19 three points. One, on the statute that says no aid
20 shall be awarded to a student pursuing a degree in
21 theology. A question was asked saying that for
22 administrative ease the state uses this legislative
23 approach, their constitutional command. But it's not
24 just administrative ease. I think it's a question of
25 entanglement. Should the state be involved in a

1 class-by-class assessment of whether it -- it
2 individually, it should be categorized as religious
3 instruction or not.
4 QUESTION: But we've held in Witters that
5 there is no problem with that -- with that kind --
6 with that kind of subsidy.
7 MS. PIERCE: For purposes of the
8 Establishment Clause. And I just wanted to point out
9 that our state supreme court has questioned in a
10 dissent in the Gallway v. Grimm case, some justices
11 of our state supreme court have asked, is focusing on
12 the degree program sufficient for our state
13 constitution? But we believe there are good reasons
14 for it that's not yet been addressed by our court,
15 and that's to avoid that kind of class-by-class
16 determination, not necessary in Witters because there
17 the focus is, does the Establishment Clause -- is it
18 violated by government endorsement?
19 But Washington does take a different
20 approach to both prongs, both twin prongs of
21 religious freedom, and this is my second point. For
22 purposes of funding, it looks beyond government
23 endorsement and looks to the freedom of conscience in
24 religious matters of a broader range of citizens,
25 including citizens who may not want to have their

1 compelled tax payments used for religious
2 instruction.
3 So it's the same principle. It doesn't
4 become hostility to religion just because it extends
5 that one principle beyond what the Establishment
6 Clause requires. On the other hand, the State of
7 Washington also puts greater restrictions on
8 government where their regulations may impact
9 someone's free exercise of their religion so that
10 unless a state -- the state can show a substantial
11 need, certain regulatory laws cannot be applied in a
12 fashion that burdened the free exercise.
13 The Munns v. Martin case is a classic
14 example that we have cited to the Court. It's a case
15 where historic landmark laws could not prevent a
16 church from building a pastoral center because the
17 historic landmark laws were deemed not to be
18 substantially needed by the state to protect the
19 public.
20 So we do think there is wide latitude, and
21 my final point, Mr. Chief Justice, is that this Court
22 has accorded the states wide latitude in funding
23 decisions for the states to make their own policy
24 judgments. Here, all the state has done has been to
25 decline to fund religious instruction wherever it

1 occurs, including in a theology degree program. We
2 have not overstepped our bounds by imposing an
3 unconstitutional condition on Mr. Davey as a
4 recipient. In the overall picture, we're not
5 suppressing --
6 QUESTION: It -- it -- it will fund
7 religious instruction. So long as he doesn't major
8 in theology, he can take the same courses and get --
9 get instructed in religion, can't he?
10 MS. PIERCE: Yes, Scalia, that --
11 QUESTION: So what you say is just not
12 true?
13 MS. PIERCE: Yes, Justice -- well, that
14 can happen in a rare circumstance. We believe that
15 there's a good reason to use that --
16 QUESTION: Everybody who takes a theology
17 course has to major in theology? I don't think it's
18 rare at all. Probably most of the students at
19 Northwest College take theology courses. It's --
20 it's a religious institution, and that's perfectly
21 okay, and the state is willing to fund that.
22 MS. PIERCE: That's what the statute
23 permits now. Some justices of our state supreme
24 court have expressed the same question whether that
25 is possible. Thank you, Mr. --

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