The Burger Court Opinion Writing Database

Witters v. Washington Department of Services for Blind

474 U.S. 481 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 21, 1986

Re: No. 84-1070 - Witters v. Washington Dept. of Serv. for the Blind

Dear Lewis:

I join your concurring opinion.

Regards,

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 2, 1986

No. 84-1070

Witters v. Washington Department of Services for the Blind

Dear Thurgood,

I agree.

Sincerely,

Bill

Justice Marshall

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: JAN 2 1986

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1070

LARRY WITTERS, PETITIONER *v.* WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[January ——, 1986]

JUSTICE WHITE, concurring.

I remain convinced that the Court's decisions finding constitutional violations where a state provides aid to private schools or their students misconstrue the Establishment Clause and disserve the public interest. Even under the cases in which I was in dissent, however, I agree with the Court that the Washington Supreme Court erred in this case. Hence, I join the Court's opinion and judgment.

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: JAN 21 1986

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1070

LARRY WITTERS, PETITIONER *v.* WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[January ——, 1986]

JUSTICE WHITE, concurring.

I remain convinced that the Court's decisions finding constitutional violations where a state provides aid to private schools or their students misconstrue the Establishment Clause and disserve the public interest. Even under the cases in which I was in dissent, however, I agree with the Court that the Washington Supreme Court erred in this case. Hence, I join the Court's opinion and judgment. At the same time, I agree with most of JUSTICE POWELL's concurring opinion with respect to the relevance of *Mueller* v. *Allen*, 463 U.S. 388 (1983) to this case.

Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: DEC 2 8 1985

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–1070

LARRY WITTERS, PETITIONER *v.* WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[January ——, 1986]

JUSTICE MARSHALL delivered the opinion of the Court.

The Washington Supreme Court ruled that the First Amendment precludes the State of Washington from extending assistance under a state vocational rehabilitation assistance program to a blind person studying at a Christian college and seeking to become a pastor, missionary, or youth director. Finding no such federal constitutional barrier on the record presented to us, we reverse and remand.

I

Petitioner Larry Witters applied in 1979 to the Washington Commission for the Blind for vocational rehabilitation services pursuant to Wash. Rev. Code §74.16.181.[1] That statute authorized the Commission, *inter alia*, to "[p]rovide for special education and/or training in the professions, business or trades" so as to "assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care." *Ibid.* Petitioner, suffering from a progressive eye condition, was eligible for voca-

[1] In 1983 the Washington legislature repealed chapters 74.16 and 74.17 of the Code, enacting in their place a new chapter 74.18. The statutory revision abolished the Commission for the Blind and created respondent Department of Services for the Blind. See 1983 Wash. Laws, chapter 194, §3. We shall refer to respondent for purposes of this opinion as "the Commission."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 3, 1986

84-1070 Witters v. Washington Department of Services

Dear Lewis:

Thank you for your thoughtful comments.

I continue to believe that the Mueller case was wrongly decided, and am concerned that extensive discussion of it would only muddy the waters here. Because it is crystal clear in this case that the state aid is as much available to students attending secular schools as it is to those attending sectarian ones, there is no need to revisit the questions that so deeply divided the Court in Mueller, such as whether the tax deduction really was equally available for secular and sectarian purposes, or as to whether the benefit to religion really was attributable wholly to private choices. This easy case can be decided on narrower, less controversial grounds, and I believe that it should be. Further, the fact that the challenged aid was part of a comprehensive state tax deduction plan was a key factor relied upon by the Mueller Court, and is not present here.

I am also concerned that a sweeping statement that the effect of an aid program, for purposes of the Lemon test, is to be determined with reference to the program's "overall" effect rather than its individual applications, may not be consistent with our case law. In Tilton v. Richardson, 403 U.S. 672 (1971), we invalidated a provision of federal law under which the federal government provided construction grants for college and university buildings even though those buildings might, after the passage of twenty years, be used for sectarian purposes. We reached that result even though it might have been said that relatively few buildings financed under the program would in fact be used for religious purposes, and therefore the "overall" effect of the program would be secular. In Hunt v. McNair, 413 U.S. 734 (1973), again considering governmental aid to institutions of higher education, we explicitly "narrow[ed] our focus from the statute as a whole to the only transaction presently before us." Id., at 742. We suggested that a general program of state aid to colleges and universities would be unconstitutional to the extent it provided aid to even one pervasively sectarian institution. Id., at 743-744. We expressed similar views in Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976), in which more than two thirds of the institutions aided under the state program were secular. While it may be possible to fashion a rule consistent both with these (and other) cases and with the SG's argument, such an excursion is not necessary to decision of this case, and I think probably is best avoided.

I hope my concern that we produce as narrow an opinion as possible in this case does not in any respect stand in the way of your join.

Sincerely,

T.M.

Justice Powell

The Conference

STYLISTIC CHANGES THROUGHOUT

Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: _____

Recirculated: JAN 16 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–1070

LARRY WITTERS, PETITIONER *v.* WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[January ——, 1986]

JUSTICE MARSHALL delivered the opinion of the Court.

The Washington Supreme Court ruled that the First Amendment precludes the State of Washington from extending assistance under a state vocational rehabilitation assistance program to a blind person studying at a Christian college and seeking to become a pastor, missionary, or youth director. Finding no such federal constitutional barrier on the record presented to us, we reverse and remand.

I

Petitioner Larry Witters applied in 1979 to the Washington Commission for the Blind for vocational rehabilitation services pursuant to Wash. Rev. Code § 74.16.181 (1981).[1] That statute authorized the Commission, *inter alia*, to "[p]rovide for special education and/or training in the professions, business or trades" so as to "assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care." *Ibid.* Petitioner, suffering from a progressive eye condition, was eligible for voca-

[1] In 1983 the Washington Legislature repealed chapters 74.16 and 74.17 of the Code, enacting in their place a new chapter 74.18. The statutory revision abolished the Commission for the Blind and created respondent Department of Services for the Blind. See 1983 Wash. Laws, ch. 194, § 3. We shall refer to respondent for purposes of this opinion as "the Commission."

Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT

From: **Justice Marshall**

Circulated: _____

Recirculated: JAN 23 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1070

LARRY WITTERS, PETITIONER *v.* WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[January ——, 1986]

JUSTICE MARSHALL delivered the opinion of the Court.

The Washington Supreme Court ruled that the First Amendment precludes the State of Washington from extending assistance under a state vocational rehabilitation assistance program to a blind person studying at a Christian college and seeking to become a pastor, missionary, or youth director. Finding no such federal constitutional barrier on the record presented to us, we reverse and remand.

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Petitioner Larry Witters applied in 1979 to the Washington Commission for the Blind for vocational rehabilitation services pursuant to Wash. Rev. Code § 74.16.181 (1981).[1] That statute authorized the Commission, *inter alia*, to "[p]rovide for special education and/or training in the professions, business or trades" so as to "assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care." *Ibid.* Petitioner, suffering from a progressive eye condition, was eligible for voca-

[1] In 1983 the Washington Legislature repealed chapters 74.16 and 74.17 of the Code, enacting in their place a new chapter 74.18. The statutory revision abolished the Commission for the Blind and created respondent Department of Services for the Blind. See 1983 Wash. Laws, ch. 194, § 3. We shall refer to respondent for purposes of this opinion as "the Commission."

(4)

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 20, 1986

Re: No. 84-1070, Witters v. Washington Department of Services for the Blind

Dear Thurgood:

Please join me.

Sincerely,

Harry

Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 31, 1985

84-1070 Witters v. Washington Dept. of Services

Dear Thurgood:

I think you have written a fine opinion, and I expect to be able to join you.

I do have two suggestions for your consideration. I agree that Nyquist - upon which you rely heavily - is relevant and persuasive authority. I believe, however, that Mueller v. Allen, 463 U.S. 388 (1983) is even stronger authority for the results you reach. In Mueller, we sustained a tax deduction for certain kinds of educational expenses despite the fact that about 95% of those benefited were parents of children attending religious schools. The Mueller Court approved the deduction because any benefit to religion was the result of the private choice of individual taxpayers (id., at 399), and also because the deduction was equally available to parents of public school children and parents of children attending private schools (id., at 397). The aid to religion in this case results from Witters' personal choice, and aid is offered to all handicapped persons regardless of the type of school they attend. Mueller therefore is a highly relevant if not controlling authority.

Secondly, both petitioner and the SG argued that the Washington Supreme Court erred in gauging the "primary effect" of the aid program by reference to this particular case rather than looking to the program's overall effect. Would it not be helpful to make clear that the relevant "effect" of an aid program is to be determined in light of its overall purpose and effect, rather than by how the program may impact upon one individual?

In sum, although your well written opinion supports reversal, I do think it would be stronger if additions along the foregoing lines were included.

Sincerely,

Lewis

Justice Marshall

lfp/ss
cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 6, 1986

84-1070 Witters v. Washington Department

Dear Thurgood,

I appreciate your prompt response. Mueller v. Allen, of course, is a Court decision. Unless overruled it is a precedent that all lower federal courts are obliged to follow. Omitting mention of Mueller sends a somewhat confusing signal to lower courts, since it suggests--quite wrongly, in my view--that Mueller is inapplicable to cases like this one.

Nor do I think that Tilton v. Richardson, 403 U.S. 672 (1971) and Hunt v. McNair, 413 U.S. 734 (1973) impliedly require us to assess the "primary effect" of Washington's aid program by reference to petitioner alone. Both Tilton and Hunt involved direct state aid to religious institutions--a particularly suspect form of government assistance to religion, as our decisions last Term show. See Grand Rapids School District v. Ball, 105 S.Ct. 3216, 3228-3229 (1985); Aguilar v. Felton, 105 S.Ct. 3232, 3241 (1985) (POWELL, J., concurring). Aid that is given to individuals who may or may not choose to use it for religious purposes raises lesser concerns. Mueller v. Allen is again instructive. The Court in that case did not assess the "primary effect" of Minnesota's tax deduction in terms of the parents who were parties to the case; rather, we emphasized the program's broad sweep, its neutrality, and the fact that any aid to religion depended on the private choices of the individual beneficiaries. 463 U.S., at 397-400. The aid in this case is far closer in principle to the tax deduction at issue in Mueller than to the direct aid to religious colleges involved in Hunt and Tilton.

I will certainly join the judgment in this case, but I now expect to write separately to express the views outlined above.

Sincerely,

[redacted]

Justice Marshall

lfp/ss
cc: The Conference

01/16

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: JAN 17 1986

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1070

LARRY WITTERS, PETITIONER *v.* WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[January ——, 1986]

JUSTICE POWELL, concurring.

The Court's omission of *Mueller* v. *Allen*, 463 U. S. 388 (1983), from its analysis may mislead courts and litigants by suggesting that *Mueller* is somehow inapplicable to cases such as this one.[1] I write separately to emphasize that *Mueller* strongly supports the result we reach today.

As the Court states, the central question in this case is whether Washington's provision of aid to handicapped students has the "principal or primary effect" of advancing religion. *Lemon* v. *Kurtzman*, 403 U. S. 602, 612 (1971). See also *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 783–785 n. 39 (1973). *Mueller* makes the answer clear: state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon* v. *Kurtzman* test,[2] because any aid to religion results from the private choices of

[1] The Court offers no explanation for omitting *Mueller* from its substantive discussion. Indeed, save for a single citation on a phrase with no substantive import whatever, *ante*, at 4, *Mueller* is not even mentioned.

[2] Cf. *Sloan* v. *Lemon*, 413 U. S. 825, 832 (1973):
"The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions."

01/17

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: JAN 17 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1070

LARRY WITTERS, PETITIONER *v.* WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[January ——, 1986]

JUSTICE POWELL, concurring.

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01/21

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: JAN 31 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1070

LARRY WITTERS, PETITIONER *v.* WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[January ——, 1986]

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring.

The Court's omission of *Mueller* v. *Allen*, 463 U. S. 388 (1983), from its analysis may mislead courts and litigants by suggesting that *Mueller* is somehow inapplicable to cases such as this one.[1] I write separately to emphasize that *Mueller* strongly supports the result we reach today.

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To: The Chief Justice
Justice Brennan
Justice [illegible]
Justice [illegible]
Justice [illegible]
Justice [illegible]
Justice [illegible]
Justice [illegible]

Stylistic Changes Throughout

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SUPREME COURT OF THE UNITED STATES

No. 84-1070

LARRY WITTERS, PETITIONER *v.* WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[January 27, 1986]

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring.

The Court's omission of *Mueller* v. *Allen*, 463 U. S. 388 (1983), from its analysis may mislead courts and litigants by suggesting that *Mueller* is somehow inapplicable to cases such as this one.[1] I write separately to emphasize that *Mueller* strongly supports the result we reach today.

As the Court states, the central question in this case is whether Washington's provision of aid to handicapped students has the "principal or primary effect" of advancing religion. *Lemon* v. *Kurtzman*, 403 U. S. 602, 612 (1971). See also *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 783–785, n. 39 (1973). *Mueller* makes the answer clear: state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon* v. *Kurtzman* test,[2]

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"The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 9, 1986

Re: No. 84-1070 Witters v. Washington Department of Services for the Blind

Dear Thurgood,

My sentiments about our case law in this area are much like those which Byron has expressed in his short concurrence. Nonetheless, I could join an opinion which evenhandedly discussed the applicable cases in support of the result for which all of us voted at Conference. But I agree with Lewis that your opinion, particularly in its failure to even mention Mueller v. Allen, is not such an evenhanded discussion of the cases, and I gather from your response to him that you intend to make no changes along the line he suggested. I will therefore await what Lewis writes, and either join that or join Byron's concurrence.

Sincerely,

WHR

Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 21, 1986

No. 84-1070 - Witters v. Washington Dept. of Services for the Blind

Dear Lewis:

Please join me in your concurring opinion.

Sincerely,

WHR

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 3, 1986

Re: 84-1070 - Witters v. Washington Dept. of Services for the Blind

Dear Thurgood:

Please join me.

Respectfully,

John/lfp

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 10, 1986

No. 84-1070 Witters v. Washington Dept. of Services for the Blind

Dear Thurgood,

I agree with most of your opinion in this case but I also think Lewis is correct in suggesting that Mueller lends support to the concept that "a program ... that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." 463 U.S. 388, 398-399. Accordingly, for now I will wait for the additional writing.

Sincerely,

Sandra

Justice Marshall

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–1070

LARRY WITTERS, PETITIONER *v.* WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[January ——, 1986]

O'CONNOR, J., concurring in the judgment and concurring in part.

I join Parts I and III of the Court's opinion, and concur in the judgment. I also agree with the Court that both the purpose and effect of Washington's program of aid to handicapped students are secular. As JUSTICE POWELL's separate opinion persuasively argues, the Court's opinion in *Mueller* v. *Allen*, 463 U. S. 388 (1983), makes clear that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon* v. *Kurtzman* test, because any aid to religion results from the private decisions of beneficiaries." *Ante*, at 1–2 (POWELL, J., concurring) (footnote omitted). The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the state itself is endorsing a religious practice or belief. See *Lynch* v. *Donnelly*, 465 U. S. 668, 690 (1984) (O'CONNOR, J., concurring).