

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 THE GOOD NEWS CLUB, ET AL., :

4 Petitioners :

5 v. : No. 99-2036

6 MILFORD CENTRAL SCHOOL. :

7 - - - - - x

8 Washington, D.C.

9 Wednesday, February 28, 2001

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United
12 States at 10:15 a.m.

13 APPEARANCES:

14 THOMAS MARCELLE, ESQ., Delmar, New York; on behalf of
15 the Petitioners.

16 FRANK W. MILLER, ESQ., East Syracuse, New York; on
17 behalf of the Respondent.

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CHIEF JUSTICE REHNQUIST: We'll hear argument now on number 99-2036. Good News Club v. Milford Central School.

Mr. Marcelle.

ORAL ARGUMENT OF THOMAS MARCELLE

ON BEHALF OF THE PETITIONERS

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

This is a free speech case. On page 13 of its brief in opposition to certiorari, Milford concedes that State law, the same State law at issue in Lamb's Chapel, requires it to censor petitioner's speech from its broad community forums at all times, to all audiences because they had a religious purpose. This Court rejected such an argument in Lamb's Chapel. It should reject it in this case as well. The Second Circuit circumvented this Court's decision in Lamb's Chapel by resurrecting a distinction that this Court buried in Widmar. A distinction between constitutionally-protected speech and unconstitutionally-protected religious worship and instruction.

QUESTION: Mr. Marcelle, did you cite Lamb's Chapel to the Second Circuit?

1 MR. MARCELLE: Yes, Your Honor, quite
2 extensively, and dissent as well said, Judge Jacobs said
3 the case couldn't be squared with Lamb's Chapel.

4 QUESTION: Lamb's Chapel, if I'm correct, is not
5 even cited in the Second Circuit's opinion, is that right?

6 MR. MARCELLE: That's correct, Your Honor.

7 QUESTION: Isn't even mentioned?

8 MR. MARCELLE: Isn't even mentioned. And I
9 think the way they got around Lamb's Chapel, Your Honor,
10 was really by embracing a distinction that this Court
11 rejected in Rosenberger, a distinction --

12 QUESTION: I assume that the judge who wrote the
13 opinion for the Second Circuit was aware of Lamb's Chapel,
14 not just because you cited it, but because it had reversed
15 an earlier decision of his, isn't that right?

16 MR. MARCELLE: That's correct, Your Honor. He
17 was the author of Lamb's Chapel that this Court reversed.
18 And I think the way --

19 QUESTION: Mr. Marcelle, could you clarify for
20 us the nature of the right that you are asserting. Now,
21 could the school district say we are not going to allow
22 access to any groups in off-school hours?

23 MR. MARCELLE: Absolutely.

24 QUESTION: And you contend that the school has,
25 instead of doing that, opened a limited public forum

1 allowing some groups to use the school in off hours?

2 MR. MARCELLE: That's correct, Your Honor.

3 QUESTION: Could the school say only hours after
4 6 p.m.?

5 MR. MARCELLE: Your Honor, yes, they --

6 QUESTION: And only certain days a week?

7 MR. MARCELLE: Yes, Your Honor. They have broad
8 discretion, the school board --

9 QUESTION: You're just seeking equal access on
10 the same terms that the school offers it to other groups
11 to benefit the welfare of the community, is that the idea?

12 MR. MARCELLE: Exactly, Justice O'Connor. We're
13 not asking for unique access, just equal access.

14 QUESTION: What if a church asks for privilege
15 to conduct church services once a week during the hours
16 the school allows?

17 MR. MARCELLE: Because, Your Honor, Milford has
18 chosen to create a forum that it's probably the broadest
19 possible forum you could create, the uses that pertain to
20 the welfare of the community under this policy, I think
21 they would a Mass, or a church service would qualify, but
22 of course, they have the power and the discretion.

23 QUESTION: So if one of the local churches came
24 in and said we'd like to use it one day a week to conduct
25 our regular services, that would have to be granted as

1 well, if it fell on a day and an hour when the school said
2 it was open?

3 MR. MARCELLE: Yes, Your Honor, under this
4 policy. Of course the school could write the policy to
5 limit it to athletic, just athletic events or just
6 theatrical events but they couldn't exclude religious
7 groups or religious viewpoints on those subjects.

8 QUESTION: Well but, I think you can say that
9 the school, that the school couldn't exclude religious
10 viewpoints or religious groups and still not necessarily
11 say that it had to be open for a full dress religious
12 service.

13 MR. MARCELLE: Mr. Chief Justice, that's
14 correct. I think again in this case Milford has drafted
15 the broadest possible policy. It's really when you say
16 any social, civic or recreation use or other uses
17 pertaining to the community you, I think, have created the
18 broadest possible forum --

19 QUESTION: It specifically allows meetings and
20 entertainment events and other uses.

21 MR. MARCELLE: That's correct. And I think the
22 phrase is other uses that pertain to the welfare of the
23 community, Justice Kennedy.

24 QUESTION: Might there not be a problem with the
25 establishment clause, apart from the viewpoint versus

1 content discrimination if there were say a church service
2 to be conducted the same time the Boy Scouts are meeting?

3 MR. MARCELLE: I don't believe so, Justice
4 Ginsburg, for this reason. When you choose, when you
5 choose, as Milford has in this case, to shut its school
6 down at 3 o'clock and thereby open up a public forum
7 inside your school, you can't restrict religious
8 viewpoints even if the viewpoint in the speech is exercise
9 in a religious ceremony.

10 QUESTION: But you are talking about a First
11 Amendment free speech right. That's how you open this.
12 There is also an issue that hasn't been aired in this
13 case, and that is the issue that arose in Widmar and in
14 Murgens, the distinction between, for establishment clause
15 purposes, people of a certain sophistication versus
16 younger people.

17 MR. MARCELLE: Justice Ginsburg, I'll give you
18 two answers to your inquiry. One, I think this is like
19 Widmar. For example, in Widmar would essentially be the
20 cornerstone group which was the student group that sought
21 access to the school was a religious group singing
22 religious songs, reading the Bible and praying, and this
23 Court didn't find a constitutional problem in that case
24 because it was --

25 QUESTION: The age of the, the -- that played

1 some role in the Court's decision, didn't it? That these
2 were college students who had a degree of sophistication
3 and could distinguish between just opening it up to
4 everybody, and the school endorsing it?

5 MR. MARCELLE: That's correct, Justice Ginsburg.
6 And in this case, in Widmar, the appropriate community was
7 the students so you would look at the observer student,
8 but in this case, Milford has ended school and has opened
9 up a community forum for parents to initiate and parents
10 to run these community groups.

11 QUESTION: What was at issue in Widmar? What,
12 what kind of activity?

13 MR. MARCELLE: It was a -- praying and reading
14 the Bible and singing religious songs and teaching from
15 the Bible.

16 QUESTION: In, in the school or to the whole
17 school body, before the whole school body?

18 MR. MARCELLE: Not before the whole school body,
19 Your Honor. Just to the participants who wanted to hear
20 and chose to hear this message like this case. The only
21 children who attend the Good News Club are sent there by
22 there parents.

23 QUESTION: And that was upheld?

24 MR. MARCELLE: And that was upheld, Your Honor.

25 QUESTION: I'm sorry. Isn't the nub of the

1 problem in this case that you're not dealing with college
2 students, you're dealing with grade school kids, kids
3 from, I think it was ages starting at six going up to 12.
4 You're doing it -- in this particular case, the meeting
5 was being held immediately after the school and the
6 meeting sounds to me as it was described as Sunday school.
7 They pray. They sing sort of children's religious songs,
8 and they have a teaching lesson and I guess some
9 discussion, but it sounds like Sunday school, and isn't
10 the problem in this case that you don't have a
11 sophisticated group of people of college age who know that
12 the university is not proselytizing them or approving of
13 their particular religious practice, whereas in this case
14 you have a bunch of kids who just don't make those kinds
15 of distinctions, and isn't that the nub of the
16 establishment clause problem here, which didn't exist in
17 Widmar?

18 MR. MARCELLE: If I may, Justice, be allowed to
19 give you, kind of, two answers. One, that's not the case
20 because if this meeting was conducted at 9 o'clock at
21 night and was given just to adults, State law would
22 prohibit from them meeting under those circumstances.

23 QUESTION: Well, that, that might be the case,
24 and it might be the case that you would have a different
25 case before us if those were your facts, but whether State

1 law would prohibit it or not, my question is, don't we
2 have here at least a substantial, I won't decide it from
3 the bench, but don't we have a substantial establishment
4 clause issue, which we simply didn't have in Widmar so
5 that you can't take Widmar as being direct authority for
6 what was going on here?

7 MR. MARCELLE: I would say the answer -- and
8 that would be in the second part of my answer.

9 QUESTION: Right. Get to number two.

10 MR. MARCELLE: -- to your, to your question, is
11 the parents are the ones who decide whether or not the
12 children will attend.

13 QUESTION: He's worried about the other children
14 who are, who are supposedly hanging around the school
15 after the bell rings, instead of skipping off the way my
16 kids do. Actually, and they are infected by seeing these
17 other kids going into an activity which they think
18 represents the approval of the State for these religious
19 services. I think that's the point he's making.

20 QUESTION: I would never spurn Justice Scalia's
21 help, but actually -- actually, I think you understood my
22 question. Why don't you answer it as modified by Justice
23 Scalia.

24 MR. MARCELLE: I guess I would go back to
25 Justice O'Connor's concurrence in Capitol Square where she

1 said the endorsement tests and the establishment clause
2 are concerned with the political community at large and
3 not particular individuals or isolated observers. Here
4 the day ends and --

5 QUESTION: That's, that's, you know, that's
6 because that was the group to which Capitol Plaza was
7 appealing, but here, the appeal is to kids, and in
8 particular, to the kids who are going to this Sunday
9 school kind of service.

10 MR. MARCELLE: I guess I would disagree with all
11 respect, Justice Souter. I think the appeal is to the
12 parents.

13 QUESTION: Mr. Marcelle, was this the basis for
14 the school's refusal to allow the group, you can't do it
15 right after school? Was that the --

16 MR. MARCELLE: No. That was not the basis.

17 QUESTION: And was this point raised before the
18 Second Circuit? Was it part of the Second Circuit's
19 opinion?

20 MR. MARCELLE: Absolutely not.

21 QUESTION: Was the point raised before the
22 Second Circuit?

23 MR. MARCELLE: If I could search my memory and I
24 don't believe, or if it was raised, it was raised
25 tangentially, Your Honor. It certainly wasn't the thrust.

1 QUESTION: Well then, then do you feel that the
2 decision that the judgment of the Second Circuit should be
3 vacated and the case should be remanded for consideration
4 of this issue?

5 MR. MARCELLE: Well, I, I think what happens is
6 for the purpose of --

7 QUESTION: What do you, what do you think should
8 happen?

9 MR. MARCELLE: Excuse me. I think this case
10 should be reversed and remanded back to district court to
11 grant the relief we requested.

12 QUESTION: And why, why should this issue not be
13 considered in the Second Circuit?

14 MR. MARCELLE: I believe that Milford school had
15 the burden of proof.

16 QUESTION: But you were the Plaintiff in the
17 case, and you had the First Amendment theory, and that
18 lost, and you appealed on that theory.

19 MR. MARCELLE: Yes.

20 QUESTION: Now, it would seem to me if the other
21 issue was, was not aired, we should not decide it in the
22 first instance.

23 MR. MARCELLE: Justice Ginsburg, there was cross
24 motions for summary judgment. We moved for summary
25 judgment and the school district moved for summary

1 judgment, and to defeat our motion for summary judgment,
2 they had the burden of proving a compelling State interest
3 and that the censorship forum, from the forum was the
4 least restrictive means to achieve that interest.

5 QUESTION: Mr. Marcelle, when the, when the
6 State refuses somebody something to which he is entitled
7 for the wrong reason, and the case is appealed up here,
8 and we say that reason was wrong, do we normally, if the
9 State comes in and says oh, we could have, we could have
10 done it for another reason, you know, not because of his
11 race. We might have done it for some other reason, do we
12 normally remand to give him a second bite? Aren't they
13 stuck with the reason that they gave?

14 MR. MARCELLE: Well, I think, they are stuck
15 with the record as in any trial, on any appeal, you could
16 raise new issues and new grounds and could have a new
17 trial.

18 QUESTION: This school said we will not let you
19 conduct this service, period.

20 MR. MARCELLE: At any time.

21 QUESTION: At any time because we do not allow
22 religious services in the school, and that's the basis on
23 which it was argued below, as I understand it.

24 MR. MARCELLE: That's correct.

25 QUESTION: Did the Court of Appeals rely on the

1 establishment clause in its decision?

2 MR. MARCELLE: No, it did not, Mr. Chief
3 Justice. We were briefly, my recollection, questioned
4 about it, but the Second Circuit did not rest its decision
5 on that grounds.

6 QUESTION: And in a trial court, the school
7 district made no distinction in its summary judgment
8 motions or in its answer based on the fact that this was
9 immediately after school?

10 MR. MARCELLE: I'm not sure --

11 QUESTION: The school district said it could bar
12 these, it could bar these meetings at any time of day?

13 MR. MARCELLE: That's correct. And it's --

14 QUESTION: And it made no, and it made no
15 distinction between right after school or an hour after
16 school or two hours after school?

17 MR. MARCELLE: That's correct, Justice Kennedy
18 and in fact on the joint appendix at G-4 and I believe
19 it's paragraph 13, it's the superintendent's affidavit
20 where he is basically says that your speech is too
21 religious to be using the forum.

22 QUESTION: Mr. Marcelle, does State law require
23 this school district to open its facilities after school
24 to other groups?

25 MR. MARCELLE: No, Justice O'Connor.

1 QUESTION: This is a decision made the
2 particular school.

3 MR. MARCELLE: Yes. New York State education
4 law grants the power to the local school boards.

5 QUESTION: But does not require it.

6 MR. MARCELLE: But does not require it.

7 QUESTION: And is it clear under State law that
8 the school could adopt whatever provisions it wants for
9 its opening of the school? It could choose to limit it to
10 athletic purposes at certain hours and on certain days?

11 MR. MARCELLE: Yes. What State law sets a
12 ceiling for what school districts can do, and they can go,
13 the floor goes to not even opening the forum and they can
14 go anywhere in between. Here, Milford chose to, the
15 maximum possible extent allowed under, under --

16 QUESTION: So it would be entirely open,
17 whatever this Court chose to do for the school to revamp
18 its policy for hours and days and purposes?

19 MR. MARCELLE: Absolutely, Justice O'Connor.
20 New York grants them broad discretion and the school board
21 has that ability to exercise that discretion.

22 QUESTION: May I ask, what is the, is there a
23 State statutory ceiling you say? In other words, is there
24 a State limit on how much religious activity they could
25 permit?

1 MR. MARCELLE: Yes, Justice Stevens. It's State

2 --

3 QUESTION: Are you challenging both the school
4 board's regulation and the State statute?

5 MR. MARCELLE: They gave both reasons for
6 denial, and --

7 QUESTION: And I'm asking, are you challenging
8 --

9 MR. MARCELLE: I'm sorry, yes, Justice Stevens.
10 We are challenging both.

11 QUESTION: So you are contending the statute is
12 unconstitutional?

13 MR. MARCELLE: The statute to the extent --
14 Justice Stevens, actually it requires a little explanation
15 under New York law. It really isn't that, the history in
16 New York law is a little more entangled. The State
17 legislature had opened up it for these broad purposes if
18 the school board so chose. In 1978, there was a mid level
19 appellate court in the State that was decided prior to
20 Murgens that said because the State legislature didn't
21 specifically include religious purposes in the statute,
22 the court interpreted as it meant to exclude religious
23 purposes, although the State doesn't, the statute doesn't
24 say that, that has become part of the judicial
25 interpretation of the statute, so I don't want to mislead

1 you and it's contained in the statute, Justice Stevens.

2 QUESTION: Well, I want to know how that
3 explanation that you just gave us fits with, with what you
4 were telling Justice O'Connor a moment ago. If you win
5 this case, and the school board says we want to revamp our
6 regulations, and our regulations are going to be that
7 although religious purposes do not exclude a group from,
8 from use of the facilities, religious worship does, and we
9 are going to draw the line there, or they might say we are
10 going to draw the line against any use that could be
11 regarded reasonably as an establishment clause violation
12 when young kids are involved.

13 Would you take the position then that because
14 you think the, the New York statute is unconstitutional
15 that the school district could not draw that restriction
16 or either of those restrictions that I have just
17 described, and which if the statute is unconstitutional
18 does it render the school district in fact, in this
19 respect, does it render the school district incapable of
20 drawing any distinction whatever that has any reference to
21 religion?

22 MR. MARCELLE: I believe Widmar answers that
23 question, Justice Souter.

24 QUESTION: I would like Marcelle to answer that
25 question. What position, what's your argument?

17

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1 MR. MARCELLE: My argument is religious worship
2 is inherently a religious viewpoint. In other words, when
3 I say hail Mary full of grace and say amen, that's my
4 internal attitude. If I say ha ha, I'm allowed in the
5 forum, but if I say amen, I'm excluded and it seems to me
6 what makes one worship and the other not worship is my
7 internal attitude.

8 QUESTION: No. But -- is, you are saying that
9 the State cannot exclude what's going on -- that the
10 district could not exclude what's going on here. But is it
11 because the statute is itself unconstitutional in drawing
12 a religious distinction?

13 MR. MARCELLE: No. I believe it's
14 unconstitutional under the free speech clause. That is,
15 the State cannot exclude religious viewpoints from a forum
16 that otherwise speaks on the subject matter. For example,
17 in this case --

18 QUESTION: Okay. No. I don't, I don't mean to
19 cut you off, but I just wonder, you answered Justice
20 O'Connor's question, as I recall, by saying yes, the State
21 could go back and revamp the policy and draw it more
22 narrowly, and I understood you to say, or to imply that if
23 it wanted to draw a policy that says no religious worship
24 involving young kids or something like that, that, that
25 would be open to it and I want to know whether your

1 position on the statute leads you to say no, the school
2 district would not be, even without State, would be
3 without State authority under State law even to do that.

4 MR. MARCELLE: My position is that the First
5 Amendment prohibits drawing that distinction, if that,
6 whatever you called the worship fits within the otherwise
7 religious neutral boundaries of the forum. So, for
8 example --

9 QUESTION: But is that because the State statute
10 is simply inoperative to give the school districts the
11 authority to redraw a policy more narrowly?

12 MR. MARCELLE: No. I think the limitation on
13 the school board is the First Amendment to the United
14 States Constitution.

15 QUESTION: Okay.

16 QUESTION: If there were to be an action, let's
17 say you prevailed in this action, there would be an action
18 by parents of a 6-year-old attending this school, that
19 would challenge the allowance of this group on
20 establishment clause grounds, that would in no way be
21 foreclosed by this, this decision if the issue is there,
22 but not decided by this case, is that right?

23 MR. MARCELLE: I guess that would be correct,
24 Justice Ginsburg. I mean, I guess cases can't stand for
25 propositions which aren't decided in them, and I think

1 that's --

2 QUESTION: So the whole question one way or
3 another of whether elementary school students are
4 differently situated than high school students or college
5 students would be open in any case?

6 MR. MARCELLE: Depending how the court wrote the
7 opinion, yes. Yes. Yes, Your Honor.

8 QUESTION: Well, I mean the establishment clause
9 has been presented in this case at least as a defense,
10 that is to say, it has been alleged that one of the
11 reasons that the State could do this is because of the
12 establishment clause problems that would arise were they
13 to do it, and it is, it is quite possibly for this Court's
14 opinion to address that establishment clause argument as
15 well, isn't it?

16 MR. MARCELLE: I would assume it's quite
17 possible, Your Honor.

18 QUESTION: I'm confused. I thought you said it
19 wasn't raised.

20 MR. MARCELLE: I'm sorry, I said that, excuse
21 me, Justice Ginsburg. I think what I was trying to say in
22 response to Justice Souter's question was they hadn't met
23 their burden. It's different between, I think, not
24 raising it and not meeting the burden of proof of showing
25 a compelling stage.

1 QUESTION: But wasn't there a position below,
2 maybe, maybe I misunderstood what you were saying, but I
3 thought their position below was that any use for a
4 religious purpose, any, as you were putting it, any
5 expression of a religious point of view on the subjects
6 that might be discussed could be excluded and that was the
7 reason for excluding this. Is that so?

8 MR. MARCELLE: That's correct, Justice Souter.

9 QUESTION: And do you, do you believe that, that
10 if we say no, that's too broad a ground, that they would
11 then be foreclosed from redrawing their policy on a
12 narrower ground based upon avoidance of an establishment
13 clause problem if they do allow this, would they be --

14 MR. MARCELLE: I'm not sure.

15 QUESTION: Would they be precluded? In other
16 words, they are saying okay, we can't paint with a broad
17 brush. We are going to paint with a narrow brush. We are
18 going to say this would be a violation of the
19 establishment clause to allow a Sunday school kind of
20 worship for young school kids immediately after school, we
21 won't allow it. Would that in your judgment be precluded
22 by the judgment in this case?

23 QUESTION: Assuming you know what we are going
24 to say.

25 MR. MARCELLE: I guess that's --

1 QUESTION: I take it, I take it based on your
2 position it's open to us to say that it's a violation of
3 the establishment clause for the State to scan and to
4 review every single event, every single class in order to
5 purge it of religious content; that that is itself is an
6 establishment violation. That's open for us to say, so if
7 we said, that would certainly foreclose the line of
8 questioning that, the suggestions that Justice Souter is
9 making about further lawsuits.

10 MR. MARCELLE: Absolutely. And moreover,
11 Justice Kennedy, I think there is also this problem. This
12 is a broad community forum, and parents, it would seem to
13 me the establishment clause was crafted to defend the
14 rights of the religious people to participate in broad
15 community forums and to exclude Andrea Fournier from a
16 forum because of her religion would seem to be the very
17 value that the establishment clause was, was crafted to
18 defend, so if she wears her daisy scout uniform, for
19 example, she is okay to come in, but if she wears her Good
20 News Club uniform, she is not. And it, I think not only
21 the free speech clause protects her right to meet under
22 those circumstances, but not to be excluded from a broad
23 community forum and the parents not to be excluded from
24 the broad community forum also is protected by the
25 establishment.

1 QUESTION: All right. I want to make sure I
2 understand your answer. You are saying that if you win
3 this case based upon the ground that the exclusion broadly
4 of religious viewpoints is unconstitutional, is it your
5 position that if they then redraw the policy more narrowly
6 and say we are going to exclude Sunday school type of
7 meetings held on the school grounds immediately after
8 school, is it your position that they would be foreclosed
9 by the judgment of this Court in this case from doing
10 that?

11 MR. MARCELLE: The way you state it, Justice
12 Souter, absolutely.

13 QUESTION: Well, not if we rely simply on, on,
14 on the First Amendment speech clause. That, that's
15 another option that we have. We say it's simply violative
16 of the First Amendment speech clause.

17 QUESTION: It's almost impossible for counsel to
18 say what the effect of an opinion is going to be.

19 QUESTION: Trust me, Mr. Marcelle.

20 QUESTION: Also principles of res judicata
21 involved that anything that was litigated or might have
22 been litigated in a suit is barred.

23 QUESTION: Trust me, Mr. Marcelle, we can write
24 this opinion so it does almost nothing.

25 MR. MARCELLE: Mr. Chief Justice, may I reserve

1 the balance of my time?

2 QUESTION: Very well, Mr. Marcelle.

3 Mr. Miller, we'll hear from you.

4 ORAL ARGUMENT OF FRANK W. MILLER

5 ON BEHALF OF THE RESPONDENT

6 MR. MILLER: Mr. Chief Justice and may it please
7 the Court, the issue before this Court today is whether a
8 public school district may lawfully exclude a religious
9 group from conducting adult-led, adult-sponsored and
10 adult-initiated prayer and worship services and religious
11 instruction immediately at the end of the school day where
12 these activities involved the youngest children.

13 QUESTION: Well now, what difference does
14 adult-sponsored make? I assume the Girl Scout meetings
15 are adult-sponsored. What's the purpose of emphasizing
16 that?

17 MR. MILLER: The purpose of emphasizing that --

18 QUESTION: All these things are adult-sponsored.

19 MR. MILLER: Well, Justice O'Connor, except for
20 the fact that we have the Equal Access Act which we submit
21 that if Petitioner's position is accepted in this case,
22 the Equal Access Act will become meaningless because then
23 you will be able to have adult-led and adult-sponsored
24 religious activities occurring in a school which the Equal
25 Access Act would prohibit.

1 QUESTION: What Equal Access Act are you talking
2 about?

3 MR. MILLER: I'm talking about the Equal Access
4 Act that was discussed by this Court in Murgens and --

5 QUESTION: The New York law?

6 MR. MILLER: I'm sorry?

7 QUESTION: You are referring to some New York
8 law? Some Federal law?

9 MR. MILLER: Yes, Justice O'Connor, the Federal
10 statute known as the Equal Access Act.

11 QUESTION: Is that before us in this case?

12 MR. MILLER: No, Justice O'Connor.

13 QUESTION: I didn't think it was presented to us
14 on that basis.

15 MR. MILLER: No, it is not. It is that, it is
16 that the Federal law would allow, the Equal Access Act
17 would allow adult, would not allow adult-led or
18 adult-sponsored religious worship and activity in a school
19 under any circumstances. Whereas, if it were
20 student-initiated and student-led at the secondary level,
21 that would be permissible under Federal law and those
22 restrictions have been upheld by this court in Murgens.

23 QUESTION: Right. But what are the grades
24 covered at the Milford Central School?

25 MR. MILLER: Mr. Chief Justice, it's

1 kindergarten through sixth grade, so it's actually ages 5
2 to 12.

3 QUESTION: Well, it would be unusual, wouldn't
4 it, for any meeting after school not to have an adult
5 leader? He wouldn't have a bunch of fourth graders in
6 there talking by themselves.

7 MR. MILLER: Oh, absolutely. Oh absolutely.
8 Absolutely, Mr. Chief Justice. I emphasize that point
9 only because of the fact that under Federal law under the
10 Equal Access Act, this activity wouldn't be permitted.

11 QUESTION: May I just ask on the equal access, I
12 don't really have it in mind. Does the Equal Access Act
13 not require or does it prohibit the activity you are
14 describing?

15 MR. MILLER: It would prohibit the activity.

16 QUESTION: It prohibits it.

17 MR. MILLER: At the elementary level, and it
18 would prohibit the involvement of adult supervision.

19 QUESTION: Are you sure about that? I, I
20 thought it would simply not compel it. It doesn't cover,
21 it doesn't cover it except, you know, student-led
22 activity.

23 MR. MILLER: Justice Scalia, my understanding of
24 the Act was that it specifically prohibited adult-led and
25 adult-sponsored activities at the elementary level, which

1 is the situation.

2 QUESTION: Wow. Well, then it would raise the
3 same problem as this raises? So my question would be, we
4 have a fairly -- no prayer in school is a controversial
5 policy, but it has one virtue. The court's opinion is,
6 the virtue is it's clear.

7 MR. MILLER: That's right.

8 QUESTION: All right. So the rule is as the
9 courts interpreted it, that school activities cannot
10 involve prayer. Well, isn't the corollary of that where
11 there isn't school activities, it can involve prayer, and
12 it can involve religious activities, and here we are after
13 school, so the same clear rule would say you can't pray in
14 school, but after school is different, and you can't
15 discriminate against religion after school. Now, I put
16 that because that's, I'm putting it squarely.

17 MR. MILLER: Right.

18 QUESTION: I want to hear your answer.

19 MR. MILLER: Yes, sir.

20 QUESTION: And, and my, my thought is aimed at
21 the clarity of such a rule that ordinary people can
22 understand, in light of the basic principles underlying
23 establishment on the one hand and free speech on the
24 other.

25 MR. MILLER: Yes, Justice Breyer. Justice

1 Breyer, we contend that this is, and I believe the parties
2 have stipulated that this is a limited open forum. And
3 what we have attempted to do is consistent with State law
4 we have attempted to exclude the subject matter of
5 religion.

6 QUESTION: Exactly. And the question is, after
7 school --

8 MR. MILLER: Correct.

9 QUESTION: People can talk about any subject
10 matter, but not religion. That sounds to me as if you are
11 discriminating in free speech terms against religion. And
12 now my question is, why isn't that contrary to the
13 Constitution? It's after school. It's not a school
14 activity. And it doesn't help me to talk about open
15 forums or not open forums or whatever. I want, I want to
16 know what, what the principle is, what the theory is?

17 MR. MILLER: Well, the theory is, Justice
18 Breyer, that we have set limits to exclude on a reasonable
19 basis certain activities from occurring in the school.
20 Just as we exclude partisan political activities. We
21 exclude commercial activities. And we exclude various
22 other activities, the school system has made a decision
23 that it wanted to exclude this activity from its forum.
24 Now, consistent with a decision, for example, in *Cornelius*
25 *vs. NAACP*, where the issue of partisan political speech

1 was excluded from a limited open forum. We have acted
2 similarly in this circumstance. Because of concern about
3 some of these establishments.

4 QUESTION: What, what do you do about the, our
5 Lamb's Chapel decision? It seems to me that the Court of
6 Appeals here paid very little attention to Lamb's Chapel.

7 MR. MILLER: I'm, I'm well aware of that, Mr.
8 Chief Justice. But I think that in part, and I, I'm not
9 certain why the Second Circuit wrote the majority opinion
10 it did, except for the, I can offer the Court this, and
11 that is that in footnote two of the majority opinion, this
12 Court indicated very clearly that it was not addressing
13 the issue of worship services and Sunday school.

14 QUESTION: Well that -- yes, but as I understand
15 it, as it has been represented to us, that wasn't the
16 basis for the school district's exclusion here. The
17 basis, as I understand it, was what you just told Justice
18 Breyer a moment ago, that the district had chosen to
19 exclude religious discussion from those which were, were
20 open. And that's, that's a very different criterion from
21 saying, we're excluding the use of the facilities just for
22 religious worship. Which was it?

23 MR. MILLER: Well, Justice Souter, I think
24 perhaps the actions of the school district have been
25 somewhat mischaracterized. I believe that there is a

1 letter in the record from the superintendent that had
2 indicated precisely what they were excluding, and the
3 letter from the superintendent to the Reverend indicated
4 that uses consistent with Lamb's Chapel would be
5 permitted, but that religious worship would be excluded
6 under the description of this forum. So it was not
7 excluded because of a viewpoint. It was excluded because
8 the entire subject matter of religious worship was
9 excluded from the forum.

10 QUESTION: Where is that letter in the record?

11 MR. MILLER: Yes, sir. Your Honor, please look
12 at the joint appendix H-1 to H-2. There is reference
13 there to the Lamb's Chapel decision of this Court
14 indicating that the viewpoint, the viewpoint was -- was
15 not what was being excluded, rather it was the religious
16 worship that was being excluded.

17 QUESTION: And was it religious worship which
18 was the ground that you -- you chose to stand on in the
19 district court and in the argument before the Second
20 Circuit?

21 MR. MILLER: Justice -- Justice Souter, we
22 advanced both. For example, an examination of our answer
23 would reveal that we raised the establishment clause as an
24 affirmative defense. But I believe it's the next to the
25 last page of the district court opinion, and I could find

1 it if the Court wishes. The district court, for example,
2 concluded that because we had found that the limited open
3 forum was properly created and properly limited, it did
4 not need to reach our establishment clause arguments or
5 the establishment clause issue.

6 QUESTION: On that, you think this letter is
7 correct that hearing a Bible lesson and memorizing
8 Scripture is the equivalent of religious worship?

9 MR. MILLER: Justice Scalia, yes, sir, I do.

10 QUESTION: And have you memorized the
11 Declaration of Independence or the preamble of the
12 Constitution, that's something other -- what is that?
13 That's not thinking? That's not training of any kind?

14 MR. MILLER: Justice Kennedy --

15 QUESTION: That's not, that's not imparting a
16 view on what our history means?

17 MR. MILLER: Oh, of course it is.

18 QUESTION: We, we don't want you to know -- be
19 able to recite the First Amendment?

20 MR. MILLER: We don't certainly contend that
21 that was a full description, Justice Kennedy, of
22 everything that was occurring. Rather we have a full
23 record that the district court and the court of appeals in
24 both instances concluded that this was indeed religious
25 worship.

1 QUESTION: Well, suppose it was.

2 MR. MILLER: Yes, sir.

3 QUESTION: And I'm just putting this to get your
4 response. It doesn't necessarily reflect what I'm
5 thinking. But social events, it doesn't say social
6 discussion. Civic events, recreational events.
7 Entertainment events. I guess that includes chess club,
8 dances.

9 MR. MILLER: Yes, Your Honor.

10 QUESTION: It includes all kinds of activity.

11 MR. MILLER: That's correct.

12 QUESTION: So suppose you were to say any
13 activity is fine, just one is not. Religious activity it
14 not.

15 MR. MILLER: No, sir.

16 QUESTION: After school. Now, my question is
17 given Lamb's Chapel, why would that be constitutional?

18 MR. MILLER: Well, Justice Breyer, the premise
19 of the question operates under the assumption that the
20 only thing that we excluded was religious, were religious
21 activities, I believe.

22 QUESTION: Well, that's what seems to be what
23 you're saying. What you excluded here, there is a
24 separate section and it says the separate section, use for
25 nonreligious purposes. It says school premises shall not

1 be used by any individual or organization for religious
2 purposes.

3 MR. MILLER: Yes, sir.

4 QUESTION: So it seems to me that what you have
5 on one side of the page is use it for anything, and on the
6 other side of the page, there is an exception, religious
7 purposes. Now, my question, which has been throughout is,
8 how do you square that with Lamb's Chapel, i.e., since its
9 after school, and isn't a school activity, why isn't it
10 discrimination against religion under the First Amendment?

11 MR. MILLER: Your Honor, we have excluded the
12 entire subject matter of religion as we --

13 QUESTION: Well, doesn't that make it worse?
14 Every other subject matter is there.

15 MR. MILLER: No, Your Honor, because that is
16 not, that is, in fact, not the case as this particular
17 forum was created. This particular forum also excluded
18 partisan political speech and various other activities
19 that I believe we enumerated in our brief and I think are
20 enumerated elsewhere in the record, particularly the
21 deposition of the school superintendent identifies a
22 number of those.

23 QUESTION: But, but it didn't exclude
24 discussions of morals -- the Boy Scouts, the Girl Scouts
25 teach that.

1 MR. MILLER: Yes, sir.

2 QUESTION: What it really excluded was a
3 discussion of morality that had a religious perspective.

4 MR. MILLER: Well, Your Honor, that -- the facts
5 in the case really don't spell that out. And in fact,
6 there is no development of the record in terms of what
7 precisely the Boy Scouts did, other than recite the Boy
8 Scout motto. In fact, the record doesn't reflect that
9 they actually held their typical club meetings on school
10 premises. What they actually held on school premises were
11 leadership meetings and not actual Cub Scout --

12 QUESTION: Well, the very oath of the Boy Scouts
13 is moral.

14 MR. MILLER: Yes, Your Honor. And our position
15 has been that that's essentially an incidental mention of
16 those issues. It is different from or distinct from
17 religious worship.

18 QUESTION: And so someone who spoke of, wanted
19 to teach about how to be a good citizen from a
20 particularly, especially secular point of view could not
21 have done so under your program?

22 MR. MILLER: Your Honor, they could have. I
23 believe that --

24 QUESTION: They could have done it.

25 MR. MILLER: Yes, sir.

1 QUESTION: But someone who wanted to speak about
2 exactly the same subject from a religious point of view
3 could not have?

4 MR. MILLER: I don't -- I don't agree with the
5 Chief Justice's statement of the question. Your Honor, we
6 would have allowed them to express their viewpoint on a
7 secular subject, I believe consistent with Lamb's Chapel.
8 We would not have, however, permitted religious worship
9 services, which is essentially what this was.

10 QUESTION: You say this is essentially a
11 religious worship service. Now, I think people might
12 quarrel with that. You can have, I think one of my
13 colleagues here described it as more like Sunday school,
14 and I think that's probably an accurate description, but
15 it certainly isn't religious worship in the sense that
16 most people think of it.

17 MR. MILLER: Well, except for the fact, Your
18 Honor -- Your Honor that the Sunday school is generally
19 the way that religious worship is presented to children of
20 this, of this age group. They are typically not required
21 to attend the full service and so forth. They typically
22 attend a Sunday school-type service.

23 QUESTION: Another way to put it would be that
24 children of that age don't engage in religious worship.
25 They go to Sunday school.

1 MR. MILLER: Well, Justice Scalia, they go --
2 QUESTION: I mean, just because they go, you are
3 going to suddenly convert Sunday school into a Mass?
4 MR. MILLER: No. Justice Scalia, except for the
5 fact that what they do is that they, they engage in an
6 activity that's age-appropriate, and for those children --
7 QUESTION: That's right.
8 QUESTION: Don't they pray --
9 QUESTION: Religious worship is not part of it.
10 QUESTION: Don't they pray?
11 MR. MILLER: Yes, sir, they do.
12 QUESTION: May I ask to you clarify now
13 something that Mr. Marcelle addressed as well. You have
14 said that you raised the establishment clause as an
15 affirmative defense.
16 MR. MILLER: Yes, Your Honor.
17 QUESTION: And that the district court said I'm
18 not going to deal with it because I decide the case in
19 your favor on another ground.
20 MR. MILLER: Correct.
21 QUESTION: So it was raised, you raised it, but
22 it wasn't decided.
23 MR. MILLER: That's correct.
24 QUESTION: It seems to me that that's got to
25 remain open.

1 MR. MILLER: Yes, Your Honor, I believe that it
2 does. I believe it's very much involved in this case.

3 QUESTION: Your position is that saying a prayer
4 is religious worship and I assume then that any group
5 which sought to meet on your school's property which
6 opened its meeting with a prayer would be excluded, and
7 you think that's in accord with Lamb's Chapel?

8 MR. MILLER: Religious worship would be
9 excluded, Justice Scalia.

10 QUESTION: And you said in response to Justice
11 Souter that saying a prayer is religious worship, right?

12 MR. MILLER: Justice Scalia --

13 QUESTION: Right? So no group admitted to this
14 school program can say a prayer to open its meeting?

15 MR. MILLER: I wouldn't necessarily say that,
16 Justice Scalia.

17 QUESTION: You just did say it.

18 MR. MILLER: Well, I -- the point I'm getting
19 across is that the activities of the Good News Club were
20 more than merely reciting one prayer. There was much more
21 involved in that which is fully developed in the record,
22 and those activities were much more religious and much
23 more in the nature of a religious worship service.

24 QUESTION: They were more religious, but they
25 were not necessarily the same thing as a church religion

1 -- as a church worship service, teaching the Scripture,
2 teaching what the Scripture has to say about morality. I
3 mean, I think it's a great distortion to call that a
4 worship service.

5 MR. MILLER: Justice Scalia --

6 QUESTION: Even if you throw in a prayer or two.

7 MR. MILLER: Justice Scalia, for children of
8 this age group, that is the religious worship service that
9 they would typically engage in.

10 QUESTION: Well, if that's so --

11 QUESTION: And that's what you want to litigate,
12 if on the broad ground you lose, you say we have raised
13 that, and we should be allowed to litigate that go back to
14 district court, is that it?

15 MR. MILLER: I'm hoping we don't lose this case,
16 Justice Souter.

17 QUESTION: I recognize that, but you're saying,
18 whether you agree with Justice Scalia or not, you're
19 saying we want to litigate that in the district court and
20 --

21 MR. MILLER: I believe that we've preserved it
22 and fully developed the record with respect --

23 QUESTION: Well, you did litigate it, didn't
24 you?

25 MR. MILLER: Except for the fact, Mr. Chief

1 Justice, that it was not ruled on specifically. The
2 district court said because we've concluded that your
3 limited open forum was constitutional under Second Circuit
4 precedent, we didn't need to reach the establishment
5 clause argument. It was raised. It was not, however,
6 ruled on previously by the district court.

7 QUESTION: Is that the right way, then, to deal
8 with what I would see as the difficult issue in this case,
9 the difficult issue being suppose it's a total prayer
10 service?

11 MR. MILLER: Yes, sir.

12 QUESTION: Imagine that it is.

13 MR. MILLER: Yes, sir.

14 QUESTION: Now, is the way to get at that
15 problem, if assuming there is a problem, that either a
16 total prayer service would be unlawful, either you have --
17 either it would violate the establishment clause or it
18 wouldn't.

19 MR. MILLER: Correct.

20 QUESTION: If it doesn't violate the
21 establishment clause, you lose this case a fortiori. If it
22 does violate the establishment clause, then the way to get
23 at it is through litigating the establishment clause
24 issue. I'm trying to figure out. That's been the point
25 of my question. I'm trying to figure out how to do this

1 on the assumption that this is pure prayer, which I know
2 it isn't, because the other alternative you could argue
3 whether it is or isn't, but assume it was, how do we get
4 at that issue?

5 MR. MILLER: Well, several ways. Number one, I
6 think that even if it's not a -- technically an
7 establishment clause violation, I think the school
8 district had a reasonable basis to conclude that it might
9 potentially be disruptive, it might potentially be
10 divisive of the community to allow this type of
11 utilization of the school building, and out of concern
12 that perhaps religions which did not predominate in the
13 area might be unrepresented and unable to use the school
14 facility for similar purposes.

15 QUESTION: This is divisive in the community? I
16 don't understand. What would the community get upset
17 about? I don't understand.

18 MR. MILLER: Well, Justice Scalia --

19 QUESTION: You would let all religious groups do
20 this, right?

21 MR. MILLER: Presumably, if you ordered it.

22 QUESTION: Religious groups that didn't want to
23 do it would get upset that other religious groups did want
24 to do it?

25 MR. MILLER: Well, actually, Your Honor --

1 QUESTION: You must have a very divisive
2 community down there. I'm glad I don't live in New York
3 anymore.

4 MR. MILLER: Actually it isn't terribly
5 divisive, Justice Scalia. What we are concerned about is,
6 is that there may be religious groups that do not have a
7 substantial representation in this small town community,
8 and that the majority religion, such as Reverend Fournier
9 represented would be able to run a Good News Club, but the
10 other groups that didn't have the numbers or the personnel
11 couldn't run a similar club, and that would show a
12 favoritism to this particular club.

13 QUESTION: Why would it be a favoritism? I mean,
14 presumably if they met the standards for, if you have to
15 have a certain number of people come to the meeting, any
16 religious group that met that standard would have been
17 granted the same right, wouldn't they?

18 MR. MILLER: Yes, sir. But it's --

19 QUESTION: Well, then what you're saying
20 basically, it's kind of a heckler's veto, that if people
21 don't like what the school is doing and are unhappy about
22 it, that is a reason for excluding religion.

23 MR. MILLER: I don't believe that to be the only
24 basis upon which we've determined that it is appropriate
25 to exclude this. We have also relied, to some extent,

1 upon the mandate of State law that the school is bound to
2 follow, and may I point out, please, that in the complaint
3 there is no challenge to the constitutionality of section
4 414 of the education law. That relief was not asked for
5 at the district court, it was not asked for at the court
6 of appeals, and it is not, in my judgment, at least from
7 what I read in the complaint, it is not before this Court.

8 QUESTION: No, but are you contending that the
9 State statute required this policy?

10 MR. MILLER: Justice Stevens, I believe that
11 that's essentially what the State statute mandated. The
12 State statute, education -- New York education law 414
13 prohibited use of a school building for religious
14 purposes.

15 QUESTION: Well, but you don't say that the
16 school couldn't adopt some different policy and say we're
17 not going to allow any use of our buildings at all?

18 MR. MILLER: That is correct, Justice O'Connor.

19 QUESTION: The State law does not prohibit that?

20 MR. MILLER: That is correct.

21 QUESTION: And the school could say, we're only
22 going to allow after-school use for athletic purposes.

23 MR. MILLER: Correct.

24 QUESTION: Or we're only going to allow it after
25 6 p.m..

1 MR. MILLER: Correct.

2 QUESTION: Yeah. It only sets a ceiling,
3 whatever that State law is.

4 MR. MILLER: That is correct, except one of the
5 things that they do not permit, along with other
6 prohibitions, such as a political -- partisan political
7 activities, commercial activities, and so on. One of the
8 other excluded areas is a religious activity.

9 QUESTION: Well, Mr. Miller, you can't have it
10 both ways. If you say that the State law requires this --

11 MR. MILLER: Yes, sir.

12 QUESTION: -- then certainly the
13 constitutionality of the State law is at issue in this
14 case. There is no difference whatever between saying that
15 what the State law requires is unconstitutional and saying
16 that the State statute is unconstitutional. That's one
17 and the same. You can't have it both ways. If you say
18 the State statute requires this, we are passing upon the
19 constitutionality of the State statute, isn't that right?

20 MR. MILLER: Yes, sir. Just as you were in
21 Lamb's Chapel, but the same statute was before the court
22 in Lamb's Chapel, and --

23 QUESTION: By the way, the Federal Equal Access
24 Act does not prohibit what was done here. It does not
25 contain any prohibitions. It just says that the

1 requirements which this Act imposes --

2 MR. MILLER: Yes.

3 QUESTION: -- are not imposed upon elementary
4 schools --

5 MR. MILLER: At the elementary level.

6 QUESTION: That's right.

7 MR. MILLER: My understanding is it was a very
8 vigorous debate about whether --

9 QUESTION: It doesn't prohibit doing it at the
10 elementary level. It just says Federal law does not
11 require you to do it at the elementary level.

12 MR. MILLER: That is correct. That is correct.
13 The -- we contend that the establishment clause argument
14 is very much involved in this case. We did raise that as
15 an affirmative defense in our answer, and we contend that
16 if this particular use is permitted, we will have Sunday
17 school on a Tuesday in a public school occurring at 3
18 o'clock immediately upon the end of the official school
19 day.

20 QUESTION: Well, now, just a minute. I thought
21 we just went over this. There is nothing in the world
22 that prohibits the school from saying we're not going to
23 have any activity before 6 p.m. or 3:30 or 4:00 or 5:00,
24 whatever it is.

25 MR. MILLER: Correct.

1 QUESTION: You told me the school can do that.

2 MR. MILLER: The school can do that.

3 QUESTION: So why would you complain about 3
4 o'clock? That must be something the school itself set up.

5 MR. MILLER: That is correct, Justice O'Connor,
6 it is something that the school set up and allows, but
7 they didn't specify specific times, and when they examined
8 this particular circumstance, they determined that it was
9 religious worship and chose not to exclude it -- or,
10 excuse me, chose to exclude it.

11 QUESTION: But --

12 QUESTION: But that's all that's before us is
13 the religious worship. The school obviously can set the
14 hours and the days and the opportunities for all these
15 groups.

16 MR. MILLER: That is --

17 QUESTION: And your position is they can't do it
18 at any time of day, and that's the way the case has been
19 presented to us here.

20 MR. MILLER: That is correct. That is correct.

21 QUESTION: And the school, in fact, never
22 complained about the time, none of this correspondence
23 said the problem is you're doing it right after school and
24 these other kids will think that -- right? That was never
25 in any of this stuff?

1 MR. MILLER: That is correct, Justice Scalia,
2 the original denial was based on the fact that it was
3 religious worship, not based upon the specific time of
4 day, that is correct.

5 QUESTION: And you defend that position?

6 MR. MILLER: Yes, sir, I do. I believe we have
7 the right to limit the forum to certain activities that
8 the school believes have a reasonable basis consistent
9 with the mission of the school system, and under the
10 circumstances, as they have excluded other activities,
11 such as political activities and commercial activities and
12 similar activities, they are permitted to exclude these
13 activities as well.

14 QUESTION: Now, why would it violate the
15 establishment clause? I mean, let's take an extreme case,
16 a local church, which doesn't have a building, says, we
17 would like to use the school for worship services two or
18 three times a week at 4:00 in the afternoon to 6:00, all
19 right? So they do it. And the school district says, no,
20 this is a school, it's not a church.

21 MR. MILLER: Correct.

22 QUESTION: Even after school. Now why, I want
23 to understand why -- it may well. Why does it violate the
24 establishment clause, in your view? After all, you could
25 turn it into a gymnasium. That's not the -- this is not a

1 discrimination point. This is an establishment point.

2 MR. MILLER: Correct.

3 QUESTION: Why?

4 MR. MILLER: Because under those circumstances
5 that you just posit, I believe that the school is then
6 lending support to a particular religious exercise or a
7 particular religion. Under the circumstances of this
8 particular case, our case, we have an increase in active
9 attendance at the meetings, we have the school being
10 utilized in effect as a church. And the same activity was
11 conducted only months earlier at the church. And under
12 the circumstances, we submit, to permit the utilization
13 for a church service, for a worship service, would involve
14 the school in endorsing and supporting the that particular
15 religion.

16 QUESTION: But the state provides, for example,
17 crossing guards on Sundays at church services, and that is
18 not thought -- to facilitate people going to the church
19 service, there's no other reason for it. So long as it
20 provides crossing guards wherever else there is need for
21 crossing guards, this is not considered to be an
22 establishment of religion.

23 MR. MILLER: That's correct, Justice Scalia.

24 QUESTION: So why if public facilities -- and I
25 don't -- I know many schools that do it. If they're

1 willing to let their facilities be used for any public
2 purpose --

3 MR. MILLER: Uh-huh.

4 QUESTION: -- why must they exclude a religious
5 purpose so long as they're doing it evenhandedly, all
6 religions, all other purposes, just like crossing guards?

7 MR. MILLER: The example of the crossing guards
8 you gave, I presume, is on a public street. That would be
9 an open forum where restrictions and limitations would be
10 very difficult to justify. In the case of a limited open
11 forum, such as the school district where you've previously
12 -- this Court has previously indicated we have to have
13 special sensitivity to the age and so forth of the
14 children, we believe that it's appropriate to make those
15 judgments to exclude from the forum those activities that
16 the school officials may believe are not inconsistent with
17 the mission.

18 QUESTION: On sundays? On Sundays and after the
19 kids are gone? The building's just lying there. Actually
20 the community can make money, it rents it out to any group
21 that wants it. The church needs it.

22 MR. MILLER: Well, they wouldn't -- if they were
23 doing it for a for-profit purpose under New York law, that
24 wouldn't be permissible.

25 QUESTION: Oh, you can violate the establishment

1 clause for money?

2 MR. MILLER: Well, no, no, it wouldn't be a
3 permissible use was my point. It would not be permitted
4 under the school use policy or under New York education
5 law 414. It's simply not permitted.

6 QUESTION: To prohibit the use of public
7 facilities for religious purposes shows the State is
8 neutral as to religion, is that your point?

9 MR. MILLER: Justice Kennedy, I believe that we
10 are required to be neutral and permit the schoolhouse to
11 be used as a house of worship would violate, I believe,
12 the principle of neutrality.

13 QUESTION: Why would it do so if, unlike this
14 case, there's no particular involvement of schoolchildren
15 involved, and the district allows the, let's say the
16 auditorium to be used for a meeting of the Elks, for a
17 meeting of the Veterans of Foreign Wars, and the Baptists
18 have had their church burned, and they want to use it.
19 Why would -- what would the theory be that would explain
20 why it would be a violation of the establishment clause to
21 let the church group use it on the same terms as the VFW
22 and other secular organizations?

23 MR. MILLER: Is Justice Souter's question in
24 reference to this specific record or is this a
25 hypothetical?

1 QUESTION: No, no, I'm going back I think to
2 Justice Breyer's question, and I understood you to answer
3 his question in such a way that would say, yes, it would,
4 in my example, it would be a violation to let the church
5 group use it at the same -- on the same terms as the VFW,
6 and I don't understand what your reasoning is. What's the
7 establishment clause theory that leads you to say that?

8 MR. MILLER: Because you would be permitting
9 then a schoolhouse to be used as a house of worship. In
10 the case of -- in our particular case, at 3 o'clock there
11 are lots of other educational activities going on.

12 QUESTION: Well, if that was the case, in -- the
13 facts in Widmar, then, would have been an establishment
14 clause violation because in Widmar you had a state
15 university property that was being used for purposes of
16 worship, so that would have violated the establishment
17 clause.

18 MR. MILLER: Well, Justice Souter, I believe
19 that Widmar is a totally different case. Number one, it's
20 an open forum as opposed to a limited open forum.

21 QUESTION: But you're talking about the First
22 Amendment, and now we're talking about the establishment
23 clause. I take it, then, that given your answer to my
24 question and Justice Breyer's, you would say that the
25 student worship service in Widmar on university property

1 was a violation of the establishment clause.

2 MR. MILLER: I would have to take the position
3 that with respect to that forum which had been open for
4 all purposes --

5 QUESTION: We're not talking about forum
6 analysis. We're talking about establishment clause
7 analysis.

8 MR. MILLER: Uh-huh. Yes, sir, I understand.

9 QUESTION: In other words, I'm going from the
10 speech clause to the establishment clause. Was the Widmar
11 worship service on public property a violation of the
12 establishment clause?

13 MR. MILLER: This Court apparently held it
14 wasn't, although you looked at it as a free speech case,
15 so presumably --

16 QUESTION: Yes.

17 MR. MILLER: -- in that particular matter you
18 allowed it. In this circumstance --

19 QUESTION: In this particular district, this
20 school district, we're dealing with elementary grades?

21 MR. MILLER: Correct.

22 QUESTION: Is there any practice with respect to
23 high school or public colleges in that area? Do they have
24 student groups that can meet for religious purposes as
25 well as all others?

1 MR. MILLER: Justice Ginsburg, that is not
2 reflected in the record, and I'm not certain of the answer
3 to that. I believe, however, that the record reflects
4 that there were no other religious uses that went on at
5 this particular school, but the record is not developed on
6 that.

7 QUESTION: Does the record show that there are a
8 lot of other children who were hanging around the school
9 while this service is conducting -- conducted? Is that in
10 the record?

11 MR. MILLER: It is not fully-developed, Justice
12 Scalia, but I believe there is some evidence of that, yes,
13 sir.

14 QUESTION: Thank you, Mr. Miller.

15 Mr. Marcelle, you have five minutes remaining.

16 REBUTTAL ARGUMENT OF THOMAS MARCELLE
17 ON BEHALF OF THE PETITIONERS

18 MR. MARCELLE: If the Court -- if it would
19 please the Court, I have two quick points to make on
20 rebuttal. First, I believe there is a slight misstatement
21 of the record. At the cert petition, appendix H, page 6,
22 it describes Milford School as a housing -- building of
23 both elementary, junior high, and high school. The school
24 building contains grades K-12, not just elementary school.

25 Second, with respect to the Equal Access Act, I

1 believe Justice Scalia is right, it is only a mandate that
2 Congress passed it. If a high school did certain things,
3 they would have to allow certain other high school groups.
4 There is nothing in the statute that makes it a
5 prohibition to it, even in the absence of the law, to
6 allow other groups.

7 QUESTION: Can I ask as long as -- I would like
8 you to --

9 QUESTION: This is on rebuttal.

10 QUESTION: I thought he was finished. Do you
11 have something else?

12 MR. MARCELLE: No, I'm finished, Justice.

13 QUESTION: I thought he was. If you have an
14 extra minute, I'd like just to get your view on what I'm
15 finding is the most difficult part of this, which we may
16 not reach. To take the opponent's point on the
17 establishment clause, suppose the city hall says every
18 Sunday we can use the city hall as a church, we'll let
19 church groups use it. So every Sunday the city hall
20 becomes a church. Does that violate the establishment
21 clause?

22 MR. MARCELLE: Not if it has a broad forum. It
23 would violate the statute --

24 QUESTION: No, what they'll say is any group can
25 use it. Now, what happens is that every Sunday the city

1 hall becomes a church and all the community goes there and
2 gathers and prays. Does that violate the establishment
3 clause?

4 MR. MARCELLE: I don't believe so, Justice
5 Breyer. I believe as long as the forum is open, the --
6 and the State is neutral, that a reasonable observer would
7 be aware of the policy and the history and the context of
8 the situation and wouldn't view that the State was
9 endorsing the religious ceremony, but, rather, the
10 adherents who chose to avail themselves of the forum, the
11 endorsement belongs really to the people who attend and
12 not be accredited to the State as long as the State didn't
13 really encourage or promote or recognize the --

14 QUESTION: May I ask you a factual question?
15 Does the record tell us how big the group was of the
16 children involved in this club?

17 MR. MARCELLE: How many, Justice Stevens?

18 QUESTION: Yes.

19 MR. MARCELLE: Initially, at the time of making
20 the application, there were 20, and we had opportunity to
21 use the school for a year and a half, and at the
22 conclusion of that, at the time we made our motion for
23 summary judgment, I believe, it was the same number.

24 QUESTION: Thank you.

25 QUESTION: You used it for a year and a half.

1 You actually did use it before the prohibition was issued
2 or what?

3 MR. MARCELLE: The district court -- yes,
4 Justice Scalia, the district court issued an injunction,
5 and we used the school facilities for a year and a half.

6 QUESTION: But you didn't use it? At what time
7 did you use it?

8 MR. MARCELLE: At 3 o'clock, the high school
9 resource room.

10 QUESTION: At 3 o'clock. And was there any
11 evidence about whether other grammar school students were
12 still milling about when you were using it, looking
13 longingly at the classroom where this was going on?

14 MR. MARCELLE: No, Justice Scalia. In fact --

15 QUESTION: Go ahead.

16 MR. MARCELLE: In fact, in the district court's
17 opinion, and for the preliminary injunction, it says such
18 a case would be unlikely.

19 QUESTION: You say this was the high school
20 room?

21 MR. MARCELLE: Yes, a high school resource room,
22 Justice Kennedy.

23 QUESTION: Is the high school and the elementary
24 school one facility?

25 MR. MARCELLE: That's correct, Justice Kennedy.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
2 Marcelle.

3 The case is submitted.

4 (Whereupon, at 11:14 a.m., the case in the
5 above-entitled matter was submitted.)

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