

1 IN THE SUPREME COURT OF THE UNITED STATES

3 GARY E. WIDMAR, ET AL.,

5 v.

6 CLARK VINCENT, ET AL.

8 Washington, D.C.

9 Tuesday, October 6, 1981

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

13                      APPEARANCES:

14 TED D. AYRES, ESQ. Counsel, University of  
Missouri, 227 University Hall, Columbia,  
15 Missouri 65211; on behalf of Petitioners.

16 JAMES M. SMART, JR., ESQ., 1006 Grand Avenue,  
Kansas City, Missouri 64106; on behalf of  
17 Respondent.

1

C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 TED D. AYRES, ESQ.  
4 On behalf of the Petitioners 3

5 JAMES M. SMART, JR., ESQ.  
6 On behalf of the Respondent 23

7 TED D. AYRES, ESQ.  
8 On behalf of the Petitioners -- Rebuttal 45

9 the Court, as the Court says, the case at bar presents

10 issues which revolve around the religion clause of the First

- - -

11 Amendment to the United States Constitution and the

12 re-occurring question of its proper relationship with public

13 education.

14 QUESTION: Just the religion clause of the First

15 Amendment?

16 MR. AYRES: It's our contention that it does, Your

17 Honor.

18 QUESTION: Now about the First Amendment itself,

19 apart from the religion clause?

20 MR. AYRES: Mr. Chief Justice, that is an argument

21 that has been made by the respondents in this case.

22 Hopefully, we will show in our argument to come that the

23 free speech clause, the press and the assembly clause which

24 were used by the Eighth Circuit were not properly used, and

25 that the case should center around the religion clause.

26 QUESTION: Now, because I take it, for purposes of

27 argument that the entire First Amendment applies with equal

1

P R O C E E D I N G S

2

CHIEF JUSTICE BURGER: We will hear arguments next  
3 in Widmar against Vincent.

4

ORAL ARGUMENT OF TED D. AYRES, ESQ.,

5

ON BEHALF OF PETITIONERS

6

MR. AYRES: Mr. Chief Justice, and may it please  
7 the Court, as the Court knows, the case at bar presents  
8 issues which revolve around the religion clause of the First  
9 Amendment to the United States Constitution and the  
10 re-occurring question of its proper relationship with public  
11 education.

12

QUESTION: Just the religion clauses of the First  
13 Amendment?

14

MR. AYRES: It's our contention that it does, Your  
15 Honor.

16

QUESTION: How about the First Amendment itself,  
17 apart from the religion clauses?

18

MR. AYRES: Mr. Chief Justice, that is an argument  
19 that has been made by the respondents in this case.  
20 Hopefully, we will show in our argument to come that the  
21 free speech clause, the press and the assembly clause which  
22 were used by the Eighth Circuit were not properly used, and  
23 that the case should center around the religion clauses.

24

QUESTION: You concede, I take it, for purposes of  
25 argument that the entire First Amendment applies with equal

1 force to the states as to the federal government.

2 MR. AYRES: Yes, Your Honor, that's no problem.

3 We're dealing in this case with a tax-supported  
4 state institution of higher education. Generally, the  
5 question can be summarized or posed as follows: Can or must  
6 a tax-supported state university permit regular religious  
7 worship services on its premises by a recognized student  
8 group?

9 The respondents in this case are members of a  
10 group or organization called Cornerstone. Cornerstone is  
11 and was a recognized student group of the University of  
12 Missouri, Kansas City.

13 In January of 1977, respondents sought to obtain  
14 the usage of a campus building for meetings on every  
15 Saturday night for two and a half hours for the following  
16 winter semester, which ran from January to May. Upon  
17 further inquiry by university officials, information was  
18 provided that indicated that respondents fully intended to  
19 conduct regular religious worship services in the meeting  
20 rooms that were sought.

21 The university was advised that a typical --

22 QUESTION: Would you give me the dates for which  
23 they sought.

24 MR. AYRES: Justice Blackmun, the dates sought  
25 which led to this case were from January through May of 1977.



1                   QUESTION: And prior to that time, had the group  
2 met on campus?

3                   MR. AYRES: Your Honor, the facts that were  
4 stipulated at the trial indicated that the Cornerstone group  
5 had met in university facilities prior to this time.  
6 However, it was also stipulated that neither the Chancellor  
7 nor the Dean of Students was ever aware that the Cornerstone  
8 group was using the facilities for actual religious worship  
9 services.

10                  QUESTION: By facilities you mean indoors or  
11 outside?

12                  MR. AYRES: Up to this point in time, Justice  
13 Blackmun, to my knowledge, the only usage that the  
14 respondents made of university facilities was indeed indoors.

15                  The university was advised that the typical  
16 Cornerstone meeting that was sought would include the  
17 following elements. The offering of prayer, the singing of  
18 hymns in praise and thanksgiving, the public reading of  
19 Scripture, the sharing of personal views and experiences in  
20 relation to God by various persons, an exposition of and  
21 commentary on passages of the Bible by one or more persons  
22 for the purposes of teaching practical Biblical principles,  
23 and an invitation to the interested to meet for personal  
24 discussions.

25                  QUESTION: The university system in Missouri has

1 recognized the right of a gay rights unit, as I understand  
2 to meet on the campus and hold discussions and exchange  
3 views, has it not?

4           MR. AYRES: That is true, Justice Rehnquist. But  
5 I would submit in response to that question -- and it's  
6 petitioners' position -- that there is no constitutional  
7 prohibition with regard to that incident as there is with  
8 regard to religious worship.

9           QUESTION: How about the Young Marxists League, if  
10 they had one on the campus, would they be permitted to meet  
11 to make attacks on the Democratic system of government and  
12 express their views?

13           MR. AYRES: Mr. Chief Justice, I would assume that  
14 unless the meetings were such to advocate the immediate  
15 overthrow of the government and were such that would lead to  
16 imminent action, it's my belief that those such meetings  
17 would be permitted on campus.

18           QUESTION: So it's only religious groups that may  
19 properly be forbidden to meet on campus, in your view.

20           MR. AYRES: Justice Rehnquist, let me make it  
21 clear from the beginning that religious groups -- in this  
22 case at the University of Missouri, Kansas City -- has ten  
23 student groups that are recognized, official student groups,  
24 which could be said to have some sort of a religious  
25 affiliation. There is no general prohibition against their

1 meeting on campus. They are free to use the meeting rooms  
2 and facilities of the university. Official student  
3 recognition also holds with it the possibility of funds to  
4 help support or fund a speaker or a meeting.

5           They're equally entitled to those benefits, as all  
6 other officially recognized student groups are, except to  
7 the extent of religious worship or religious teaching. And  
8 it is the position of petitioners that those sort of  
9 activities are prohibited not only by the First Amendment of  
10 the United States Constitution, but Missouri's constitution.

11           QUESTION: Well, would you elaborate on the  
12 distinction you make between the ten religious groups which  
13 are recognized to meet and religious worship or services?

14           MR. AYRES: Justice Rehnquist, I think we need to  
15 keep the case centered around the facts of this particular  
16 case. It appears to me, and it is petitioners' argument,  
17 that under the facts of this case there is no question, and  
18 it's undisputed in the record -- it was so found by the  
19 trial court and it's admitted by the respondents -- that  
20 they seek to use university facilities for religious worship  
21 services on a regular basis.

22           I would submit that as long as the meetings which  
23 they wish to seek are with regard to speakers, a meeting of  
24 the group for business purposes, that sort of thing, that is  
25 not within the purview of the Constitution of prohibition.

1 But it is the position of petitioners in this case that the  
2 facts that were presented to the university left us with no  
3 choice but to prohibit the regular religious worship  
4 services that were sought.

5           QUESTION: Could they sign up Jerry Falwell for  
6 once a month for a regular appearance on the campus?

7           MR. AYRES: Without further clarification from  
8 this Court and based upon prior decisions of this Court, I  
9 would say the fact that -- if Mr. Falwell comes in on a  
10 regular basis, let's say a monthly basis, depending upon the  
11 content of his presentation or his speech, in my mind there  
12 would be serious constitutional questions about allowing him  
13 to come in on a regular basis.

14           QUESTION: How about someone like William Kuntzler  
15 or someone who had defended one of the groups in the late  
16 sixties?

17           MR. AYRES: Although that individual might be  
18 considered by some to be controversial, I do not see that  
19 touching on the religious aspect. Again, there's no intent  
20 to restrict the freedom of speech of the students or anyone  
21 else properly on the campus. The question is whether or not  
22 the campus may be used for religious worship services. I do  
23 not think that your example with regard to Mr. Kuntzler  
24 would fall into that category.

25           QUESTION: But isn't reading from the Bible a form

1 of freedom of speech?

2           MR. AYRES: Justice Rehnquist, again, and relying  
3 on prior decisions of the Court, this Court has said in the  
4 Schempp case and others that the Bible is clearly an  
5 instrument of religion. But the university would not  
6 contend or not argue that the Bible may not -- or may also  
7 be considered a work of literature and may be studied for  
8 those purposes.

9           If someone were to read the Bible on campus  
10 individually as a part of their study, it seems to me that  
11 this regulation does not address that. But to say that to  
12 read the Bible in the context of the facts that we have in  
13 this case, to me stretches freedom of speech or freedom of  
14 assembly, stretches it way too far.

15           QUESTION: Well, what if the program consisted of  
16 a reading of, say, four chapters of one of the gospels,  
17 followed by a student discussion of the content of those  
18 chapter and criticism and exchange and so forth?

19           MR. AYRES: Based on that hypothetical, Justice  
20 Rehnquist, it would be my assumption that such activity  
21 would not be prohibited under this regulation, or it does  
22 not fall within the facts of the case now before the Court.

23           QUESTION: In one of the hypotheticals presented  
24 you said it would depend upon the content of what the  
25 speaker said. Do you not run afoul the free speech



1 provisions of the First Amendment, entirely apart from the  
2 religion clauses, if you censor on the basis of content?

3 MR. AYRES: Mr. Chief Justice, I am aware of this  
4 Court's opinion in Mosley and others, which indicates that  
5 content-related restriction is violative of constitutional  
6 law. And I guess that's one of the reasons that we are  
7 before this Court; is whether or not that prohibition  
8 carries over into the religious area.

9 My argument would be, Mr. Chief Justice, that if  
10 such an argument is allowed to prevail, in other words, if  
11 someone could come in and say, I am here to speak about  
12 religion, or, I am here to assemble about religion, and that  
13 is a convenient excuse to allow religious worship services,  
14 then it is my contention that that makes a complete nullity  
15 of the establishment clause.

16 I do not think it's that easy, Mr. Chief Justice,  
17 to allow that to -- allow the freedom of speech or freedom  
18 of assembly clauses to come in in a case of this nature. It  
19 just goes too far, and I realize that that presents some  
20 tough or difficult questions, but looking at the history of  
21 the establishment clause and what this Court has said it  
22 means beginning in 1947 with Justice Black's famous opinion  
23 in the Everson case, I just -- my opinion would be that if  
24 the Court holds that activities such as these are permitted  
25 because of the speech clause or the assembly clause, the

1 Court will be making a drastic retrenchment from its prior  
2 cases.

3           QUESTION: How do you distinguish what the Court  
4 has said was appropriate in terms of providing books to  
5 parochial schools and transportation to and from parochial  
6 schools, and that is certainly -- the arguments were made  
7 that that was an aid of sorts to religion and also tax  
8 exemption. Isn't that --

9           MR. AYRES: I do not think those cases are  
10 applicable in this case, Mr. Chief Justice. Obviously, the  
11 immediate distinction is -- and which the Court has made  
12 many times itself -- is that the benefits provided in those  
13 cases, for instance, the bus transportation case and the  
14 textbook cases, was an indirect aid and went primarily to  
15 the students involved and not to the parochial or private  
16 school which was involved.

17           It's my opinion that in this case it can be  
18 distinguished because here we have direct assistance that  
19 will serve to have the primary effect of advancing  
20 religion. I draw the distinction that it is a more direct  
21 benefit that is being provided than in the cases which Mr.  
22 Chief Justice has discussed.

23           QUESTION: What do you do with the provision of  
24 religious services in the military and the Navy and so forth?

25           MR. AYRES: Justice Stevens, I would address that

1 question by the fact that this Court has spoken often of the  
2 fact that if an individual is deprived of religious worship  
3 opportunities by something that the government has done;  
4 i.e., a soldier in the field, a prisoner --

5 QUESTION: How about a church at Annapolis?

6 MR. AYRES: A prisoner in prison -- let me address  
7 your question. I think the Court has often held that that  
8 would be hostile to religion to not permit the opportunity  
9 for those individuals to worship just because of the fact  
10 that they have been deprived of their other  
11 already-immediate access to such services.

12 QUESTION: Well, what if the campus is out in the  
13 middle of the desert or something like that?

14 MR. AYRES: To answer your question about  
15 Annapolis, I would submit, Justice Stevens, that the  
16 military academies, including Annapolis, are special  
17 institutions, provided to train our military officers. And  
18 I would submit that the required Chapel at those  
19 institutions are part of the training which go into --

20 QUESTION: Well, it's voluntary, I assume.  
21 Attendance is voluntary, as it is in this -- I take it here,  
22 also, the student participation is entirely voluntary.

23 MR. AYRES: That's correct.

24 QUESTION: And the university doesn't either favor  
25 or disfavor the group.

1 MR. AYRES: No.

2 QUESTION: Mr. Ayres, the university draws no  
3 distinction between religious services in buildings and on  
4 its grounds, does it?

5 MR. AYRES: Justice Powell, that is a question  
6 that will be before the Court. The trial court found that  
7 the only question before it, based upon the pleadings, was  
8 the issue of whether or not it could be permitted in a  
9 university building. The Eighth Circuit went and said that  
10 they could address the issue of whether or not worship  
11 services on the grounds were also emanating out of this  
12 complaint.

13 I would submit to the Court and to Justice Powell  
14 that the regulation involved on its face and in its own  
15 language is applicable to buildings and grounds, and I think  
16 for --

17 QUESTION: Your petition covers both.

18 MR. AYRES: Right. And I think for purposes of  
19 this case, they are questions that need to be answered. We  
20 have obviously argued in our brief why that distinction is  
21 not important as far as --

22 QUESTION: May I follow up with this question. Is  
23 the university located in Columbia or Independence or  
24 where? St. Louis?

25 MR. AYRES: Justice Powell, the University of

1 Missouri is a constitutionally-established institution. It  
2 is one university with four campuses.

3 QUESTION: Where is this one?

4 MR. AYRES: This campus which this case arose out  
5 of is located in Kansas City, Missouri.

6 QUESTION: Well, do you think a religious service  
7 could be banned in a public park in Kansas City? Or, as  
8 someone suggested, the Reverend Falwell from speaking there?

9 MR. AYRES: Justice Powell, it's not clear to me  
10 from the cases -- I don't know that that question has ever  
11 been directly answered. I would say that depending upon the  
12 prior usage of such park and depending upon its openness for  
13 events other than religious worship services, --

14 QUESTION: Let's assume it's exactly like the  
15 student building involved here; it's open for all other  
16 groups, as your answers to other questions have indicated.  
17 Could the city foreclose use for religious purposes of a  
18 public park of that character?

19 MR. AYRES: Justice Powell, it would be my  
20 opinion, responding to your question, that if it was -- if  
21 the group involved was seeking to hold religious worship  
22 services in the park on a regular basis, to the extent they  
23 were sought in this case, it is my opinion that Kansas City,  
24 based upon establishment grounds, could prohibit such  
25 meetings.j



1           QUESTION: What about services which begin at the  
2 Lincoln Memorial sometimes with prayers and hymns being  
3 sung, and then even more specifically a religious service,  
4 the Mass held on the Mall when Pope John Paul II was here  
5 several years ago?

6           MR. AYRES: Mr. Chief Justice, I think we have  
7 tried to address those points in our brief. I think that  
8 the National Mall where both of the activities which you  
9 referred to would take place has gone beyond and cannot be  
10 fairly compared to the campus of a state university. It is  
11 obvious that the National Mall is used for matters, national  
12 matters of every spectrum, and to compare that to the campus  
13 in this case is not a fair one.

14           I would also submit with regard to the Pope's  
15 visit, which I think the mere special occasion had a lot to  
16 do with the decision, but I would also point out that Judge  
17 MacKinnon noted the issue in his concurring opinion where he  
18 said that to allow these on a irregular basis does not  
19 present a problem. But if it was sought to hold religious  
20 worship services even on the National Mall on a regular  
21 recurring basis, such would present establishment clause  
22 problems.

23           QUESTION: How about the Christmas tree on the  
24 Mall every Christmas?

25           MR. AYRES: Justice Brennan, --

1 QUESTION: And the creche.

2 MR. AYRES: I think those questions have been  
3 answered to some extent by the fact that the Christmas tree,  
4 and again to some extent the creche, have gone beyond the  
5 religious significance. That Christmas has become, in  
6 effect, a national holiday, a holiday which is equally  
7 meaningful to all of us, no matter what our religious  
8 affiliation is, and so I think those cases are not  
9 pertinent, either.

10 QUESTION: Mr. Ayres, does it disturb you that  
11 members of the Congress of the United States have prayer  
12 breakfasts in the National Capitol Building on a regular  
13 basis?

14 MR. AYRES: Justice Blackmun, when you say prayer  
15 breakfast, I guess I'm not quite sure what you mean --

16 QUESTION: At which Scripture is read, prayers are  
17 offered, papers are given.

18 MR. AYRES: To being the meeting, Justice  
19 Blackmun? Or is it -- Let me respond to your question, if I  
20 may --

21 QUESTION: Of course, the Chaplain daily gives  
22 prayers in each House.

23 MR. AYRES: To respond to your question the best  
24 way that I may, I think that there are many decisions which  
25 indicate that prayer or an acknowledgement of God before a

1 public meeting are suitable in that they serve to set the  
2 tone, get the meeting started out in a properly appropriate  
3 manner, and I would submit that this situation falls into  
4 that category.

5           QUESTION: Well, Mr. Ayres, I gather some of us at  
6 least have thought that in God we trust above the Speaker's  
7 bench and the prayer breakfasts and other exercises of that  
8 kind fall into the category of political questions, not  
9 judicially reviewable in any event.

10           MR. AYRES: I think that's right, Justice Brennan.

11           QUESTION: Mr. Ayres, you suggested with respect  
12 to the Mass on the Mall that the distinction is between a  
13 regular recurring event, as was involved here, and an  
14 incidental or irregular event. But as I understand your  
15 regulation, you wouldn't permit these people to meet even  
16 once.

17           MR. AYRES: That is correct, Your Honor.

18           QUESTION: So I really don't think that's a valid  
19 distinction for purposes of defending your own regulation.

20           MR. AYRES: Well, let me say, Justice Stevens,  
21 that again in the context of this case, a one-time meeting  
22 was not sought. It was clear that they sought a regular  
23 weekly meeting place for their services.

24           QUESTION: I understand, but your regulation would  
25 prohibit a one-time meeting, if I understand the record

1 correctly.

2 MR. AYRES: If it was known that the meeting was a  
3 religious worship --

4 QUESTION: If people did give you advance notice  
5 of exactly what they intended to do, which would seem to be  
6 appropriate.

7 MR. AYRES: That's correct, Your Honor.

8 QUESTION: Mr. Ayres, I assume you were at 10:00  
9 o'clock this morning when the Marshal of the Court in  
10 announcing the Court pronounced, in effect, a very short  
11 benediction when he said God save the United States and this  
12 honorable Court. Is that any different from a ten-minute  
13 prayer?

14 MR. AYRES: Mr. Chief Justice, I would argue that  
15 it is, it is indeed. Again, I would submit to the Court  
16 that this is a ceremony to begin this auspicious occasion,  
17 to get a proper frame of reference of mind for all those  
18 involved.

19 I would submit to the Court that the Ten  
20 Commandments stand above on the building. I think there's a  
21 secular purpose for that because the other famous historical  
22 origins of long are also presented. But I would remind the  
23 Court of its opinion in Stone, that the Ten Commandments  
24 could not be posted in elementary or secondary schools.

25 QUESTION: Mr. Ayres, I suggest to you that you --

1 I don't know whether you'll win this case or not, but I  
2 would think you could win it without having to claim that if  
3 the university allowed these meetings that it would be an  
4 establishment.

5           Your question is whether they are permitted,  
6 rather than required, to ban these meetings. I mean, it  
7 could be that the university could do it either way; they  
8 could allow them or not allow them, without violating any  
9 part of the First Amendment.

10           Now, I would think all you have to do is argue  
11 that it's permissible for the university to stay as far --  
12 not as far away from religion as it wants to, but at least  
13 this far, that it could take pains to avoid any problems  
14 like this, and you wouldn't need to prove or admit or claim  
15 that if they were permitted it would be an establishment.

16           QUESTION: Justice White, I can only  
17 wholeheartedly agree, and this is the --

18           QUESTION: I know, but you've been arguing all the  
19 time that --

20           QUESTION: But you haven't had any chance to argue.

21           MR. AYRES: I've tried to answer questions,  
22 Justice White.

23           QUESTION: Exactly, exactly.

24           (General laughter.)

25           And I take it that Congress could cease having



1 prayers every day or we could probably cut out the last part  
2 of the -- cut the benediction out of this without violating  
3 the religious clauses or the free speech clauses, either.

4 QUESTION: Mr. Ayres, another thing, when the At  
5 torney General of Illinois argued the evidence in the case  
6 he said that if we ruled against him, we would have to rip  
7 down these Ten Commandments up here. And Mr. Justice  
8 Jackson said, quote, "I think we can do it without that."  
9 And he did, right?

10 MR. AYRES: Yes, sir.

11 QUESTION: So why argue about these Ten  
12 Commandments. They're still up there.

13 MR. AYRES: That's true, Your Honor.

14 (General laughter.)

15 QUESTION: He didn't get them down, so I don't see  
16 how you're going to get them down.

17 MR. AYRES: Your Honor, it's certainly not my  
18 intent to get them down.

19 QUESTION: Mr. Ayres, is the Attorney General of  
20 Missouri in this case at all?

21 MR. AYRES: No, Your Honor. The University of  
22 Missouri, our Office of General Counsel is handling the case  
23 itself, and the Attorney General's Office is not involved as  
24 an amicus or any other way.

25 QUESTION: Well, is the Office of the General

1 Counsel representing the views of the Attorney General of  
2 Missouri?

3 MR. AYRES: No, sir. We would argue that our  
4 viewpoint is upheld by several attorney general opinions,  
5 Your Honor, but we do not presume to be here on behalf of  
6 the Attorney General's office.

7 QUESTION: Well, but you're here -- the university  
8 is constitutionally organized and the Attorney General is  
9 not the lawyer for the university.

10 MR. AYRES: That's absolutely correct, Justice  
11 White.

12 QUESTION: And insofar as the state of Missouri is  
13 concerned, with respect to the university you are the  
14 attorney general.

15 MR. AYRES: That's right.

16 QUESTION: Is that clear as crystal?

17 MR. AYRES: In our opinion it is, Justice Blackmun.

18 Let me just indicate a couple of things before I  
19 sit down. As Justice White has indicated, we believe that  
20 there are other grounds upon which we can win this case;  
21 primarily, the fact that there is no indication that the  
22 free exercise rights of the students involved in this case  
23 have been infringed. This was a specific finding of the  
24 trial court, and I believe that if the Court will look at  
25 the record there is no indication that these students have

1 an absolute cardinal precept of their religion that they  
2 must worship on university premises.

3           QUESTION: But isn't it a familiar statement from  
4 any of our cases that just because the state allows you to  
5 exercise rights of free speech in some other place, then you  
6 want to exercise them, is not a defense to its refusal to  
7 allow you to exercise them where you do want to exercise  
8 them?

9           MR. AYRES: Would you repeat your question,  
10 Justice Rehnquist?

11           QUESTION: Yes. In other words, it would not be  
12 enough under our cases under the freedom of speech clause, I  
13 take it, to say that you can go down to the marina every  
14 morning and have a parade if you want to, when the mall is  
15 available and has been used for freedom of speech  
16 demonstrations of all sorts.

17           MR. AYRES: Some of the cases of this Court,  
18 Justice Rehnquist, have indicated that because a right is  
19 available somewhere else, you cannot foreclose that right at  
20 another place. I would submit to the Court that fact  
21 situation was not applicable here under the facts of this  
22 case where it was clearly a religious worship service that  
23 was sought, and so it would not be applicable to this case.

24           I am going to sit down at this time to allow me  
25 some rebuttal.

1 CHIEF JUSTICE BURGER: Mr. Smart?

2 ORAL ARGUMENT OF JAMES M. SMART, JR., ESQ.

3 ON BEHALF OF THE RESPONDENTS

4 MR. SMART: Mr. Chief Justice, and may it please  
5 the Court, I want to just remind the Court here that as the  
6 Court is well aware, the university has the burden in this  
7 case of justifying this regulation. On its face, the  
8 regulation restricts freedom of expression in what would  
9 appear from the very facts to be a public forum. Even if it  
10 were not a public form it restricts one category of speech,  
11 appears to be invidious discrimination on speech and the  
12 university has the burden of establishing here, we do not  
13 have the burden. They have to justify their regulation.

14 QUESTION: Could the university preclude the use  
15 of those meeting room for all purposes if it wanted to,  
16 except classes of the university?

17 MR. SMART: The university -- I think this Court,  
18 if that case were to come before it, the Court would have to  
19 look at the facts of the case and see, number one, if a free  
20 exercise claim was asserted, did this constitute a burden on  
21 the free exercise of religion because of the nature of the  
22 campus or did it inhibit academic freedom of the students  
23 and freedom to inquire because they had no opportunity to  
24 have meetings or to invite outside speakers on any subject,  
25 and the court might well find that such a rule that

1 completely forbids any special interest group meetings might  
2 be unconstitutional on those grounds.

3           On the other hand, --

4           QUESTION: Even if justified, Mr. Smart, by a  
5 compelling state interest?

6           MR. SMART: Well, that is the key, Your Honor.

7           QUESTION: Yes, but it has to be a compelling  
8 state interest, I take it.

9           MR. SMART: It has to be a compelling state  
10 interest, Your Honor.

11          QUESTION: Did I correctly understand one of Mr.  
12 Ayres' arguments to be that the compelling state interest in  
13 this instance was the desire to avoid any of the  
14 complications that might lead to the establishment of a  
15 religion? Would you regard that as a compelling state  
16 interest?

17          MR. SMART: I think that the establishment clause  
18 could be a compelling state interest. You have a teacher in  
19 front of a classroom who says, I want to exercise my free  
20 speech rights, and the principal says no, you may have your  
21 free speech rights but in this case the establishment clause  
22 is a compelling state interest that prohibits you. I think  
23 it could be.

24          In this case, though, we are not talking about a  
25 teacher speaking; we are talking about private individuals



1 engaged in voluntary activities among themselves.

2           QUESTION: Even so, I gather, if I understand Mr.  
3 Ayres' argument, it is that -- I know, but to permit this  
4 sort of thing is to expose the university to possible  
5 problems under the establishment clause of our being accused  
6 of favoring religion and therefore violating the  
7 establishment clause. And our compelling state interest is  
8 to avoid that possibility. Wasn't that his argument?

9           MR. SMART: That's his argument apparently, Your  
10 Honor. We contend that the university, while desiring to  
11 avoid establishment clause problems, marches straight into  
12 establishment clause problems by having the primary effect  
13 of inhibiting religion.

14           QUESTION: Let me ask you, suppose a group of  
15 students organize a denomination of a particular religion on  
16 the campus, and they say well, we have to have someplace  
17 regularly to meet like others. And they have a minister who  
18 will come and preach to them at these meetings, and they  
19 want the university to let them use, say, one of its  
20 buildings as their church. And they frankly say, we can't  
21 afford a church but if we had a church, we would meet in it,  
22 but we don't, and we want to use your building as a church.

23           Now, you would be making the same argument,  
24 wouldn't you? Or would you?

25           MR. SMART: Well, Your Honor, I might not

1 necessarily be making the same argument. We would have to  
2 look at the facts of that case.

3 QUESTION: Well, you know all the facts right now.

4 MR. SMART: Okay. Well, the case we're dealing  
5 with here --

6 QUESTION: No, just answer my question.

7 MR. SMART: It will be basically the same argument  
8 provided --

9 QUESTION: And you say the university would be  
10 required to let them hold regular church services, use their  
11 building as a church. That's your argument.

12 MR. SMART: Provided they were treated as any  
13 other special interest group.

14 QUESTION: Exactly. But your argument would say  
15 that the university would be required to use their building  
16 as a church.

17 MR. SMART: That's exactly what we're saying,  
18 provided they were treated like any other special interest  
19 group.

20 QUESTION: Well, the university, as Justice  
21 Brennan suggests your colleague is arguing, the university  
22 doesn't want to get that close to religion, and it wants to  
23 stay more neutral, and it doesn't want to have its  
24 facilities -- the university would be paying the light, the  
25 heat, everything else.

1 MR. SMART: Well --

2 QUESTION: No one charges enough to student groups  
3 to pay depreciation or anything.

4 MR. SMART: We don't deny there would be some  
5 financial aid here, we don't deny that at all. What we're  
6 saying --

7 QUESTION: Would there be anything to interfere  
8 with the university saying that there would a fixed fee for  
9 the use of the room by any group including this church group  
10 that is hypothesized?

11 MR. SMART: There would be absolutely nothing  
12 wrong with a regular fixed fee that was applied equally  
13 across the board to all special interest groups. If they  
14 wish to subsidize the light and heat and so on, that could  
15 easily be done by a fee. However, I think the key is equal  
16 accommodation. In this case there is a distinction between  
17 sponsorship and accommodation that the university seems to  
18 completely overlook.

19 When a university invites Billy Graham or someone  
20 on campus and has him speak, then you've got some  
21 sponsorship involved, then you've got some cooperation and  
22 involvement of the government in this religion.

23 Here, you have the university doing the exact  
24 opposite. The government is saying religion is not required  
25 to be on campus, even though we must be responsive to the

1 non-academic special interest needs of these students. As  
2 the university itself says in its documents, nevertheless,  
3 religion is not of such a level that we have to allow  
4 students to voluntarily engage in religious activities on  
5 campus.

6           QUESTION: May I ask, Mr. Smart, there is a rather  
7 rigid Missouri constitutional provision, is there not,  
8 dealing with --

9           MR. SMART: That's correct, Your Honor.

10          QUESTION: Precisely what does that provide?

11          MR. SMART: Okay. The constitutional provision,  
12 without reading it, provides there will be no direct or  
13 indirect aid to religious activities. There's another  
14 provision which says no one shall be compelled to erect or  
15 support any place of worship.

16          QUESTION: Now, do those provisions add anything  
17 to the federal constitutional argument that Mr. Ayres has  
18 been making? Do they help him any?

19          MR. SMART: In this case, Your Honor, I do not  
20 believe they do. I do not believe they can be applied to  
21 this case. The university -- I mean, the Missouri Supreme  
22 Court has, to my knowledge, the latest pronouncement on that  
23 provision was in 1976 in a case in which it allowed tuition  
24 grants to university students who would then attend  
25 sectarian universities in Missouri. And the court in that

1 case expressly followed the decision in Roemer vs. Board of  
2 Education of this Court.

3           There are some decisions with a lot of language  
4 about strict separation of church and state and so on, but  
5 there's no indication that the Missouri Constitution was  
6 ever intended to say that people can't use public property  
7 for religion in the same way they can use --

8           QUESTION: In any event, I gather the issue we  
9 have here has not been raised before the Missouri state  
10 court under --

11           MR. SMART: That's right, Your Honor, it's not  
12 been decided in the state of Missouri that individuals  
13 cannot use public property for religion the same way they  
14 can use -- the same way other groups can use that public  
15 property.

16           QUESTION: What if the Missouri Constitution  
17 contained a clause saying that there shall be no requirement  
18 of freedom of speech or that the state shall allow freedom  
19 of speech in its state and it shall regulate it as it sees  
20 fit. Would you think that that would be a compelling state  
21 interest for defense against a claim that the federal First  
22 Amendment was being violated?

23           MR. SMART: There is a Missouri Constitutional  
24 provision, if I understand your question -- there is a  
25 Missouri Constitutional provision that grants freedom of



1 speech to the citizens of Missouri, the same as the federal  
2 constitution. And of course, freedom of speech is one  
3 constitutional value that weighs very heavily here, as well  
4 as freedom of association and free exercise of religion.

5 All those values are on this side. There may be  
6 some establishment considerations on this side of the  
7 scale. We're talking about some incidental aid to religion  
8 from a neutral policy that says special interest groups can  
9 meet on campus and do their own thing. Self-initiated  
10 activity is what the university says and what it says it  
11 encourages.

12 QUESTION: But what if a state had a  
13 constitutional provision diametrically opposite to the First  
14 Amendment that said the state shall be able to freely  
15 regulate discussion of public topics? Would you think that  
16 was a compelling state interest if the state were charged  
17 with violating the federal First Amendment?

18 MR. SMART: Well, Your Honor, the Constitution of  
19 the United States is the supreme law of the land and no  
20 state is entitled to legislate away fundamental freedoms,  
21 and particularly in the area of religion and speech. These  
22 things were placed beyond the whim of legislative  
23 majorities. They are not to be dealt with by local  
24 legislators; they are controlled by the Constitution.

25 QUESTION: Since 1925.

1 MR. SMART: Yes, Your Honor.

2 QUESTION: Mr. Smart, you have argued, I believe,  
3 that by not permitting the group to meet on campus for its  
4 services, that some stigma attached in the minds of the  
5 students by virtue of that. Would the reverse be true, and  
6 by allowing the group to hold its sessions on campus does  
7 that imply some kind of sponsorship or approval by the  
8 university?

9 MR. SMART: It does not imply approval. If it  
10 does, then the university has some difficulties, because as  
11 we noted in our brief, the university has allowed, while  
12 Cornerstone was off campus the university has allowed  
13 transcendental meditation, which has been held to be a  
14 religion by the Third Circuit. They allowed Sri Jim Noy,  
15 Indian spiritual master who is an Eastern mystic. They even  
16 -- the university even sponsored a film with this on campus.

17 So if it implies approval, then thereby their own  
18 regulation they're violating their own regulation  
19 themselves. Secondly, it really doesn't imply approval  
20 because the university has declared no sponsorship.  
21 Footnote 44 of our brief refers to the fact that the  
22 university says, we'll not allow our name to be used by any  
23 of these groups.

24 In other words, they don't want Cornerstone going  
25 out and saying we are the University of Missouri Cornerstone

1 group and we're doing such and so. The university says,  
2 Keep us out of it; we don't sponsor them. If they want to  
3 make a bigger sign and put it on top of Jesse Hall in  
4 Columbia, Missouri, they can do that.

5           QUESTION: Mr. Ayres has conceded that the Young  
6 Communists League or the Marxist Society could meet, and  
7 surely, the university wouldn't undertake to sponsor or  
8 endorse them.

9           MR. SMART: I trust they would not undertake to do  
10 that, and I think that also relates to the financial aid  
11 argument here. If there is financial aid to religion by  
12 this -- by a neutral policy that would allow religious  
13 groups on campus, then there must be financial aid to the  
14 Young Marxist group.

15           QUESTION: Mr. Ayres says that these are spot  
16 times and it's not regular.

17           MR. SMART: Well, I don't know that there's any  
18 evidence in the record as to whether they're regular or  
19 not. I would assume that most of the --

20           QUESTION: But that man from India didn't come  
21 over here every week, did he?

22           MR. SMART: No, that's correct. But I think the  
23 key here is equal accommodation. Now, regularity could be a  
24 problem, as I think MacKinnon noted in the O'Hair case and  
25 as the Court in the Arizona University Stadium case

1 involving Billy Graham; regularity could be a problem. You  
2 have to look at the facts. Does that regularity, when you  
3 look at the facts, does it connote sponsorship.

4           If it does not because all the other groups are  
5 meeting regularly and there's no particular favoritism  
6 involved, then you have no sponsorship, you have no  
7 establishment clause violation.

8           If there's any preemption of space -- if  
9 Cornerstone would walk up and say we want a five-year lease,  
10 we want a free, five-year lease on such-and-such a room, and  
11 the university says okay, we've got to give it to you. So  
12 Cornerstone has that five-year lease, and other groups come  
13 along and say hey, we'd like to use that room once in a  
14 while, too, you know, and the university says no, they've  
15 got it. Then you might have an establishment problem  
16 because there would be favoritism toward religion.

17           QUESTION: Mr. Smart, does the university have a  
18 specific regulation with respect to non-campus groups; those  
19 that may come in casually?

20           MR. SMART: The university's policy, as I  
21 understand it and Mr. Ayres can correct me if I'm wrong, is  
22 that the university allows non-student groups to come in and  
23 use the facilities. I think they generally charge for  
24 non-student groups, but I --

25           QUESTION: On an ad hoc basis.

1 MR. SMART: On an ad hoc basis.

2 QUESTION: And is there any specific regulation?

3 MR. SMART: I'm sure there's a regulation that  
4 makes it available. I'm not familiar with that regulation,  
5 other than the one that says they cannot be used for  
6 religious services by any student or non-student group.

7 QUESTION: Is it conceded in this case, or does  
8 the record show that no outside religious group would be  
9 allowed to hold any sort of meeting on the campus?

10 MR. SMART: Well, I think the facts would show --  
11 and Mr. Ayres can correct me if I'm wrong -- that prior to  
12 the invocation of this regulation in January 1977, probably  
13 religious groups were -- in fact, I know religious groups  
14 were using, outside religious groups to some extent, were  
15 using the facilities there.

16 QUESTION: Outside groups.

17 MR. SMART: Outside groups, apparently on a  
18 payment basis, on an irregular basis. I may be wrong about  
19 that.

20 QUESTION: And then the university decided to  
21 change its policy.

22 MR. SMART: The university enacted this regulation  
23 in 1972 but began enforcing it in January of 1977, and in  
24 this case it is significant that it was applied not only to  
25 the use of the buildings, but also, to the use of the



1 grounds for a small group Bible study, as was stipulated in  
2 the facts at the trial level in the case.

3           QUESTION: Would you agree that a university has  
4 more control over the use of its campus than a city does  
5 over a public square, provided the control is exercised  
6 uniformly?

7           MR. SMART: I think that there could well be a  
8 distinction in a given case, Your Honor. I think in this  
9 case, the university really exercises no more control over  
10 its space than a park that has shelter houses and requires  
11 people to call in and reserve those shelter houses in  
12 advance. I think that's about the degree of control we have  
13 here.

14           QUESTION: But whatever the degree of control,  
15 counsel, could the university discriminate as between and  
16 among groups on the basis of the content of what took place  
17 in the meeting?

18           MR. SMART: Absolutely not, Your Honor. This  
19 Court decided that in Healy vs. James, the SDS case, in 1972  
20 and made it very clear in case there was any doubt before  
21 that the university has no business in --

22           QUESTION: Yes, but in Healy we didn't have any  
23 implication of the religion clauses.

24           MR. SMART: That's correct, Your Honor.

25           QUESTION: Well, doesn't that make a difference?

1 I mean, this is a different issue, isn't it, than we had in  
2 Healy?

3 MR. SMART: It doesn't avoid the establishment  
4 clause issue for us; we've still go to get around that.

5 QUESTION: yes.

6 MR. SMART: Which I believe we do. We don't  
7 believe this is the type of aid -- if there's aid to  
8 religion it's not the type of aid that the founders of our  
9 country, the drafters of the Constitution and the First  
10 Amendment, intended to prohibit. Because it's like a public  
11 park; there's no money grant involved, no exchange of  
12 money. Our country has a long history of permitting  
13 religious services on public property including university  
14 property. There's no competition or entanglement between  
15 groups here. Space can be allowed on a first come/first  
16 served basis, and the Cornerstone group or any other  
17 religious group would only be receiving the same aid and  
18 assistance as any other group.

19 QUESTION: I suppose, too, Mr. Smart, in applying  
20 this regulation somebody in the university has to make a  
21 judgment whether a given group is a religious group, does it  
22 not? I mean, Krishna, all the several different kinds of  
23 groups.

24 MR. SMART: That's right, Your Honor.

25 QUESTION: Does that implicate some establishment

1 problems, too? I mean the very regulation.

2 MR. SMART: We believe that that is an additional  
3 factor. We believe that, on its own, without the primary  
4 effect of inhibiting religion, might not be enough. But  
5 certainly, there is a greater tendency toward excessive  
6 entanglement in religion to have a policy --

7 QUESTION: Is Scientology a religion, for example?

8 MR. SMART: I think that my inability to answer  
9 that very well is an example of the difficulties that -- I  
10 would suspect it probably is a religion. But --

11 QUESTION: Some courts have held that it is not,  
12 but there's no uniformity. Isn't that the situation?

13 MR. SMART: I would suspect that's correct. I  
14 really have not done research in that area specifically,  
15 Your Honor. But certainly, when an administrator has to  
16 decide if something is religious because they say they are  
17 such-and-such a group; or B, decide whether they're -- you  
18 see, this regulation purports to allow business meetings but  
19 not prayer meetings.

20 Now, is the university going to go down and make  
21 sure that nobody gives an opening prayer or that the prayer  
22 is no longer than three minutes before they start the  
23 business meeting? To avoid those kind of dangers, the  
24 university would have to monitor the meetings, censor out  
25 the conduct --

1           QUESTION: I take it, for example, a Roman  
2 Catholic Church couldn't have a Mass under this regulation,  
3 but what about the Holy Name Society having a meeting?

4           MR. SMART: If the Holy Name Society were going to  
5 only have a business meeting, then presumably, the  
6 university would let them. But we're contending --

7           QUESTION: But the university would have to decide  
8 whether it was a religious meeting or not, I take it, to  
9 apply this regulation.

10          MR. SMART: Also, you have an interesting  
11 question; whether a business meeting is not an integral part  
12 of the activities of the Holy Name Society, which would  
13 probably be a pervasively religious group, and we get back  
14 to some of the Lemon vs. Kurtzman thinking.

15          QUESTION: But if the university rents its  
16 facilities to off-campus groups for a fee, your position  
17 would be, I take it, that if the Catholic Church wanted to  
18 rent one of its buildings on a regular basis to hold its  
19 church services, that the university would have to rent it.

20          MR. SMART: Well, we think --

21          QUESTION: I've asked you this question before, I  
22 take it.

23          MR. SMART: Non-students may stand in a little  
24 different footing than students because --

25          QUESTION: You mean the university could rent to

1 some outside organizations but refuse to rent a building to  
2 the Catholic Church?

3 MR. SMART: Non-students as a group may stand on a  
4 little different footing, but where the university has  
5 opened up a forum --

6 QUESTION: So your answer is they must rent the  
7 building to the Catholic Church.

8 MR. SMART: Our answer is that they must, Your  
9 Honor, that's correct.

10 QUESTION: But they could exclude all off-campus  
11 groups, could they not?

12 MR. SMART: I believe they could probably exclude  
13 all off-campus groups. Presumably, there are a lot of  
14 facilities in the community that are available for  
15 off-campus groups to use.

16 QUESTION: Could there be any question that the  
17 university could say that the facilities are limited to  
18 student body groups?

19 MR. SMART: I don't have any question about that,  
20 maybe the Court does. But I think the university would have  
21 the right to do that.

22 QUESTION: Is there any question that the  
23 university could give an advanced degree in one or more  
24 religions?

25 MR. SMART: I know there are a number of state



1 universities, and the University of Missouri has an  
2 interesting arrangement with the Missouri School of  
3 Religion, which is a separate entity but grants degrees, I  
4 believe, from the University of Missouri. And apparently,  
5 public universities do sometimes award degrees in religious  
6 studies and things of this nature.

7           QUESTION: Mr. Smart, do you see any differences  
8 between the circumstances here involving a university and  
9 the use of its premises as opposed to that of a high school  
10 or a grammar school?

11           MR. SMART: I think when we look at the  
12 fundamental principles underlying the First Amendment, the  
13 principles of volunteerism, neutrality, we may find the  
14 younger we get -- for instance, in Stein vs. Oskinsky, a  
15 case in the briefs which was a kindergarten class where some  
16 parents said we want our kids to be able to have voluntary  
17 prayer in the kindergarten. And Judge Friendly said well,  
18 that, of course, is -- there's no such thing as voluntary  
19 anything in kindergarten. And I think when you consider age  
20 in that factor I don't know that it's so easy as saying high  
21 school is different from college or anything. I think you  
22 have to look at the circumstances. Age is one factor. And  
23 is it self-initiated activity and this type of thing.

24           QUESTION: Has this Court made a distinction  
25 between universities and high schools and grade schools

1 already?

2 MR. SMART: This Court has many times in its aid  
3 to education cases drawn a distinction, particularly where  
4 the aid is going to a university which is church-related,  
5 and the Court has noticed that the chances of that  
6 church-related institution using that to indoctrinate or  
7 impose its beliefs on students was very limited, very  
8 small. We think that's a little bit different in this case  
9 because here we're talking about a meeting of students;  
10 we're not talking about an authority structure. We're  
11 talking about a voluntary meeting that student interested  
12 can come to if he wants to but there's no requirement that  
13 any student attend this meeting. It's not under the  
14 exclusive control of any religious body.

15 We submit that a neutral policy would be like the  
16 tax exemption in the Walz case. A longstanding practice,  
17 the effect of allowing tax exemptions for religious as well  
18 as other entities has not been to establish religions. And  
19 the opposite, if a state were to deny tax exemptions to  
20 religion there might be a risk of excessive entanglement.  
21 There would be a greater tendency for entanglement.

22 We think those are all factors that merit the  
23 Court's consideration here. In this case --

24 QUESTION: Do we have anything comparable to the  
25 tax exemption history in the way of a custom of allowing

1 religious meetings --

2           MR. SMART: Yes, Your Honor, we do. In our brief  
3 we've referred to the fact that Thomas Jefferson encouraged  
4 and allowed the sectarian religious instruction on the  
5 grounds of the University of Virginia in 1822, which was  
6 when it was opened, or shortly thereafter. There are a  
7 number of -- well, I would submit that almost every  
8 university in this country has allowed at one time or  
9 another religious activities on campus.

10           In 1891, the University of Illinois upheld a  
11 provision where the university actually sponsored the chapel  
12 on campus. It wasn't a student group.

13           QUESTION: Mr. Smart, when Thomas Jefferson  
14 conducted the activity at the University of Virginia, wasn't  
15 that before the Fourteenth Amendment had been used to apply  
16 the First Amendment freedoms to the state?

17           MR. SMART: Yes. That is correct, that was before  
18 the Everson case which was the first case that really, apart  
19 from the Cantwell case, applied the Fourteenth --

20           QUESTION: So that's not really a very good  
21 argument, is it, for your --

22           MR. SMART: Well, I think it's a very good  
23 argument when we're saying what is the history. I'm not  
24 saying that what Thomas Jefferson wanted to do would be  
25 correct law today, but I'm saying that's the history. And

1 I'm saying we can look at that and see has there been an  
2 establishment of religion, or has there been simply an aid  
3 to the free exercise of religion.

4           QUESTION: I thought you were saying that what  
5 Thomas Jefferson did is the law today.

6           MR. SMART: Well, we'd have to look at the exact  
7 facts of that. I think that what he did might not be  
8 because what he recommended was that professors meet with  
9 these students and teach these sectarian principles with  
10 them, and that would seem to be more of an establishment of  
11 religion than we're asking for right here. And I think this  
12 Court might not allow us to go that far.

13           But we think the main problem with this regulation  
14 is that it is an invidious discrimination against religion.  
15 A neutral policy has no primary effect of doing anything  
16 except promoting inter-communication between students. In  
17 *McDaniel v. Paty* the court struck down the Tennessee  
18 requirement concerning eligibility of ministers to hold  
19 public office, and I note in that case that Justice Brennan  
20 and Justice Marshall held that that provision violated the  
21 establishment clause. And I submit to you that this case is  
22 a better case to hold that the regulation in this case  
23 violates the establishment clause than that one, because of  
24 the fact that religion is so clearly given second-class  
25 status, it is stigmatized, it's considered as not worthy of

1 being treated the same as the other activities.

2           It's a fallacy to say that when you omit something  
3 you say nothing about it. In this case, the university is  
4 propagandizing and saying religion does not need to be  
5 allowed on the campus. We'll meet all the other needs but  
6 we will not meet a religious need except maybe we'll favor a  
7 few certain religions that are not traditional western  
8 religions. We'll allow some eastern religions and things  
9 like this, but we will not allow -- .

10           And the state has decided that religion is  
11 compartmentalized and can be off campus, and they have  
12 regulation which is arbitrary. It allows worship in chapel  
13 at Columbia campus. No chapel at UMPC, and I'm not sure why  
14 religion has to be confined to a chapel anyway. It's over  
15 broad, it by its terms would appear to apply to a bull  
16 session in a dormitory late at night where three or four  
17 people are talking and one of them maybe has been to Bible  
18 school before, so he knows more and so he begins to  
19 expound. It would appear to apply to that.

20           This Court has given the highest degree of  
21 protection to religious expression in the past in cases like  
22 Tucker vs. State of Texas, Murdock vs. Pennsylvania,  
23 Cantwell vs. Connecticut and on and on, and we submit that  
24 the government in this case has no business deciding that in  
25 a public forum that religion is not entitled to the same



1 treatment as other forms of expression, even though it is  
2 public property.

3           We submit that if the fact that it's public  
4 property bothers the Court to some extent, keep in mind the  
5 fact that the key is equal accommodation, no favoritism to  
6 religion, no sponsorship of religion. Just equal  
7 accommodation.

8           This Court's been very sensitive in the past to  
9 government actions promoting religion. For instance, Stone  
10 vs. Graham; so sensitive, in fact, that you reversed the  
11 decision of the Kentucky court without even hearing  
12 arguments; you reversed it outright on petition for cert. I  
13 submit that this Court also can be just as sensitive to  
14 government hostility to religion as it has been for  
15 government promotion and sponsorship of religion.  
16 Particularly at the univeristy, which is the marketplace of  
17 ideas, and religion should be allowed to find -- to be  
18 placed in its own spectrum by the marketplace in which it  
19 exists. The students will put it where it needs to be.

20           Thank you, Your Honor.

21           CHIEF JUSTICE BURGER: Do you have anything  
22 further?

23                   ORAL ARGUMENT OF TED D. AYRES

24                   ON BEHALF OF PETITIONERS -- REBUTTAL

25           MR. AYRES: I would like to say first of all that

1 with regard to Thomas Jefferson, I might point out for the  
2 Court if it's interested in history that when Thomas  
3 Jefferson was a member of the Board of Visitors at William  
4 and Mary when it was a state institution in 1779, Thomas  
5 Jefferson was instrumental in having religious instruction  
6 outlawed at William and Mary.

7           I would also point out that what occurred at the  
8 University of Virginia --

9           QUESTION: Well, religious instruction might be a  
10 little different from allowing a religious meeting.

11          MR. AYRES: That's absolutely true, Your Honor.

12          QUESTION: May I just ask one question. I gather,  
13 do I not, that your principal argument is that the  
14 compelling state interest that justifies this regulation is  
15 a desire to avoid the problems that otherwise might arise  
16 from establishment.

17          MR. AYRES: Justice Brennan, I think that is fair,  
18 that the compelling interest not only of the United States  
19 Constitution establishment clause but the Missouri strong  
20 interest in avoiding --

21          QUESTION: Well, does the Missouri constitutional  
22 provision help your federal First Amendment argument at all?

23          MR. AYRES: To some extent. In line with what  
24 Justice Rehnquist was going to, I certainly would not argue  
25 to the Court that Missouri could constitutionally violate or

1 infringe upon freedoms guaranteed by the Constitution. But  
2 I think it goes along and strengthens our argument.

3 QUESTION: On compelling state interest?

4 MR. AYRES: Yes.

5 QUESTION: Well, it helps you in saying that at  
6 least the interest is bona fide. It's not a recent dream.

7 MR. AYRES: Exactly. It's not an invented thing.

8 I might also point out that with regard to the  
9 chapel that was mentioned at the University of Missouri at  
10 Columbia, it was built entirely with private funds and is  
11 not a situation where regular religious worship occurs.

12 CHIEF JUSTICE BURGER: Thank you, gentlemen, the  
13 case is submitted, but Justice Rehnquist has one more  
14 question.

15 QUESTION: Counsel, I understood this regulation  
16 was enforced only from 1977.

17 MR. AYRES: Your Honor, I would submit, Justice  
18 Rehnquist, that the regulation has been in effect since  
19 1972. It was only in 1977 that an occurrence occurred where  
20 it needed to be enforced. As the record shows, the  
21 university had no knowledge that any meetings were taking  
22 place or occurring that had elements of worship in it.

23 QUESTION: But it's not of ancient vintage, then.

24 MR. AYRES: I would submit in its particular form  
25 it's been around since 1972. I think some form of the

1 regulation has been on the books prior to that.

2 CHIEF JUSTICE BURGER: Thank you, gentlemen.

3 (Thereupon, at 12:00 p.m. the oral argument in the  
4 above-entitled matter was adjourned.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25



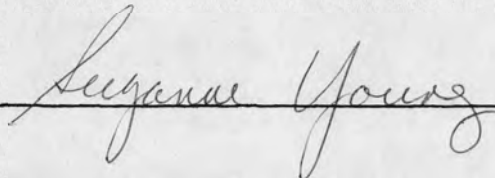
CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:  
GARY E. WIDMAR, et al. vs. CLARK VINCENT, et al.

---

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY

A handwritten signature in cursive script, appearing to read "Suzanne Young", is written over a horizontal line.



RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

1981 OCT 13 PM 4 33