

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

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DKT/CASE NO. 84-277

TITLE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE, ET AL.,
Petitioners V. KATHLEEN S. McCREARY, ET AL.

PLACE Washington, D. C.

DATE February 20, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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BOARD OF TRUSTEES OF THE :
VILLAGE OF SCARSDALE, :
ET AL., :

Petitioners : No. 84-277

v. :

KATHLEEN S. MCCREARY, ET AL. :

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Washington, D.C.

Wednesday, February 20, 1985

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

APPEARANCES:

MARVIN E. FRANKEL, ESQ., New York, New York; on
behalf of the Petitioners

MARVIN SCHWARTZ, ESQ., New York, New York;
on behalf of the Respondents.

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1 Appeals said that the city could adopt reasonable time,
2 place and manner of restriction. Presumably those
3 restrictions might incorporate a provision that unattended
4 displays will not be permitted in the park. Do you think
5 that such a restriction would be one that the city could
6 properly adopt under that opinion?

7 MR. FRANKEL: Your Honor, I think there are
8 various ways the municipality could approach this problem.

9 QUESTION: Well, do you think that that opinion
10 would permit the city to adopt the regulation that I
11 suggest?

12 MR. FRANKEL: Very possibly, Your Honor.

13 QUESTION: It isn't true that the Court of
14 Appeals has required the city to permit unattended displays
15 such as a creche.

16 MR. FRANKEL: Your Honor, it is as true that
17 there is such a requirement here as it was in Widmar
18 against Vincent which has been applied by the Circuit
19 to this case. When the case went back to the University
20 of Missouri, presumably they could adopt time, place
21 and manner regulations. For example, they could have
22 abolished their meeting rooms.

23 What we say is in this case that what Scarsdale
24 has done without time, place and manner regulations so-
25 called is constitutional; that there is no such thing

1 required under the First Amendment as an open public
2 forum for unattended statues, symbols, structures, and
3 signs, and that therefore Widmar and Vincent does not
4 apply to this case; that the Circuit should be reversed
5 as things stand under the way that Scarsdale has run
6 its parks up until now.

7 QUESTION: Do you think that the display of
8 a creche or a cross or something symbolic of that kind
9 is symbolic speech?

10 MR. FRANKEL: Yes, Your Honor. We have never
11 denied that. My friend says we dispute it. We not only
12 agree to it, Your Honor, but we embrace it as I hope
13 to show in the argument as I might mention right now.

14 This is a free speech case. It goes off on
15 the free speech clause. At some earlier point, there
16 was a free exercise claim which was rejected properly
17 and properly abandoned.

18 Under this conception of the free speech clause,
19 if Scarsdale in its existing situation with such regula-
20 tions as it has and doesn't have must allow a creche,
21 then it must allow a sign saying Vote Republican, it
22 must allow a swastika, it must allow a sign saying Support
23 Planned Parenthood.

24 QUESTION: Well, I suppose if it is speech,
25 we don't normally suppress it on the grounds that some

1 people find it offensive, do we?

2 MR. FRANKEL: We don't normally, Your Honor,
3 provided that you are dealing with a public forum where
4 people are allowed to express themselves in the manner
5 in question.

6 QUESTION: Well, is the city park a public
7 forum? Could anybody go out there and speak in favor
8 of Nazism or some other offensive topic?

9 MR. FRANKEL: Yes, Your Honor. It is a public
10 forum under Hague and the CIO and all the cases decided
11 by this Court up to now, but not for unattended symbols
12 that --

13 QUESTION: Why doesn't the city just say that
14 and say we have a rule against unattended symbols?

15 MR. FRANKEL: Your Honor, the city has said
16 it in the first case that raised the problem in a contro-
17 versial fashion. If the first case had been an effort
18 to place a hammer and sickle in Boniface Circle and the
19 village had denied the request, it would have behaved
20 properly provided it stated a principle that as decent
21 and neutral.

22 As the Solicitor General of that city says,
23 the village, which is not a legal institution, not less
24 than the courts certainly, may proceed case by case to
25 the problems as they come before it.

1 This, in the whole history of Scarsdale, appears
2 to be the only object offered for placement on a park
3 that has been controversial.

4 In the prior history of Scarsdale there have
5 been about six kinds of things in the park and I might
6 say, I hope without arrogating, that I think the Scarsdale
7 park in this sense are like the parks of America generally
8 that all of us know. What you have had is friendly,
9 communal and in some sense innocuous symbols like the
10 Red Cross, the United Fund, Community Fund, American
11 Field Service, and that is about it.

12 QUESTION: Well, if the city rules, as you
13 described it, one that says we will not allow unattended
14 displays if they are controversial or if the engender
15 confronters.

16 MR. FRANKEL: Your Honor, as of today I think
17 the fair answer to Your Honor's question is yes as the
18 rule is evidence by practice. That is to say it has
19 had one controversial symbol presented to it.

20 I might say that in the non-controversial symbols,
21 even the Red Cross, the United Fund and so on as this
22 record shows, each one has been presented by the Village
23 Manager to the Board of Trustees and they have considered
24 each one for its aesthetic suitability which cities and
25 municipalities can do in the use of their property, and,

1 indeed, in the use of private property. It is considered
2 then in terms of their impact, as the record shows, on
3 the sensibilities of the residents of the village and
4 it has made its determinations accordingly, sometimes
5 saying you may put the Red Cross on this piece of land,
6 not Boniface Circle, which is the place that has always
7 been demanded, but on some other park.

8 Our record shows that nobody thus far has ever
9 tried to compel the village to emplace a symbol that
10 it believes in its local judgment is offensive to a large
11 proportion of the village residents for whom those parks
12 are held in trust for all of them, who all support it
13 and who all pay the expense of maintaining it.

14 QUESTION: May I ask, Mr. Frankel -- I think
15 you perhaps read the judge -- Judge Pierce's opinion
16 somewhat more broadly than I do. I was just looking
17 at what seems to me the operative sentence on page 25A
18 of the Petition, the second sentence in the conclusion.
19 He says, "We remand for the entry of an injunction
20 prohibiting the village from relying on the establishment
21 clause as a reason for prohibiting the erection of a
22 creche at Boniface Circle, a traditional public forum,
23 for a period of approximately two weeks."

24 Now, if that was the reason the village gave,
25 surely it could come back and give any number of other

1 reasons other than that that the Second Circuit would
2 probably sustain.

3 MR. FRANKEL: Your Honor, I want to say two
4 or three things in response to that question.

5 First, Judge Pierce goes on and says "it is
6 remanded for action regarding a disclaimer sign or signs
7 and for other such action as is consistent with our deter-
8 mination herein."

9 Now, the location the court used in Widmar
10 could have been exactly the same one. Missouri University
11 had relied on the establishment clause as its defense
12 against allowing cornerstone to use those rooms.

13 But, let me go further. We argue that on our
14 first and basic proposition that Widmar does not apply
15 here, reversal is required without ever reaching the
16 establishment clause because we say that the notion of
17 an open, public forum in this case, which is a novel
18 case after all, has never been applied to require munici-
19 palities to allow in their parks unattended symbols that
20 are offensive to a great many of the people for whom
21 those parks are held in trust.

22 QUESTION: But, might not that depend on the
23 reason you give for turning down the request for an
24 unattended symbol?

25 MR. FRANKEL: Your Honor, we have given the

1 reason first, of course, in our brief, but if you look
2 through the record of this case you will find the reasons
3 and they are not stated in the form of legal brief.

4 The village trustees, including one rather eloquent and
5 articulate lawyer named Oman summarized their views under
6 a number of headings and the main was that to place this
7 christian symbol in the shared park was unneighborly
8 and was offensive to a great many of the people who share
9 those parks.

10 Another reason given was, according to one
11 or more of the trustees, the establishment clause.

12 QUESTION: Do you defend the right of the village
13 to refuse to place the creche for two weeks on the grounds
14 that it would violate the establishment clause?

15 MR. FRANKEL: We do, Your Honor, but we say
16 that without that defense we win any way because just
17 as we argue that the village does not have to allow a
18 display like the one that was held "protective" in
19 Brannenbergh and Ohio. A village in Mississippi does
20 not have to allow a display showing some hooded Klan
21 figures and a sign saying Send the Blacks Back to Africa
22 and the Jews Back to Israel.

23 We say and assert that no village in America
24 has ever allowed such things and none is required to
25 under the free speech clause.

1 We say by the same token though -- I take the
2 example of offensive symbols that are more widely offensive.
3 We say by the same token this is true of the creche.
4 The creche may well be and is to a majority not a hateful,
5 but a cherished symbol.

6 QUESTION: But what if the village in the past
7 has allowed other uses of the park?

8 MR. FRANKEL: Your Honor, we have to look at
9 those and I might say if I had to take one case of this
10 Court's precedence to rely on I think I would take Perry
11 Association, both the majority and the dissent, and I
12 think we would win on either one. There you will recall
13 it was held that the mail boxes were not a public forum
14 for communication of the kind attempted although the
15 incumbent union could communicate through them, the out
16 union, the minority union, could not. Now, that was
17 sustained and the Court analyzed the kinds of public
18 property -- and that is what I use the case for -- that
19 we classify for this kind of purpose. There is the open,
20 public forum, there is a limited public forum, and there
21 is the government property that is not a public forum
22 at all.

23 Now, I say that the park in this case, for
24 purposes of unattended structures and symbols, is not
25 an open, public forum; that the uninhibited, robust,

1 and wide-open debate that the First Amendment assures
2 for speakers and speech does not extent to cluttering
3 the parks with controversial symbols to stand there and
4 beguile or benumb the residents as they walk in those
5 places.

6 Therefore, I say that the doctrine of Perry
7 applies here and Perry said it didn't matter that the
8 alleged forum, the communication device given by the
9 government could be used by the YMCA and some other civic
10 kinds of associations. It still did not become an open,
11 public forum. At most the Court said if you restrict
12 the use of this governmental communicative device to
13 certain kinds of communications you may be required to
14 allow similar kinds of communications.

15 Here we deal with a situation in that respect,
16 in that doctrinal respect very like Perry. The village
17 is allowed a few charitable, educational, civic organiza-
18 tions to put up their signs and nobody disputes that.
19 If somebody with a similar sign wanted to put his up
20 or hers, I suppose the village would have to be consistent.
21 But, within the terms of Perry, it is not required that
22 the village allow a Klan symbol, a hammer and sickle,
23 a sign that says God Doesn't Hear the Prayers of Jews,
24 or any other of the kinds of expression that people
25 are free to make orally in public parks, but that we

1 say has never been compelled under the free speech clause
2 of the First Amendment, under the decisions of this
3 Court which have never squarely reached this somewhat
4 interesting question and we say never should be. And,
5 we say that the Circuit must be reversed without ever
6 reaching its establishment clause argument though we
7 reach it.

8 QUESTION: But, you do insist that leaving
9 these unattended symbols in the park would be an establishment
10 of religion, is that your position?

11 MR. FRANKEL: We do take that position and
12 let me say that I will try to reach it and I will reach
13 it in a few minutes.

14 QUESTION: Because that seems to me to be
15 the heart of the Second Circuit's decision which was
16 that the city shouldn't be able to rely on the establishment
17 clause to keep --

18 MR. FRANKEL: It is, Your Honor, but the Second
19 Circuit, with all deference --

20 QUESTION: I understand your other argument, but --

21 MR. FRANKEL: Well, it skipped point one. It
22 skipped point one and that is why I make it point one.
23 You don't find a word in the Circuit's opinion whether
24 there is --

25 QUESTION: I am not sure what the -- If the city

1 isn't relying on -- is forbidden to rely on the establishment
2 clause, I just don't know what the Second Circuit would
3 do about refusals to allow this creche on other grounds.

4 MR. FRANKEL: Your Honor, the other ground that
5 I am giving --

6 QUESTION: They might agree with you completely.

7 MR. FRANKEL: Well, they might, but the argument
8 was made to them, Your Honor, and they skipped it. What
9 is a litigant to do when he says point one, Second Circuit,
10 Widmar doesn't apply? If you would allow speech of this
11 kind, which the village agrees with absolutely and allows,
12 it doesn't follow that you must permit an unattended
13 structure or symbol.

14 QUESTION: They certainly disagreed with your
15 argument that this unattended creche is an establishment.

16 MR. FRANKEL: They did.

17 QUESTION: They certainly disagreed with your
18 position on that.

19 MR. FRANKEL: Yes, Your Honor, and I will come
20 to that --

21 QUESTION: What else did they disagree with you
22 on?

23 MR. FRANKEL: I will come directly to that, but
24 I want to preserve the important argument that you won't
25 find a word in the Circuit's opinion about a subject in

1 our view, rather eloquently treated by Judge Stewart in
2 the District Court, about the difference between an unattended
3 symbol setting on the land giving its message when its owners
4 aren't there, called the Scarsdale Creche Committee, though
5 the majority of its proponents don't even live in Scarsdale.

6 QUESTION: That is the way you avoid Widmar.

7 MR. FRANKEL: That is the way --

8 QUESTION: At least you say Widmar doesn't cover
9 a situation like that.

10 MR. FRANKEL: That is correct, Your Honor. Now,
11 let me -- We say Widmar doesn't cover and logically because
12 it doesn't cover the Circuit must be reversed without reaching
13 the establishment clause, but let me reach it.

14 That, of course, brings us to last year's decision
15 in Lynch against Donnelly and I want to state quickly what
16 we think are the salient distinctions between that case
17 and this one.

18 QUESTION: Before you get to that, Mr. Frankel,
19 I am not sure I track your emphasis on unattended. Suppose
20 they had two persons, one on each side of the creche, ringing
21 a bell or doing something, would that make any difference?

22 MR. FRANKEL: Yes, Your Honor, it would. We think
23 as an exercise of the right of a live speaker to speak the
24 speaker may probably bring with him or her a symbol, a sign.

25 QUESTION: Then you think it would be all right?

1 MR. FRANKEL: I think it would be all right,
2 because then it becomes clear that it is that speaker's
3 message that is being delivered. Here --

4 QUESTION: How about once the speech is finished,
5 he leaves. He has to take the symbol with him.

6 MR. FRANKEL: He takes the symbol with him, exactly,
7 and that has been touched upon in more than one of this
8 Court's cases, most recently Taxpayers against Vincent.

9 Let me illustrate a little further, Your Honor.
10 One of the Plaintiffs in this case, Mr. Charles Butler,
11 was asked and said he never goes down to Boniface Circle
12 even to look at the creche. He feels strongly and deeply
13 that the creche must be there but he is not there. Who
14 is there? Nobody is there. Whose speech is this, Your
15 Honor? This is called the Scarsdale creche and I repeat
16 half or more of the people who put it there don't even live
17 in Scarsdale.

18 Judge Stewart said --

19 QUESTION: Is that critical to your position?

20 MR. FRANKEL: It is quite important.

21 QUESTION: Who the sponsors are?

22 MR. FRANKEL: No, Your Honor.

23 QUESTION: Or the residence of the sponsors?

24 MR. FRANKEL: No, Your Honor. It is illustrative,
25 it is illustrative in an interesting way and we look at

1 the facts of a particular case of the point that this is
2 the speech of the creche and the land. This is Scarsdale's
3 creche.

4 QUESTION: Well, there is a sign, is there not --

5 MR. FRANKEL: Pardon?

6 QUESTION: There is a sign presumably with the
7 display that says that it is sponsored by the Committee.

8 MR. FRANKEL: It says it is placed there by the
9 Scarsdale Creche Committee, the Scarsdale Creche Committee,
10 a private organization. Just as the --

11 QUESTION: So, it is a little hard if you look
12 at the sign to attribute the sponsorship to the city, isn't
13 it?

14 MR. FRANKEL: No, it is not hard at all, Your
15 Honor. And, many of the people, as is stipulated in this
16 record, find that it is a mingling of the public property
17 with this private message that gives a kind of sense of
18 sponsorship and identification.

19 QUESTION: Well, do you think if the city allowed
20 a speaker on the subject of christianity to speak at the
21 park that the people would attribute that sponsorship to
22 the city?

23 MR. FRANKEL: No, Your Honor, they would attribute
24 it to that speaker, but, you know, in this case again we
25 have to use the facts of the case. This Creche Committee

1 was offered by a group of christian clergymen the use of
2 church properties to rotate the creche upon and they said,
3 no, putting it at a church property would defeat the
4 ecumenical aspect of their creche. Well, they were asked,
5 couldn't you put a sign there and say this isn't this church's
6 creche, this is the creche of the Scarsdale Creche Committee.
7 No, that was not an acceptable solution and they are right,
8 Your Honor, because people walking by seeing the object
9 there -- Children don't read the sign. Others say, well,
10 if it is the Scarsdale Creche Committee's creche, what is
11 it doing here?

12 The village must at least view it with benign
13 approval or acquiescence or something. The mingling is
14 there undoubtedly and it is perceived as such by some of
15 the people who share the ownership of this municipal property.
16 And it was held to offend on that ground by a majority of
17 those people's elected representatives.

18 Now, I want to answer Mr. Justice White and I
19 want to do it by coming directly to Lynch against Donnelly
20 which upheld by a close margin the right of Pawtucket's
21 city officials to have a creche on private property which
22 the city owned, had spent \$200 for, and sponsored. Are
23 there any distinctions? We say there are critical dis-
24 tinctions if the Court please.

25 First, it is important that there the city wanted

1 to put up the creche and had decided that it had a secular
2 purpose for doing that. This Court sustained that judgment
3 of the local officials about the purpose and propriety of
4 that creche. Here, the local officials have concluded they
5 don't want a creche in the park. They don't see a valid
6 secular purpose for it. And, you have a court ordering
7 them to place it there. We say that is a significant
8 distinction.

9 QUESTION: I do object to that characterization
10 of the opinion of the court below which again appeared at
11 least to say the city could have a neutral restriction,
12 for example, banning all unattended displays. So, it is
13 hard to turn that order of the court into what you say is
14 an affirmative order to display it.

15 MR. FRANKEL: Your Honor, until the Solicitor
16 General made that suggestion -- and this doesn't bind the
17 court -- let me say none of the parties have felt that this
18 could go back and the Second Circuit could look at it again
19 and the Scarsdale board could debate it some more. We have
20 all construed the opinion as saying Scarsdale must allow
21 the creche.

22 Now, we could be wrong. Let me assure the Court
23 as a realistic matter that if this case goes back and it
24 is affirmed it will be deemed an order to allow the creche.
25 And, I am assuring the Court as a legal matter --

1 QUESTION: That would depend a good deal on what
2 the opinion of this Court would say.

3 MR. FRANKEL: Oh, I think so, Your Honor, I think
4 so.

5 QUESTION: I think it would.

6 MR. FRANKEL: I am referring to just the way the
7 Circuit wrote it. We are affirmed on that --

8 QUESTION: Well, we probably won't use just a
9 one-word affirmance.

10 (Laughter)

11 MR. FRANKEL: I feel I have accomplished something,
12 Your Honor.

13 Let me pursue the distinctions of Lynch briefly.
14 Here you have a creche on the public land with all the problems
15 of aura and identification to which I have spoken. Here
16 you have a creche that in this circle stands quite alone
17 as the pictures show dearly in the record, is not surrounded
18 by all the things in the display involved in Pawtucket.
19 Our friends, with all the rollicking humor that we lawyers
20 enjoy, talk about count of reindeer and teddy bears and
21 so on. We don't ask the Court to count them, but we say
22 and the Court wrote is that the constant emphasis on that
23 display it must be deemed in our view to be meaningful if
24 not decisive in itself.

25 Finally, I want to say that in Scarsdale, in this

1 record, you have a history of long, bitter divisiveness.
2 You have divisions in the Board of Trustees, you have voters,
3 including one of the Plaintiffs, saying our vote is affected
4 by the way the Trustees do with the creche, you have candi-
5 dates for office telling their position on the creche, and
6 we say you don't have the prediction that the Chief Justice
7 made in Lemon and Kurtzman but the fact of divisiveness of
8 the kind that is a factor in our view in establishment clause
9 questions.

10 Before I try to save two minutes, if the Court
11 please, I want to say that I repeat what I started with.
12 If we are wrong in our establishment clause position, if
13 the village may allow the creche, it does not follow that
14 it must and we think the Circuit has held that it must and
15 that it is wrong in that.

16 Thank you.

17 CHIEF JUSTICE BURGER: Mr. Schwartz?

18 ORAL ARGUMENT OF MARVIN SCHWARTZ, ESQ.,

19 ON BEHALF OF THE RESPONDENTS

20 MR. SCHWARTZ: Mr. Chief Justice, and may it please
21 the Court:

22 What the Second Circuit decided in this case was
23 that the only two grounds offered by the village for denial
24 of access to the creche were invalid. The first ground
25 which the village offered was the establishment clause.

1 The Second Circuit, I submit correctly, held that that
2 argument could not survive Lynch.

3 The second argument made by the village in the
4 Second Circuit and made explicitly in its brief was that
5 even if the establishment clause was not an adequate justifi-
6 cation for denial of access, then the village could not
7 be required to post and to permit controversial devicive,
8 sectarian symbol.

9 The Second Circuit made no mention in its opinion
10 of that second ground and I respectfully submit that the
11 reason for that is that the ground is so devoid of con-
12 stitutional merit that it takes ingenuity and a facility
13 and forensic skills such as only my friend possesses to
14 advance it.

15 It is significant, may it please the Court, that
16 the only effort to express a point of view which has been
17 denied by the Village of Scarsdale for its park, the only
18 effort to express which has been denied access is the
19 creche.

20 For more than 25 years every application to display
21 an unattended symbol in Scarsdale's parks has been granted
22 or the village Trustees have directed the use of a part
23 of the park system other than Boniface Circle.

24 QUESTION: May I ask, Mr. Schwartz, your view?
25 If the village in response to the request had then adopted

1 a regulation saying no more unattended symbols in the park
2 and for that reason you may not show the creche, would that
3 have been permissible in your view?

4 MR. SCHWARTZ: That would depend, sir, upon several
5 circumstances. I agree that the village could impose
6 reasonable time, place and manner restrictions.

7 QUESTION: Well, that is my restriction. I have
8 given you a specific example.

9 MR. SCHWARTZ: But it would first of all have
10 to be content neutral.

11 QUESTION: It is.

12 MR. SCHWARTZ: And, secondly, it would have to
13 justify a significant governmental interest.

14 QUESTION: Well, does it. You are just rephrasing
15 the question. I am really interested in your answer.

16 MR. SCHWARTZ: What could the village do if this
17 Court affirm?

18 QUESTION: No. I am just asking you under your
19 view of the law before we decide.

20 MR. SCHWARTZ: I doubt very much, sir, that this
21 village could deny access to all of its parks for symbols
22 and signs of all kinds. I find it difficult to perceive
23 a substantial governmental interest which would be so
24 served.

25 QUESTION: Wouldn't there be something like a

1 governmental interest if the recital -- the preamble said
2 that in order to minimize vandalism with respect to
3 unattended symbols that no unattended symbols would be
4 allowed?

5 MR. SCHWARTZ: In a village which has a history
6 for more than 25 years of freely permitted year after year
7 the banners of the Red Cross, a symbol of the Red Cross,
8 the banners of the American Field Service, the signs of
9 the United Fund, and when the village itself displays
10 Christmas lights and ornaments on its own lampposts,
11 village employees decorate Christmas trees in the lobby
12 of Village Hall, village employees ornament a living tree
13 in Boniface Circle where this creche sat for 24 years, it
14 seems difficult to me, though it is certainly conceivable,
15 and one would have to wait and see what justification the
16 village advanced, to determine if it advanced a significant
17 governmental interest.

18 But, standing here, may it please the Court, I
19 find it difficult to perceive a substantial governmental
20 interest which would be legitimately served by a total ban
21 of all unattended signs and symbols.

22 QUESTION: Well, why can't the -- Supposing it
23 had pursued the kind of policy you say for the last 25 years
24 and it has resulted in having the creche up. Now, the
25 majority of the people in Scarsdale, let's say, are Jews

1 rather than Christians and they would rather just not have
2 the parks used for any sort of symbols like that if they
3 have to put up a creche. I don't see why they couldn't
4 have a neutral policy that says at least in Boniface Circle
5 which is right in front of everybody, we are not going to
6 have anything.

7 MR. SCHWARTZ: Boniface Circle -- I believe the
8 village probably could say that there was a substantial
9 governmental interest to be served by banning all unattended
10 displays, but that isn't the issue in this case, Your Honor.

11 QUESTION: I realize that isn't. I don't think
12 that is what the village said.

13 MR. SCHWARTZ: But, bear this in mind, Your Honor,
14 the village manager testified in this case by deposition
15 and his testimony is that in the 24 years the creche was
16 displayed at Boniface Circle there was never a complaint
17 that it was aesthetically displeasing, there was never a
18 complaint that it constituted visual clutter, never a
19 complaint that it interfered with traffic. The only com-
20 plaint ever made was that it was sectarian, divisive,
21 offensive, and unneighborly.

22 It is difficult for me standing here to evaluate
23 whatever reason the village might advance when this Court
24 affirms for a new regulation. All I say is it must be
25 reasonable in time, place and manner. It must not be content

1 based or if it is content based, then there must be a
2 compelling governmental interest to support it and I can't
3 conceive of any.

4 QUESTION: Why can't it say we just don't want
5 any content oriented messages in Boniface Park, it just
6 causes too much hassle, one side is yelling, the other side
7 is yelling? We want to cut it out.

8 MR. SCHWARTZ: That may well be permissible but
9 it doesn't solve the issue in this case. It doesn't solve
10 the issue in this case.

11 QUESTION: Would you figure it would be consistent
12 with the Second Circuit's opinion and judgment if there
13 was an injunction entered on remand ordering the city to
14 allow this creche?

15 MR. SCHWARTZ: I don't think the District Court
16 would enter such an order, Justice White.

17 QUESTION: Not under this?

18 MR. SCHWARTZ: I don't think so. I think the
19 order would simply state that the village may not rely upon
20 the establishment clause or in its argument of divisiveness
21 or offensiveness.

22 QUESTION: The Second Circuit has not mandated
23 that the creche be in the park?

24 MR. SCHWARTZ: It has not passed upon regulations
25 which were not before it nor could it.

1 The only reasons offered, as I said a moment ago,
2 were the establishment clause and offensiveness. The Court
3 rejected those. Now, if next year the village postulates
4 a regulation, someone will have to decide if it is a reason-
5 able regulation designed narrowly to support a substantial
6 governmental interest.

7 QUESTION: May I ask, the statement that is quoted
8 at the end of your opponent's reply brief says that the
9 reason was it is inappropriate to use public property for
10 religious expression which is not necessarily saying it
11 would violate the establishment clause. They just think
12 as a matter of community policy it is inappropriate.

13 Supposing they relied on that reason and no other,
14 what happens?

15 MR. SCHWARTZ: I don't think the Constitution
16 would permit it, sir.

17 QUESTION: That would not be a sufficient reason?

18 QUESTION: Widmar would read on that, wouldn't
19 it?

20 MR. SCHWARTZ: Yes, sir. And, almost every First
21 Amendment case --

22 QUESTION: Let me change the question a little
23 bit. Supposing they said -- they made the controversial
24 argument, we don't want things like burning crosses,
25 swastikas and the like, so we will not permit any symbol

1 that might be considered inappropriate to a large segment
2 of our community?

3 MR. SCHWARTZ: I think that is impermissible,
4 Your Honor, for two reasons among others. First, the First
5 Amendment as this Court has construed it means anything,
6 is that inhibitions of expression may not be content based
7 absent a compelling governmental interest, so compelling
8 that only a clear and present danger test, for example.

9 QUESTION: So your response to your opponent is
10 his horrible examples about the swastikas and all that,
11 those parade of horrors, yes, that is exactly what might
12 be done.

13 MR. SCHWARTZ: Not necessarily. I can conceive
14 of a content neutral, reasonable time, place and manner
15 regulation which would leave the village latitude to ban
16 a swastika. The question would be does it pose a clear
17 and present danger to peace and order? The Scarsdale police
18 force --

19 QUESTION: Assuming he doesn't go that far, it
20 just upsets a lot of people.

21 MR. SCHWARTZ: Religion is the opiate of the people.
22 There is a constitutional right to put that up, may it please
23 the Court, so long as the Red Cross can put up its banners.

24 QUESTION: You don't see a distinction between
25 the Red Cross and symbols of that kind?

1 MR. SCHWARTZ: I don't think the Constitution
2 can admit such a distinction, Justice Stevens. Let me give
3 you a more difficult case. Let us assume that the Planned
4 Parenthood organization is unpopular in Scarsdale for the
5 views it maintains about a woman's right to abortion. Can
6 Scarsdale permit the United Fund to put its banner up, the
7 Red Cross to post its symbol and its banners and the
8 Community Chest -- Excuse me, the Cancer Crusade to put
9 up a sword? Can it do that and yet deny access to Planned
10 Parenthood? I think not unless the First Amendment has
11 to be rewritten.

12 QUESTION: So, your view is that this decision
13 means that Planned Parenthood has a right to put up the
14 kind of sign you describe in this park?

15 MR. SCHWARTZ: I would assume, Your Honor, no
16 matter what this Court decides in this case, no municipality
17 may inhibit speech on the basis of content unless it presents
18 a clear and present danger of disorder, unless it interferes
19 with other uses or unless, in the case of the explicit sexual
20 statuary which my friend envisions, it is unsuitable for
21 viewing by children.

22 But, even if this Court reverses here, the
23 difficulties of line drawing will not be obviated. If the
24 Village of Scarsdale or any village anywhere in the land
25 can ban this display because its content, its message is

1 unpopular or offensive, or unwanted, where will it go
2 next?

3 The Liberal Party and the Conservative Party are
4 on the ballot in my State of New York. Relatively speaking
5 they are minority parties. Can their fund raising banners
6 be banned because the majority of Scarsdale in its wisdom
7 thinks the views of those two groups are extreme? Can they
8 ban banners of an anti-nuclear group because the majority
9 believes that their views are inconsistent with --

10 QUESTION: Could they put up a sign that says
11 we don't think the people of Scarsdale?

12 MR. SCHWARTZ: If you are going to permit the
13 Red Cross, if you are going to permit the United Fund --
14 Yes, sir.

15 QUESTION: I don't see where the Red Cross has
16 ever said anything about Scarsdale.

17 MR. SCHWARTZ: The banner --

18 QUESTION: Suppose it said we don't like the Jews
19 who live in Scarsdale.

20 MR. SCHWARTZ: Unless that presented a clear and
21 present danger of breach of the peace which the Scarsdale
22 police were unable to deal with, I think there is a
23 constitutional right to put it up so long as other banners
24 are there. And, I don't think, Your Honor, that a sign
25 which simply says the Red Cross or the Red Cross symbol

1 is unintended to give a message. When those banners are
2 put up in March and when the symbol is put up in a railroad
3 station in Scarsdale every March, the message which is intended
4 to convey is please give money to the Red Cross. That is
5 a message, that is an entreaty, it is a prayer, it is
6 expression.

7 QUESTION: What if Scarsdale said in Boniface
8 Circle or the railroad station or wherever they now have
9 Red Cross banners in support of fund raising, we will let
10 any fund raising group that is active for Scarsdale put
11 up a banner but we are not going to have anything else?

12 MR. SCHWARTZ: I think that is an unconstitutional
13 distinction.

14 QUESTION: Why?

15 MR. SCHWARTZ: I don't think -- Let me put it
16 another way, in an affirmative way. When the state opens
17 a place for the expression of views, it may not select those
18 who may express those views.

19 QUESTION: But the city's reponse here would be
20 we haven't opened a place for expression of all views, all
21 we have opened is a place for signs supporting fund raising
22 drives.

23 MR. SCHWARTZ: That, to me, is an expression of
24 a view and I think it is constitutionally impermissible
25 to say that I may ask for funds for the Red Cross, I may

1 ask for funds for the PTA, but I may not express my views
2 about a non-fund raising function. I don't think that is
3 the kind of distinction. After all, it is content based
4 and this Court has held time and time again that only a
5 compelling, a compelling government interest can justify
6 a content-based exclusion from a public forum.

7 QUESTION: I take it from what you have said that
8 if only the creche as a symbol were allowed, but all other
9 faiths and religious symbols were prohibited that that would
10 not stand.

11 MR. SCHWARTZ: I agree with that, Chief Justice.
12 Now, let me spend just a moment, if I may, on
13 the Perry case. That case has nothing to do with the issue
14 before the Court here.

15 In the first place, the Court explicitly noted
16 that the mailboxes in the public school were not a public
17 forum. Denial of access, the Court said, was not because
18 of the viewpoint of the non-certified union, it was based
19 upon status.

20 The most important thing, I think, for me to note
21 about the Perry case is the Court statement that a state
22 may use property for its intended purpose or restrict its
23 use so long as the regulation is reasonable and not an
24 effort to suppress expression merely because public officials
25 oppose the speaker's view. That, may it please the Court,

1 is this case. What we have here is expression for which
2 access is denied and for no other reason that some
3 functionaries in the Village of Scarsdale find that the
4 view sought to be expressed is controversial, unpopular,
5 divisive and offensive. I respectfully submit that the
6 Constitution does not permit.

7 On the establishment clause, if I may --

8 QUESTION: Would you agree before you go on to
9 the establishment clause that there is at least theoretically
10 a basis for distinction between saying everything offensive
11 shall be banned and saying I will ban it because I disagree
12 with what you say?

13 MR. SCHWARTZ: There is a difference --

14 QUESTION: As I read the reason here, it wasn't
15 necessarily that they disagreed with the message of the
16 creche, they just thought this was an inappropriate use
17 of the religious symbol.

18 MR. SCHWARTZ: I think the total effect of reading
19 the appendix is that it was rejected because some were
20 offended by its display, that it was not considered
21 neighborly to manifest a point of view which others did
22 not share or which made them uncomfortable, and that it
23 was thought to breach a wall which was thought erroneously
24 we now know to exist between church and state. I don't
25 find that very much different than saying since I don't

1 like what you propose to say I won't let you say it. There
2 is a slight difference but I don't think it amounts to a
3 constitutional difference.

4 QUESTION: You don't think, for example, a Catholic
5 priest who would be clearly sympathetic with the message
6 could ever oppose having the creche in the village square?

7 MR. SCHWARTZ: I can conceive of a priest saying
8 that I am so firmly devoted to the principle of non-intermingl-
9 ing of church and state that I don't believe religious
10 symbols should be displayed on public property. I can
11 understand that position. He might very well entreat the
12 village trustees not to permit it. But, the Constitution
13 here is the problem. So long as the District Court found
14 this village freely granted access to its parks for the
15 display of unattended symbols, with that finding of the
16 District Court which was explicitly sustained by the Second
17 Circuit and is not challenged here, it was not challenged
18 in the Second Circuit, I don't think you can say, yes, to
19 one symbol and no to --

20 QUESTION: You say the Constitution requires that
21 all unattended symbols be treated as fungible?

22 MR. SCHWARTZ: Yes, sir, unless there is a com-
23 pelling governmental --

24 QUESTION: You allow solicitation for the Red
25 Cross, you must allow solicitation for legal advocacy groups

1 and others like that?

2 MR. SCHWARTZ: Yes, sir, no matter how hateful,
3 no matter how hateful.

4 On the establishment clause, may it please the
5 Court, it seems to me, if I may be trite, clearly and without
6 doubt that it is disposed of by Lynch.

7 If a city may itself erect and display a creche
8 in the context of a Christmas celebration, then how, may
9 I ask, how in the world is the establishment clause offended
10 by permitting a private group to erect a creche in the context
11 of a Christmas observance which was not unlike that of
12 Pawtucket, not unlike that at all? How can that be said
13 to convey a message from the state to its citizens that
14 the state was endorsing the christian religion? I don't
15 think the argument can survive a reading of Lynch.

16 Let me close by alluding very briefly to the
17 Christmas celebration in Scarsdale, which my friend said
18 not a word about. Boniface Circle was selected in 1957
19 or 1956 as the site for the creche display by the Scarsdale
20 Creche Committee because that was the traditional site of
21 Scarsdale's Christmas observance. At that place a local
22 organization sang Christmas carols each year, much of the
23 time on platforms provided by the city, and their voices
24 were amplified over a sound system provided by the village.

25 Throughout the Christmas season, 25 years at least,

1 the two lamp posts in Boniface Circle have been festooned
2 with lights and Christmas ornaments. The little park is
3 in the center of the business district and every lamp post
4 in the business district, village property, is likewise
5 decorated with lights and ornaments.

6 QUESTION: Do you see any difference between the
7 creche and Christmas ornaments?

8 MR. SCHWARTZ: I think there is a difference,
9 but I don't think it is a constitutional dimension.

10 If I am right that symbols may not be differentiated
11 because of content, I don't think the fact that a Christmas
12 light is three inches long and the creche nine feet wide
13 should make any difference. I think the basic question
14 is under what circumstances may the state restrict the --

15 QUESTION: What makes a creche a creche?

16 MR. SCHWARTZ: The Infant Jesus.

17 QUESTION: Thank you.

18 MR. SCHWARTZ: And Mary and Joseph and the sheep
19 and the --

20 QUESTION: You don't have them on the lamp posts,
21 do you?

22 MR. SCHWARTZ: Pardon me?

23 QUESTION: You don't have those up on the lamp
24 posts, do you?

25 MR. SCHWARTZ: I have never seen one, Your Honor,

1 but conceivably they could be --

2 QUESTION: Well, if you say the same thing goes
3 on --

4 QUESTION: I suppose those symbols are intended
5 to convey the same general message, are they not?

6 MR. SCHWARTZ: I would have to concede, Mr. Chief
7 Justice, that the message of the creche is far more religious
8 than a string of Christmas lights or a wreath.

9 QUESTION: Or is it just more specific?

10 MR. SCHWARTZ: It is more specific, but the
11 significant thing to me is that it is in the context of
12 observance of a national holiday; that the holiday is
13 celebrated by people of all religious persuasions. It is
14 not only religious christians who buy gifts and exchange
15 them and who exchange greetings of peace and goodwill, it
16 is our society as a whole. So, whether we like it or not,
17 Christmas has come to be a holiday with a wide-spread
18 secular acceptance. I think it is in that context that
19 the creche is part of the symbol of Christmas even though
20 it emphasizes the religious aspect more than other
21 decorations do.

22 QUESTION: May I take you back to your argument
23 about the history in Scarsdale which I think you rely on
24 rather heavily that there has been a history of symbols
25 in the park.

1 MR. SCHWARTZ: I think it is important.

2 QUESTION: And they can't deviate from that.

3 Supposing you had a community which had no comparable history,
4 had never allowed symbols. I would assume you would not
5 contend that they couldn't continue that policy and refuse
6 a creche?

7 MR. SCHWARTZ: If a village had never allowed
8 an unattended symbol because no one had ever requested
9 permission to display it, then the question would be, when
10 permission was denied, was this a reasonable time, place
11 and manner restriction which supported a significant
12 governmental interest? Would it interfere with traffic,
13 would it be aesthetically displeasing? There are all sorts
14 of grounds which a municipality might advance for saying
15 no symbols of any kind. But, of course, that isn't the
16 case here.

17 QUESTION: I understand, but I was wondering if
18 you were willing to concede, and I guess you are really
19 not quite willing to, that if there had been a total absence
20 of symbols in the past, then they could continue that policy.
21 I was wondering what you would do in a community which had
22 Scarsdale's history, but then for a period of five or ten
23 years they had no creches and nothing else, and then the
24 controversy arose. Which history would you look to?

25 MR. SCHWARTZ: I think that history, Your Honor,

1 is important principally to show that this could not really
2 be offensive, this really could not be a fighting symbol.

3 QUESTION: You have a lawsuit here.

4 MR. SCHWARTZ: Well, we have a lawsuit, Your Honor,
5 because beginning in 1976 a lawyer who was associated with
6 the New York Civil Liberties Union moved into Scarsdale
7 and he brought a lawsuit and the matter has been in turmoil
8 ever since that time regrettably so. I think controversies
9 of this kind should be settle locally with good will on
10 both sides. And, much as it is a honor and pleasure for
11 me to be here, I regret that I am here.

12 QUESTION: Your clients didn't want it to be settled
13 locally.

14 MR. SCHWARTZ: Not so, Your Honor, not so. My
15 clients, the Scarsdale Creche Committee, made it perfectly
16 clear that it would be willing to display its creche on
17 any suitable public park land in Scarsdale and, indeed,
18 in 1981, when access to public parks were denied, they
19 displayed this creche on a sidewalk across the street from
20 the park where it was vandalized.

21 It seems in no circumstances a group which has
22 displayed a creche the same place for 24 years, with
23 exceptions being generated only in 1976, not on the ground
24 of aesthetics or traffic or what-have-you, has a right to
25 maintain to let's get settled --

1 QUESTION: All I was suggesting is that a judgment
2 of the Court of Appeals for the Second Circuit isn't
3 ordinarily thought of as settling something locally.

4 MR. SCHWARTZ: My clients had no option, Your
5 Honor. My clients had no option.

6 QUESTION: They could have put it on private
7 property.

8 MR. SCHWARTZ: I don't think that is the answer,
9 Justice Marshall.

10 QUESTION: But the answer is yes.

11 MR. SCHWARTZ: Oh, they could have, but that isn't
12 the answer.

13 QUESTION: It wouldn't have had the same effect
14 on private property, would it?

15 MR. SCHWARTZ: No, it would not, sir.

16 QUESTION: You want it to get the imprimatur of
17 the state.

18 MR. SCHWARTZ: I don't believe the record would
19 support that conclusion.

20 QUESTION: I am asking you. Don't you think that
21 is what they wanted?

22 MR. SCHWARTZ: No, sir. No, sir. The reason
23 the creche was put in Boniface Circle in the first place
24 was because that was the site of the village's traditional
25 Christmas observance where the lamp posts were strung with

1 lights and where the carols were sung. Now, once a tradition
2 begins inertia continues. It wasn't until 1976 a fuss
3 started. When permission was denied in 1981, my clients
4 did move their creche across the street. But, what they
5 seek is a level space in the center of town which is
6 accessible to pedestrians. It makes no point to put a creche
7 in a church back yard where its view is obstructed by trees
8 and shrubs.

9 QUESTION: What about the front yard?

10 MR. SCHWARTZ: The record here shows that only
11 one church was centrally located and met that minimal
12 requirement.

13 QUESTION: Well, do any of the contributors to
14 this creche fund own property?

15 MR. SCHWARTZ: The record doesn't show that.
16 It shows that five --

17 QUESTION: Can't we assume they do?

18 MR. SCHWARTZ: I assume so.

19 QUESTION: Can't we assume we can put it on their
20 property?

21 MR. SCHWARTZ: Nobody lives, Justice Marshall,
22 in Boniface Circle or in a centrally located place where
23 shoppers and pedestrians would see the creche throughout
24 the season.

25 QUESTION: Do they all live in Scarsdale?

1 MR. SCHWARTZ: Five of the seven do, but all of
2 the seven have Scarsdale post offices and all seven of the
3 churches are either in Scarsdale or in the immediate sur-
4 rounding area with Scarsdale post office addresses. No
5 point was made of that, Your Honor, in any of the courts
6 below.

7 With all respect --

8 QUESTION: Well, I think it ties into your comment
9 about having it settled locally.

10 MR. SCHWARTZ: I meant within the forum of the
11 Board of Trustees. That is what I meant. These people
12 have been before the Board of Trustees on this subject year
13 in and year out and it is regrettable it could not be resolved
14 there. Ultimately it will have to be.

15 Thank you.

16 CHIEF JUSTICE BURGER: Do you have anything further,
17 Mr. Frankel?

18 ORAL ARGUMENT OF MARVIN E. FRANKEL, ESQ.

19 ON BEHALF OF THE PETITIONERS -- REBUTTAL

20 MR. FRANKEL: I think I have about a minute and
21 a half, Your Honor.

22 QUESTION: You have two minutes.

23 MR. FRANKEL: I think it is clear that Mr.
24 Schwartz's clients and another group brought this lawsuit
25 after the village Board had settled locally its view on

1 this subject.

2 I think the Court should know that the turmoil
3 in Scarsdale which has grown begins in 1960, as the record
4 shows, and continues and accelerates and does not begin
5 with the lawsuit, the abortive lawsuit by the Civil Liberties
6 Union person.

7 I think in answer to a question put by Justice
8 Stevens, it should be said that this is not a case by any
9 means of viewpoint discrimination. You just have to read
10 the somewhat anguished expressions of then Mayor Stone who
11 had once voted to allow the creche and came to realize its
12 significance standing there speaking for Scarsdale and
13 changed her vote, who is a christian, who has a creche of
14 her own, to realize that this is not an anti-christian
15 expression.

16 You just have to read the statement of ten
17 christian clergymen quoted at the end of our reply brief
18 against offending their non-christian neighbors, against
19 appropriating the public property for the practice of
20 religion, against mingling religion with the state, even
21 our own religion, to realize this is an effort to keep the
22 village free of the kind of division that has erupted and
23 is not in any sense a discrimination on the basis of view-
24 point.

25 I think with all the back and forth, the line

1 is clearly drawn and the potential significance for the
2 parks in the cities and villages of America ought to be
3 clean.

4 The first question is must they open those parks
5 to unattended structures, to swastikas, to creches, to
6 abortion controversies, or may they limit the parks as almost
7 all American parks have been limited to community symbols
8 that the people care about, restricting them in this fashion.

9 Thank you.

10 CHIEF JUSTICE BURGER: Thank you, gentlemen, the
11 case is submitted.

12 (Whereupon, at 11:59 a.m., the case in the
13 above-entitled matter was submitted.)

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CERTIFICATION

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

#84-277 - BOARD OF TRUSTEES OF THE VOLLAGE OF SCARSDALE, ET AL., Petitioners

v. KATHLEEN S. MCCREARY, ET AL.

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

BY Paul A. Richardson

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