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OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-773

TITLE MICHAEL BENDER, ET AL., Petitioners V.
WILLIAMSPORT AREA SCHOOL DISTRICT, ET AL.

PLACE Washington, D. C.

DATE October 15, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL BENDER, ET AL.,

Petitioners

V.

WILLIAMSPORT AREA SCHOOL
DISTRICT, ET AL.

No. 84-773

Washington, D.C.

Tuesday, October 15, 1985

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at
12:59 a.m.

APPEARANCES:

JAMES MADISON SMART, JR., ESQ., Kansas City, Missouri;
on behalf of the Petitioners.

CHARLES FRIED, ESQ., Acting Solicitor General,
Department of Justice, Washington, D.C.; as
amicus curiae in support of Petitioners.

JOHN C. YOUNGMAN, JR., ESQ., Williamsport, Pennsylvania;
on behalf of the Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments now in Bender against Williamsport School.

Mr. Smart, you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES MADISON SMART, JR., ESQ.

ON BEHALF OF THE PETITIONERS

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

The facts of this case are not extremely complicated, but they can be misunderstood. This case does not involved teacher-led or government-prescribed religious activities. Very simply, students from Williamsport Area High School, which we represent, wanted to meet during the extracurricular activity period. The school was originally content to let them meet. Then permission was withdrawn after the first meeting, but solely because the school's lawyer felt that allowing student meetings containing prayer and religious expression would violate the Establishment Clause.

Now, since the lawyer's belief was the only reason for the denial of meeting space in this case, the legal issue is very narrow and that is simply whether the Establishment Clause requires a high school to censor out the religious expression of private individuals after having first created an opportunity for students to engage in their own self-initiated activities and expression.

1 QUESTION: Mr. Smart, do you think there is a
2 jurisdictional question at all in this case?

3 MR. SMART: No, Your Honor. By that, do you mean
4 by that --

5 QUESTION: Well, Mr. Youngman and his --

6 MR. SMART: All right.

7 QUESTION: -- and his position in the case. Did
8 the Court of Appeals have jurisdiction, do you think?

9 MR. SMART: In our opinion, they did, Your Honor,
10 and the case is properly here. It is a valid case or contro-
11 versy. However --

12 QUESTION: And, why do you think they have jurisdiction?

13 MR. SMART: Well, it was our judgment that Mr.
14 Youngman probably stood in the same position as Mrs. Bashdi
15 McCollum in the McCollum case in 1948 as a parent.

16 But, if the Court should decide that Mr. Youngman
17 does not have standing, the correct disposition of this case
18 would be to vacate the Third Circuit decision and
19 reinstate the decision of the district court.

20 Now, it is important to understand that in this --

21 QUESTION: While you are on that subject, Mr. Youngman
22 is no longer a member of the School Board, is he?

23 MR. SMART: Mr. Youngman is no longer a member of
24 the School Board, as I understand it.

25 QUESTION: And, he no longer has any children in

1 the school?

2 MR. SMART: He has a child in the Williamsport Area
3 High School.

4 QUESTION: How old?

5 MR. SMART: I believe his child is in the ninth grade,
6 if I am not mistaken.

7 QUESTION: Now, how does that bear on the issues.
8 You sued him in his official capacity, as I understand it.

9 MR. SMART: Yes, Your Honor.

10 QUESTION: Was there any framing of liability against
11 him individually in any sense?

12 MR. SMART: Not that I am aware of, Your Honor.

13 QUESTION: How is it relevant that he has got a child
14 in the school. Could any parent have appealed this judgment?

15 MR. SMART: Well, Your Honor, in reviewing the McCollum
16 case, it appeared that that was the case, but we would be quite
17 content --

18 QUESTION: In the McCollum case, wasn't there an
19 allegation that the child was being offended in some way by
20 these practices? Nobody says Mr. Youngmen's children are unhappy
21 in any way, are they? Is there anything in the record about
22 his children?

23 MR. SMART: I don't know the details on that, Your
24 Honor. We felt he would be able to repair his case if that
25 issued was raised. If we were in error, we would be quite

1 pleased to have the district court decision in this case
2 reinstated since it was in favor of our clients.

3 QUESTION: Why would that be the result? There still
4 wouldn't be a case of controversy even in the district court.

5 MR. SMART: Yes, Your Honor. He was a member of
6 the School Board in the district court.

7 QUESTION: He is no longer.

8 MR. SMART: He is no longer a member of the School
9 Board.

10 QUESTION: Well, I know, but suppose the Court of
11 Appeals said a piece of controversy has just washed out, wouldn't
12 it have directed the district court to dismiss the case?

13 MR. SMART: No, Your Honor, I don't believe so.
14 I believe it would have been a valid decision at the district
15 court level since all parties were properly represented.

16 QUESTION: Well, it might have been a valid decision
17 at the time the district court rendered it, but I think our
18 practice, since the time of the Munsingwear case, you know,
19 some years ago, has been to say if it becomes moot on appeal,
20 the whole thing washes out.

21 In other words, you would simply go back and there
22 would be no district court decision, you would have no Court
23 of Appeals decision.

24 MR. SMART: Well, if that were the case, then the
25 Court of Appeals would have two options if that were the law,

1 Your Honor. One would be to treat it as a case or controversy
2 that is capable of repetition, yet evading review, or to wash
3 the whole thing out.

4 QUESTION: Why not, Mr. Smart? Was not the vote
5 against Mr. Youngman's position in the Board itself eight to
6 one?

7 MR. SMART: I believe that is correct, Your Honor.
8 I believe that --

9 QUESTION: So, he had no support for his position
10 at all.

11 MR. SMART: No, Your Honor, he did not.

12 QUESTION: Of course, the School Board doesn't decide
13 the constitutional questions with finality, do they?

14 MR. SMART: No, Your Honor, however, they do decide
15 what course the School District takes and the Respondent is
16 here in the capacity as an original member of this lawsuit
17 against whom we sought individual liability, including attorney's
18 fees, and he has represented that he is in this lawsuit at
19 this point as a parent.

20 QUESTION: So, he could have been a plaintiff in
21 the case originally?

22 MR. SMART: Yes, Your Honor. That is our view of
23 the McCollum case.

24 QUESTION: So, you think he is still in the case?

25 MR. SMART: We believe he is still in the case and

1 we believe it is still a valid case or controversy.

2 It is important to understand that in this case the
3 record shows that the school did not simply make available
4 certain specified activities to the students during this activity
5 period. The school did not say, students, you can do this,
6 this, or this, take your pick of those. Instead, the school
7 said to the students, students, you decide what you will do
8 during the activity period.

9 QUESTION: Is that the same as the Widmar factual
10 setting?

11 MR. SMART: We think that constitutionally it is
12 indistinguishable, Your Honor.

13 QUESTION: I am speaking narrowly. In the Widmar
14 case did the students decide what it was they wanted to talk
15 about?

16 MR. SMART: That is exactly correct, Your Honor.

17 QUESTION: If they wanted to advance socialism, they
18 could do it?

19 MR. SMART: Yes, Your Honor.

20 QUESTION: They were free entirely, weren't they?

21 MR. SMART: They were free entirely to conduct their
22 meetings as they saw fit.

23 We believe that the district court findings in this
24 case, that that was the case in the Williamsport Area High
25 School, and are correct; that the School District --

1 QUESTION: Did they have to do something? Did they
2 have to go outside and sit on the steps?

3 MR. SMART: No, Your Honor. The only reason they
4 couldn't do that is because the school requires them to remain
5 in the building, as I understand it, and that is part of the
6 reason for having all the activities, as I understand it, inside
7 the building unless perhaps there is special permission to
8 go outside.

9 QUESTION: You mentioned that some of these youngsters
10 were in the ninth grade. I think his present child was in
11 the ninth grade. Do you carry your argument to the junior
12 high level in those schools which, at the junior high level,
13 have a ninth grade?

14 MR. SMART: Your Honor, our case concerns only age 14,
15 grade nine through twelve. Fourteen through 18 are the ages.

16 QUESTION: Suppose, as in another school district,
17 your high school consisted of grades ten, eleven and twelve
18 and the junior high had nine as is the case in many communities.
19 Does your argument also carry you to the grade nine in those
20 communities?

21 MR. SMART: No, it -- Well, it would depend on whether
22 the school had created a free-speech opportunity for the students
23 through some kind of self-initiated activity forum.

24 QUESTION: Then you would go down to the first and
25 second grades on that basis?

1 MR. SMART: No. Probably the closest you would get
2 in elementary school to a student-initiated activity forum
3 would be recess.

4 QUESTION: Suppose they wanted to play chess. They
5 had a couple of chess prodigies and they formed a chess club
6 in the fifth grade. Does your argument apply?

7 MR. SMART: I think that there is going to be --
8 Of course, the Third Circuit and the Court of Appeals was concerned
9 about the impressionability and age of students and I would
10 have to frankly admit that I think there is some age at which
11 any sort of religious activities going on may reasonably be
12 interpreted by a student as having been sponsored by the school.

13 For instance, the case Judge Friendly decided involving
14 the kindergarten students where there was a claim that they
15 should be allowed to say a prayer before grace. If the teacher
16 leads them in that prayer, why, it is not going to be a voluntary
17 prayer. At that age, nothing is voluntary to those students
18 unless they are maladjusted students.

19 QUESTION: Mr. Smart, in this case, a faculty member
20 was present at the Petros meetings.

21 MR. SMART: That is correct.

22 QUESTION: But, not participating, is that the record
23 evidence?

24 MR. SMART: That is exactly the record evidence,
25 Your Honor.

1 QUESTION: Does the record disclose whether the teachers
2 had been instructed not to actively participate?

3 MR. SMART: The record does not disclose that, although
4 I think it is clear that that is what did happen.

5 QUESTION: Would your conclusion be the same if the
6 teacher had actively participated in the meeting?

7 MR. SMART: No, Your Honor. We believe that the
8 crucial constitutional distinction is the distinction between
9 state action or government action and individual action and
10 that the only safe harbor of constitutional analysis is that
11 distinction between is the government acting in promoting or
12 conducting this activity or are private individuals acting
13 and what is the government's role? We must look at the govern-
14 ment's role.

15 QUESTION: Mr. Smart --

16 MR. SMART: Yes, Your Honor.

17 QUESTION: -- if that is your position, supposing
18 the time that is devoted to this activity is needed to qualify
19 the school for its academic diplomas and all the rest, and
20 as I understand, you can't tell from the record whether it
21 is counted or not. The Court of Appeals said they couldn't
22 tell whether the activity periods count toward the minimum
23 requirement for powers of the school under the state statute.

24 Now, if it is required, then would it not be state
25 action?

1 MR. SMART: I don't see that that is a significant
2 constitutional connection, Your Honor. If the school in this
3 case determined that they wanted to take credit for the
4 activity period and to apply it, that certainly was their
5 prerogative to do so because there is educational value even
6 in self-initiated student activities. However, there has been
7 no adjudication --

8 QUESTION: Well, if that is your position, why would
9 it matter if the monitor was an employee of the school and
10 who directed the activity? I don't understand how you
11 reconcile that with your response to Justice O'Connor's question.

12 MR. SMART: I am not sure I understand the question.

13 QUESTION: The issue as you put it is whether it
14 is state action or not.

15 MR. SMART: That is right.

16 QUESTION: And, if it is action that is necessary
17 in order to have these students be qualified for a state diploma,
18 why is it not state action?

19 MR. SMART: Well, Your Honor, the state action con-
20 sists of having them on the premises in the question that you
21 put forth. The state action you want to focus on is who is
22 doing the religious activity, who is promoting it, who is
23 sponsoring it, who is encouraging people to participate? If
24 the state is doing that, then it would violate the Constitution.
25 But, all the state has done here is to require these people

1 to go to school, these students to be at school between certain
2 hours.

3 Now, not everything that goes on in the school grounds
4 during those hours makes them a captive audience to that
5 activity on the school.

6 In fact, there is an inherent competition during
7 this activity period between all of the activities that are
8 going on. A student has to choose what he will do during that
9 time and he can even choose to start new activities during
10 that time if he doesn't like any of the existing ones that
11 are going on.

12 And, that is where we get the free-speech opportunity
13 for these students that was created and that is how we draw
14 the distinction between the government action in the case and
15 the individual, private action in the case. And, this is a
16 crucial distinction. Any departure from the distinction on
17 government action versus private action will get us into
18 constitutional difficulty. It will get us into problems with
19 excessive entanglement as we try to determine what students
20 are doing at their meeting. Are they too religious at this
21 meeting, are they talking too much about religion, do they
22 have an invocation, that sort of thing.

23 It will, furthermore, put us in the problem of having
24 to tell these students that we cannot allow your meeting because,
25 you see, if we have a neutral policy, then somebody might think

1 that we are sponsoring your activity. So, we can't have a
2 neutral policy. We have to have a non-neutral policy.

3 QUESTION: Mr. Smart, to get back to the teacher,
4 is there anything in the record to show what the teacher is
5 there for?

6 MR. SMART: Yes, Your Honor. It is clear from the
7 record the teacher was there and was instructed to simply be
8 there in case of an emergency, to make sure the students were
9 there and don't leave, that type of situation.

10 QUESTION: Couldn't that have been accomplished in
11 the hallways?

12 MR. SMART: Couldn't it be accomplished in the hallways?
13 No, Your Honor, they have --

14 QUESTION: I mean, if you stationed yourself in the
15 hallways, you would find out whether or not they have left
16 unless they jumped out a window.

17 MR. SMART: That is right, Your Honor, and that is
18 an excellent point, Your Honor. And, these students met in
19 the cafeteria and the doors -- if there were any doors -- could
20 be secured and the teacher could be in the hallway.

21 QUESTION: Was the teacher monitoring or anything,
22 that is what I want to know?

23 MR. SMART: Your Honor, the teacher was grading tests
24 during this time and I think that is pretty --

25 QUESTION: Just needed, you say, in case something

1 comes up.

2 MR. SMART: Well, Your Honor --

3 QUESTION: Like what?

4 MR. SMART: Well, it is the duty of the School District
5 to keep the students on the premises. If a fight breaks out
6 in any respect or the students start smoking marijuana or
7 something of this nature -- I would hope the students wouldn't
8 do that -- but that -- if there is something like that occurs,
9 the teacher is available to put a stop to that type of activity.

10 The --

11 QUESTION: Mr. Smart, I thought the record indicated
12 that the teacher was there to take the roll to make sure the
13 students were present and then to remain because of disciplinary
14 problems.

15 MR. SMART: There is a reference in the record to
16 the teacher taking the roll, although I think that what actually
17 happened was that the students signed a roster in actuality.

18 The school has a practice of having a teacher or
19 school employee present in all areas of the building where
20 there are students. There are teachers stationed in the
21 hallways between periods and during this activity period.
22 That doesn't mean they are monitoring with the speech of the
23 students in the hallway or censoring the speech of the students,
24 it simply means that they are there to take care of any need
25 that might arise and to keep the students on the premises.

1 QUESTION: Mr. Smart, in the Appendix, pages 95 and
2 96, which is a deposition apparently, there is a question:
3 "Do you know of any -- are there any school board policies
4 or regulations requiring adult supervision of student clubs
5 or student groups?

6 Answer: "It doesn't need to be, it's covered fairly
7 adequately in state law. Student groups must be supervised
8 by a professional employee of the commonwealth."

9 As I understand your answer, you are interpreting
10 the word "supervision" to mean just presence.

11 MR. SMART: That is my understanding, Your Honor.

12 QUESTION: Nothing else, just be there.

13 MR. SMART: I think that fits the record in this
14 case.

15 QUESTION: Hardly the normal definition of supervision,
16 is it?

17 MR. SMART: Well, Your Honor, I think that if you
18 look at the purpose of the activity period, it is not a curricular
19 activity period, it is an extra-curricular period, and --

20 QUESTION: But, what is the situation. I don't think
21 you answered Justice Stevens' question. Does this hour count
22 toward the required number of hours for the school to operate?

23 MR. SMART: It is my understanding that it does.
24 However, I would urge on the Court the fact that the School
25 District itself calls these periods extra-curricular and I

1 think the curricular and the non-curricular --

2 QUESTION: Well, if it is required, what importance
3 is the nomenclature the School Board puts on it as required
4 or not?

5 MR. SMART: Well, I think the curricular/non-curricular
6 distinction is a distinction this Court has used in the past.
7 For instance, in the School Library case, the Board of Education
8 of Island Trees School District versus Pico the Court did
9 not look at the hours the students had to be at the school.
10 The Court drew the distinction between the curricular activities
11 and the non-curricular activities.

12 And, the position of this Court has been that students
13 have free speech rights in the public school. Our view of
14 what the First Amendment requires in a public school is not
15 a highly regimented, dictatorial type of situation outside
16 of the classroom. When students are in the hallways or in
17 self-initiated activities or in the cafeteria, they are able
18 to exercise free-speech rights.

19 The school created that right here. All we are asking
20 is that you not exclude one category, the religious student,
21 from participation in that right simply because of the
22 religiousness of it.

23 The Court has always held religious speech to the
24 same protection as other forms of speech.

25 Mr. Chief Justice, if I could, I would like to reserve

1 my remaining time for rebuttal.

2 CHIEF JUSTICE BURGER: Very well.

3 Mr. Fried?

4 ORAL ARGUMENT OF CHARLES FRIED, ESQ.

5 AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

6 MR. FRIED: Thank you, Mr. Chief Justice, and may
7 it please the Court:

8 The federal interest in this case is direct and sub-
9 stantial. If the Court of Appeals is correct and the
10 Respondents are correct that the Establishment Clause forbids
11 what these students chose to do, wanted to do, that the school
12 authorities were perfectly willing to have them do until the
13 lawyer said otherwise, if the Court of Appeals is correct,
14 then the subsequently enacted Equal Access Act is under grave
15 constitutional doubt.

16 QUESTION: Mr. Fried, may I ask if the federal interest
17 would be adequately satisfied by a decision that the Appellant
18 here didn't have standing to appeal and the judgment of the
19 Court of Appeals was vacated?

20 MR. FRIED: The doubt which the Court of Appeals
21 has raised about the act would still be there. The decision
22 itself would have been vacated and we would have to wait another
23 case in which the matter would be litigated.

24 QUESTION: But, you wouldn't have any doubt about
25 how it would come out in the Third Circuit, would you?

1 MR. FRIED: I would not, sir.

2 The case is a puzzle.

3 QUESTION: I am not sure of what your answer is.

4 You don't think the federal interest would be adequately
5 vindicated by vacating the decision?

6 MR. FRIED: The cloud would still be there, Justice
7 Stevens.

8 QUESTION: So, you would rather have an advisory --

9 MR. FRIED: On the jurisdictional point, Justice
10 Stevens, we do discuss that on page five of our brief. It
11 is fairly intricate.

12 I would like to proceed to the rather puzzling point
13 in the Court of Appeals decision. One wonders why in this
14 case we have had the new notion introduced that free speech
15 has got to be balanced against the Establishment Clause and,
16 indeed, that free speech must yield to the Establishment Clause.

17 This case is not like Wallace and Jaffree last term
18 or Stone v. Graham where the Court could point to a state statute
19 which the Court concluded sought by direction or indirection
20 to endorse religion.

21 And, indeed, this case is easier, should be viewed
22 as easier than its older twin brother, Widmar against Vincent,
23 because in Widmar the state had reasons of its own, quite
24 apart from the federal Establishment Clause, for wishing to
25 limit the access of those students to their religious activities.

1 Here, the controverted action -- the controverted
2 activity was entirely student initiated and there was no state
3 objection apart from the lawyer's objection based on the federal
4 Establishment Clause.

5 So, here we have no endorsement of religious and
6 we have no conflict with a substantive state educational
7 policy.

8 If you compare this case to cases of incidental,
9 but permissible state involvement, tax exemption in Walz, school
10 books and text books for parochial school students, or the
11 use of the mall for a papal mass, one sees that the objective
12 involvement of the state is virtually negligible.

13 So, how is it that this case is thought to present
14 these agonizing constitutional difficulties. Only on one premise
15 and that is that high school students are different. There
16 is the fear that unlike the rest of us high school students
17 are unable to discern the difference between neutrality and
18 endorsement. That is the fear which moved the Court of Appeals
19 in its decision and that is the fear which is raised by the
20 Respondents and the amici in this case.

21 Now, whether that fear is justified, whether high
22 school students, indeed, are so immature that they cannot make
23 the distinctions that the rest of us make was a question which
24 was specifically addressed by Congress. Hearings were held,
25 testimony was taken, materials were examined. And, Congress

1 concluded that high school students -- secondary school students
2 was the word of the statute -- are sufficiently mature to make
3 the same distinctions that the rest of us make, that all of
4 us have to make when that papal mass was held on the mall,
5 to distinguish between state endorsement and state neutrality
6 towards religion.

7 And, this Court has consistently held, most recently
8 in Rostker and Goldberg, that where Congress has made a determi-
9 nation of a controverted matter of general fact, that disposition
10 is entitled to the very highest degree of deference.

11 This case cannot be affirmed without controverting
12 that congressional judgment about the maturity of secondary
13 school students and rejecting the major premise of the Equal
14 Access Act.

15 That is why I say the federal interest is direct
16 and substantial.

17 Now, once that factual premise is accepted, high
18 school students do understand the difference between neutrality
19 and endorsement, this becomes the easiest of cases for we are
20 far from any actual endorsement of religion in this case.

21 If the Court has no further questions, I thank you
22 for its attention.

23 QUESTION: I do, Mr. Fried, if you have a moment.
24 You pointed out that this activity was entirely initiated by
25 the students. To what extent was that point litigated in

1 the court below? Did the Defendants take any discovery from
2 the Plaintiffs of any kind or put in any evidence or did they
3 just more or less go along with the Plaintiffs' case?

4 MR. FRIED: The Petitioners in this case made --

5 QUESTION: Petitioners -- I am sorry, go ahead.

6 MR. FRIED: Petitioners made that allegation and
7 it was not controverted and it was the basis for the District
8 Court's judgment and for the judgement of the Court of Appeals.

9 QUESTION: Was any pleading filed other than the
10 one answer by the School Board as an entity?

11 MR. FRIED: Not that I am aware of.

12 MR. FRIED: Mr. Youngman didn't take any active part
13 in the trial, is that correct?

14 MR. FRIED: Not that I am aware of.

15 QUESTION: He surfaced at the time of the notice
16 of appeal.

17 MR. FRIED: I am not sure of the answer to that,
18 Justice Stevens.

19 QUESTION: Mr. Fried, I know that you passed over
20 the standing of jurisdiction question and referred to the
21 passage in the Solicitor General's brief on the subject. Is
22 it your view that a student who does not allege a desire to
23 attend a Petros meeting has standing to complain about the
24 fact that the school is holding such meetings or permitting
25 them if nothing else appears?

1 MR. FRIED: A student may allege an injury of a
2 constitutional dimension if that student alleges that the going
3 on of such activities in his school is, as it were, constitutionally
4 offensive to that student.

5 But, I should point out that in this case the Petros
6 students are still seeking to meet and the School Board is
7 still preventing them from meeting.

8 QUESTION: But, we don't know that any of them are
9 before us, do we?

10 MR. FRIED: Of the Petros students?

11 QUESTION: Right.

12 MR. FRIED: I believe that the Petros students are
13 included among the class of Petitioners, Justice O'Connor.

14 QUESTION: All right. But, on the other side, where
15 we are concerned about Mr. Youngman's standing?

16 MR. FRIED: I think the way to put that concern to
17 rest would be to realize that the School Board is still preventing
18 Petros from meeting. True, it is acting like a disinterested
19 stakeholder. They are saying just tell us what we should do
20 and we will do it, but as a stakeholder, they are currently
21 precluding Petros from meeting and that, I should think, would
22 be sufficient to create a case of--

23 QUESTION: Mr. Fried, were they doing that at the
24 time the appeal was taken? They were not as I understand the
25 record. They permitted them to meet.

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MR. FRIED: But, after the appeal and at this moment --

QUESTION: But, at the time the appeal was taken, what was the controversy? Who was fighting with whom? Was there any allegation that any non-Petros child was offended by these meetings?

MR. FRIED: Mr. Youngman, I believe, at that time was claiming on his behalf as a parent --

QUESTION: Where in the record do you find that?

MR. FRIED: I cannot point you to the section of the record. I believe that the record indicates that Mr. Youngman is a parent at the school and a former member of the School Board.

Thank you.

CHIEF JUSTICE BURGER: Mr. Youngman?

ORAL ARGUMENT OF JOHN C. YOUNGMAN, JR., ESQ.

ON BEHALF OF THE RESPONDENTS

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

I would like to read to you the first paragraph of the complaint in this case.

"This is an action for declaratory judgment and permanent injunction, brought by students in the Williamsport High School, through the parents of these students who are minors, and on behalf of all others similarly situated,

1 against the Williamsport Area School District, hereinafter,
2 'the District', the Superintendent of the District, The President,
3 and each member of the School Board of the District, in their
4 individual and official capacities."

5 I was sued in my individual as well as my official
6 capacity.

7 QUESTION: And, did the judgment of the District
8 Court grant any relief against you in your individual capacity?

9 MR. YOUNGMAN: That is still to be decided, Justice
10 Stevens.

11 QUESTION: Well, if one reads the judgment, one cannot
12 find any relief against you as an individual.

13 QUESTION: Well, you got a declaratory judgment.
14 There was a declaratory judgment entered, wasn't there?

15 MR. YOUNGMAN: That is correct.

16 QUESTION: And a judgment you didn't agree with.

17 MR. YOUNGMAN: That is right.

18 QUESTION: So, if you were going to obey the law,
19 you were stuck with it.

20 MR. YOUNGMAN: Unless I appealed.

21 QUESTION: Yes.

22 QUESTION: And, if the judgment of the Court of Appeals
23 in this case were reversed and the thing should go back to
24 the District Court, saying that the procedure were consistent
25 with the Constitution, is there any possibility then that the

1 District Court might grant further relief against you such
2 as attorney's fees?

3 MR. YOUNGMAN: That is still to be decided. There
4 is a petition for attorney's fees against me and I contend
5 that I am not liable individually for attorney's fees.

6 QUESTION: You must be relying on Kentucky against
7 Graham.

8 MR. YOUNGMAN: What?

9 QUESTION: You must be relying on Kentucky against
10 Graham which clearly makes you not liable for fees.

11 MR. YOUNGMAN: That is right.

12 Furthermore, I wish to correct a misimpression. My
13 son, who is my youngest, is a junior in the high school at
14 the present time and not in the ninth grade.

15 I would like to -- Furthermore, when standing became
16 a question in this case, a successor of mine, who also happens
17 to be my minister, agreed to become Respondent in this case.
18 Thus, I think there is a case for controversy. I think it
19 exists now and the notion that --

20 QUESTION: Well, how did he ever become one?

21 MR. YOUNGMAN: Through Supreme Court Rule 28 as a
22 successor in interest who agrees with my position.

23 QUESTION: So, you think that here he is now a
24 Respondent?

25 MR. YOUNGMAN: That is rsight.

1 QUESTION: And, that is in his capacity as a member
2 of -- in his official capacity of --

3 MR. YOUNGMAN: That is right. That is in his official
4 capacity.

5 QUESTION: And, he can speak for the entire Board?

6 MR. YOUNGMAN: No, that isn't the point. But, a
7 dissenting Board member has a right to speak too and has a
8 right to challenge this adjudication.

9 QUESTION: And to impose a liability for fees and
10 costs on the Board itself, one person can do that?

11 MR. YOUNGMAN: Well, I think I have the right to
12 oppose that myself and I think --

13 QUESTION: I say impose it. Do you know of any other
14 situation in which one member of a board has been able to
15 litigate on behalf of the entire board when the rest of the
16 board takes the opposite position?

17 MR. YOUNGMAN: No, I don't presume to litigate on
18 behalf of the entire Board. I took the appeal as one member
19 of the Board who dissented from the decision not to appeal.

20 All right. I would like to draw the Court's
21 attention --

22 QUESTION: May I just ask one more question and then
23 I won't take any more of your time?

24 MR. YOUNGMAN: Yes.

25 QUESTION: Prior to your filing the Notice of Appeal

1 in this case, had you independently taken any action or had
2 anybody on the School Board taken any action to resist the
3 claim other than to file an answer?

4 MR. YOUNGMAN: Yes. We had counsel employed to fight
5 this case.

6 QUESTION: By fighting, did they take any depositions?

7 MR. YOUNGMAN: Yes.

8 QUESTION: Whose deposition did they --

9 MR. YOUNGMAN: They took the deposition of the
10 principal and --

11 QUESTION: The Plaintiffs' lawyer took the deposition
12 of the principal.

13 MR. YOUNGMAN: Yes.

14 QUESTION: Did the Defendants' lawyer take any
15 depositions?

16 MR. YOUNGMAN: No, but the Defendants' lawyer procured
17 affidavits of both the principal and the superintendent, sub-
18 mitted papers and briefs, and argued the motion, the cross-motion
19 for summary judgment.

20 So, yes, they did participate and the Defendants
21 did participate.

22 I would like to call the Court's attention to the
23 Joint Appendix. At the bottom of page 63, Question: "What
24 is the policy of the Williamsport School District regarding
25 student clubs and student meetings on public school grounds?"

1 Answer: "Policy has been that any group of students
2 that wishes a meeting within the confines of the building must
3 meet with a faculty advisor."

4 The point of this is that the forum as it existed,
5 that Williamsport High School, prior to the decision of the
6 District Court in this case, was that these clubs had advisors.

7 What is an advisor? I direct your attention to page
8 83 of the record.

9 QUESTION: Record of Appendix?

10 MR. YOUNGMAN: Joint Appendix, excuse me.

11 Question: "What sort of adult supervision does the
12 school district generally require of student groups, you might
13 have answered that before, but I don't remember."

14 Answer: "Any group of students that meets within
15 the confines of the school district meets with an advisor,
16 a paid coach or somebody of that nature, somebody that is on
17 the faculty or somebody that is being hired by the Williamsport
18 Area School District to perform the function."

19 And, then on down the page, "Generally speaking,
20 do adult supervisors participate in the student group meetings
21 or activities?"

22 Answer: "I would say yes. If they are an advisor,
23 I would expect them to be there as somebody who's going to
24 help the students."

25 Question: "Are there any student clubs for which

1 the faculty advisor is instructed not to participate?"

2 Answer: "Not to my knowledge."

3 And, then a question is "Are these advisors hall
4 monitors?"

5 Answer: "I do not look upon advisors as hall monitors.
6 I think they are there to help the activities."

7 That was the forum as it existed at Williamsport
8 High School prior to the decision of the District Court in
9 this case.

10 Petros did not meet until after the District Court --
11 other than informally -- until after the District Court decided
12 this case and issued its order.

13 So, the District Court in this case altered the forum
14 as it existed.

15 The relevance of that is that it is our position
16 that the Petitioners must live with the forum as it existed
17 and that forum was to have advisors. Why? Because the School
18 Board wants to have structure and direction given in the
19 educational process and that occurred in these clubs before
20 the District Court's order in this case and it is our contention
21 that that should occur and that by the District Court's altering
22 the forum it puts -- in effect, gives the Petitioners the right
23 to negotiate as to how the forum will be and that is not
24 consonant with the basic purpose of public education.

25 QUESTION: Mr. Youngman --

1 MR. YOUNGMAN: Yes.

2 QUESTION: You gave Joint Appendix 33 as a source.

3 I wonder if that could be --

4 MR. YOUNGMAN: Eighty-three, excuse me.

5 QUESTION: Eighty-three.

6 MR. YOUNGMAN: Eighty-three, Mr. Chief Justice.

7 Then, on page 70, question: "If there were a group
8 of students who came to the school, whether they were in a
9 club or not, if they came into the school, are they required
10 to be under the direct supervision of either a principal or
11 a faculty member?"

12 Answer: "If the students are meeting as a club,
13 such as the Key Club, their advisor would be required to meet
14 with them. If they are not meeting as a club group, or are
15 just in the building, we have principals and teacher monitors ..."

16 QUESTION: Mr. Youngman, why are you reading us these
17 excerpts? Is it to show that the District Court misconceived
18 the factual setting?

19 MR. YOUNGMAN: That is right.

20 QUESTION: Did the Court of Appeals disagree with
21 any of the District Court's factual --

22 MR. YOUNGMAN: The Court of Appeals did not disagree,
23 however, we believe that the Court of Appeals misread the
24 nature of the forum.

25 QUESTION: Well, then, you are asking us to upset

1 a finding made by the District Court and not upset by the
2 Court of Appeals?

3 MR. YOUNGMAN: That is correct. That is correct.

4 QUESTION: And, if we don't do that, do you lose
5 or do you have other grounds?

6 MR. YOUNGMAN: We certainly have other grounds, Justice
7 White.

8 If there is -- It is our position here that there
9 is an Establishment violation, whether or not there was a public
10 forum or not, and that is based on the nature of the forum
11 as it existed at Williamsport High School.

12 We believe that when an advisor is present to help
13 the students, this objectively is sponsoring and advancing
14 religion.

15 In addition, I would point out on page 76 of the
16 record with respect to this advisor the answer of Mr. Newton,
17 the Principal, to Mr. Seevers' question.

18 "Do you make, you and the other principals or
19 supervisors, actively check, attend, periodically, student
20 groups to make sure that the speech which is going on is what
21 you consider proper?"

22 Answer: "I would say that the very rule that we
23 have with regard to any group must meet with a faculty advisor
24 gives us direct input as to what is going on."

25 And, then, there is a stipulation in this case, found

1 on page 144 of the Appendix with respect to this advisor
2 situation.

3 There is -- Reading in the middle of Paragraph One,
4 Faculty Advisors: "There is, however, an unwritten policy
5 of the Williamsport Area High School that each student club
6 have an adult advisor who is generally a faculty member or
7 another employee of the school district. In some circum-
8 stances, parents of student club members serve as adult
9 advisors."

10 And, then in the next paragraph: "Selection is based
11 upon the nature of the particular club and corresponding back-
12 ground of the faculty member. Although students may request
13 a particular adult advisor, the principal and his staff have
14 final approval as to whom will serve as an advisor to a
15 student club."

16 Then, I would like to point out on page 65 of the
17 Appendix that the nature of the forum as it existed in the
18 question: "Are there any political clubs such as the Young
19 Democrats or Young Republicans, something of that nature."

20 "No."

21 And, --

22 QUESTION: Now, do you mean by that, if you will
23 clear it up for me, that if the faculty member was there they
24 can participate in the debate of the students on a political
25 issue?

1 MR. YOUNGMAN: And do. That is correct, Chief
2 Justice.

3 QUESTION: So, if the faculty advisor had republican
4 leanings, he could -- or she -- could influence the line of
5 discussion, is that what you are suggesting?

6 MR. YOUNGMAN: Well, there was no Republican Club.

7 QUESTION: I am giving you a hypothetical.

8 MR. YOUNGMAN: If --

9 QUESTION: They could have one, could they not,
10 a Republican or a Democratic Club?

11 MR. YOUNGMAN: They could have had one, but that
12 was not the nature of the forum as it existed at Williamsport
13 High School.

14 QUESTION: But, we are concerned here with the scope
15 of the authority as well as what really took place. So, clear
16 that up for me, if you will. Could a group of students get
17 together and say we want to meet with this other group who
18 are Democrats and we will call ourselves Republicans and have
19 a debate. They could do that under this arrangement?

20 MR. YOUNGMAN: I am not sure. I just don't know
21 what would have happened in that case.

22 QUESTION: Well, can you suggest anything in the
23 program that prohibits that?

24 MR. YOUNGMAN: There is nothing except that the clubs
25 that were in this forum were uncontroversial and I believe

1 that the School Board would not have opened this forum
2 generally to First Amendment speech on the ground that they
3 would not have wanted to promote controversy and divisiveness.

4 The purpose of the forum was to examine -- First
5 of all, to expand on directly curricular activities.

6 QUESTION: Do you suggest the school performs its
7 function of getting young people ready for citizenship if it
8 would forbid a group to get together, one asserting a democratic
9 position and one asserting a republican position and perhaps
10 someone asserting a socialist position? Do you think they
11 could prohibit that?

12 MR. YOUNGMAN: If there were a non-public forum,
13 I believe, yes. That is my position. And, I think they could
14 prohibit that absent a public forum. If there was a public
15 forum, then, no. The answer to that is no.

16 I would also like to call the attention of the Court
17 to the Joint Appendix at page 104, the second paragraph, which
18 is an affidavit of Wayne E. Newton, the Principal of the school,
19 the last paragraph prior to III.

20 "Any student activity or club which is considered
21 to contribute to the intellectual, physical or social
22 development of the students and is otherwise considered legal
23 and constitutionally proper would likely be approved as an
24 officially sponsored and sanctioned school activity."

25 That was also the nature of the clubs. They were

1 approved, they were sponsored, and that is the nature of the
2 public school. There is structure, there is direction, and
3 people understand that what goes on there is approved and
4 sponsored by the district. That is the nature.

5 QUESTION: Let me come back to this other question
6 because I am perplexed by your responses.

7 Suppose a group of students said we want to have
8 one of these seminars, one of these gatherings, in the school
9 in this period to discuss the whole problem of the budget
10 deficit. We kids -- the children would say to the faculty --
11 We kids are going to have to pay that and we would like to
12 have a debate about it. Would that be permitted?

13 MR. YOUNGMAN: My reaction is that that would be
14 permitted.

15 QUESTION: How could you discuss that --

16 MR. YOUNGMAN: But, it would be -- The point is it
17 would have an advisor there and would be subject to structure
18 and direction from the School District.

19 We, as a School Board, were not going to give up
20 our right to give structure and direction to the education
21 that was going on in the public school. If that had happened,
22 believe me, the parents would have been in on us the next day
23 complaining loudly and bitterly about having a situation where
24 there was no direction being applied at the school.

25 QUESTION: What if the student group wasn't going

1 to have a debate about the budget but it was students against
2 taxation and they wanted to have their meeting like all the
3 other groups around and that is how they can oppose taxation?

4 Now, suppose the school approved, sent an advisor
5 there, take the roll, do you think that the public would think
6 that the views expressed at that meeting were the school's
7 views?

8 MR. YOUNGMAN: I don't think so. I don't think so.

9 QUESTION: What makes you think that the ordinary
10 member of the public would think that the views expressed at
11 this -- what is the name of the group, Petros?

12 MR. YOUNGMAN: Petros.

13 QUESTION: Why would the public think that the views
14 expressed there were the school's?

15 MR. YOUNGMAN: The problem isn't the public, Justice
16 White.

17 QUESTION: What is it?

18 MR. YOUNGMAN: It is the students themselves.

19 QUESTION: Well, all right, the students. Do you
20 think the students in my other example -- Do you think the
21 other students would think the school was espousing the views
22 expressed at that meeting against taxation of any kind?

23 MR. YOUNGMAN: If this was the Anti-Taxation Club
24 and it had an advisor --

25 QUESTION: Yes.

1 MR. YOUNGMAN: -- that activity would be viewed by
2 the students at the high school as being approved by the --

3 QUESTION: You say that too. That the students would
4 think the school was fundamentally endorsing a cancellation
5 of --

6 MR. YOUNGMAN: Yes.

7 QUESTION: -- taxation and even though the school's
8 life depends on it.

9 (Laughter)

10 QUESTION: That is kind of silly, isn't it?

11 MR. YOUNGMAN: Well, it is silly until you consider
12 the nature of public high schools. We educate kids that run
13 the gambit from educable mentally retarded to gifted and the
14 perceptions of those kinds of children, especially at the lower
15 end of the intellectual scale, are very much more subject to
16 impressionability than -- It seems ridiculous to think that
17 that would happen, but with that kind of child --

18 QUESTION: Do you think the standards should be set
19 to gauge to the lowest common denominator, the retarded? That
20 is what you seem to suggest.

21 MR. YOUNGMAN: No, Mr. Chief Justice, but some
22 accommodation has to be given to that situation, just as I
23 don't think you should gear the standard to the highest level,
24 because you span the gambit. That is a distinction from the
25 university situation where people are there, first of all,

1 who aren't compelled to be there, and, secondly, who have some
2 intellectual ability to begin with and are admitted on that
3 basis.

4 QUESTION: Well, what if in the next room beside --
5 along side the group of Against All Taxation is a group that
6 is -- It is called the Committee for Fair Taxation and they --
7 supporting taxation. Now, which group is another student going to
8 think the school is endorsing?

9 MR. YOUNGMAN: There --

10 QUESTION: You mean some might think one and some
11 might think the other.

12 MR. YOUNGMAN: You have opposites in the forum and
13 there it is more difficult, I grant. But, some students would
14 think that the school was endorsing one and some the other,
15 unless they also understood that both groups were there and
16 understood the purpose of both groups.

17 QUESTION: Well, in judging the effect of a particular
18 course of conduct for Establishment Clause purposes, wouldn't
19 we apply an objective test that would ask what a reasonable
20 student would think?

21 MR. YOUNGMAN: Well, you would apply an objective
22 test, that is true. That is one of the tests you would apply,
23 but you would also apply the subjective test, which is what
24 would the students, as they exist at the high school,
25 reasonably perceive from the activity that was going on and

1 there --

2 QUESTION: A reasonable person's standard, not one
3 that is geared either to the high or the low end of the
4 spectrum or to individual problems.

5 MR. YOUNGMAN: But, I don't think you can entirely
6 discount the fact that you do have the low end of the spectrum
7 in this particular situation. And, that is the nature of public
8 education. It educates everyone.

9 QUESTION: Mr. Youngman, in defending this case,
10 was any effort made to bring out evidence that would support
11 the suggestion you are making that some of the high school
12 students would perceive endorsement? There is nothing in the
13 record to support that, is there?

14 MR. YOUNGMAN: No.

15 QUESTION: The Court of Appeals certainly made a
16 lot of it.

17 MR. YOUNGMAN: That is right. And, I think that
18 that is something that I think this Court has to determine
19 whether it should take judicial notice of.

20 QUESTION: Even though nobody in the trial of the
21 case thought it important enough --

22 MR. YOUNGMAN: Even though the record doesn't have
23 expert testimony in this regard.

24 I will say this, that the record in the Equal Access
25 Act is in some ways equally deficient. That is I am not

1 sure that this is the kind of thing that can be quantified
2 that way. It is a matter of if you brought up students or
3 brought up kids between the ages of 14 and 18, you know they
4 are impressionable.

5 QUESTION: But, Mr. Youngman, isn't it true that
6 this program was permitted to operate for about a year after
7 the District Court decision and there is nothing in the record
8 to suggest anybody was even remotely unhappy about it in any
9 way, got any misperceptions or anything. Nobody thought to
10 supplement the record after the program had been going for
11 a year either.

12 MR. YOUNGMAN: That is true. And, I would suggest
13 that one of the reasons for that is that this matter was in
14 litigation and that you did not have another religious club
15 or a group of religious clubs as I feel you would have to have
16 which will inevitably result if this -- if the decision of
17 the Circuit Court is reversed.

18 That is my reasoning, Justice Stevens, for that --

19 QUESTION: Does the record tell us anything about
20 the attendance during that year, how popular the group was?

21 MR. YOUNGMAN: The record says that the club did
22 not exceed 45 members.

23 QUESTION: That was at the very first meeting.

24 MR. YOUNGMAN: That is right.

25 QUESTION: There were about 20 at the second meeting

1 and they met for a year. Do we know how many people during
2 the year --

3 MR. YOUNGMAN: No, the record doesn't show how many
4 met.

5 QUESTION: We don't know if it is two or three or
6 twenty or thirty.

7 MR. YOUNGMAN: You don't know that from the record.
8 I suspect it was between twenty and forty-five, a relatively
9 small number.

10 But, the fact of the matter is this matter was in
11 litigation and I think that there was an inhibiting effect
12 of that and that is why you haven't had the others come in
13 and ask for access which I fully expect to happen if this case
14 is reversed.

15 QUESTION: May I ask this question? Do you agree
16 with the Court of Appeals that the only difference between
17 this case and Widmar is the age of the students?

18 MR. YOUNGMAN: No. I think Widmar is distinguished
19 also by the very nature of public schools as opposed to the
20 university.

21 QUESTION: Without regard to the age of the children?

22 MR. YOUNGMAN: Without regard to the age, that is
23 right. We span the gambit, as I have said.

24 QUESTION: In what respect?

25 MR. YOUNGMAN: In intellect from educably mentally

1 retarded to gifted.

2 QUESTION: That has to do with age though, maturity.

3 MR. YOUNGMAN: Well, it has to do with age, but it
4 also has to do with maturity regardless of age too, and that
5 is the point.

6 QUESTION: The test turns in this case solely on
7 the question of the age of the pupils?

8 MR. YOUNGMAN: No, it also turns --

9 QUESTION: The Court of Appeals said that explicitly.

10 MR. YOUNGMAN: Yes, but I don't believe that that
11 should be the test. I think it should turn on the nature of
12 the public school as opposed to the university.

13 QUESTION: Who finances the University of Missouri,
14 taxpayers, the same as the grade school and high school?

15 MR. YOUNGMAN: As I understand it, the taxpayers
16 did finance the university.

17 QUESTION: It is a public school?

18 MR. YOUNGMAN: That is correct, that is correct,
19 but the university situation is different from the secondary
20 and elementary education provided in the compulsory attendance
21 setting and there is just no way to avoid that.

22 QUESTION: Mr. Youngman, suppose we reverse the Court
23 of Appeals and the School Board says, well, even if this is
24 not an establishment, we nevertheless don't want the group
25 to meet and we are perfectly free to do that just as our own

1 decision. Would the District Court's decision stand as a bar
2 to --

3 MR. YOUNGMAN: District and Circuit Court's decision
4 with respect to the open forum question would mean that any
5 First Amendment club has a right to be in that forum.

6 QUESTION: So, the free-speech interest would get
7 them into the school regardless of the wishes of the school?

8 MR. YOUNGMAN: That is correct.

9 QUESTION: At least that is what the two courts below
10 said.

11 MR. YOUNGMAN: That is right. You would leave no
12 discretion to the School Board in the running of the educational
13 process in that particular forum.

14 CHIEF JUSTICE BURGER: Your time has expired now,
15 Mr. Youngman.

16 MR. YOUNGMAN: Thank you.

17 CHIEF JUSTICE BURGER: Do you have anything further,
18 Mr. Smart?

19 MR. SMART: A few comments, Your Honor.

20 ORAL ARGUMENT OF JAMES MADISON SMART, JR., ESQ.

21 ON BEHALF OF THE PETITIONERS -- REBUTTAL

22 MR. SMART: Mr. Chief Justice:

23 First of all, I would like to disagree with Mr.
24 Youngman about the discretion of the school administrators.
25 I view the decision of the District Court in this case resting

1 on the fact that the Establishment Clause was the only reason
2 asserted for denying this group an opportunity to meet and
3 I think it would be a different case --

4 QUESTION: Would you say that under the -- Would
5 you say that if we reverse the Court of Appeals the School
6 Board could nevertheless keep your group out?

7 MR. SMART: I think it would be an entirely different
8 case.

9 QUESTION: Well, that isn't what I asked you.

10 MR. SMART: Yes. I think they could keep it out
11 if they had --

12 QUESTION: Do you mean despite their free-speech
13 interest?

14 MR. SMART: No. Only if they had a structured
15 activity period, only if they had a --

16 QUESTION: Well, yes, there is a structured activity
17 period, isn't there?

18 MR. SMART: Yes. And, if it is predetermined what
19 the categories are in their curricular, then they could keep
20 them out.

21 QUESTION: Well, if there is a forum in the school,
22 you would think your group should be able to get in. You would
23 think the First Amendment would require them to get in.

24 MR. SMART: Yes, Your Honor, we would argue that.

25 QUESTION: Well, what if the school policy were that

1 we will have an activities period and it is open only to secular
2 groups to meet. Can the school do that, not considering the
3 Act passed by Congress that might superimpose some different
4 standard today. As a matter of constitutional doctrine, could
5 the school do this?

6 MR. SMART: Your Honor, I do not believe that they
7 could articulate a valid reason for having only secular activities
8 once they have opened the forum.

9 I also think it would create Establishment Clause
10 problems with regard to excessive entanglement of determining
11 what is religious and what is not religious as the Court
12 discussed in the Widmar case.

13 QUESTION: I gather they would simply have to abandon
14 the whole program to keep your group out.

15 MR. SMART: Your Honor, I think they would not have
16 to abandon the whole program. I think they have a choice of
17 curricular-related groups that are an extension of the
18 curriculum, or letting the students decide and if they let
19 the students decide, then they can't keep the religious group
20 out.

21 And, all we are saying here is we believe they have
22 opened the forum and we are just asking to be included in that.

23 QUESTION: Mr. Smart, do you take the position your
24 clients have the right to use the bulletin boards as the other
25 activity groups do?

1 MR. SMART: No, Your Honor, that is not in this case.
2 Our clients have never sought that right.

3 QUESTION: I know they haven't sought it, but assume
4 they did seek it. Would they not have the same right as others
5 and, if not, why not?

6 MR. SMART: If our students had sought that right,
7 then I think this Court would want to know more about the details
8 of how that is administered, who puts the notices up there,
9 who determines what is up there, and that sort of thing.

10 We would argue that if it is the students putting
11 the notices up there, then the concept of neutrality, if everyone
12 realizes this is the students' bulletin board and they can
13 put whatever they want to up there, then the concept of neutrality
14 requires that they have equal access to that bulletin board.

15 If there were more government involvement in the
16 board, then it might be a different question.

17 QUESTION: Well, Mr. Smart, under your view, would
18 the Board have to permit some group such as Sons of Satan or
19 whatever it might be that would be entirely anti-religious
20 to come and meet?

21 MR. SMART: Yes, Your Honor, the School Board would
22 have to permit that.

23 QUESTION: Or a neo-Nazi party?

24 MR. SMART: Or a neo-Nazi party unless the School
25 Board can articulate a compelling interest. And, the School

1 Board would probably have two options in that regard. Number
2 one, a hate group or something of that nature might present
3 a compelling state interest to keep them out or a school district
4 could always go to a parental consent format if it was causing
5 a lot of political turmoil for the school board to have such
6 a group.

7 I think that would be an easier way. It would keep
8 the government from prescribing what is orthodox. I think
9 the issue is --

10 QUESTION: Did both parties here agree that in this
11 instance an open forum had been created?

12 MR. SMART: Did both parties agree?

13 QUESTION: Both sides.

14 MR. SMART: Both sides in the District Court I think,
15 in effect, agreed that at least that was not contested.

16 QUESTION: So, perhaps it isn't necessary in this
17 case to wrestle with all those problems.

18 MR. SMART: That is exactly right.

19 QUESTION: The only barrier is the Establishment
20 Clause now?

21 MR. SMART: The only thing we are asking this Court
22 is to decide that our group does not face any additional barrier
23 because of the Establishment Clause.

24 QUESTION: But, wasn't an issue in the Court of Appeals
25 whether any kind of an open forum had been created at all,

1 because the Court of Appeals certainly spent a lot of time
2 discussing it and saying, yes, there is one.

3 MR. SMART: That was certainly argued by Mr. Youngman
4 in the Court of Appeals that there was no public forum created.

5 QUESTION: Exactly. I suppose, in support of the
6 judgment below, he could argue it here.

7 MR. SMART: Yes, Your Honor, he could argue that.
8 The fact is that the only reason that the School District said
9 that we can't meet is because of the Establishment Clause.
10 They did not say, well, we think that this is inappropriate --

11 QUESTION: Mr. Smart, does the record contain the
12 legal opinion on which the School Board relied?

13 MR. SMART: Excuse me, Your Honor.

14 QUESTION: Does the record contain the legal opinion
15 on which the School Board relied?

16 MR. SMART: It does not contain the letter from the
17 attorney, however, we do have a recitation in the record from
18 the Superintendent of what the attorney said.

19 QUESTION: I understand. But, the opinion itself
20 was not put in record?

21 MR. SMART: The opinion itself is not in the record,
22 but it is clear from the record that the opinion of the attorney
23 concerning the Establishment Clause was the only reason and
24 I think that it would be a different case if the school had
25 said it is inappropriate for this reason or that reason or

1 some other reason. I think as lawyers --

2 CHIEF JUSTICE BURGER: Your time has expired.

3 MR. SMART: Thank you, Your Honor.

4 CHIEF JUSTICE BURGER: Thank you, gentlemen.

5 The case is submitted.

6 (Whereupon, at 2:04 p.m., the case in the above-
7 entitled matter was submitted.)

CERTIFICATION

Alderson 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:

#84-773 - MICHAEL BENDER, ET AL., Petitioners V.

WILLIAMSPORT AREA SCHOOL DISTRICT, 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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