

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-104

TITLE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES,
ET AL., Petitioners V. JEWS FOR JESUS, INC., AND ALAN HOWARD
SNYDER, aka AVI SNYDER

PLACE Washington, D. C.

DATE March 3, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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BOARD OF AIRPORT COMMISSIONERS :
OF THE CITY OF LOS ANGELES, :
ET AL., :
Petitioners, :
v. : No. 86-104
JEWS FOR JESUS, INC. AND :
ALAN HOWARD SNYDER, aka :
AVI SNYDER :

-----x
Washington, D.C.
Tuesday, March 3, 1987
The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:09 a.m.
APPEARANCES:
JAMES R. KAPEL, ESQ., Assistant City Attorney,
Los Angeles, California; on behalf of the
Petitioner.
JAY ALAN SEKULOW, Atlanta, Georgia; pro hac
vice on behalf of the Respondents.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

JAMES R. KAPEL, ESQ.,

on behalf of the Petitioners

3

JAY ALAN SEKULOW, ESQ.,

on behalf of the Respondents

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REBUTTAL ARGUMENT OF:

JAMES R. KAPEL, ESQ.,

on behalf of the Petitioners

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1 QUESTION: Mr. Kapel, may I ask a preliminary
2 question or two?

3 There was a resolution passed by the airport
4 board, whatever it's called.

5 MR. KAPEL: Yes, the Board of Airport
6 Commissioners.

7 QUESTION: Was that resolution binding without
8 city council approval?

9 MR. KAPEL: It is binding without city council
10 approval. It does not have a criminal penalty
11 associated with it without the city council approval.
12 So it is a rule --

13 QUESTION: Has the city council ever approved
14 it in fact?

15 MR. KAPEL: No, it has not been presented to
16 the city council. The Board of Airport Commissioners has
17 the power and ability to adopt rules and regulations
18 regarding the use of the airport.

19 They cannot adopt criminal penalties.

20 QUESTION: And in another preliminary inquiry,
21 would the airport be a public forum under California
22 constitutional law?

23 MR. KAPEL: No, I don't believe so. Under
24 California constitutional law, I believe it tracks very
25 closely the federal law in this case.

1 There are some distinctions.

2 QUESTION: How about the Hoffman case making a
3 railroad terminal a public forum?

4 MR. KAPEL: In that case there was no
5 indication that the owner of the property ever attempted
6 to restrict the uses of the terminal facilities.

7 In addition, as a --

8 QUESTION: Was the state law point argued in
9 the courts below?

10 MR. KAPEL: Yes, it was argued. Neither court
11 addressed those issues.

12 QUESTION: Thank you.

13 QUESTION: May I ask a question before you
14 proceed, Mr. Kapel?

15 Has this ordinance ever been enforced against
16 anyone?

17 MR. KAPEL: Yes.

18 QUESTION: Specifically?

19 MR. KAPEL: Yes. It has been enforced from
20 the standpoint that police officers have informed people
21 and requested people to leave, and people have left.

22 The police officers have escorted people out
23 of the buildings and onto the sidewalks.

24 QUESTION: When people have not left, have
25 ,they been prosecuted?

1 MR. KAPEL: They have not been prosecuted.
2 The challenge to this case, and the district court
3 hearing, because of that, the Board continued enforcing
4 its policy; however until the constitutionality was
5 decided, the city attorney's office has not taken
6 injunctive action against the people that violated the
7 policy.

8 QUESTION: So this is a facial challenge?

9 MR. KAPEL: Yes, it is.

10 QUESTION: That means, I take it, that if we
11 disagree with you that it is a public -- if we disagree
12 with you that it's a public forum, what result should
13 accrue?

14 MR. KAPEL: I believe that the determinative
15 issue is the public forum issue.

16 QUESTION: Suppose we're worried about the
17 allegations of unequal enforcement of it?

18 MR. KAPEL: Excuse me, I'm sorry?

19 QUESTION: Suppose we're worried about the
20 allegations of unequal enforcement, the Christian
21 Science reading room, for example, and the advertisement
22 about environmental matters that are alleged to have
23 been in the airport.

24 That issue is not before us?

25 MR. KAPEL: I don't believe that issue is

1 before you, because I believe both of those matters are
2 airport-related matters, or matters the Board could
3 determine were airport related.

4 The Christian Science reading room sounds very
5 bad. However, the issue with regard to our resolution
6 is not the name of the tenant, but the purpose or the
7 activity they're conducting within the terminal
8 buildings.

9 If the Christian Science reading room were
10 merely a religious activity and did not provide an
11 airport related activity, it would not be permitted.

12 If United Airlines wished to conduct a
13 non-airport-related activity, it would not be permitted.

14 QUESTION: What I'm asking is, do we have to
15 reach that? Suppose we find, as you want us to find,
16 that this is not -- that this is not a public forum, but
17 suppose we're also concerned that the rules against
18 First Amendment activity have not been applied
19 even-handedly.

20 What should our disposition be?

21 MR. KAPEL: If you find that there has been
22 viewpoint discrimination, where the Board has picked
23 improperly and decided that an activity is airport
24 related when in fact it isn't, then I believe our
25 resolution should not be enforced until we remedied that

1 situation.

2 QUESTION: And we can make that determination
3 here.

4 MR. KAPEL: Yes, I believe you can.

5 QUESTION: Did the lower court base its
6 decision in part on that?

7 MR. KAPEL: No. The lower district court
8 found that the airport terminal facilities were public
9 forums. They did not specifically indicate traditional
10 or otherwise.

11 The Ninth Circuit --

12 QUESTION: So we wouldn't have to -- and the
13 Ninth Circuit did the same?

14 MR. KAPEL: That's correct. They found that
15 it was a traditional public forum.

16 QUESTION: So if we're worried about these
17 other matters, we could remand and let them decide
18 whether there's been unequal enforcement, couldn't we?

19 MR. KAPEL: Yes, you could.

20 QUESTION: Counsel, is your position one of
21 all or nothing, that it either is a traditional public
22 forum or it is not?

23 Do you have any room at all for what the Court
24 has recognized in some cases, a limited public forum
25 status?

1 MR. KAPEL: There is room for that in this
2 case. However, I believe that it is not necessary to
3 reach that. I believe the non-public-forum issue is
4 determinative.

5 There is no question that speech occurs within
6 the terminal. And there is no question that there are
7 information boards and things like that.

8 Again, those activities, whether they be
9 speech or nonspeech, are airport related and necessary
10 for the operation of the airport.

11 To allow information, so long as the Board
12 limits it to that information that is needed by the
13 travelling public in their travels, I believe it's
14 airport related and permissible in a nonpublic forum.

15 QUESTION: Of course, you have presented
16 nothing by way of evidence to counter-balance the
17 thing. It seems to me you're taking an all or nothing
18 position here. And if you lose, maybe we can't take an
19 intermediate way out, as we have done in some cases.

20 MR. KAPEL: That's true.

21 QUESTION: May I ask, you said airport
22 related, and you said, things needed by the traveller.

23 You don't airport related in terms of
24 necessity, that everything there is absolutely necessary
25 for the traveller. You don't need a Christian Science

1 reading room. Maybe it helps, but -- is that your test?

2 MR. KAPEL: The test is airport related, and
3 it is what the Board has determined aids the travelling
4 public in their travels.

5 The Board has --

6 QUESTION: But not necessary for the traveller?

7 MR. KAPEL: Not absolutely necessary. Clearly
8 it would be possible to operate an airline terminal
9 without food.

10 QUESTION: And without a Christian Science
11 reading room.

12 MR. KAPEL: It is not necessary to board an
13 airplane.

14 QUESTION: However, if it's something like the
15 reading room that provides a place to sit while you're
16 waiting for planes, and maybe to obtain peace of mind
17 before you get up in the storm, or something like that,
18 why wouldn't the literature that is passed out by these
19 people perhaps serve some airport related function?

20 MR. KAPEL: The reading room provides a
21 waiting area that is the same as any other waiting area
22 in the terminal facilities. It's in a little different
23 location, and someone other than the airport is paying
24 for it.

25 People read magazines in that reading room

1 just as they do in any of the waiting rooms.

2 QUESTION: Well, but they read newspapers,
3 which is something to pass the time and occupy the
4 traveller and perhaps give him peace of mind.

5 MR. KAPEL: Absolutely.

6 QUESTION: Why wouldn't reading the literature
7 that these people pass out be airport related in the
8 same sense as reading a newspaper is?

9 MR. KAPEL: I believe reading the literature
10 would be. However, the activity of passing it out --

11 QUESTION: Well, why is that any different
12 than passing -- than offering it for sale by the news
13 vendor?

14 MR. KAPEL: I think it is different, because
15 the Board of Airport Commissioners has determined that a
16 certain amount of space within the terminal should be
17 devoted to loading gates; a certain amount to newstands;
18 a certain amount to --

19 QUESTION: Well, but could they then, just as
20 they have -- and consistently with the general policy
21 decide, this is good health literature that will help
22 the passenger be comfortable if there's a thunderstorm
23 or something; we ought to set aside an area of 10 square
24 feet and let them have a booth to pass it out, just like
25 the Christian Science people can pass out Mary Baker

1 Eddy's writings?

2 MR. KAPEL: Well, the Board of Airport
3 Commissioners does not decide what literature is made
4 available within the terminals. That is up to the
5 concessionaire, or to any lessee that is in the terminal
6 who has leased space for that purpose.

7 QUESTION: No, I understand. But wouldn't it
8 be consistent with the policy, couldn't they have come
9 -- I'm not suggesting they must -- but could they
10 consistently with the policy have said, we think this is
11 good literature that would be helpful for the passengers
12 to read instead of Time Magazine or Science and Health
13 or whatever else it might be?

14 MR. KAPEL: Clearly they could come to us and
15 do that. And clearly they could lease space just like
16 the Christian Science reading room has, if they were
17 willing to provide a waiting area, and were not just
18 there to hand out their pamphlets.

19 If they were providing an airport related
20 service, a waiting area, they could have leased space
21 like anyone else; they could easily --

22 QUESTION: Yes, but you keep going to the
23 waiting area. But isn't the reading activity that the
24 newspaper offered, isn't that also airport related in
25 the same sense, that it's something the traveller wants

1 to do.

2 MR. KAPEL: That's correct.

3 QUESTION: Why isn't it equally conceivable
4 that travellers might want to read the literature of the
5 Jews for Jesus?

6 MR. KAPEL: They may well wish to read it, and
7 they're welcome to bring that in the terminals and read
8 it in the termals or anywhere in the airport.

9 QUESTION: Are the news people allowed to hawk
10 their newspapers by walking around in the terminal
11 selling them?

12 MR. KAPEL: Absolutely not. The news and gift
13 concession is from fixed locations which the Board has
14 decided were appropriate.

15 QUESTION: But that isn't how your ordinance
16 reads. I mean, that isn't the limitation. The
17 limitation isn't for the conduct of First Amendment
18 activities by walking around the terminal, is it?

19 MR. KAPEL: No, it is not.

20 QUESTION: What specifically is prohibited?

21 MR. KAPEL: Non-airport-related activities.

22 QUESTION: So I'm a Congressman flying from
23 Washington to Hawaii, and I have to transfer planes in
24 Los Angeles. I make an appointment with an aide to talk
25 over some national issues, and I say, let's meet inside

1 the airport, and we want to talk over the pros and cons
2 of some national issues.

3 That's in violation of the ordinance?

4 MR. KAPEL: Absolutely not. Conversation is
5 not prohibited. The activities conducted within the
6 terminal facilities is what the Board is trying to
7 prohibit.

8 The Board does not have a limitation on a
9 person's speech saying that the only speech --

10 QUESTION: Speech is not an activity? What is
11 an activity? Suppose that the representatives of Jews
12 for Jesus just stand there and they do nothing but
13 speak, they don't even pass out anything; they just
14 speak, just the way I would be speaking to the
15 Congressman?

16 MR. KAPEL: I don't believe there would be any
17 problem with that.

18 QUESTION: Oh really? It's only the passing
19 out of the literature that's the problem?

20 MR. KAPEL: I believe conversations are not a
21 problem. If someone were to hold a rally in there with
22 200 people, I believe that would be an activity that
23 would not be airport related, and would be in violation.k

24 QUESTION: I couldn't give the Congressman a
25 piece of paper. I could talk to him if he came?

1 MR. KAPEL: No, I believe you could give the
2 Congressman a piece of paper.

3 QUESTION: Well, isn't the ordinance designed
4 in part to prevent obstruction of the passage of people
5 along the concourses on the way to the planes, and
6 coming out from the planes?

7 MR. KAPEL: Of course. The ordinance here was
8 adopted because the Board of Airport Commissioners had a
9 choice as to how they operate their facility, assuming
10 it's not a traditional public forum.

11 They could limit it to the official business
12 of the airport, or they could open the facility for all
13 types of activities, and adopt a time, place and manner
14 restriction.

15 They chose the former option, to limit it to
16 the official business of the airport. Granted,
17 activities occur within the facility between individuals
18 which are not directly airport related. But those
19 activities occur in every building.

20 And if the mere fact that those activities did
21 it, every building would be a public forum; every
22 government building.

23 QUESTION: Is there anything in the record to
24 show exactly what they do? Like grab hold of your arm
25 and don't let you walk, and stand in front of you and

1 not move? Is that in the record?

2 MR. KAPEL: It is in the record from the
3 standpoint that the city has stipulated that the Jews
4 for Jesus, the individual who brought this lawsuit, was
5 not interfering with the travelling public, and was not
6 grabbing onto anybody.

7 However, the offensiveness of his activity I
8 don't believe is the issue here. The real issue here
9 is, can the Board exercise its option to reserve the
10 facility to only those activities that directly aid the
11 travelling public in their travel.

12 QUESTION: (Inaudible) do.

13 MR. KAPEL: Excuse me?

14 QUESTION: What is wrong with what these
15 people do?

16 MR. KAPEL: Nothing is wrong with what they do.

17 QUESTION: Well, how can you prohibit
18 something that doesn't do anything wrong?

19 MR. KAPEL: Because we are trying to control
20 the uses of the interiors of the terminal facilities.

21 The mere fact that it is not wrong does not
22 mean that it is airport related and is the best use of
23 the terminal facilities.

24 QUESTION: Well, what right do you have to
25 stop it?

1 MR. KAPEL: I believe the Board has the right
2 to limit the use of its facilities to their intended,
3 dedicated purposes.

4 QUESTION: Could it stop all red-headed people
5 from using it?

6 MR. KAPEL: Absolutely not.

7 QUESTION: Why not?

8 MR. KAPEL: Because I believe that would be
9 discriminatory. The people --

10 QUESTION: Well, why isn't this
11 discriminatory? You're singling out one group of people.

12 MR. KAPEL: No, I don't believe we have
13 singled out one group of people. What we have tried to
14 do is define --

15 QUESTION: You have singled out people that
16 you don't want to use your facilities?

17 MR. KAPEL: Absolutely not. The Jews for
18 Jesus are welcome to use our facilities for their travel
19 purposes. They're welcome to be a passenger; they're
20 welcome to come in and lease space, so long as the
21 activity they wish to do --

22 QUESTION: (Inaudible.)

23 MR. KAPEL: I'm sorry?

24 QUESTION: Are they welcome to come in and
25 visit and just stand there?

1 MR. KAPEL: Yes. We do not have --
2 QUESTION: Well, what are they doing other
3 than that?
4 MR. KAPEL: They are conducting literature
5 distribution. They are not just generally coming into
6 the airport. They are conducting an activity.
7 QUESTION: If they're just standing there
8 holding up their book and saying nothing else, is that
9 prohibited?
10 MR. KAPEL: I don't know if that would be
11 prohibited or not. The Board --
12 QUESTION: Well, what are they doing other
13 than that?
14 MR. KAPEL: They are conducting a literature
15 distribution activity within the terminal. It is not
16 just an occasional occurrence. It's not somebody
17 passing through the terminal in their travels, handing
18 somebody another piece of paper.
19 They are not there for an airport purpose.
20 They're not there just to generally sight-see.
21 They are conducting a non-airport-related
22 activity. They're trying to achieve their particular
23 objective. And we, the Board, has tried to limit the
24 airport --
25 QUESTION: Mr. Kapel, may I go back for a

1 second?

2 The resolution itself uses the term, prohibits
3 First Amendment activities.

4 MR. KAPEL: That is correct.

5 QUESTION: And it doesn't use the term,
6 airport related activities, does it? Or am I wrong on
7 that?

8 MR. KAPEL: I believe earlier in the
9 resolution, in the whereas clauses --

10 QUESTION: I see.

11 MR. KAPEL: -- it refers to accommodating air
12 commerce and air navigational --

13 QUESTION: But what is prohibited by the
14 resolution is, quote, First Amendment activities,
15 unquote, I think; isn't that right?

16 MR. KAPEL: By the resolution.

17 QUESTION: The resolution.

18 MR. KAPEL: However, the resolution is not
19 something new. The resolution came about in order to
20 address the interaction between protected activities and
21 the Board's longstanding policies of limiting the
22 airport to its intended purposes.

23 The airport had a number of requests from a
24 wide variety of people. The people that ignored the
25 Board's policy were claiming the right to ignore that

1 policy because of the First Amendment.

2 Therefore the resolution was directly to
3 address that. And it reaffirmed the policy.

4 QUESTION: Correct. But the conduct that is
5 prohibited by the resolution is, quote, First Amendment
6 activities, unquote, as I read it. Of any individual or
7 any -- engages in First Amendment activities and so
8 forth, he's directed -- the city attorney to institute
9 appropriate litigation.

10 But does the ordinance define the term -- or
11 the resolution define the term, First Amendment
12 activities?

13 MR. KAPEL: No, it does not.

14 QUESTION: Does that mean that if, for
15 example, one of these people wore -- carried a sign, say
16 they were a sandwich, you know, one of these wooden
17 signs, that said, Jews for Jesus, whatever their message
18 might be.

19 Would that -- that would violate it, I suppose?

20 MR. KAPEL: I believe it would violate it.

21 QUESTION: And I take it if a political
22 candidate came in and said, vote for Joe Smith, carried
23 a banner or something like that, that would violate it?

24 MR. KAPEL: The Board has denied that before,
25 yes.

1 QUESTION: So that would -- and what if he
2 just spoke out loud and went around shaking hands with
3 people? That would be against the resolution -- a
4 candidate?

5 MR. KAPEL: I believe that's a closer
6 question. But yes, I believe the Board would find that
7 if he was campaigning there, it would violate --

8 QUESTION: So basically, whatever the First
9 Amendment protects, the resolution prohibits?

10 QUESTION: It's how it reads. What I turn to
11 the person next to me and say, good morning, how are you?

12 MR. KAPEL: I don't believe that would violate

13 --

14 QUESTION: I don't have a First Amendment
15 right to turn to the person next to me and say, good
16 morning, how are you?

17 MR. KAPEL: You do have a First Amendment
18 right. The resolution doesn't focus on First Amendment
19 as prohibiting it. The resolution allows First
20 Amendment activities on the sidewalk.

21 Non-airport-related commercial activities
22 would not be permitted on the sidewalk areas, the
23 exteriors.

24 The Board addressed the interaction of the
25 First Amendment protected activities with its policy by

1 allowing those activities to occur on the sidewalks.
2 Other non-airport-related activities are not permitted
3 to occur on the sidewalk.

4 QUESTION: Now let me just be sure I
5 understand. The sidewalk you refer to is the external
6 sidewalk. If you went from United to American outside,
7 where you take the bus, that's okay.

8 MR. KAPEL: Outside of the terminal facilities.

9 QUESTION: But if you walk on your internal,
10 where you walk about half a mile down these alleys,
11 that's prohibited in there, isn't it?

12 MR. KAPEL: Yes, it is.

13 QUESTION: That's not part of the sidewalk.

14 QUESTION: You know I guess what we're talking
15 about is overbreadth problems. That's not the basis on
16 which the court below went.

17 But don't you see some problems of overbreadth
18 here, just banning all First Amendment activity?

19 MR. KAPEL: If there are any problems with
20 overbreadth, the problems would come up in terms of
21 determining what First Amendment activities would be
22 allowed on the sidewalk areas, or would not -- would be
23 permitted on the sidewalk areas.

24 I don't believe there are any overbreadth
25 problems with regard to airport-related activities.

1 QUESTION: Well, clearly there are. I mean,
2 the language of the resolution is very simple. It says
3 that the central terminal area is not open for First
4 Amendment activities by any individual or entity.

5 And that covers the good morning to the person
6 next to you, under the literal terms of it. There is
7 absolutely no attempt to define it in this resolution,
8 is there?

9 MR. KAPEL: There is not an attempt to define
10 First Amendment activities within the resolution. There
11 is an attempt to define airport-related activities.

12 The Board of Airport Commissioners has not
13 prohibited speech within the terminals. I think it's
14 impractical to think they could.

15 QUESTION: (Inaudible.) I mean, the
16 resolution says it. I don't --

17 MR. KAPEL: I believe the resolution says that
18 the interiors of the airport should be limited to
19 airport purposes only.

20 QUESTION: Well, in your answers to questions,
21 you've identified some First Amendment activities that
22 are forbidden; some that are not forbidden, as you
23 interpret the ordinance.

24 MR. KAPEL: Yes, I have identified some
25 activities that have been protected -a-

1 QUESTION: Some First Amendment activities are
2 and some First Amendment activities that aren't.

3 MR. KAPEL: That's correct. Speech is a
4 protected activity. Speech happens, occurs, in every
5 public building there is.

6 I don't believe the fact that speech occurs or
7 that people read newspapers within a building requires
8 the government to open that building to all types of
9 expressive activities.

10 QUESTION: But you haven't banned -- you
11 haven't banned just some types. I mean, that's the
12 problem. If you read it, you've banned all types.

13 But again, maybe your point is that that's not
14 what's before us. That that's an overbreadth problem,
15 and all we have before us is a decision below that says
16 that this is a public forum, and you have to allow all
17 types. And that even if it weren't overbroad it would
18 be no good.

19 Is that --

20 MR. KAPEL: That is correct.

21 QUESTION: That's what I thought.

22 MR. KAPEL: I think the public forum,
23 nonpublic forum, issue is definitely the issue before
24 you.

25 The Ninth Circuit Court of Appeals and the

1 respondents have claimed that the interiors are
2 traditional public forums, and therefore, all types of
3 speech can only be restricted by a time, place and
4 manner restriction.

5 They've cited among other things there's
6 unrestricted public access into the terminals, and the
7 fact that people read or converse in the terminals.

8 They also claim that there is some sort of
9 preferential treatment for commercial activities because
10 commercial speech, in a limited context, has been
11 permitted in the terminals.

12 These arguments, I believe, fail to recognize
13 the nature and purpose of LAX, that is, its
14 airport-related purposes; and also fails to recognize
15 that the government has the right to reserve their
16 facilities under their control to their official
17 business.

18 The commercial activities and the commercial
19 speech that occurs within the terminals are all airport
20 related.

21 QUESTION: May I ask you one other question?
22 Some airports, out in front of the airport, they do have
23 a covered area, so you're sheltered from the rain, and
24 there may even be kind of like a tunnel where you drive
25 in.

1 Supposing the airport decided to make its
2 sidewalks outside part of the airport by appropriate
3 constructive devices, and decided to extend the ban to
4 the outside sidewalks -- what are now outside sidewalks
5 as well?

6 I suppose your theory would be the same, that
7 they could do that, couldn't they?

8 MR. KAPEL: Although that's not the issue
9 here, I think there are -- I think the Board would have
10 a right to do so. I think there is precedent for that.

11 QUESTION: And they could probably include the
12 parking lot, too. It's a big area. It's all devoted to
13 airport function, and the driveways up to it.
14 Everything inside the sign that says, you are now
15 entering Los Angeles Airport or whatever it is.

16 MR. KAPEL: I believe certain cases like Greef
17 v. Spock and so forth would support that. The Board has
18 not done that.

19 I believe they've attempted to show a
20 sensitivity to First Amendment activities by permitting
21 them within the airport.

22 QUESTION: You mean outside the airport. By
23 permitting it outside the airport?

24 MR. KAPEL: Excuse me, on the sidewalk areas
25 outside the interiors.

1 I would like to save a few minutes.

2 QUESTION: Well, I still don't understand how
3 you keep saying that the airport permitted you to do it
4 outside. They haven't a blame thing to do with
5 outside. They're not doing any great favor by letting
6 you do it someplace else.

7 Am I right or wrong?

8 MR. KAPEL: I believe there's an argument that
9 could be made that the airport is not integrated into
10 the open streets and parks of a municipality; that the
11 sidewalk areas inside the terminal areas, even though
12 they are exterior sidewalks, are not identical to those
13 that were involved in U.S. v. Grace. So therefore I
14 believe the Board would have the power --

15 QUESTION: Do you have any ordinance to
16 protect you on that? You're just taking that right out
17 your --

18 MR. KAPEL: I don't believe so. I believe the
19 Board's policy --

20 QUESTION: Well, the Board's policy is limited
21 by the statute; am I right? Does the statute give them
22 the right to legislate as to the sidewalks: yes or no?

23 MR. KAPEL: Yes. With regard to all airport
24 property, they have the right to adopt rules and
25 regulations.

1 QUESTION: Well, is the sidewalk, quote,
2 airport property?

3 MR. KAPEL: Absolutely, everything surrounding
4 those terminals.

5 QUESTION: Is that in this record?

6 MR. KAPEL: Yes.

7 QUESTION: It says so in this record?

8 MR. KAPEL: Yes, I believe in the stipulated
9 facts, approximately number 8 or 9.

10 QUESTION: Thank you.

11 MR. KAPEL: I would like to reserve a few
12 minutes, if I may.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kapel.

14 We'll hear now from you, Mr. Sekulow..

15 ORAL ARGUMENT OF JAY ALAN SEKULOW, ESQ.,

16 ON BEHALF OF THE RESPONDENTS

17 MR. SEKULOW: Mr. Chief Justice, and may it
18 please the Court:

19 Local governments have important
20 responsibilities concerning their efficient operation of
21 airports under their control.

22 However, the record in this case is clear.
23 There is no justification for a sweeping ban on First
24 Amendment activities which would subordinate cherished
25 First Amendment freedoms.

1 In fact, four circuit courts and numerous
2 district courts have determined that airport terminals
3 are public fora.

4 The petitioners, throughout their argument --

5 QUESTION: You mean just generally that any
6 airport -- any airport that's open to the public is a
7 public forum?

8 MR. SEKULOW: Your Honor, we have couched our
9 argument that -- a major airport terminal. The
10 designation "major" is not really regarding the amount
11 of people that would seek access.

12 QUESTION: And you would say that nothing that
13 the city could do could -- could close it, or to -- or
14 to put it in a category other than a public forum?

15 MR. SEKULOW: Our position is twofold. That
16 by tradition, if you will, that a public forum has been
17 created.

18 QUESTION: So it's like a sidewalk, they just
19 can't --

20 MR. SEKULOW: Yes, a sidewalk or a street or a
21 park.

22 QUESTION: How has it been created by
23 tradition is airport authorities close them?

24 MR. SEKULOW: Well, the tradition, Your Honor
25 --

1 QUESTION: I mean what is the tradition with
2 respect to major airports?

3 MR. SEKULOW: Major airports as we know them
4 are a major -- a recent phenomenon. Their history is
5 limited.

6 QUESTION: So there is no tradition with
7 respect to major airports; is that true or false?

8 MR. SEKULOW: I think there is a tradition,
9 Your Honor.

10 QUESTION: What is it?

11 MR. SEKULOW: I think it's twofold. The first
12 part of the tradition analysis could be that in a
13 limited history -- there is a history, though -- First
14 Amendment activities in the central terminal area at LAX
15 have taken place.

16 Jews for Jesus has been distributing religious
17 literature for over 12 years now.

18 And the other history --

19 QUESTION: So that is the tradition, what's
20 happened in the past 12 years?

21 MR. SEKULOW: Considering the length of the
22 history of the airport itself, that period of time is
23 substantial.

24 We would further argue for a history in this
25 case one looking at transportation centers generally.

1 City gates -- we've argued this in our brief -- the city
2 gates, from the period of scripture, have been places
3 where people have come to hear ideas.

4 It later moved to railroads, the waterfront,
5 and now airport terminals. Our position is that --

6 QUESTION: I thought about that city gates
7 thing. Is it -- do you really think that the analog is
8 the city gate? Or wouldn't the analog be, to go back to
9 the time of the Constitution, wouldn't it be the inn at
10 which the coach would stop to pick up passengers. And
11 they'd all assemble there and sit down in the dining
12 room and eat a piece of mutton or something.

13 Were -- were Jews for Jesus allowed inside
14 these inns? Do you think so? They were private
15 operations, weren't they?

16 MR. SEKULOW: Well, Your Honor, I think in the
17 spectrum of history, if you will, starting from -- if
18 you want to start from the Constitution, our position
19 would be, not being there, of course, that Jews for
20 Jesus would have had the right if in fact it was not a
21 private enterprise.

22 We're not saying that all places are public
23 forums. Everybody can go everywhere for First Amendment
24 activities.

25 QUESTION: No, but come back to a place where

1 travellers gather to use transportation. Why has that
2 been historically the place, like city gates, where
3 there's classic First Amendment proselytizing and
4 argumentative activity? I don't know.

5 MR. SEKULOW: The places such as an inn or a
6 bus terminal or a rail station have been the places
7 where people have gathered. They have become, if you
8 will, the town squares.

9 QUESTION: The innkeeper couldn't throw
10 somebody out, saying I don't want to have any -- you
11 know, no politics, no religion in my inn. We want happy
12 people.

13 MR. SEKULOW: The innkeeper could throw
14 someone out if the innkeeper wasn't a government
15 sponsored organization like the Los Angeles
16 International Airport.

17 I think your analogy is very good. But the
18 difference --

19 QUESTION: But he traditionally was a private
20 operation, that's the point. And the railroad station
21 traditionally was a private operation, wasn't it?

22 MR. SEKULOW: No, I think that from a historic
23 standpoint, it was the access issue there. I don't
24 think the case in this particular -- our particular
25 case, I think we're looking at the use of those

1 facilities as places where people have congregated.

2 QUESTION: But what's your answer as to the
3 private versus public ownership of a railroad terminal
4 in this tradition?

5 MR. SEKULOW: A different situation as far as
6 the actual private ownership. What we were seeking to
7 sho, vis-a-vis the analogy of scripture, ancient -- the
8 city gates, going forward to the airport, was, these
9 were places where people congregated.

10 QUESTION: In the railroad terminals?

11 MR. SEKULOW: Yes, I mean it was --

12 QUESTION: And yet there's no question that
13 people could have been thrown out of there by the owners
14 of the terminals.

15 MR. SEKULOW: That's correct, Your Honor. In
16 a private terminal, that would be correct.

17 QUESTION: And weren't almost all of the
18 railroad terminals privately owned?

19 MR. SEKULOW: I'm not an expert in that area,
20 and I don't know if in fact all of them were privately
21 owned. However --

22 QUESTION: Have you ever seen a station where
23 people stand around in groups and discuss things?

24 MR. SEKULOW: Excuse me, Your Honor?

25 QUESTION: Have you ever seen a station or an

1 airport where people stand around and discuss problems
2 at all?

3 MR. SEKULOW: Absolutely.

4 QUESTION: You have?

5 MR. SEKULOW: I have, Your Honor. Where
6 people have stood around --

7 QUESTION: Well, you get in Grand Central
8 Station around 5:00 o'clock, and you'll get run over.

9 MR. SEKULOW: Your Honor, the fact that there
10 are a lot of people in the particular forum is more
11 evidence of the importance of those particular places
12 being available for public access for the dissemination
13 of, in this case, religious literature.

14 It is that concentration of people that, I
15 think, is evidence of the need.

16 QUESTION: (Inaudible) home to dinner, not on
17 religion.

18 MR. SEKULOW: Your Honor, if we were to phrase
19 the issue as it has been phrased, is that the airports
20 are traditional public forum, as we have phrased the
21 issue, our position would be, that access that you're
22 talking about, that mass of people is exactly the reason
23 why First Amendment activities should be allowed inside
24 the central terminal area at LAX as they have been for
25 over 12 years.

1 QUESTION: Because there are a lot of people?

2 MR. SEKULOW: Are there a lot of -- yes, Your
3 Honor, there is.

4 QUESTION: I mean, that's the reason: Because
5 there are a lot of people?

6 MR. SEKULOW: No, it's -- we would -- we would
7 -- in reviewing the issue or making a determination of
8 whether a particular area was a public forum, we would
9 utilize what this Court has long held as a
10 compatibility.

11 When you have a general access open to the
12 public, and the speech taking place in the forum is
13 compatible --

14 QUESTION: Counsel?

15 MR. SEKULOW: Yes, Your Honor.

16 QUESTION: Excuse me for interrupting you.
17 You agree, of course, that the airport authority could
18 adopt reasonable time, place and manner regulations?

19 MR. SEKULOW: Yes, Your Honor, a reasonable
20 time, place and manner regulation would be appropriate.

21 QUESTION: Yes, right.

22 MR. SEKULOW: Could be appropriate.

23 QUESTION: Now, the facts in this -- facts in
24 this case, as I recall them are, that a minister of Jews
25 for Jesus was physically handing out literature.

1 MR. SEKULOW: That's correct.

2 QUESTION: That's correct? Assume for the
3 moment that the airport adopted a resolution that
4 permitted that type of literature, or any type of
5 literature, for example, to be disseminated from the
6 equivalent of a newsstand.

7 Would that be satisfactory? That resolution,
8 as a manner restriction?

9 MR. SEKULOW: Depending on the particular
10 forum, a booth limitation could be appropriate --

11 QUESTION: Analogous to distributing
12 newspapers.

13 MR. SEKULOW: It could be appropriate. We
14 would say, of course, that an analysis of what time,
15 place and manner regulation would be appropriate would
16 be an analysis of that particular forum.

17 There may be situations where limiting it to a
18 booth -- I'm not talking about a rental space, for
19 instance, but a booth, storefront type of situation --
20 might be appropriate in a given forum.

21 In this particular case, however, the record
22 is totally devoid of any evidence of harrassment.
23 Missionaries with Jews for Jesus had been distributing
24 gospel literature at the airport for over 12 years.

25 There is nothing in the record showing any

1 type of harrassment, annoyance, or even a complaint
2 being filed.

3 QUESTION: Can you think of any place where it
4 wouldn't be compatible? Let's say the Capitol, right
5 across the lawn there. Couldn't you set up little
6 booths for various groups that want to pass out
7 literature to the tourists coming? Would that interrupt
8 the --

9 MR. SEKULOW: That's a factual analysis. But
10 there conceivably are places --

11 QUESTION: Oh, I think it wouldn't, but
12 Congress just says, we don't want it here. This is not
13 what the building is for. We don't want it. We could
14 live with it, but we don't want it.

15 Why can't the airport say that?

16 MR. SEKULOW: Well, the airport has taken --
17 of course, have taken the position that they have said
18 that. However, it is that the accommodating purpose,
19 the contemplation of being able to hand out or
20 distribute religious literature in this case, where it
21 does not at all interfere with the efficient operation
22 of that facility.

23 If in fact the outside of the Capitol area was
24 appropriate for distributing literature, as with the
25 situation with the sidewalks in front of this Court's

1 facility, it would be appropriate --

2 QUESTION: That's your test. If it's, number
3 one, a public area; and number two, it wouldn't
4 interfere with the public purpose --

5 MR. SEKULOW: Substantially interfere.

6 QUESTION: -- substantially, the activity must
7 be allowed?

8 MR. SEKULOW: Your Honor, it would be a
9 balancing test. If the compatibility is there, yes.

10 We would assert that if, in fact, the First
11 Amendment activity is compatible with the forums used,
12 that -- and there is a general open access -- that in
13 fact a public forum has been created.

14 QUESTION: Well, that's a vast extension of
15 the public forum doctrine to date, it seems to me.

16 MR. SEKULOW: Your Honor, our position is that
17 it's really not. In the line of cases that this Court
18 has determined, that compatibility has been the
19 threshold.

20 Without the compatibility, there is obvious
21 problems. --

22 Our position is that LAX is both a traditional
23 public forum and one that has been open.

24 QUESTION: I thought the rule was that when it
25 is a public forum, you must allow those activities to

1 the extent they're compatible with the other things
2 occurring in that public forum.

3 But you're converting that to a rule that if
4 there is a compatible activity, it's a public forum?

5 MR. SEKULOW: Your Honor, our position is that
6 the compatibility is, does the First Amendment activity
7 substantially interfere with the primary purpose of the
8 public forum.

9 Streets' primary purposes are not the
10 distribution --

11 QUESTION: You have to establish that it's a
12 public forum first. I agree with the proposition you
13 just stated. Does the activity interfere with the
14 primary purpose of the public forum?

15 But you have to establish first that it is a
16 public forum, and that's what I thought we were
17 discussing here.

18 MR. SEKULOW: And the public forum, to look at
19 the public forum, we have to look at it as a multitude
20 of factors.

21 Important factors would be that open access,
22 general access to the public, which is clear here.
23 Anyone, as the record shows, can enter into LAX for
24 purposes other than travel-relatedness.

25 So you could go to the airport for any reason.

1 Not only that, the city has made much of
2 limitations contained in their charter. However, a
3 careful reading of that charter shows that the facility
4 is not limited just to airport related activities,
5 whatever that means, which there's no definition for.

6 Leases can be entered into for reasons other
7 than airport related activities. In fact, revocable
8 permits can be issued for any and all purposes that,
9 again, do not interfere with the efficient operation of
10 the facility.

11 QUESTION: You mentioned the sidewalk in front
12 of this building. What about the plaza out in front?

13 MR. SEKULOW: Your Honor, that is something
14 obviously I pondered as I walked up. That brings up an
15 interesting point.

16 Our position would be, or certainly my
17 position would be, that there is a line where the public
18 forum analogy stops.

19 However, I'm not convinced that the plaza
20 level is that appropriate place. Clearly, the
21 sidewalks, as this Court has held, are public forum.

22 I say there are arguments once you enter into
23 this facility that negate towards a public forum
24 concept.

25 However, the plaza, I think arguments could be

1 made that that is an area of public access, and
2 certainly one that could constitute a public forum.

3 Whether in fact that --

4 QUESTION: (Inaudible) test you're applying?

5 MR. SEKULOW: I'm applying --

6 QUESTION: You just look at the sky and say it
7 is?

8 MR. SEKULOW: Absolutely --

9 QUESTION: I thought it depends on tradition,
10 essentially.

11 MR. SEKULOW: Your Honor, it goes -- it's both
12 tradition, and it is of course those that have been
13 open.

14 Let's spend a moment on the tradition. The
15 tradition is the tradition of access for communication
16 purposes.

17 Communicating activities have taken place at
18 LAX since at least 1974.

19 QUESTION: What about the plaza in front of
20 this courthouse?

21 MR. SEKULOW: Well, based on my knowledge of
22 the plaza of the courthouse, I think communication --
23 communicating activities have not taken place because
24 there has been a presumption that it is not an area
25 open.

1 Which brings up --

2 QUESTION: But that doesn't trouble you?

3 MR. SEKULOW: How can you bring up -- how can
4 you have a history, Your Honor, when a government
5 authority says no?

6 QUESTION: That's how you get a history.
7 Under your theory, if the government from day one had
8 banned discussion on the streets, there would be no
9 tradition of public discussion on the streets, and
10 therefore the streets would fail your test.

11 MR. SEKULOW: No, Your Honor, it's precisely
12 contrary to that. That history existed because people
13 did it. People distributed literature on the streets
14 and sidewalks.

15 QUESTION: Well, but we don't know about the
16 hypothesis, whether they would have done it or not, if
17 the government had banned it.

18 MR. SEKULOW: Your Honor, there were laws in
19 1789, the Seditions Act, which said, basically, don't
20 distribute literature. Those were challenged.

21 I would take the position, Your Honor, that in
22 this --

23 QUESTION: Well, tell me a little bit about
24 those laws that were challenged in 1789.

25 MR. SEKULOW: Again, not specifying the date,

1 the handing out --

2 QUESTION: Well, pin it down to within 40 or
3 50 years, will you?

4 MR. SEKULOW: Well, I'll do my best.
5 Activities that were, quote -- it's even more recent
6 than that -- activities that were against government
7 policy, and activities took place where those activities
8 were published by criminal activities.

9 QUESTION: Where was this?

10 MR. SEKULOW: I don't recall the exact place,
11 Your Honor. I know --

12 QUESTION: Somewhere in the United States?

13 MR. SEKULOW: Yes, absolutely. The point I'm
14 making is that that history exists in this case, and in
15 fact, the Los Angeles International Airport has opened
16 the facility up.

17 The charter doesn't prohibit it, and the facts
18 in the case show it has in fact happened.

19 First Amendment activities have taken place at
20 LAX. The petitioners even today conceded that there is
21 a place for limited public forum. That's completely
22 contrary to the position they've taken thus far.

23 QUESTION: Mr. Sekulow --

24 MR. SEKULOW: Yes, Your Honor.

25 QUESTION: -- suppose that we disagree with

1 the court below and think that this is not a traditional
2 public forum, did -- did you argue below that in any
3 event under the California constitution it would be a
4 public forum, and must be open?

5 MR. SEKULOW: Yes, Your Honor. In the
6 district court, arguments regarding the California law
7 on the liberty of free speech was argued extensively.

8 QUESTION: But the courts below never reached
9 the state law question?

10 MR. SEKULOW: That's correct, Your Honor.
11 They dealt with it on a federal --

12 QUESTION: And if we decided the federal
13 constitutional issue here against you, would it be your
14 position that the state law might nevertheless require
15 it to be open?

16 MR. SEKULOW: Our position would be that in *re*
17 Hoffman, as Your Honor cited earlier, would stand for
18 the proposition that First Amendment activities would be
19 appropriate.

20 However, we would also assert that under the
21 federal Constitution of course these activities --

22 QUESTION: Well, suppose we decide against you
23 on the federal Constitution? I'm trying to inquire
24 whether you think it then is still open to you and your
25 client to raise the state constitutional issue?

1 MR. SEKULOW: Yes, Your Honor, we would take
2 the position it has. We've not limited --

3 QUESTION: Why then shouldn't the court below
4 have decided the state issue first?

5 MR. SEKULOW: We've pointed that out in our
6 brief. Inexplicably, there is nothing in the state --
7 the district court's opinion here, U.S. district court's
8 opinion, regarding the California constitution.

9 It was argued. It was in the briefs. The
10 opinion did not contain any response to it. It merely
11 found that the airport terminal, in line with other
12 cases in the district, was --

13 QUESTION: Let me ask one other question,
14 too. Did you argue overbreadth of the statute below?

15 MR. SEKULOW: Yes, Your Honor. Our argument
16 was not just on the public forum issue. We argued
17 overbreadth; vagueness. We also got into the
18 content-based, viewpoint-based discrimination analysis,
19 as well as a prior restraint.

20 The prior restraint analysis that we utilize
21 is, as the petitioners have again stated today and
22 they've said throughout their brief, there is this
23 airport related exception, if you will. The resolution
24 on its face bans all First Amendment activities. That's
25 what it does on its face.

1 However, there is this airport related
2 exception that they determine, as they've stated, they
3 determine whether something's airport related or not.

4 There's no standards. There's no guidelines.
5 It's merely something the Board in its discretion
6 decides.

7 I think the argument certainly could be made
8 that -- we could go so far as to say that it is
9 absolutely and capricious, the determination made by the
10 Board here. They have no guidelines.

11 They've also pointed out --

12 QUESTION: That's not before us, though, right?

13 MR. SEKULOW: It's not before you -- before
14 this Court --

15 QUESTION: So we should decide this case as
16 though the question is, could LAX like the Capitol
17 promulgate a nicely, narrowly crafted rule that says, no
18 religious proselytizing on these grounds, right, and
19 that's the issue? Could LAX do that? If it's a public
20 forum, it couldn't. If it's not a public forum,
21 presumably it could.

22 MR. SEKULOW: Your Honor, the Court has before
23 it facts which have been stipulated by the parties
24 showing exactly what's taken place in LAX, the
25 activities that have taken place.

1 In our briefs, and in the trial court briefs,
2 we have argued these other points. I -- we would take
3 the position that this Court could reach these other
4 issues.

5 Viewpoint discrimination, regardless --

6 QUESTION: Putting it more precisely, you're
7 asking us to affirm the judgment on other grounds than
8 the ones relied on by the Ninth Circuit, which we do all
9 the time?

10 MR. SEKULOW: Your Honor, I'm also asking that
11 the Court affirm, of course, that it is a traditional
12 public forum.

13 QUESTION: Yes, but I mean you have not
14 abandoned your overbreadth arguments.

15 MR. SEKULOW: Absolutely not, Your Honor.

16 QUESTION: And if we think it's overbroad, we
17 have to affirm, don't we?

18 MR. SEKULOW: Overbroad, vagueness, and again,
19 the content-based discrimination.

20 QUESTION: Mr. Sekulow --

21 MR. SEKULOW: Yes, sir.

22 QUESTION: -- suppose your group stood in the
23 -- with the permission of the newsstand and handed it
24 out inside of the newsstand.

25 Would that be prohibited?

1 MR. SEKULOW: Under the resolution, there
2 wouldn't be a newsstand to stand in at. Because the
3 resolution on its face would ban the newspapers being
4 sold as well.

5 It bans all First Amendment activities.
6 Whether someone -- Justice Scalia earlier said, if he
7 said hello to someone, if he wrote it on a piece of
8 paper, under this resolution he would be -- the
9 resolution would not allow him to do that. It wouldn't
10 be airport related.

11 QUESTION: Assuming that they don't close the
12 newsstand.

13 MR. SEKULOW: Yes, Your Honor.

14 QUESTION: Could he stand in the middle of
15 that with the permission of the newsstand and hand out
16 these pamphlets?

17 MR. SEKULOW: The question then would be,
18 would that activity substantially interfere with the
19 flow of traffic? That's a legitimate concern.

20 Our position would be that if in fact there is
21 a situation where traffic is impeded, that a reasonable
22 regulation of time, place and manner could handle that.

23 Our position would be, if the newspaper stand
24 officer -- operator said yes, that we could do it, that
25 we could distribute the literature; that it's a

1 protected activity under the First Amendment. And this
2 resolution is unconstitutional on its face.

3 When you get into weighing whether something
4 is -- affects its usage overall, that's a different -- a
5 different situation.

6 The important -- another important aspect of
7 this case is the existence of other First Amendment
8 activities in the central terminal area of LAX. There
9 is a Christian Science reading room.

10 We do not accept the position that the
11 Christian Science reading room is just there for a
12 waiting room. The record doesn't say how many seats are
13 there, or how many seats could be put in that amount of
14 space.

15 The record does say, however, that the
16 material available at the Christian Science reading room
17 regards the Christian Science faith.

18 QUESTION: Well, Mr. Sekulow, they lease
19 space. Has Jews for Jesus leased space?

20 MR. SEKULOW: No, your Honor, it has not.'

21 QUESTION: Well, then, they're not the same
22 situation.

23 MR. SEKULOW: Your Honor, we would take the
24 position --

25 QUESTION: They're paying a lease. And

1 presumably, you could lease space, as well.

2 MR. SEKULOW: Your Honor, our position is that
3 a First Amendment activity is not something we would
4 have to pay for; that one of the purposes of the public
5 forum doctrine is giving groups that may have less
6 popular messages and not the -- not through that cost.

7 QUESTION: I understand that. But it does not
8 avail you to argue about the Christian Science reading
9 room because they have leased space.

10 So it just doesn't support your argument, at
11 least in my view. I don't see how it does.

12 MR. SEKULOW: Your Honor, in this context.
13 The material that is being disseminated at the Christian
14 Science reading room is regarding the Christian Science
15 faith only.

16 Effectively, if we took -- looking at an
17 establishment clause analysis, that activity is allowed
18 to exist -- I'm not saying that that's not -- and you
19 know, that there's not a technical establishment problem
20 there. We're not saying that the existence of the
21 reading room causes an establishment problem.

22 Our position is that the existence of that
23 reading room, and denying Jews for Jesus its right to
24 distribute literature, would be a violation of our First
25 Amendment rights.

1 QUESTION: Well, that's like saying that the
2 Methodist Church, which owns the property on which the
3 church is located, because they preach religious
4 doctrine in there, somebody else who doesn't own a
5 church should be able on the street outside to hold
6 their church service.

7 No case has ever held that.

8 MR. SEKULOW: Well, the courts have dealt with
9 that. When you're dealing with an assemblage of people,
10 again, the reasonable time, place and manner
11 restrictions would come in, Your Honor.

12 However, if Jews for Jesus was outside of a
13 Methodist Church distributing literatures to passersby,
14 certainly that would be constitutionally protected, even
15 though the Methodist Church owns the facility.

16 If we're on the sidewalk, public property,
17 distributing literature -- I'm not talking about a
18 church service --

19 QUESTION: Yes, but what you're saying is if
20 -- anything the Christian Science people can do by
21 leasing, you want to be able to do without leasing.

22 And no case has ever held that.

23 MR. SEKULOW: Your Honor, we're not taking it
24 that far.

25 QUESTION: Well, I hope not.

1 MR. SEKULOW: We're saying that the
2 distribution of literature by the Christian Science --
3 in the Christian Science reading room, allowing that
4 activity to take place, and denying Jews for Jesus the
5 right to disseminate its religious literature inside the
6 central terminal area, those messages for First
7 Amendment purposes are the same.

8 The fact that one leases the space and one
9 does not, it would be our position that that would be
10 basically irrelevant in a publicly owned facility.

11 What we have here is, in our opinion, a
12 viewpoint discrimination.

13 The other issue that exists in this thing is,
14 one that walks into the airport terminal and is made
15 aware of this resolution, doesn't even know what the
16 resolution says.

17 It says, all First Amendment activity is
18 banned. There's an exception somewhere in the recitals,
19 as Mr. Kapel pointed out. That exception creates a
20 whole list of problems.

21 Who decides if something's airport related or
22 not? The Board. How do they decide it? They decide
23 it. There's no standards, again, no guidelines set
24 forth wherein they can make this determination.

25 Another position that we've taken in this

1 situation is the existence of a limited or open public
2 forum. The activities of Jews for Jesus and other
3 religious, political, social organizations have taken
4 place at the central terminal area of LAX. They've
5 taken place for at least 12 years.

6 The petitioners have made much of the fact
7 that some groups have been denied access.

8 First off, we would say, some groups may have
9 been denied access, but other groups have done First
10 Activities there.

11 Furthermore, there is nothing in the record
12 showing why these groups were denied access. For all we
13 know, the reason they were denied could be one of
14 legitimate concerns. The activities that were going to
15 take place would be inappropriate in an airport
16 facility.

17 So that is not a dispositive -- in our
18 opinion, that is not a dispositive issue.

19 QUESTION: Well, we don't know that either.
20 We could certainly leave that to the lower court to
21 figure out if there was some problem there.

22 MR. SEKULOW: That was the point I was making
23 Your Honor, is, there's nothing in the record which
24 shows why they were denied it, so saying some people
25 have been denied it, when effectively people have

1 exercised First Amendment activities inside the central
2 terminal area, in our opinion shows that they are,
3 again, compatible.

4 QUESTION: Mr. Sekulow, would you explain to
5 me, because I really don't understand this from your
6 argument, what is it that makes a public forum special
7 as opposed to any public building?

8 Because as I understand your argument, I think
9 what it boils down to saying is, that any public
10 building must be allowed to be used for free speech
11 activities to the extent that such activities are not
12 incompatible with the other uses of the building.

13 Now, if you adopt that as a principle, why do
14 you need a public forum doctrine? You don't need it.
15 Doesn't it totally gobble up the concept that there are
16 some buildings where you cannot -- you don't even have
17 to have reasonable time, place and manner restrictions?

18 MR. SEKULOW: Your Honor, one important
19 element of our analysis on this compatibility issue is
20 that there's general access open to the public. And if
21 -- let's take an office building as a good example --
22 you have an office building, narrow quarters. There is
23 an -- an argument can be made that the activities taking
24 place inside an office building may not be compatible --
25 may not be compatible -- with the efficient operation of

1 that particular facility.

2 But it's that general public access, coupled
3 with the compatibility.

4 QUESTION: But even in a public forum, you are
5 allowed to place such restrictions as are necessary to
6 make the speech compatible with whatever else is going
7 on.

8 MR. SEKULOW: That's correct.

9 QUESTION: In a park, and so forth. So then
10 what difference is there between a public forum and a
11 nonpublic forum, in your view of the world?

12 MR. SEKULOW: A nonpublic forum -- and
13 arguments have been made regarding a nonpublic forum
14 concerning the internal mail school systems. It's that
15 public access was lacking, Your Honor, in that
16 particular situation, and many others.

17 There are also cases like Greer v. Spock.
18 There are special functions of facilities, military
19 bases, where that special constitutional function is
20 what this Court determined that special constitutional
21 function justifies -- the concern for national security
22 -- justifies -- and national defense -- the regulation
23 or elimination in some cases of First Amendment
24 activities from taking place.

25 We're not saying that all facilities are

1 public forums open to everyone. What we are saying is,
2 when you have that compatibility and general public
3 access, that is what we're saying is part of the key.
4 That compatibility and access.

5 That's a balancing. The public forum issue is
6 on a spectrum. Our position is that LAX on the spectrum
7 of public forum is closer to a street, a sidewalk or a
8 park than it is to a military base or a prison.

9 QUESTION: Could you -- could LAX pass a rule
10 that you people cannot go beyond the metal detector, and
11 only those who are riding go beyond a metal -- would
12 that be a good rule?

13 MR. SEKULOW: If in fact the general public
14 was not allowed access past a security point --

15 QUESTION: I said nobody but riders.

16 MR. SEKULOW: I think, Your Honor, an argument
17 can be made that the First Amendment activities should,
18 if you will -- that should be the line of demarcation;
19 that should be the stopping point.

20 QUESTION: Could be made or would be made?
21 You say, could be made. You know, you can argue that
22 the building's a cat. But I mean, would be made.

23 MR. SEKULOW: Well, Your Honor, I would say
24 that there is a line. And that would be an appropriate
25 place --

1 QUESTION: I want to know just how far you go.

2 MR. SEKULOW: You have to add a factor to
3 that, Your Honor, and that is, are there other
4 activities taking place past that security point? Are
5 there restaurants and shops?

6 Many times in airports, there's not. If it's
7 just a cutoff, only ticketed passengers only, I would
8 say the security concerns outweigh it.

9 QUESTION: Restrict your answer to my question.

10 MR. SEKULOW: Okay, Your Honor, in that
11 particular case --

12 QUESTION: And not add to it.

13 MR. SEKULOW: -- I would say that a reasonable
14 time, place and manner regulation, eliminating that area
15 from First Amendment activities could be appropriate, in
16 the event that it was a secured area only, yes, based on
17 that proposition.

18 QUESTION: Thank you.

19 MR. SEKULOW: Thank you, Your Honor.

20 The position that the respondents have made
21 concerning the openness of the forum --

22 QUESTION: May I just follow up on Justice
23 Marshall? Suppose -- what about a particular congested
24 area, like ticket lines and that sort of thing? Could
25 they also perhaps restrict them from there?

1 MR. SEKULOW: I think there are legitimate
2 reasons to restrict access to ticketing areas, baggage
3 pickup areas, where that high concentration -- these --
4 utilizing, rather than a broad, sweeping, no First
5 Amendment activities, a reasonable time, place and
6 manner regulation.

7 We're not taking the proposition that all
8 buildings are public forums. We are weighing that. And
9 we are weighing that compatibility.

10 And part of that compatibility would be a
11 security issue, and part of that compatibility certainly
12 could be ticketing and baggage and things such as this.

13 QUESTION: You are taking the position that
14 they're all public forums if there is general public
15 access. The only inquiry you would make, once you've
16 determined that there is general public access to the
17 building, is whether free speech activities are
18 compatible.

19 MR. SEKULOW: If there is general public
20 access and compatibility, our position would be that a
21 public forum should exist, subject to special concerns,
22 such as a military base or a prison if there was an area
23 that was general access.

24 The Court's decisions regarding -- in Greer v.
25 Spock, although the military base was open, there are

1 special constitutional functions there. And we would --
2 we would --

3 QUESTION: And the question of whether it's
4 appropriate isn't necessarily the same as the question
5 whether it's compatible.

6 I mean, take my hypothetical about the
7 Capitol. It's compatible, in the sense that they can
8 run their business over there with booths passing out
9 religious literature and political literature. They
10 could run their business anyway.

11 But it's just never been done. This is not
12 the place for it. They have just said, it's not the
13 place for it.

14 You would not allow that to be said, would you?

15 MR. SEKULOW: Your Honor, the position of
16 something not be the place for the activity is
17 something that we think is exactly why we think
18 airports would be a traditional public forum.

19 I don't take the position that the grace of
20 government is the determining factor of what constitutes
21 a public forum. Nor do I take the position that a mere
22 chance of history, if you will, would create the public
23 forum; or increased mobility of society; or for that
24 matter, new architectural designs.

25 An excellent point was raised with, what if

1 the airport extended its central terminal area out to
2 the sidewalks and covered it? Well, is that now banned?

3 And that's the position we're taking. The
4 compatibility is an important factor. The public access
5 is an important factor.

6 The accommodation of it, we would take the
7 position that it's an analysis that has to draw a
8 balancing. There has to be a balancing there.

9 The balancing would take into consideration
10 these other positions.

11 QUESTION: Could I -- do you stand by all the
12 stipulations of fact that are in the record?

13 MR. SEKULOW: Yes, Your Honor.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
15 Sekulow.

16 Mr. Kapel, you have two minutes remaining.

17 REBUTTAL ARGUMENT OF JAMES R. KAPEL, ESQ.,

18 ON BEHALF OF THE PETITIONERS

19 MR. KAPEL: Thank you.

20 Much has been made of the presence of
21 solicitors here within the terminals for ten years or
22 so.

23 The only thing that shows is that the Board
24 has not had the appropriate tools to keep these people
25 out and to enforce its policy. They have had --

1 QUESTION: Like a good ordinance drafter?

2 MR. KAPEL: Yes. Part of the problem is that
3 many of the laws, criminal laws, were drafted to cover
4 many pieces of property within Los Angeles.

5 Here it is the Board that people charged with
6 operating the airport that are making the determinations
7 of what rules should apply with regard to that.

8 This Court has repeatedly stated that a
9 government entity has the power to preserve the property
10 under its control to the uses for which they're lawfully
11 dedicated.

12 This Board has attempted to do just that, what
13 you have said is constitutionally permissible.

14 And we request that you find that the airport
15 is not a traditional public forum, or has not been
16 opened as a public forum.

17 Thank you.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
19 Kapel. The case is submitted.

20 (Whereupon, at 11:09 a.m., the case in the
21 above-entitled matter was submitted.)
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23
24
25

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:

#86-104 - BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, ET AL

Petitioners V. JEWS FOR JESUS, INC., and ALAN HOWARD SNYDERM aka

AVI SNYDER

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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