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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: BOARD OF EDUCATION OF THE WESTSIDE
COMMUNITY SCHOOLS, ETC., ET AL., Petitioners,
v. BRIDGET C. MERGENS, BY AND THROUGH HER
NEXT FRIEND, DANIEL N. MERGENS, ET AL.

CASE NO: 88-1597

PLACE: Washington, D.C.

DATE: January 9, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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BOARD OF EDUCATION OF THE :
WESTSIDE COMMUNITY SCHOOLS, ETC., :
ET AL., :

Petitioners :

v. : No. 88-1597

BRIDGET C. MERGENS, BY AND :
THROUGH HER NEXT FRIEND, DANIEL :
N. MERGENS, ET AL. :

-----X

Washington, D.C.
Tuesday, January 9, 1990

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:07 a.m.

APPEARANCES:

ALLEN E. DAUBMAN, ESQ., Omaha, Nebraska; on behalf of the
Petitioners.

JAY ALAN SEKULOW, ESQ., Washington, D.C.; on behalf of the
private Respondents.

KENNETH W. STARR, ESQ., Solicitor General, Department of
Justice, Washington, D.C.; on behalf of the Federal
Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

ALLEN E. DAUBMAN, ESQ.

On behalf of the Petitioners

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JAY ALAN SEKULOW, ESQ.

On behalf of the Private Respondents

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KENNETH W. STARR, ESQ.

On behalf of the Federal Respondent

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REBUTTAL ARGUMENT OF

ALLEN E. DAUBMAN, ESQ.

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On behalf of the Petitioners

1 the act and meet their educational obligations.

2 The Equal Access Act, as we see it, basically
3 balances three concerns: certainly the free speech rights
4 of students in our public schools; certainly also it
5 balances a concern of nonestablishment of religion; and
6 certainly also it affords deference to school officials,
7 affords them the autonomy and discretion to make
8 educational decisions.

9 In that context, we urge the Court to interpret
10 the act, interpret noncurriculum-related, as that term is
11 used in the act, to encompass a situation which is not
12 found at Westside High School. All of the student clubs
13 and organizations at Westside High School were under, by
14 school board policy, the direct control and supervision of
15 the administration and shall have a faculty sponsor. The
16 record is replete with testimony that the school officials
17 maintained an active role in practice, in determining the
18 goals and objectives of student clubs and organizations
19 and the manner in which those clubs and organizations
20 operated in their school.

21 QUESTION: Well, Mr. Daubman, is there some
22 provision in the Federal act that at least with regard to
23 clubs covered by the act would limit the participation of
24 the faculty sponsor?

25 MR. DAUBMAN: The act basically provides that a

1 school district that has a safe harbor provision, which
2 basically provides that a school district does not have to
3 provide a faculty sponsor, but if it does so in terms of a
4 role of a monitor, that that is permitted under the act.

5 QUESTION: And it goes further and says the
6 sponsor will act as no more than a custodian, in effect?

7 MR. DAUBMAN: Yes.

8 QUESTION: That the faculty sponsor will not be
9 active?

10 MR. DAUBMAN: That is correct.

11 QUESTION: Do you suppose the act would be
12 applied so as to limit the participation of the sponsor
13 for the scuba class, for example -- the Scuba Club?

14 MR. DAUBMAN: The sponsor for the Scuba Club, in
15 our particular case there were really -- there was a
16 faculty sponsor that was subject to the direction of the
17 administration.

18 QUESTION: I'm just asking whether the Federal
19 act would apply across the board to all clubs covered by
20 the act, whether they are religious or not?

21 MR. DAUBMAN: That's correct.

22 QUESTION: So that the type of participation
23 you've been describing would not be permitted under the
24 Federal act by the faculty sponsor?

25 MR. DAUBMAN: What -- the problem presented is

1 that we did not have a forum at the high school and
2 therefore not a forum under the Equal Access Act which
3 provided for custodial sponsors, but rather provided for
4 active participation.

5 QUESTION: I thought the court below found that
6 you did have a forum.

7 MR. DAUBMAN: The district court found
8 otherwise. The court below reversed that --

9 QUESTION: Right.

10 MR. DAUBMAN: That's correct.

11 QUESTION: Right.

12 MR. DAUBMAN: And in that regard --

13 QUESTION: So we're talking about the present
14 situation.

15 Let me ask you one other question. Does the
16 school have classes in the regularly offered courses for
17 credit in scuba and in chess?

18 MR. DAUBMAN: No, it does not, Your Honor. But
19 what our school district does have -- what our high school
20 does have is an extensive physical education curriculum,
21 mandated at least in part by state educational guidelines
22 and the school district felt that the Scuba Diving Club,
23 called Subsurfers in our school, was certainly related to
24 that -- the regular curriculum offerings, to no lesser
25 extent, other than the degree of participation, than other

1 athletic endeavors that are maintained as co-curricular
2 activities, whether that be organized sports teams or
3 intramural competition -- all of those activities.

4 QUESTION: Yes, but am I correct, Mr. Daubman,
5 that even if you had no classes that related to scuba
6 diving or athletics you would still maintain that a Scuba
7 Club would be non -- would be -- would not make -- not
8 convert the school into a limited public forum, wouldn't
9 you?

10 MR. DAUBMAN: That's not entirely correct. The
11 -- if there were no physical education classes at the
12 school it would be difficult to say that that was one of
13 the educational objectives of the school, and therefore
14 the Scuba Diving Club related to that. I don't think that
15 --

16 QUESTION: I thought your test was a little --
17 was one that, if the school could sponsor the activity as
18 a curriculum activity, that it would be all right to have
19 a club, even though it didn't have a class.

20 For example, supposing you had a French Club,
21 but you had no French classes. Would you say that would
22 make it a -- bring the act into play?

23 MR. DAUBMAN: It would not --

24 QUESTION: Under your view. I'm not asking you
25 to --

1 MR. DAUBMAN: Under my view, it would not bring
2 the act into play.

3 QUESTION: And the reasons?

4 MR. DAUBMAN: The absence of a French class does
5 not mean the absence of foreign language department.
6 There are many education --

7 QUESTION: Well, say there's no foreign language
8 department -- let me push you -- but you still want to
9 have a French class on the theory that it's the kind of
10 activity a school can sponsor without getting into all
11 these sensitive issues?

12 MR. DAUBMAN: If the club's object -- goals and
13 objectives were instruction or discourse regarding the
14 French language, then I would agree with you. If it was
15 to -- if the goals and objectives of that club, as
16 developed through the faculty sponsor and the
17 administration, dealt with French culture or French
18 history, then there would be, I think, quite a strong
19 relationship to the European studies programs.

20 QUESTION: Mr. Daubman, one of your clubs
21 involves helping handicapped children. Wasn't that one of
22 the clubs which you related to your curriculum because you
23 said that it's part of the responsibility -- there is no
24 class in that. It was just a means of teaching community
25 responsibility, as I recall. Isn't that your

1 justification?

2 MR. DAUBMAN: Well, the name of the club, or the
3 activity, is Peer Advocates. First of all, that was
4 something that was initiated by a teacher as opposed by a
5 student and would therefore fall outside the act.

6 QUESTION: Why is that?

7 MR. DAUBMAN: Because the act talks about clubs
8 that are student initiated.

9 QUESTION: Oh, that's for the club -- for a club
10 to be entitled to be admitted under the act, it has to be
11 student initiated, but I don't read the act anywhere as
12 saying that for purposes of the test of the act, of
13 whether you're a limited forum, the club has to be student
14 initiated. Where does it say that?

15 MR. DAUBMAN: It -- what it says is that the act
16 provides that student -- that it applies to student
17 initiated clubs.

18 QUESTION: No, it says "a public secondary
19 school has a limited open forum whenever such school
20 grants an offering to or opportunity for one or more
21 noncurriculum-related student groups." It does not say
22 student initiated.

23 It says student initiated later, when it
24 describes the type of club that is entitled to plead the
25 benefit of the act. That has to be student-initiated, but

1 it seems to me that any act, whether it's -- any club,
2 whether it's initiated by the school itself or by a
3 student, triggers the act.

4 MR. DAUBMAN: Quite apart from that, with
5 respect to Peer Advocates, the situation presented there -
6 - two points: first of all, that was -- purposes of the
7 pretrial stipulation, in terms of what clubs were going to
8 be determined to be at issue as to whether they were
9 noncurriculum-related for purposes this -- of this
10 lawsuit, was raised for the first time on appeal in the
11 briefs.

12 It was not something that was tried to the trial
13 court and I don't believe it was even argued in the Eighth
14 Circuit, but discussed for the first time in briefs on
15 appeal here. Therefore we did not have any opportunity,
16 certainly, at trial or otherwise, to respond to that.

17 QUESTION: Did you make this point in your
18 briefs? I don't --

19 MR. DAUBMAN: Yes, Your Honor.

20 QUESTION: What about the Chess Club? What --
21 how is that curriculum related? That is related to math,
22 as I recall.

23 MR. DAUBMAN: Yes, it is, and logical thought
24 processes that are associated with that.

25 The history of the Chess Club at the high

1 school, as shown by the record in this case, was something
2 that was conducted in the math -- before it was a club,
3 was conducted in the math resource room at the urging, and
4 being allowed by the head of the math department because
5 of his feeling that it -- those who participated actively
6 in chess became, and continue to be, better math students.
7 In the math resource room that became disruptive, and for
8 that reason it was relegated to a club situation --

9 QUESTION: Could teachers at different schools
10 take different positions about whether or not the Chess
11 Club is curriculum related? Suppose you have two
12 identical schools, two identical chess clubs, but one math
13 teacher says well, I think this is curriculum related and
14 the other says it isn't. Are we bound by that?

15 MR. DAUBMAN: What we are bound by is the record
16 presented in this case. In terms of our factual record,
17 that was undisputed. The testimony --

18 QUESTION: Well, what I'm asking is, what is the
19 test for a curriculum-related club? Is it what the
20 faculty thinks, or what this Court thinks?

21 MR. DAUBMAN: Ultimately, it is what this Court
22 thinks, sir.

23 (Laughter.)

24 MR. DAUBMAN: But with respect to --

25 QUESTION: Well, I don't know. This -- do you

1 think -- what is the standard of review on this issue? Do
2 you think it's a factual determination?

3 MR. DAUBMAN: I think the -- I think it is a
4 factual determination.

5 QUESTION: Well then, if it's a -- it has to be
6 clearly erroneous to overturn the district court.

7 MR. DAUBMAN: That's correct, Your Honor. The
8 Eighth Circuit --

9 QUESTION: Well, that isn't what the Eighth
10 Circuit did. Didn't even say that.

11 MR. DAUBMAN: That's correct, Your Honor, and
12 we've urged that point.

13 QUESTION: I would think you would be arguing
14 that.

15 MR. DAUBMAN: I'm sorry?

16 QUESTION: I would think you would be arguing
17 that.

18 MR. DAUBMAN: I am arguing that.

19 (Laughter.)

20 MR. DAUBMAN: What we have is the Eighth Circuit
21 --

22 QUESTION: But I'm not -- are you sure it's a
23 factual determination (inaudible)?

24 MR. DAUBMAN: What the Equal Access Act
25 provided, quite clearly, is that there was a broad

1 discretion granted to school officials. The legislative
2 history is -- is full of references to that. Congress did
3 not choose to define what constitutes noncurriculum-
4 related. To do so would be tantamount to establishing a
5 national definition of curriculum.

6 QUESTION: But if this issue is open to de novo
7 review by the court of appeals, I would suppose they know
8 more about what's curriculum related in Omaha than -- is
9 this in Omaha?

10 MR. DAUBMAN: Yes, it is.

11 QUESTION: In Omaha than we do. I would suppose
12 we might just accept what the court of appeals said about
13 this issue.

14 MR. DAUBMAN: Well, certainly the district court
15 judge knows more about what's going on and what's
16 curriculum related in Omaha than the Eighth Circuit does.

17 QUESTION: Well, did he make findings of fact?

18 MR. DAUBMAN: At the trial level?

19 QUESTION: Yes.

20 MR. DAUBMAN: Yes, and those were not really
21 discussed in the Eighth Circuit opinion. The Eighth
22 Circuit basically looked at some references in the
23 legislative history, saw a Chess Club as in one part of
24 the legislative history being characterized by one senator
25 as noncurriculum related --

1 QUESTION: Did he make findings of fact that all
2 the clubs were curriculum related?

3 MR. DAUBMAN: At the trial level, yes.

4 QUESTION: This was Judge Beam?

5 MR. DAUBMAN: Yes, it was.

6 QUESTION: Now on the Eighth Circuit?

7 MR. DAUBMAN: That is correct.

8 QUESTION: You're arguing now, Mr. Daubman, that
9 the high school did not have a limited open forum, is that
10 right?

11 MR. DAUBMAN: That's right.

12 QUESTION: You -- are you asking us to construe
13 the Equal Access Act to reach that conclusion?

14 MR. DAUBMAN: That's correct. What the Equal
15 Access Act does, as I mentioned earlier, is balance those
16 three concerns.

17 It is very difficult for certainly this Court
18 and much more certainly for school officials to determine
19 on a case-by-case basis how close a relationship one needs
20 for a particular club activity as it relates to one or
21 more particular regular courses that are offered by the
22 school.

23 What was done in this case, or what our practice
24 had been at Westside High School for several years prior
25 to the passage of the Equal Access Act, was to treat and

1 run the co-curricular student clubs as part of the
2 educational program of the school.

3 That is to be, I think, very clearly
4 distinguished from the type of club activities which were
5 permitted in *Widmar v. Vincent*. Their access to school
6 facilities for purposes of student meetings was allowed,
7 but at no time did the university in that case exercise
8 control over those student clubs and activities. Our high
9 school setting is much different.

10 QUESTION: I think that the Federal statute
11 prohibits that. That -- that's why I didn't understand
12 your sponsor argument. You're saying since -- since the
13 state requires a faculty sponsor for all these other
14 groups, and since it can't provide the same kind of a
15 faculty sponsor for these groups, perhaps because of
16 establishment reasons, therefore it doesn't have to comply
17 with the act.

18 But I don't -- I think the act overrides your
19 ability to simply say, every student group will have a
20 faculty sponsor. Where -- why do you think you have a
21 right to do that, any more than you have a right to say
22 every student group shall have no more than 30 people?
23 The act wouldn't permit you to exclude a religious group
24 that has 50 people on the basis that we don't have any
25 student groups with more than 30 people, would it?

1 definition MR. DAUBMAN: What the act does is provides a
2 definitional framework for when you have a limited open
3 forum triggering the applicability of that act, and it is
4 our contention that we did not have a limited open forum
5 under the terms of that act.

6 The Equal QUESTION: Why? Because you had a -- because
7 you had sponsors?

8 MR. DAUBMAN: Primarily because we had -- we did
9 not have noncurriculum-related student groups. The fact
10 of a faculty sponsor and the control exercised by that
11 sponsor, as well as the supervision of that sponsor and
12 the answering to, by that sponsor, to the administration,
13 I think clearly shows that we did not have a situation
14 where simple access to building premises was allowed, but
15 rather there was active sponsorship and involvement by the
16 school district.

17 know Cong QUESTION: That's all it takes to make it
18 faculty related, is that you have a sponsor on the faculty
19 who directs the group, and the group can be engaged in any
20 subject whatever. I mean, pick whatever you want. If you
21 think chess is faculty related, I hesitate to suggest
22 something that might not be. But pick something that you
23 think is and -- and put a faculty sponsor in charge of it.
24 It would then be curriculum related?

25 able to MR. DAUBMAN: What we are urging is that the

1 definition of curriculum-relatedness really goes to the
2 heart of what the school officials have chosen to do with
3 the co-curricular activities. They have chosen to treat
4 that as part of their curricular offerings of the school,
5 part of the educational program offered by the school.
6 The Equal Access Act I don't think goes that far. I don't
7 think it touches that far.

8 QUESTION: Well, it would certainly -- that
9 would certainly -- your construction would certainly
10 enable any school district that felt like it to totally
11 avoid the Equal Access Act.

12 MR. DAUBMAN: I think that certainly that risk
13 is present. You have a situation --

14 QUESTION: Well, do you think that's what
15 Congress intended?

16 MR. DAUBMAN: I think Congress intended -- I
17 know Congress intended that what ought to be done in terms
18 of the school district's response to the Equal Access Act
19 is to allow school districts in their discretion to make
20 educational decisions as to what academic and co-
21 curricular programs they're going to sponsor.

22 If a school district were to just blatantly say
23 no, everything we do here is curriculum related, therefore
24 the act doesn't apply, I think our trial courts are well
25 able to see a sham when one exists.

1 Our trial court in this particular case spent a
2 great deal of time exploring that issue, and there was a
3 great deal of testimony regarding the curricular nature --

4 QUESTION: But the Eighth Circuit disagreed with
5 the trial court.

6 MR. DAUBMAN: The Eighth Circuit disagreed with
7 the trial court in interpretation of the Equal Access Act.
8 It did not have any detail on its opinion as to a
9 discussion of what constitutes curriculum related or not.

10 QUESTION: It didn't define -- purport to state
11 a standard for deciding.

12 MR. DAUBMAN: It gave no guidance.

13 QUESTION: May I interrupt?

14 QUESTION: What do you think the test is?

15 MR. DAUBMAN: I think the test is --

16 QUESTION: Justice Kennedy asked you awhile ago
17 -- I think I -- I'm afraid I interrupted before you could
18 really answer him.

19 MR. DAUBMAN: The test, I think -- and again,
20 balancing -- keeping in mind the three concerns that the
21 Equal Access Act addressed: free speech rights,
22 nonestablishment of religion and school district
23 discretion, the correct, and I think most proper way to
24 interpret the act to satisfy those three concerns, is to
25 determine whether or not the co-curricular activity

1 student clubs, whatever you want to call them, do in fact
2 relate to the curriculum of the high school and the school
3 district officials --

4 QUESTION: In fact. In fact, so it's --

5 MR. DAUBMAN: In fact, and if school district
6 officials, in doing -- in structuring their co-curricular
7 activities in student clubs, treat it truly as co-
8 curricular, treat it truly as part of the educational
9 program that it offers, as the trial court found --

10 QUESTION: What is truly? What is truly?

11 MR. DAUBMAN: In fact. A nonsham. Not, as
12 suggested earlier --

13 QUESTION: Well, may I ask you a question?
14 Supposing they have a course in government and that it
15 would be related to government to have a Young Democrats
16 Club or a Young Republicans or a Young Communist Club,
17 would you say that those could be -- and membership
18 confined to those who wanted to advocate joining that
19 particular group and supporting its policies, would that
20 be curriculum related?

21 MR. DAUBMAN: One of the other basic educational
22 choices that Westside community schools made, again long
23 prior to the passage of the Equal Access Act --

24 QUESTION: Well, they said they weren't going to
25 do that, I know. But my question is, suppose they did?

1 Would that be curriculum related, under your definition?

2 MR. DAUBMAN: Again, we don't -- keeping in mind
3 we don't have adversary clubs.

4 QUESTION: Are you suggesting, in other words,
5 that Congress intended to allow that kind of latitude in
6 the clubs and not allow the religious groups to meet?

7 MR. DAUBMAN: No. No. The clubs -- political
8 clubs that you mentioned --

9 QUESTION: Because isn't it true that one of the
10 costs of having a noncurriculum-related club is that you
11 must allow not merely religious groups but political
12 groups? The Ku Klux Klan, perhaps, and advocacy of free
13 use of drugs and things like that?

14 MR. DAUBMAN: Sure, and it's those adversarial
15 types of clubs --

16 QUESTION: And if you have a Chess Club, the
17 price you pay for that is, you must let all these other
18 groups in?

19 MR. DAUBMAN: Well, if the Chess Club is --

20 QUESTION: If a Chess Club is noncurriculum
21 related?

22 MR. DAUBMAN: That's correct.

23 QUESTION: Yes. But you would not say that any
24 of the groups in the category that advocate particular
25 points of view are curriculum related, would you, within

1 the meaning of the statute?

2 MR. DAUBMAN: It depends on the curriculum or
3 the -- what the school district' done.

4 QUESTION: Well, you can put anything on the
5 curriculum, under that view.

6 MR. DAUBMAN: Well, and that's what Congress
7 did. Congress -- curriculum for one school district is
8 not the same for another school district. It's not the
9 same today as it is ten years from now.

10 QUESTION: Mr. Daubman, I -- tell me if I'm
11 correct, that I think that you're using the term
12 "curriculum" to mean not just the formal courses that are
13 taught in the school. Am I correct in that?

14 MR. DAUBMAN: That is correct.

15 QUESTION: That you are saying that anything
16 becomes part of the school's curriculum if the school
17 wants to teach it, even if the school wants to teach it
18 only through these extracurricular activities -- so-called
19 extracurricular. I mean, that's sort of a contradiction
20 in terms. You're saying that the curriculum includes the
21 noncurriculum.

22 MR. DAUBMAN: No. I --

23 QUESTION: Basically.

24 MR. DAUBMAN: Well, I wouldn't phrase it that
25 way, obviously.

1 QUESTION: Well --

2 (Laughter.)

3 QUESTION: I think most of us who use the term
4 "curriculum" would.

5 MR. DAUBMAN: Well, and I think as pointed out
6 in the briefs of the Respondent and the government, the
7 dictionaries do it that way, too, but the testimony at
8 trial, from the students' own expert witness, defines
9 "curriculum" in the same manner that was defined by, or
10 used by our administration, long before passage of the
11 act.

12 QUESTION: Well, in your answer to Justice
13 Stevens you indicated that the Democrat or Republican Club
14 would be noncurriculum related because it's adversarial.
15 I don't see why that follows.

16 MR. DAUBMAN: No. I'm -- that isn't -- if I
17 said that, it isn't what I meant. What -- what we have
18 is, if you have a -- excuse me -- if you have a club
19 system -- you know, co-curricular clubs that do have --
20 that are noncurriculum related under the act, then
21 certainly the governmental clubs that was -- that were
22 mentioned earlier would fall under the terms of the act,
23 and they would have to be allowed as well.

24 In our school district we do not have
25 adversarial clubs. One of the things testified to at

1 trial and, in practice, was in existence again long before
2 the passage of the act is that adversarial clubs that
3 advocate a particular point of view are not allowed in the
4 school. The school district did not -- does not -- lend
5 its name to advocating a particular view. Not that
6 controversial subjects are shied away from, by any means.
7 It's just that they are dealt with --

8 QUESTION: Under your view, Mr. Daubman,
9 supposing that a school, perhaps not Westside, but some
10 similar school, said we're going to have Republican and
11 Democratic Clubs as extensions of the curriculum, as
12 extensions of the civics class. Now, if that were upheld,
13 that wouldn't give way to any other noncurricular clubs,
14 would it?

15 MR. DAUBMAN: The problem there is, again, that
16 those clubs are expressing a particular point of view.

17 QUESTION: But why should that be a limiting
18 factor?

19 MR. DAUBMAN: It's a limiting factor in terms of
20 the operation of our club structure is all I'm saying.

21 QUESTION: The statute doesn't require --
22 doesn't permit you to apply that limiting factor. It says
23 if you have a limited public forum, which it doesn't
24 define as a public forum that admits controversial clubs.
25 It just says if you have a limited public forum you have

1 to admit all sorts of clubs, including controversial
2 clubs.

3 MR. DAUBMAN: That's correct.

4 QUESTION: May I ask you, in your brief I
5 thought you endorsed the test that Congressman Goodling
6 advocated, and he's quoted on page 70 and 71 of your
7 brief. You seem to have walked away from that. Or --
8 what is -- I don't really understand whether you're still
9 advocating that position or not.

10 MR. DAUBMAN: The position being?

11 QUESTION: Well, first there's a subject matter
12 of the meeting of the type which a public school could
13 sponsor. Now, obviously it couldn't sponsor Republican
14 points of view to the exclusion of other points of view,
15 so that would take them out.

16 And the second test was -- was does the school
17 or school teacher require, or directly encourage, student
18 participation in that activity, and obviously, again, a
19 public school couldn't encourage people to vote
20 Republican. But that test would take care of this
21 hypothetical, but you seem to have abandoned that.
22 Whereas, it would take care of things like the Chess Club
23 and stuff that isn't very controversial.

24 It would draw a line between advocacy groups
25 that would require you to open the door to other points of

1 view and those that are obviously neutral and perfectly
2 proper for a school to sponsor. But you seem to have
3 abandoned that argument.

4 MR. DAUBMAN: I've not abandoned that argument,
5 Your Honor, but that, Representative Goodling's test, if
6 you will, as well as other things suggested in the
7 legislative history --

8 QUESTION: But doesn't that test solve most of
9 these hypotheticals?

10 MR. DAUBMAN: It does. I'd like to reserve the
11 balance of my time for rebuttal.

12 QUESTION: Very well, Mr. Daubman.
13 Mr. Sekulow?

14 ORAL ARGUMENT OF JAY ALAN SEKULOW
15 ON BEHALF OF THE RESPONDENTS

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

18 The students of Westside High School who desire
19 to form a student-initiated, student-led and voluntary
20 Bible club do acknowledge that the school officials have
21 important and oftentime delicate functions to perform with
22 regard to the operation of schools under their control.
23 However, these concerns do not justify the prohibition of
24 these students' Bible club from the Westside High School
25 campus.

1 At issue at Westside High School, and what is
2 before the court today is whether one or more
3 noncurriculum-related clubs existed, which would then
4 trigger Congress' Equal Access Act.

5 The Peer Advocates Club, which was discussed at
6 trial, was an admission by the principal himself that that
7 particular club was not related to any of the curriculum
8 activities of Westside High School.

9 The pretrial stipulation that was discussed by
10 the Petitioners' attorney related to ten clubs that were
11 designated to be discussed. However, and I think it's
12 important to note that that same stipulation did not state
13 that they would -- that the Respondents would in any way
14 not challenge other club activities.

15 The school officials themselves have set forth,
16 if you will, the way in which to make the determination of
17 whether a particular club is related to the curriculum.
18 And our test for whether the act would be triggered would
19 be whether there is a direct relationship between the club
20 and a core curriculum course or a curriculum course.

21 For instance, in defining the clubs, as it has
22 in its -- in the Joint Appendix there is a listing of the
23 various student groups and student clubs that meet at
24 Westside High School. One of the clubs, Distributive
25 Education Club, is listed by the schools as, in fact, an

1 extension of the course in distributive education.

2 QUESTION: May I interrupt you on that?

3 MR. SEKULOW: Yes, Your Honor.

4 QUESTION: Supposing the school does not teach
5 any physical education courses at all. Would a football
6 team be required -- trigger the act?

7 MR. SEKULOW: Congress discussed that and in the
8 legislative history addressed that also.

9 QUESTION: I know they said no, but in terms of
10 just looking at the language of the statute, why wouldn't
11 it or would it? What is your view?

12 MR. SEKULOW: I think in fact that the existence
13 of the football team with no physical education still
14 could have the -- the -- the relationship which would not
15 trigger the act because of the -- the coaches being
16 involved to the -- such a extent, the paid salary of --

17 QUESTION: Supposing you don't have coaches.
18 You just have a faculty sponsor who referees the games.

19 MR. SEKULOW: Oh, I think then in that situation
20 that the act could apply, in fact.

21 QUESTION: The act could or -- obviously, it
22 could --

23 MR. SEKULOW: It would apply, Your Honor.

24 QUESTION: Yes.

25 MR. SEKULOW: And the reason that I think

1 Congress in looking at that issue, and what they were
2 looking at is more of the typical situation where the
3 school has the football team and the team's a little bit
4 different than the clubs.

5 Also, the act does not --

6 QUESTION: I know. What you're saying is
7 Congress wanted the schools to make the choice between
8 clubs of this character and opening it up to things like
9 sponsoring drugs and Ku Klux Klan and political advocacy
10 and all that.

11 MR. SEKULOW: No, we're --

12 QUESTION: Because that's the price, is it not,
13 if you -- if you become a public forum.

14 MR. SEKULOW: My response to that is this, Your
15 Honor, that Congress wanted to eliminate invidious
16 discrimination against religious and political speech.

17 QUESTION: But is it not true that if you -- if
18 you say it's a limited public forum, that's the
19 consequence. All these other groups must also have access
20 to the school facilities?

21 MR. SEKULOW: For instance, I would not think
22 that a club for --

23 QUESTION: Is that your view or not?

24 MR. SEKULOW: Not with relate to a group that
25 would be advocating drug use and drug abuse. I would say

1 no.

2 QUESTION: Why not?

3 MR. SEKULOW: Because that is -- Congress
4 addressed that in the act and stated at -- under Section
5 D, Number 5 that to sanction meetings that are otherwise
6 unlawful and a group that was promoting the use --

7 QUESTION: No, not the use, just the --
8 advocating change in the law to make it permissible.

9 MR. SEKULOW: That would be covered by the act.
10 That would -- that is the price -- that's the price of
11 freedom and what -- in fact, one of the early cases
12 involving the implementation of the Equal Access Act
13 involved political speech: Student Coalition for Peace.

14 They wanted to form a group to discuss nuclear
15 freezing, and they were denied access, and they, in fact,
16 utilized the Equal Access Act, and the Third Circuit did,
17 in fact, grant them equal access.

18 But what the act also does, and as the
19 Petitioners have conceded today, we're not -- and I think
20 the act really does protect this -- Congress did not ask
21 the schools to surrender control to the facilities. They
22 did not say, if you will, open the door for the parade of
23 horrors.

24 For instance, in 1969 this court in the Tinker
25 decision allowed certain expressions of speech to take

1 place on -- on the high school campuses, and there's yet
2 to be that real parade of horribles.

3 Now, Congress was concerned about groups going
4 over the line, if you will, and what I mean by the line,
5 it's advocating illegal activity and things like that.

6 And Congress was specific, number one, adopted
7 the test that this court enunciated in Tinker in saying
8 that any type of group or organization that would be
9 materially disruptive or interfere with other students'
10 right to learn would, in fact, not have to take place in
11 the school.

12 Also, going further than what was really
13 addressed in Tinker, and different as well, Congress
14 sought to make sure that school administrators, as the
15 Petitioners in fact have stated, would be entitled to
16 protect the well-being of students under their control.

17 And I want to state here that the only club that
18 has been denied access based on the content of the speech
19 in this particular case has been the proposed Bible club
20 which was to meet --

21 QUESTION: You don't know -- you don't know
22 whether there's been a lot of people that applied who --
23 do you know who's applied?

24 MR. SEKULOW: There was statements -- and
25 actually that was addressed, Your Honor, in the lower

1 court, and what was discussed there was there was a club
2 that was going to -- a soccer club was actually going to
3 be formed, and there was a lack of student interest
4 involved. And there was a Dungeons and Dragons club
5 proposed which was denied, not based on content, but based
6 on safety concerns that the school administration had with
7 regard to allowing that particular club to exist.

8 QUESTION: Yes, but isn't it also --

9 QUESTION: Sounds unsafe.

10 MR. SEKULOW: Excuse me, Your Honor?

11 QUESTION: Sounds unsafe.

12 MR. SEKULOW: It does sound unsafe, yes.

13 (Laughter.)

14 MR. SEKULOW: We agree that that could have been
15 an unsafe -- an unsafe club.

16 QUESTION: But isn't it also true that the
17 school policy had been rather clear that they would not
18 permit a Young Republican or a Young Democrats club to be
19 formed, so there was -- probably nobody would bother to
20 apply.

21 MR. SEKULOW: Well, Your Honor, that is correct.
22 However, that's -- as Justice Scalia stated, that's
23 specifically what the Equal Access Act and -- granted,
24 some of their policies, many of their policies, were
25 before the adoption of the act. But I would find it very

1 difficult to have -- I'm frankly perplexed by a school not
2 allowing a Young Democrat and a Young Republican club to
3 meet on campus.

4 QUESTION: Do you think it would be an
5 impermissible educational decision to say we would rather
6 have none of these groups at all and if we have to abolish
7 all clubs, we'll do that?

8 MR. SEKULOW: Yes, I do. I think that's when
9 this Court would have to intervene because if that was --

10 QUESTION: Let me -- let me just take it one
11 step further.

12 MR. SEKULOW: Yes, sir.

13 QUESTION: The government identifies four clubs
14 that they say make it a limited club.

15 Supposing after the case is decided and you win
16 and the government's position is upheld, they say well,
17 we'll cancel those four clubs.

18 MR. SEKULOW: That's exactly what the school
19 board in this particular case has stated they would do.
20 That if, in fact --

21 QUESTION: Would that be permissible under the
22 act, in your view?

23 MR. SEKULOW: They have the right to -- there's
24 nothing in the act that prohibits them from closing down
25 the club forum. There would be constitutional issues

1 implicated at that point, as we've stated in our brief.

2 One of our concerns is, in fact, that the school
3 board has stated that in the event this court or a court
4 were to determine that under the Equal Access Act a
5 limited open forum were to exist, that they would
6 recommend to the school board that the clubs be cancelled.

7 Now, does the --

8 QUESTION: Do you agree that could be done under
9 the Equal Access Act?

10 MR. SEKULOW: Absolutely, Your Honor. There's
11 no question that the schools have to -- do not have to
12 allow any type of extracurricular activity.

13 We take it a step further, and one of the
14 concerns that we expressed in our brief is that there are
15 other constitutional implications here, but under the act
16 they certainly have that type of discretion to absolutely
17 close down the forum if they so elect.

18 Yes, Your Honor?

19 QUESTION: You -- the -- you -- you win this
20 case and they close down the club system, and you suggest
21 that they constitutionally could not do that?

22 MR. SEKULOW: No, Your Honor. They could close
23 down the club system absolutely. What they could not --

24 QUESTION: And keep your group off the campus?

25 MR. SEKULOW: Keep my group off the campus in

1 this context, Your Honor.

2 QUESTION: But you say there's a constitutional
3 question?

4 MR. SEKULOW: Yes.

5 QUESTION: What?

6 MR. SEKULOW: And that is this: The school
7 board, and the testimony at trial stated clearly, and it's
8 -- it's really unequivocal that informal meetings on a
9 regular basis, even so far as meeting at lunch on a
10 regular basis with a Bible open and discussing the Bible
11 or these students discussing each other's spiritual
12 concerns that they had or religious concerns that they had
13 or religious viewpoints, if that was done on a regular
14 basis during lunch, not any kind of extracurricular
15 activity period, that they would prohibit that activity.

16 QUESTION: Did the school board --

17 QUESTION: That's a different question.

18 QUESTION: Did the school board say -- say why
19 they would close down the clubs if this case went against
20 them?

21 MR. SEKULOW: That they -- yes. Their position
22 is that at Westside High School they desire -- the
23 rationale they gave was to present a balanced view, and
24 that allowing this type of speech activity would not
25 present a balanced view. And therefore -- I'm not trying

1 to argue their position, obviously -- that they would not
2 have to allow a group that would advocate a position.

3 However, it's interesting that no particular
4 group, no particular discussions took place with what
5 exactly -- prior to the denial, what exactly these
6 students intended to do. And what they wanted to do was
7 read the Bible, pray and encourage one another with regard
8 to the issues that they're going to face at Westside High
9 School on a daily basis.

10 For instance, and as the Petitioners stated, the
11 school is -- does have controversial discussions on topics
12 ranging from abortion to homosexuality to drug abuse. But
13 what they've really done is deny these students the right,
14 even outside of the particular club forum here, to meet on
15 a regular basis during lunch to discuss those concerns.
16 But under --

17 QUESTION: Where were these discussions held
18 about, you know, abortion, homosexuality? Is that in
19 class?

20 MR. SEKULOW: Some of them, yes. Many times
21 they were in class with a teacher present. However,
22 Planned Parenthood came in for an open module section, and
23 sometimes, as the testimony stated, sometimes the teacher
24 was there and sometimes the teacher wasn't.

25 And we're not saying that the school has to

1 surrender its control of allowing controversial subjects
2 to be discussed in class. What we are saying is that
3 these students in nature of 30 other clubs existing at
4 Westside High School, many of which on their face are not
5 related to the curriculum as they -- really to take the
6 position that anything that relates to the missions and
7 goals is thereby curriculum related and, therefore, it
8 does not trigger the act really does, as it was pointed
9 out earlier, circumvent exactly what Congress was trying
10 to prohibit.

11 QUESTION: Unrelated.

12 MR. SEKULOW: Your Honor, my test is simple, and
13 that is, is the particular club directly related to the
14 class and --

15 QUESTION: Well, that just restates -- that
16 isn't very illuminating. You've just -- all you've done
17 is put in the word "direct."

18 MR. SEKULOW: Your Honor, I think -- I'd -- I --
19 I would say this. I do believe it does provide a barrier
20 or a -- a -- a standard, if you will, because the clubs
21 listed by the school in their listing of student
22 organizations without even dealing with the Equal Access
23 Act had no difficulty deciding which clubs were extensions
24 of the curriculum and those that were not.

25 In a -- for instance, as I stated earlier, the

1 Distributive Education Class is listed as an extension of
2 the distributive education course. However, the Chess
3 Club is listed as a club for students interested in chess,
4 and the Interact is listed as a club --

5 QUESTION: So, is it just going to be a formal
6 thing because a logic is sort of a -- an extension of the
7 mathematics course?

8 MR. SEKULOW: I don't think you could take it
9 that --

10 QUESTION: Or logic?

11 MR. SEKULOW: Your Honor, I don't think --

12 QUESTION: We teach logic in the school, and the
13 best way -- one of the best -- one of the -- one of the
14 ways of stirring up interest in it is a chess club.

15 MR. SEKULOW: Your Honor, number one, in this
16 particular class -- club setting in the class function
17 there is no class in logic. There was a --

18 QUESTION: Mathematics?

19 MR. SEKULOW: There was a mathematics class, but
20 that -- the chess club, for instance, was exactly what
21 Congress was -- one of the clubs frequently discussed in
22 reviewing the act, the history of the act, that would
23 trigger the existence of a noncurriculum club, therefore
24 the limited open forum under the act.

25 QUESTION: Under your test could two math

1 professors at two different schools disagree as to whether
2 or not a chess course was directly related, assuming their
3 textbook is the same?

4 MR. SEKULOW: I would defer to Congress on that,
5 and I would say that in that particular situation since
6 the chess club did come up fairly frequently in the
7 debates going back and forth, that that would trigger the
8 act.

9 If we look at one --

10 QUESTION: I -- I'm not sure. So -- so, you're
11 saying that as -- as -- as a matter of law chess clubs are
12 directly related to the math curriculum?

13 MR. SEKULOW: No, they're not. I would -- I
14 know I would not say that they were directly related to
15 the math curriculum. That's in fact the opposite of what
16 I would say, that the Chess Club is the -- one of the main
17 bases upon which in the legislative history that Congress
18 uses the example triggering noncurriculum related at this
19 particular school.

20 QUESTION: Even if a math professor disagrees
21 with that?

22 MR. SEKULOW: I would think so because even if
23 the math professor would disagree, I think -- I believe
24 that that would still present the same problem, and that
25 is if, in fact, we take a posture -- if this Court were to

1 take a posture that anything related to the missions and
2 goals, which is what the district court stated, which the
3 Eighth Circuit rejected entirely, would circumvent the
4 act. The act would become a nullity really by
5 administrative fiat, if you will.

6 Yes, sir.

7 QUESTION: The act doesn't list chess clubs or
8 anything like that. That's just legislative history.

9 MR. SEKULOW: That's correct, Your Honor, the
10 act does not. But what the act does show is that -- and
11 in fact I think you can even draw an analogy to the
12 directly related test --

13 QUESTION: You still haven't given me much help
14 on -- what is your standard? The only thing you've said
15 so far is that it has to be sort of a direct relationship,
16 and then you look at the legislative history and you're
17 bound by the legislative history.

18 MR. SEKULOW: No, Your Honor, absolutely not.
19 What I'm saying is this, and let me do this by example.
20 For instance --

21 QUESTION: Justice White doesn't think much of
22 legislative history, Mr. Sekulow.

23 MR. SEKULOW: I've heard that.

24 (Laughter.)

25 MR. SEKULOW: There are other members of the

1 Court that don't, as well.

2 QUESTION: I've been reading subversive
3 literature.

4 MR. SEKULOW: Oh, you have?

5 (Laughter.)

6 MR. SEKULOW: Our position would be, Your Honor,
7 that the best way to take a look at it was one of the
8 examples that the Court addressed to the Petitioners in
9 the -- during their argument, and that is, what if there's
10 no French class, but there is a French Club? Here --
11 especially, no form of French, or any type of foreign
12 activities.

13 What Congress meant by curriculum related in
14 that context, and why I do use the term, "directly related
15 to curriculum" is, when you have the situation where
16 you've got a French class and a French Club, or Latin
17 class and a Latin Club, but you cannot -- I think the line
18 is easy to draw, Your Honor, or not impossible to draw,
19 when you have a situation where the school administrators
20 acknowledge and admit that a pure advocate club exists and
21 they state on the record it does not relate to curriculum.

22 QUESTION: Well, are you saying that the subject
23 has to be taught in a regular class, in essence?

24 MR. SEKULOW: Yes, Your Honor, that that would
25 be a part of the school's curriculum, that credit would be

1 given. I'm not --

2 QUESTION: If in the math class some time were
3 devoted to teaching chess, then it's curriculum related?

4 MR. SEKULOW: Yes. In that type of situation, I
5 think then you have -- that argument could be made. What
6 we have in this particular case is a whole listing of
7 clubs that do not address the directly related, or even
8 come close to it.

9 For instance, in addition to the Peer Advocates,
10 which is acknowledged not to be related to curriculum by
11 the principal himself, we have the Interact Club, which is
12 an affiliate of Rotary International, and there isn't a
13 view being espoused there, and that club -- the school's
14 only basis to tie that into curriculum related would be in
15 fact whether there was an overall interest in the missions
16 and goals of the particular school --

17 QUESTION: Well, you're -- the more you spell
18 this out, the more it sounds like the court of appeals
19 missed the boat. I don't read anything like that in the
20 court of appeals test.

21 MR. SEKULOW: Well, I think that the court of
22 appeals response, Your Honor, was twofold. Number one,
23 that the definition of noncurriculum related that the
24 district court approved and that the school utilized
25 totally circumvents the act. Now, there is not a great

1 deal of discussion in the Eighth Circuit's opinion with
2 regard to the various tests. They did state that there
3 was a Chess Club --

4 QUESTION: No, there isn't any. There isn't
5 any.

6 MR. SEKULOW: Well, they stated that the Chess
7 Club, for instance, was not related to curriculum as well
8 as other clubs, and they did not spell out what those
9 other clubs were. So that's clear, but as I was saying --

10 QUESTION: Well, suppose we arrive at some --
11 which it sounds like we have to, or might, anyway, some
12 definition of that "curriculum related." Don't you think
13 we ought to remand to see if the -- have the court of
14 appeals apply it, which it never did?

15 MR. SEKULOW: No, Your Honor. I think in the
16 court of appeals' opinion they, in effect, applied more of
17 the directly-related test because of their statements with
18 regard to Chess Club and as it related to the logic
19 situation in the district court.

20 For instance, the judge -- Judge Beam stated
21 that the Logic Club would -- be a growth out of the Math
22 Club, but there is no direct tie-in. The Logic Club, for
23 instance, doesn't even really function in that fashion,
24 and I think what the district court -- or the court of
25 appeals was concerned with was the administrative

1 deference that was being paid to the school officials in
2 their interpretation of what, in fact, curriculum related
3 meant.

4 That the Equal Access Act, if you will, becomes
5 a nullity. That anything that's related to missions and
6 goals, which was the test that was decided by Judge Beam
7 in the lower court. And I think the Eighth Circuit
8 specifically, albeit not as detailed as we would like,
9 rejected that proposal by stating that the Chess Club, as
10 well as other curriculum clubs, were in fact not related
11 to curriculum and therefore the Equal Access Act would
12 have applied.

13 And in the context of this particular forum,
14 with the 30 other clubs there's a -- and again, in the
15 joint appendix, if we're looking for the test, the school
16 officials had no trouble in doing -- in implementing the
17 test in this context. Their own listing of clubs does
18 state, for instance, that the Band Club is a part of the
19 curriculum of band.

20 So these types of delineations are made all the
21 times. What we're saying is that educators and school
22 officials should be given deference with regard to setting
23 forth what their curriculum is, but if in fact they're
24 going to allow student-initiated clubs, which this club
25 does -- the school does, that they, then, if a

1 noncurriculum-related club does exist, they in fact have
2 to open that forum up under the act.

3 QUESTION: Mr. Sekulow, but you would make this
4 exception to your curriculum related -- you would consider
5 it to be part of the curriculum if the student -- if the
6 school is devoting a substantial amount of its resources
7 specifically to running or directing the club? For
8 instance, if it doesn't have a music course but has a
9 school band and pays a conductor of the school band?

10 MR. SEKULOW: Your Honor, I see my time has
11 expired. May I respond?

12 QUESTION: You may answer the question.

13 MR. SEKULOW: Thank you, Chief Justice.

14 In that particular situation, I think it would
15 have to go beyond just expending resources. There would
16 have to be something more where there was instruction
17 going on, or else in fact it would just not be more than,
18 if you will, another club. That there would have to be
19 something during the curriculum where academic credit was
20 given, supervision of a teacher and these types of things.

21 Thank you, Your Honor.

22 QUESTION: Thank you, Mr. Sekulow.

23 General Starr, we'll hear now from you.

24 ORAL ARGUMENT OF KENNETH W. STARR
25 ON BEHALF OF THE FEDERAL RESPONDENT

1 MR. STARR: Mr. Chief Justice, and may it please
2 the Court:

3 In the view of the United States, careful study
4 of this statute and of the record compiled by the Congress
5 in the course of considering, of vigorously debating and
6 enacting this measure, reveals two overriding concerns or
7 values. The value of fairness and evenhandedness, of
8 equality, in the treatment of public secondary school
9 students. And the value of liberty, especially First
10 Amendment the liberties assured to all of our citizens,
11 those who are deeply religious and those who are not.

12 As one of the co-sponsors of this overwhelmingly
13 bipartisan measure, Senator Leahy of Vermont put it, this
14 bill makes an important statement about ideas. It says
15 that ideas are sacred to Americans, whether or not they
16 concern religion. It says that student-initiated
17 religious groups have the same rights to meet on school
18 property during noninstructional time as any other groups.

19 QUESTION: But also these other groups we've
20 talked about also have the same right, like the Ku Klux
21 Klan and so forth?

22 MR. STARR: Yes.

23 Certainly groups cannot be discriminated against
24 on the basis of --

25 QUESTION: And -- and Congress was motivated by

1 treating all of them equally with one -- one another.

2 MR. STARR: Of treating them equally, subject to

3 --

4 QUESTION: You don't find in the legislative
5 history a predominant interest in the religious groups?

6 MR. STARR: I beg your pardon?

7 QUESTION: You don't find in the legislative
8 history a predominant interest in protecting the religious
9 groups?

10 MR. STARR: Oh, I think the primary thrust was
11 to protect religious liberty, because the problem that
12 presented itself to Congress was one of discrimination
13 that was visited on the heads of students who wanted to
14 participate in religious discussion.

15 It is quite clear, it could not be clearer, that
16 the purpose of this statute was to eliminate
17 discrimination against students who were religious and who
18 wanted to engage in religious discussion voluntarily. I
19 quite agree with that.

20 QUESTION: And the other groups may have been
21 included, the Ku Klux Klan and -- and whatever, because of
22 our establishment clause jurisprudence suggesting that you
23 cannot accommodate religion without accommodating
24 everybody else.

25 MR. STARR: The bill was originally drafted so

1 as to provided protection only to religious groups. There
2 was concern that, by virtue of constitutional
3 interpretations of this Court and other courts, the
4 statute should speak neutrally, to include political,
5 philosophical and other grounds.

6 I hasten to add, however, that Congress was
7 quite clear with respect to the authority of schools to
8 maintain order and discipline. Subsection F of Section
9 4071 was inserted for the very purpose of achieving Tinker
10 kinds of concerns with respect to disruption.

11 This measure was not only intended to eliminate
12 discrimination, but it was intended to achieve a sensitive
13 balancing, a sensitive balancing of rights, and what was
14 recognized to be a very difficult and sensitive area for
15 the country.

16 QUESTION: Mr. Starr, is the authority of
17 Congress in this case derived from its control over funds?

18 MR. STARR: I believe its authority derives
19 under the spending powers of Article 1, Section 8, and
20 also by virtue of the statement with respect to any number
21 of members of the House and the Senate, its authority
22 under Section 5 of the Fourteenth Amendment to eliminate
23 discrimination.

24 QUESTION: Well, it can't be the spending power,
25 because there is no -- no remedy of the cut off of funds

1 here. It has to be the latter, I think.

2 MR. STARR: Well, however, Justice Stevens, that
3 the Congress saw fit to apply this statute only to schools
4 that receive federal financial assistance, I suppose if we
5 had a Grove City kind, as it were, of public school system
6 that eschewed any federal funds, this would not apply.
7 Although I would think that under this Court's decisions
8 under section 5 of the Fourteenth Amendment, there might
9 very well be power to reach that school (inaudible).

10 But Congress saw fit not to exercise the
11 entirety of its power in that respect.

12 The discussion has been not about Congress'
13 purposes and intentions and motives at all, but rather
14 with respect to the meaning of curriculum related.

15 There are three reasons why we would urge to the
16 Court not to embrace the school district's open-ended
17 approach. We believe, first, that its approach is quite
18 inconsistent with the ordinary meaning of the word
19 curriculum.

20 The word curriculum means the aggregate of
21 courses -- courses offered by the institution. It was
22 that common meaning, secondly, that one most readily
23 discerns in reading the legislative history.

24 In particular, the description by Senator
25 Hatfield, one of the co-sponsors of the Senate, who

1 described curriculum-related clubs as those that are, in
2 effect, extensions of the classroom.

3 And by the express admission at trial of the
4 principal of Westside High School, Dr. Findley, Peer
5 Advocates -- it was discussed at trial; it was the subject
6 of testimony at trial. At page 277 of the trial
7 transcript, Dr. Findley stated that Peer Advocates was not
8 related to any course at Westside. That, in our view, is
9 sufficient to trigger the act.

10 Third, the school board's approach --

11 QUESTION: Mr. -- Mr. Solicitor General, then
12 you say a football team would do it if there's no athletic
13 program?

14 MR. STARR: I don't think Congress contemplated
15 that if we're guided by the legislative history --

16 QUESTION: Yeah, but I mean your reading of the
17 statute, what would that do? I know Congress didn't think
18 that; that's perfectly clear. But under your reading of
19 the statute.

20 MR. STARR: I believe that is a matter of
21 considerable confusion. I would not --

22 QUESTION: I thought you had a bright line test
23 for reading this.

24 MR. STARR: If -- if -- I were -- if I were
25 interpreting this statute, I would say it would not,

1 because, Justice Stevens, it seems to me that it's rather
2 odd to describe the school football team as a student
3 group wishing to conduct a meeting. That's not --

4 QUESTION: (Inaudible).

5 MR. STARR: They certainly have meetings --

6 QUESTION: They have an awful lot of meetings to
7 do before they can play.

8 (Laughter.)

9 MR. STARR: But it's not the ordinary way.

10 QUESTION: Why is that different from -- why is
11 that different from chess? Why is that different from
12 chess? You've got no athletic program, you've got no
13 chess program in your regular class.

14 MR. STARR: Oh, if there is no athletic program
15 at all --

16 QUESTION: No formal classes, no curriculum --
17 no athletic curriculum.

18 QUESTION: And no physical education courses.

19 QUESTION: No physical education classes.

20 QUESTION: And you don't get credit or anything
21 else.

22 QUESTION: That's right.

23 MR. STARR: Yes, then it might very well be.

24 QUESTION: (Inaudible).

25 QUESTION: Was it might or --

1 MR. STARR: It might very well be.

2 MR. STARR: It is --

3 QUESTION: Is your test, the literal one, the
4 same one, and if you don't have a French class but you
5 have a French club, that triggers the act, too?

6 MR. STARR: It is certainly clear that Congress
7 was focusing on what the course work was. However, it
8 also was mindful of the fact that there is a history of
9 competitive athletics -- and I think it's quite clear in
10 the legislative history that Congress did view the
11 athletic teams as not creating a limited open forum.

12 QUESTION: And -- and is that legislative
13 history sufficient, in your view, to overcome the plain
14 language of the act?

15 MR. STARR: Oh, I don't think that the plain
16 language, with respect to a student group wishing to
17 conduct a meeting, is crystal clear with respect to the
18 football team. I think it is clear with respect to the --

19 QUESTION: How about the chess club?

20 MR. STARR: -- to the history of student
21 activities in the United States. There is considerable
22 testimony at trial that student activities were in fact
23 student initiated. I'm not sure that football teams have
24 that same history. They may.

25 But the history of student activities is that

1 students coming together in school wanted to pursue areas
2 and activities of interest to the students; administrators
3 were resistant to that. And ultimately, in the fullness
4 of time, school administrators began permitting students
5 to pursue their interests just as Westside and other high
6 schools across the country have seen fit to do here.

7 QUESTION: Well, I gather if you -- you say
8 there has to be some connection with some particular part
9 of the curriculum. I suppose that would vary then from
10 semester to semester as to whether the French Club was or
11 wasn't within the act, or whether some of these other
12 things would --

13 MR. STARR: I don't believe that the course
14 would have to be offered every single semester. But it
15 would have to relate to course work.

16 QUESTION: Or every year? Or every year?

17 MR. STARR: It might not even have to be offered
18 every year. But it does seem to me, in light of Congress'
19 use of the term curriculum and its discussion of any
20 number of groups -- the Chess Club, which does exist at
21 Westside was considered the quintessential noncurriculum-
22 related club, even though it obvious --

23 QUESTION: With all due respect, I think the
24 colloquy on the Chess Club was much more ambiguous than
25 you portrayed it, between Senator Gorton and Senator

1 Hatfield.

2 MR. STARR: Quite right. Justice Stevens, I
3 completely agree. In fact, Senator Gorton conducted
4 extremely skillful cross examination of Senator Hatfield.
5 It will be recalled that Senator Gorton thought that the
6 act would be much clearer if you eliminated political and
7 philosophical and made it quite clear that all you were
8 trying to protect were religious groups by virtue of the
9 discrimination that was being visited upon religious
10 students.

11 I thank the Court.

12 QUESTION: Thank you, General Starr.

13 Mr. Daubman, you have four minutes remaining.

14 REBUTTAL ARGUMENT OF ALLEN E. DAUBMAN
15 ON BEHALF OF THE PETITIONERS

16 MR. DAUBMAN: The test proposed by the
17 Respondents and by the government is contrary to the act
18 and is educationally unworkable. To suggest that having
19 students work with the handicapped at school, our regular
20 ed students, so they can learn to be sensitive to the
21 handicapped to characterize that as noncurriculum related,
22 but to say that a football team, even in the absence of a
23 physical education program at the high school is
24 curriculum related creates unworkable and --

25 QUESTION: I assume moral formation is part of

1 your school -- what the schools try to teach as well and -
2 - and I suppose religious groups are as closely related to
3 moral formation as your -- your helping the handicapped
4 club is to sensitivity or whatever you -- whatever value
5 you said was being taught by that.

6 MR. DAUBMAN: That's correct.

7 QUESTION: So then if you allowed the one, you
8 should have been allowing the other.

9 MR. DAUBMAN: Again, the act isn't triggered
10 unless we have noncurriculum related. What the school has
11 chosen to do is in structuring their co-curricular
12 activities is those groups that advocate a particular
13 point of view are not included in the curricular or co-
14 curricular activities of the school. And that was not the
15 case with the club that was requested in this case.

16 Another example of the unworkability of the test
17 advocated by the other side, Photography Club, which was
18 identified as a suspect club in this case was
19 alternatively taught. Photography was, as a club or as a
20 class, depending upon the availability of a state-
21 certified teacher who could teach photography.

22 To suggest that we cannot have -- that we create
23 a limited open forum by having a photography club when a
24 state-certified teacher is unavailable to teach it as a
25 regular class I think presents an unworkable problem, a

1 dilemma that school districts would not be able to work
2 with.

3 Service clubs also indicated by the legislative
4 history to perhaps in some circumstances be noncurriculum
5 related.

6 In our school district the record is clear that
7 service clubs in many of those -- in the sociology class
8 activities with service clubs could constitute -- in some
9 cases required over the years, in other cases could be
10 used as extra credit in some of the sociology classes.

11 Again, to say that a particular type of club is
12 noncurriculum related for all purposes I think really
13 stifles the efforts of educators to deal with curriculum
14 issues as they're constantly being called upon to do, in
15 structuring a program that is relevant and provides
16 educational benefit to its students.

17 Thank you, Your Honor.

18 CHIEF JUSTICE REHNQUIST: Thank you, mr.
19 Daubman.

20 The case is submitted.

21 (Whereupon, at 11:06 a.m., the case in the
22 above-entitled matter was submitted.)
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: Board of Education of the West-
side Community Schools, etc., et al., Petitioners v. Bridget C. Mergens,

by her next friend, Daniel N. Mergens, et al. - No. 88-1597

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

BY *Lona M. May*

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