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PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

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SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

CAPTION: LAMB'S CHAPEL AND JOHN STEIGERWALD,  
Petitioners, v. CENTER MORICHES UNION  
FREE SCHOOL DISTRICT, ET AL.

CASE NO: 91-2024

PLACE: Washington, D.C.

DATE: Wednesday, February 24, 1993

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1                   IN THE SUPREME COURT OF THE UNITED STATES  
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3   LAMB'S CHAPEL AND JOHN                   :  
4   STEIGERWALD,                           :  
5                   Petitioners                   :  
6           v.                               :   No. 91-2024  
7   CENTER MORICHES UNION                   :  
8   FREE SCHOOL DISTRICT, ET AL.       :  
9   - - - - -X  
10   Washington, D.C.  
11   Wednesday, February 24, 1992  
12                   The above-entitled matter came on for oral  
13   argument before the Supreme Court of the United States at  
14   10:05 a.m.  
15   APPEARANCES:  
16   JAY ALAN SEKULOW, ESQ., Washington, D.C.; on behalf of the  
17       Petitioners.  
18   JOHN W. HOEFLING, ESQ., Jericho, New York; on behalf of  
19       the Respondents.  
20  
21  
22  
23  
24  
25

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in number 91-2024, Lamb's Chapel and  
5 John Stig -- Steigerwald v. Center Moriches Union Free  
6 School District.

7 Mr. Sekulow.

8 ORAL ARGUMENT OF JAY ALAN SEKULOW

9 ON BEHALF OF THE PETITIONERS

10 MR. SEKULOW: Mr. Chief Justice and may it  
11 please the Court:

12 This case is about censorship of Lamb's Chapel's  
13 speech, which was entertained for the purpose of having a  
14 film series at the school facilities to show and discuss  
15 contemporary family issues. The direct targeting of  
16 religious purpose as an exclusion under the access policy  
17 of the school district is both content based and viewpoint  
18 based, and does not meet Constitutional scrutiny.

19 QUESTION: Under what?

20 MR. SEKULOW: Under -- well first of all, we  
21 would assert that it's purely -- this case is based purely  
22 on religious perspective, it's viewpoint based. Most  
23 recently, R.A.V., but also under --

24 QUESTION: Well, so --

25 MR. SEKULOW: Yes, Your Honor.

1 QUESTION: So what -- what provision of the  
2 Constitution are you relying on?

3 MR. SEKULOW: First Amendment, as applied to the  
4 States through the Fourteenth, freedom of speech.

5 QUESTION: Which part of it?

6 MR. SEKULOW: Free speech.

7 QUESTION: Just free speech.

8 MR. SEKULOW: Well, this case is based on three  
9 issues when it was originally brought fourth in the  
10 complaint. The First Amendment's freedom of speech  
11 clause, there was an allegation that there was a violation  
12 of the establishment clause, and there was an allegation  
13 that there was violation of free exercise.

14 And, quite frankly, the nature of the  
15 discrimination that takes place here in the context of  
16 Lamb's Chapel's application being denied violates all  
17 three. From the First Amendment perspective --

18 QUESTION: What did the -- what did the court of  
19 appeals decide?

20 MR. SEKULOW: The court of appeals came to the  
21 conclusion that acknowledging that there were a wide  
22 diversity of uses, which the respondents have conceded as  
23 well, that, in fact, because there were no prior religious  
24 uses, the -- the school district could then not allow  
25 Lamb's Chapel to meet. They held, in fact, that it was a

1 close question whether there was prior religious uses, but  
2 determined, based on review of the Salvation Army being  
3 there, the Southern Gospel Harmonizers, that it was no --  
4 there was no previous religious purpose in any meaningful  
5 way.

6 QUESTION: Well, as the case comes to us, do we  
7 judge it on the basis that the court of appeals was  
8 correct in saying that -- that this program had a  
9 religious purpose?

10 MR. SEKULOW: The respondents have --  
11 petitioners have conceded Your Honor, Justice White, that  
12 yes, the -- the movie series was dealing with contemporary  
13 family issues from a -- a religious perspective and are  
14 quite up front that it is for a religious purpose.

15 QUESTION: All right.

16 MR. SEKULOW: Our concern here, and I think what  
17 is evident here, is that the viewpoint discrimination that  
18 has been engaged in by the school district comes from  
19 their own admissions. The respondents have stated that  
20 the decision -- and I'm quoting from their brief. "The  
21 decision to exclude petitioners was due to the admittedly  
22 religious nature of the film and the school district's  
23 prohibition against the use of school property for  
24 religious purposes."

25 They then state that, and again quoting, "Each

1 of these applications were denied due to the decidedly  
2 religious perspective of the film."

3 If Lamb's Chapel Church desired to utilize  
4 school facilities during noninstructional time in the  
5 evening, pursuant to the school's access policy, and if  
6 they determined to discuss the same issues, contemporary  
7 family issues, with the sole exception being that they do  
8 not make religious references or religious perspectives,  
9 then Center Moriches could not object to allowing the  
10 group to be there.

11 This isn't a case where we are arguing that a  
12 school district must open its facilities to a broad array  
13 of uses. Here the school district, by policy, has stated  
14 that they are opening their facilities to community use  
15 for social, civic, recreational purposes and other uses  
16 pertaining to the welfare of the community.

17 QUESTION: What about political speech?

18 MR. SEKULOW: They actually allow political  
19 speech, however --

20 QUESTION: What does the -- what does the rule  
21 say?

22 MR. SEKULOW: The rule says this, that political  
23 speech could take place, political meetings could take  
24 place. However if, in fact, the political meetings were  
25 partisan, if they were sponsored by a political

1 organization, then there would have to be a vote of the  
2 district to determine whether, in fact, that group could  
3 meet, which I think presents another Constitutional issue  
4 which is not one that we're -- we're concerned with today,  
5 but I think it points to the problem.

6 QUESTION: Well, I know, but religious speech is  
7 not the only speech that is at least presumptively barred.

8 MR. SEKULOW: Political speech by a party has to  
9 go through an admission process, if you will. So -- but  
10 here, and I think what's relevant here is this is not a  
11 question of where, Justice White, they've eliminated or  
12 construed their statute to remove the subject matter of  
13 family issues from the permissible speech. This is not a  
14 question of whether the speech topic was permissible, nor  
15 is this really a question of whether the group was  
16 entitled to access.

17 Clearly the admission policy, the use policy of  
18 the school district states that it is open to not-for-  
19 profit outside groups. Here the exclusion was based -- as  
20 they have conceded, based on its content, the nature of  
21 the film, its viewpoint, its perspective. And they've  
22 allowed, in other existing uses, several discussions on  
23 family issues. For instance --

24 QUESTION: Mr. -- Mr. Sekulow --

25 MR. SEKULOW: Yes, Justice --

1           QUESTION: You would -- on your view, you would  
2 also be entitled to win, wouldn't you, if we don't accept  
3 your characterization of it as viewpoint based, but held  
4 it to be content based. On your theory, you'd still win,  
5 wouldn't you?

6           MR. SEKULOW: Yes, we do, Your Honor.

7           QUESTION: So that if we said what was excluded  
8 was simply discussions of religion or religious  
9 proselytization, you would still, on your viewpoint, win.

10          MR. SEKULOW: Certainly, especially in the  
11 context of the policy that the school district has adopted  
12 here. The -- the school district has adopted a policy  
13 which, as I said, opens its facilities to social, civic,  
14 recreational use and other uses pertaining to the welfare  
15 of the community. Our submission is quite clear that we  
16 believe the religious perspective, religious discussions,  
17 serve civic, social, and welfare of the community needs.  
18 So --

19          QUESTION: But what if the school district had  
20 adopted a policy of excluding both religious and political  
21 speech on the grounds these tend to cause controversy and  
22 arguments and we'd just rather stay away from them?

23          MR. SEKULOW: I -- I still would say, Mr. Chief  
24 Justice, that that would not -- could not justify the  
25 exclusion. Because the policy here, in its beginning,

1 opens up facilities uses -- that's again for social,  
2 civic, recreational purposes. I think the religious view  
3 or religious perspective on social, civic, and welfare of  
4 the community needs is relevant, and there's no basis upon  
5 which --

6 QUESTION: Well --

7 MR. SEKULOW: -- Unless, of course, a compelling  
8 interest could be shown.

9 QUESTION: Could -- could -- could the State  
10 exclude only partisan political speech and say that we  
11 just don't want to get into that sort of thing?

12 MR. SEKULOW: I think that brings up a different  
13 question, but here the -- the free exercise issue would  
14 come up and I think an establishment clause issue comes up  
15 in the context of our case.

16 QUESTION: How about the -- how about the -- how  
17 about the political question --

18 MR. SEKULOW: I --

19 QUESTION: -- You were just asked?

20 MR. SEKULOW: I think that political --

21 QUESTION: But didn't answer, yeah.

22 MR. SEKULOW: Political speech is appropriate in  
23 the designation that the school district has adopted.  
24 Could a school district adopt one that narrowly tailors  
25 and says no political speech because of our concerns?

1 Maybe they could, but that's not what they've done here.

2 And I -- I think that maybe --

3 QUESTION: Well, but what's the difference.

4 It -- it seems to me --

5 QUESTION: You still haven't answered it.

6 QUESTION: It seems to me you haven't answered  
7 the question.

8 MR. SEKULOW: I don't think that you can say --

9

10 QUESTION: You talk about free exercise. We're  
11 talking about -- just about speech. If there is a -- a  
12 prohibition against political speech, is that valid? And  
13 if not, how is that different from the case we have here?

14 MR. SEKULOW: A prohibition --

15 QUESTION: That's the question you've been  
16 asked.

17 MR. SEKULOW: Justice Kennedy, if there was a  
18 prohibition on just political speech, I think it suffers  
19 the same Constitutional defect. It has -- there has to be  
20 some type of compelling interest here to justify the  
21 exclusion, especially when the subject matter is a valid  
22 topic.

23 And I -- I would also point out here that there were  
24 discussions of civic issues, political issues, meet-the-  
25 candidates nights.

1 QUESTION: Well -- well then you're saying that  
2 if a school district opens up its forum to any outsiders,  
3 it's got to -- up -- open it up across the board.

4 MR. SEKULOW: No -- no I'm not, Mr. Chief  
5 Justice.

6 QUESTION: Well it seems to me that's what  
7 you're saying.

8 MR. SEKULOW: No. What we're saying is this.  
9 The school district here has adopted a policy that states  
10 that social, civic, recreational uses and other uses  
11 pertaining to the welfare of the community can take place.  
12 They've made the affirmative determination that, in fact,  
13 those type of activities can take place.

14 A school district certainly can -- a school  
15 district could close its facilities. They're not --  
16 they're not being compelled to open them --

17 QUESTION: But doesn't -- doesn't political  
18 speech fall under that category, that -- that -- that --

19 MR. SEKULOW: I believe -- I believe it does,  
20 Justice Scalia. That's what I was saying too --

21 QUESTION: Hum.

22 MR. SEKULOW: -- The question here is not  
23 whether political speech can take place, because under the  
24 policy political speech can take place. The exclusion is  
25 if it's of a -- from a partisan organization, and I think

1 that suffers from Constitutional defects as well.

2 QUESTION: Also, by the same token would you say  
3 that if they -- they could not exclude a -- a religious  
4 service, for example. If an outside group wanted to -- to  
5 celebrate a mass or a baptism or something like that,  
6 could the -- I presume, by a parity of reasoning, that  
7 could not be excluded.

8 MR. SEKULOW: I think under the policy that's  
9 been adopted, Justice Souter, that removing a service,  
10 religious service, would suffer the same Constitutional  
11 problems. And I would state that what this Court said in  
12 Widmar is -- is relevant to that. In Widmar the Bible  
13 group meeting of Cornerstone was in -- in reality a  
14 service. There were hymns, there was singing, there were  
15 discussions on biblical commentary.

16 That is a church service and I don't think that  
17 a school district that decides to open its facilities --  
18 as I said, they don't have to open their facilities,  
19 they've decided to open their facilities -- can then parse  
20 the speech so closely to determine when religious speech  
21 crosses the line, if you will, to a religious service.

22 QUESTION: But are -- are you accepting the --  
23 the ultimate premise of the other side that they can, in  
24 fact, define the extent to which they open it up?

25 MR. SEKULOW: I think they can in the extent of

1 speaker identification, clearly, and as regard to the  
2 subject matter of the discussion. But to have an  
3 exclusion on --

4 QUESTION: So the answer is there -- quite  
5 clearly, they could exclude all political speech and they  
6 could exclude all religious speech.

7 MR. SEKULOW: Not when the -- Justice Souter,  
8 not when the policy granting access says social --

9 QUESTION: No, no. But you were -- you're just  
10 changing the premise of my question. My -- the premise of  
11 my question was that their policy granting access says no  
12 religious speech, no political speech. On your view, that  
13 would be permissible.

14 MR. SEKULOW: Not in the context -- well, if it  
15 was just a flat -- there were no outside groups for other  
16 purposes. I think the -- the hypothetical that you're  
17 giving depends on -- and I don't want to change the  
18 hypothetical --

19 QUESTION: Yeah, there would be outside groups  
20 for other purposes, there just wouldn't be outside groups  
21 for political purposes and religious purposes.

22 MR. SEKULOW: I -- I don't think that would --  
23 would be a valid exclusion.

24 QUESTION: Well, why not? I thought your  
25 argument was proceeding on the fact that they've opened

1 the doors wide and they cannot then pick and choose within  
2 the extent to which they have opened them. But that  
3 apparently isn't your argument and you're now saying  
4 they've got to open the doors wide.

5 MR. SEKULOW: Absolutely not, Justice Souter.

6 QUESTION: Then how do we draw the line?

7 MR. SEKULOW: Let me make -- let me make the  
8 position -- what we're saying is this. The school  
9 district here has elected to open its facilities and  
10 they've conceded to a wide diversity of uses. They have  
11 targeted the religious purpose speech for exclusion. They  
12 have conceded that the religious exclusion in our case is  
13 based on the perspective of the film series and its  
14 religious nature, that's their concessions.

15 Once you have an -- a governmental municipality  
16 organization opening up its facilities to social, civic,  
17 recreational uses and other uses pertaining to the welfare  
18 of the community, they cannot then close it because of a  
19 religious perspective.

20 QUESTION: Is your -- is your theory, Mr.  
21 Sekulow, that you cannot pick on religion, that -- that --  
22 that if religion is just one of many things excluded it's  
23 okay.

24 MR. SEKULOW: No.

25 QUESTION: But if it's the only thing excluded

1 or one of only a couple of things excluded, it's not okay.

2 MR. SEKULOW: My position is -- this is my  
3 position, that when you open up a school district -- when  
4 a school district elects to open up its facilities for  
5 community use for such uses as social, civic, and welfare  
6 of the community needs, you cannot exclude the religious  
7 perspective.

8 QUESTION: Why? Because that includes too many  
9 needs.

10 MR. SEKULOW: No, because the religious  
11 perspective is relevant to civic concerns.

12 QUESTION: Oh --

13 MR. SEKULOW: And that's -- and that's where the  
14 viewpoint discrimination is here. And I think the -- the  
15 record in our case points that out quite clearly, Justice  
16 Kennedy.

17 QUESTION: But they haven't -- but they haven't  
18 said civic concerns. They've said civic concerns except  
19 religious concerns.

20 MR. SEKULOW: No, actually --

21 QUESTION: I mean don't --

22 MR. SEKULOW: Precisely what they've said is we  
23 are allowing outside not-for-profit groups to utilize  
24 school facilities due -- for access policy -- under our  
25 access policy for social -- meetings for social, civic,

1 recreational purposes --

2 QUESTION: Yes.

3 MR. SEKULOW: -- And other uses pertaining to

4 the welfare of the community.

5 QUESTION: But heaven's not there and they've

6 said except --

7 MR. SEKULOW: Yes.

8 QUESTION: -- Religious.

9 MR. SEKULOW: Right.

10 QUESTION: Okay.

11 MR. SEKULOW: And that's precisely our point.

12 That is the type of viewpoint discrimination --

13 QUESTION: Yes, why? Because they've singled

14 out religious --

15 MR. SEKULOW: Yes, they have targeted religious

16 speech for exclusion in the nature of the entire --

17 QUESTION: Right. Well --

18 MR. SEKULOW: -- Facilities that they've opened

19 up.

20 QUESTION: But -- but you would not mind if they

21 singled out religious -- religion for exclusion along with

22 a lot of other things. That if -- that is they said we

23 are going to -- we are going to have -- we are going to

24 allow bowling.

25 MR. SEKULOW: That's --

1 QUESTION: Nothing else. We're not going to  
2 allow religion, we're not going to allow politics, we're  
3 not going to allow other socially good things, you  
4 wouldn't have an objection then, would you?

5 MR. SEKULOW: No. But that's the type of  
6 subject matter restrictions that a school district in this  
7 type of situation certainly -- they could say just for  
8 bowling, just for tennis.

9 QUESTION: But why is that -- why is that okay  
10 and this one not okay?

11 MR. SEKULOW: Because here they have opened up  
12 the facilities intentionally for social, civic, and  
13 welfare of the community needs.

14 QUESTION: No, they haven't. They've said  
15 social, civic, and welfare except religious.

16 MR. SEKULOW: But they've -- they have -- that's  
17 what they cannot do, however.

18 QUESTION: We know you say they cannot do it.  
19 Why can they not do it?

20 MR. SEKULOW: Because this Court has said that  
21 viewpoint discrimination, even in a nonpublic forum, is  
22 not acceptable. And I -- I don't think that --

23 QUESTION: But you've just said viewpoint  
24 discrimination is acceptable if they say we're going to  
25 have bowling but we're not going to have --

1           MR. SEKULOW: I -- I guess the argument could be  
2 made if there's a religious perspective on bowling. But  
3 when you open up the topic and the subject matter to  
4 social, civic, and welfare of the concerns, and I think  
5 the record points to this.

6           The -- there's two things that I think are --  
7 are extremely important with regard to the record. Family  
8 Counseling Services, which was an organization that  
9 utilized the facilities for counseling, dealt with the --  
10 precisely the same issues that the school district would  
11 have dealt with -- that the church would have dealt with  
12 in its film series.

13           QUESTION: You also said that they could not  
14 exclude religious services, didn't you?

15           MR. SEKULOW: I -- I think under the policy that  
16 they've adopted, they cannot.

17           QUESTION: Well, you don't -- you don't have to  
18 defend some of these rather extreme hypotheticals to win  
19 your case. Your position, I take it, is that since they  
20 have had family rearing matters shown and discussed, they  
21 can't exclude a family rearing presentation because of a  
22 religious perspective in it.

23           MR. SEKULOW: That's correct. And that -- that  
24 is, I think, what -- what I was -- at bottom, is what this  
25 case is about. This case --

1 QUESTION: Well, isn't -- isn't -- aren't you --  
2 I would think you would argue that we've already decided  
3 this case.

4 QUESTION: In Widmar.

5 MR. SEKULOW: We have argued that this Court's  
6 decision in Widmar has decided this case.

7 QUESTION: Well, you've hardly mentioned it.

8 MR. SEKULOW: I have not, we've been dealing  
9 with the hypotheticals.

10 (Laughter.)

11 MR. SEKULOW: But I will address -- I will  
12 address the Widmar issue.

13 But let me say first -- answer to the Chief  
14 Justice's question and then I will proceed to answer you,  
15 Justice White.

16 This is a case where the identical subject  
17 matter, family issues, child abuse, marital conflict, was  
18 discussed by Family Counseling Services and a number of  
19 other groups. And the film series, if Lamb's Chapel was  
20 allowed to show it, addressed the same issues, albeit from  
21 a religious perspective.

22 And that is what is prohibited by the policy and  
23 that is the viewpoint discrimination when the subject  
24 matter is acceptable and the speaker's entitled to access,  
25 that this Court has said that type of viewpoint

1 discrimination --

2 QUESTION: May I give you one other  
3 hypothetical?

4 MR. SEKULOW: Certainly, Justice Stevens.

5 QUESTION: Supposing there's a group that thinks  
6 families would be much healthier and happier and get along  
7 better if they all smoked marijuana together, and they  
8 came and they want to advocate that under the subject  
9 matter of child rearing and family values. Would they  
10 have to give that group access to the facilities?

11 MR. SEKULOW: I think that, in that case, unless  
12 the school district could show a compelling interest to  
13 justify the exclusion, they would have the same problem.  
14 And I'm -- I'm not so sure they would. This is not an  
15 educational --

16 QUESTION: Well, the fact is it would be against  
17 the law.

18 MR. SEKULOW: Well, that's -- that's what I was  
19 going to say. And the compelling interest would be --

20 QUESTION: And the law should be changed in  
21 order to accommodate this family value.

22 MR. SEKULOW: That's a different hypothetical.  
23 (Laughter.)

24 QUESTION: It's the one I had in mind all along.

25 MR. SEKULOW: The first -- the second

1 hypothetical is different. You're talking about speech  
2 that is not advocating --

3 QUESTION: Well say -- or just say family value  
4 would be promoted by soak -- by having the children learn  
5 how to smoke cigarettes at an early age.

6 MR. SEKULOW: I think perhaps a school district  
7 would then have to assert that the health concerns -- and  
8 now, again, this is another situation not precisely -- or  
9 really very remote from our case -- but where maybe the  
10 school district could come up with some compelling  
11 interest to justify medical exclusion based on that.

12 But that's not what happened here, and this is  
13 not a case where they're advocating illegal activity,  
14 although you would think from the New York Attorney  
15 General's perspective that's exactly what's going here.  
16 They -- they say religious advocacy is only good to those  
17 who already believe -- already adherents of the faith.

18 But Widmar has addressed this issue precisely.  
19 By policy, the school district -- the University in Widmar  
20 encouraged student groups and stated that they would  
21 like -- they encouraged student groups to meet and form  
22 for social, civic, political, recreational, and  
23 educational purposes. Here, the Center Moriches School  
24 District has adopted a policy and --

25 QUESTION: But in Widmar -- in Widmar, the

1 group, the religious group that wanted to meet was a  
2 student group.

3 MR. SEKULOW: I don't think in this case --

4 QUESTION: It was a student group in Widmar.

5 MR. SEKULOW: That's correct. And the school --

6 QUESTION: Now I would -- I would suppose  
7 that -- I would suppose that if the school in this case  
8 had opened its -- had opened its property just for student  
9 activities dealing with social and such, but no outside  
10 groups whatsoever, you probably wouldn't be here.

11 MR. SEKULOW: Correct. Different case. And --

12 QUESTION: Well yeah, but that -- but that  
13 happens to be Widmar.

14 MR. SEKULOW: But the distinction, and I think  
15 the distinction cuts our way here, Justice White, is that  
16 in Widmar the university determined to open its school  
17 district up for student groups to use it. Here, the  
18 school district determined to open up its school  
19 facilities for outside uses.

20 QUESTION: Exactly.

21 MR. SEKULOW: So I think the speaker  
22 identification restrictions in Widmar and what was adopted  
23 here, albeit different, cut our way. Because what we have  
24 is a school district affirmly saying community groups,  
25 come in and use our facilities, for precisely the same

1 policy in scope that was in Widmar.

2 The exclusion is the same as well. In Widmar  
3 the exclusion was that they prohibited school district --  
4 university facilities to be used for the purposes of  
5 religious worship or teaching. Here the exclusion states  
6 that school district facilities may not, or school  
7 premises may not be used for religious purposes, and the  
8 justification for the exclusion is the same as well.

9 QUESTION: Mr. Sekulow.

10 MR. SEKULOW: Yes, Justice Scalia.

11 QUESTION: Well, on that narrow basis, you know,  
12 what you're asking us to do is relatively limited. You're  
13 saying if -- if you -- if you allow the discussion of a  
14 certain topic you cannot permit a religious viewpoint on  
15 that topic.

16 But the next case just around the corner is --  
17 is a group that wants to come into this same -- the same  
18 school district and they say we want to address the -- the  
19 topic of religion, not -- not family, we want to address  
20 separately the topic of religion. And it's not a question  
21 of giving a religious viewpoint on some other topic  
22 which -- which the rules allow, but rather the topic of  
23 religion in and of itself which is as a separate topic --

24 MR. SEKULOW: I believe --

25 QUESTION: -- Now.

1 MR. SEKULOW: -- That case is not different, and  
2 I'll -- here's the reason. My statement is if the  
3 topic -- if the preamble to the use application is for  
4 social, civic, recreational purposes and other uses  
5 pertaining to the welfare of the community, a religious or  
6 religion has value, in my client's perspective and others,  
7 to civic affairs. That is where I think the -- that's not  
8 saying that a school district can --

9 QUESTION: Can it say civic, social, and -- and  
10 recreational purposes other than politics? Can it say  
11 that?

12 MR. SEKULOW: I think politics, political  
13 speech, has relevant application to social and civic  
14 issues. I don't think a school district can say that.

15 QUESTION: I know it does, but the school says  
16 it's just too controversial --

17 MR. SEKULOW: That would --

18 QUESTION: -- And therefore we're going to  
19 exclude that from our otherwise all-inclusive program.

20 MR. SEKULOW: Not without justifying it by --

21 QUESTION: They can't exclude anything.

22 MR. SEKULOW: Yes, Justice Scalia, they can  
23 exclude -- they could close the forum down. They could  
24 say just bowling. But they can't open it up to social,  
25 civic --

1 QUESTION: Okay, I see.

2 MR. SEKULOW: -- And recreational use and say no  
3 to religion or religious perspective.

4 QUESTION: Well --

5 MR. SEKULOW: No to politics, albeit a different  
6 case.

7 QUESTION: Well, all candidates for office would  
8 be entitled to use the schoolhouse to -- to make their  
9 speeches then.

10 MR. SEKULOW: They did, in this case. The --  
11 there was a meeting of the candidates where they each gave  
12 their proposal. And I think that points out what's --  
13 what's taken place here. This isn't a problem where a  
14 political group is having trouble getting access; they  
15 have had access. The problem is --

16 QUESTION: Mr. Sekulow.

17 MR. SEKULOW: Yes, Justice --

18 QUESTION: Mr. Sekulow, if I were an attorney  
19 for a school board and was listening to your argument, I  
20 would go back to my board of education and say if you open  
21 your auditorium to two or three different lectures in the  
22 community, based on the argument I heard from Mr. Sekulow,  
23 you're going to have to allow a Catholic mass to be said  
24 in that facility. Because I've heard him say nothing that  
25 would allow the Court to write a decision that gives any

1 kind of reasonable assurance that we can design a category  
2 to prevent this use once we have two or three different  
3 lecture groups come in from the community at large.

4 MR. SEKULOW: I don't think that that would be a  
5 difficult policy for the school district to write, Justice  
6 Kennedy. A school district could write a policy, and I  
7 don't want to be in the place of writing their policies  
8 but can write a policy limiting the subject matter and  
9 limiting the speaker identity and still have other groups  
10 participate.

11 But once you open it up to social, civic -- this  
12 isn't just social, civic, and recreational use. They also  
13 have in their --

14 QUESTION: But under your First Amendment  
15 submission, which is that there must be absolute content  
16 neutrality --

17 MR. SEKULOW: Yes.

18 QUESTION: -- In viewpoint neutrality.

19 MR. SEKULOW: Yes.

20 QUESTION: -- I -- I contest that you could --  
21 could -- could accomplish the objective that you've just  
22 outlined.

23 MR. SEKULOW: I think -- I'm not -- shouldn't be  
24 in the position of drafting the regulations, but I would  
25 be quite forthright in saying we've thought about that

1 issue and I think a -- a policy could be drafted which  
2 states that school facilities will be used for recreation.  
3 School facilities will be used for the student groups to  
4 discuss student issues.

5 You don't have to open it up, but when you start  
6 opening it up to social, civic, and other uses pertaining  
7 to the welfare of the community --

8 QUESTION: It's a question of how broad the  
9 other uses are then, isn't it?

10 MR. SEKULOW: Absolutely. And it's not -- it's  
11 not a --

12 QUESTION: So -- so let me come back to the  
13 question I asked before but which you -- you -- you would  
14 not answer. If you -- if you exclude religion when you're  
15 letting in virtually everything else that seems to be a  
16 problem to you.

17 MR. SEKULOW: Absolutely.

18 QUESTION: But if you're excluding religion when  
19 you're excluding a lot of other stuff, that does not seem  
20 to be a problem. Is that the case?

21 MR. SEKULOW: No. I don't think --

22 QUESTION: Well then what is the --

23 MR. SEKULOW: In the context --

24 QUESTION: Then I don't understand what the case  
25 --

1 MR. SEKULOW: Well here's -- here's -- let me  
2 make -- put it in at it's bottom. By policy and practice  
3 the school district has determined to open its facilities  
4 to these various uses, the social, civic, and welfare of  
5 the community. Having done that --

6 QUESTION: Except religion.

7 MR. SEKULOW: That's right. But having done  
8 that, they cannot exclude it as to religion. And I  
9 think -- and the reason is this Court has said --

10 QUESTION: But if they only -- if they only let  
11 in recreation and theater, then they can exclude religion.

12 MR. SEKULOW: I think --

13 QUESTION: Right? Why is that?

14 MR. SEKULOW: Well I don't think if -- let me  
15 take your theater hypothetical. If they let in theater  
16 groups to perform issues, but then say no to Handel's  
17 Messiah -- which this school district, by the way, allowed  
18 Handel's Messiah but they found that not to be religious  
19 in a meaningful way -- I don't think they can do that.  
20 But could a school district say we're going to open our  
21 facilities to drama groups --

22 QUESTION: No.

23 MR. SEKULOW: -- For the presentation of  
24 Shakespeare, yes.

25 QUESTION: But they --

1 MR. SEKULOW: But not have --

2 QUESTION: But they could say -- but they could  
3 say no mass. The could say no mass.

4 MR. SEKULOW: Under that policy, yes. I don't  
5 think that's under --

6 QUESTION: Right. But under this current policy  
7 you say they can't even say no mass.

8 MR. SEKULOW: I don't --

9 QUESTION: Right?

10 MR. SEKULOW: I would have to concede, which I'm  
11 not going to, that a mass would be irrelevant to the  
12 community good or community welfare or civic, social  
13 concerns. They could draft a policy to prohibit masses.  
14 They could draft a policy to prohibit this film series  
15 from showing, but --

16 QUESTION: You say you would have to concede it,  
17 but you're not going to.

18 MR. SEKULOW: I would not --

19 (Laughter.)

20 MR. SEKULOW: I will -- I said I will not  
21 concede it because -- I'll make that very clear, I  
22 believe, and our perspective that we're taking here is  
23 that when you open it up to social, civic, and  
24 recreational uses and other welfare of the community, that  
25 a mass would serve the community.

1           That doesn't mean everyone has to go to the  
2 mass. This isn't a captive audience. This isn't a  
3 situation where students are there, during the day. And I  
4 think this -- what this Court said in Mergens is -- is  
5 relevant to that. If a -- if high school students were  
6 mature enough to understand that a school district does  
7 not endorse everything it fails to censor, I think the  
8 adults in the community of Center Moriches could do the  
9 same.

10           And I don't think it presents the type of  
11 Constitutional dilemma that -- that some have made it out  
12 to be, that we'll have to allow all religious services.  
13 If allowing the religious service is going to be so  
14 divisive to the community that they now can justify the  
15 exclusion under this policy, no they can't.

16           QUESTION: So you're saying a narrow  
17 categorization is possible, and I think you're also saying  
18 that if a -- if a general categorization, including speech  
19 generally is allowed, there cannot be a specific exception  
20 to it for subject matter.

21           MR. SEKULOW: That is correct.

22           QUESTION: So it -- it simply boils down to a  
23 question of the precision with which they specifically  
24 identify the permitted uses.

25           MR. SEKULOW: Absolutely. This ordinance,

1 although maybe not suffering the same constitutional  
2 defect that the Board of Airport Commissioners were, where  
3 it was, you know, no First Amendment activities in here,  
4 suffers from that same type of problem.

5 They have not chosen to narrowly tailor their  
6 restrictions. Instead, what they've done is open it up to  
7 social, civic, recreational, and other uses pertaining to  
8 the welfare of the community, but say no if it's a  
9 religious perspective, no if it's religious content.

10 Mr. Chief Justice, I'd like to reserve --

11 QUESTION: May I just make sure I understood one  
12 of your statements. You mentioned Shakespeare if they  
13 opened up for drama. Did you say yes or no to the  
14 question of whether they could limit it to Shakespeare?

15 MR. SEKULOW: I think they could limit it to  
16 Shakespeare if they had a -- a standard which was specific  
17 saying we're going to have Shakespeare. But they cannot  
18 say we're going to allow drama groups and they exclude  
19 Handel's Messiah because we do not want a religious group  
20 or discriminate against a religious play if it was opened  
21 up to -- to drama generally.

22 And that's what the difference is. They've not  
23 chosen to limit to specifics. They've been -- they've  
24 chosen to open it to everything but religion.

25 QUESTION: But if they do open it up to -- if

1     they open it up to drama generally, they can't be  
2     concerned about whether it's just adult drama or teenage  
3     drama or any kind of drama, it's just open generally.

4             MR. SEKULOW: Once they've made that -- once  
5     they've said we're going to allow our facilities to be  
6     used for dramatic productions, you cannot say, now, no  
7     to --

8             QUESTION: X-rated movies are okay.

9             MR. SEKULOW: That's a different -- different  
10    question, because that -- and here's the difference. In  
11    the drama context, if they open up the drama, open it up  
12    to dramatic use, okay, they can then not say no to the  
13    religion. If it's an X-rated movie shown for, for  
14    instance, for profit, they've already said that speaker  
15    identity won't take place then.

16            QUESTION: No, I disagree.

17            MR. SEKULOW: But if they don't like the movie.

18            QUESTION: -- Throw in the for profit.

19            MR. SEKULOW: Okay. Well, if they're saying an  
20    X-rated movie's going to be shown at the school district  
21    facilities, this -- the analysis I don't think changes  
22    Constitutionally. Again, I think that in -- in a real  
23    sense, a town -- this is the meeting hall, the town hall  
24    that was discussed -- mentioned in Lemon.

25            And I think that the interesting issue and the

1 important issue here at bottom is not that school  
2 districts have to open its facilities up, not that they  
3 can't narrowly tailor them, but once they've opened them  
4 up to such a broad array of topics, they cannot exclude  
5 religious speech or religious purpose speech, as they have  
6 determined. And here that's exactly what they've done and  
7 that type of viewpoint discrimination this Court should  
8 not tolerate.

9 Mr. Chief Justice, I'd like to reserve the rest  
10 of my time for rebuttal.

11 QUESTION: Very well, Mr. Sekulow. Mr.  
12 Hoeftling, we'll hear from you.

13 ORAL ARGUMENT OF JOHN W. HOEFTLING

14 ON BEHALF OF THE RESPONDENTS

15 MR. HOEFTLING: Mr. Chief Justice and may it  
16 please the Court:

17 It's the position of the respondent in this  
18 case, the Center Moriches School District and the  
19 president of the board, that they have denied access to  
20 the petitioners in this case based upon a well tailored  
21 State statute, the New York State Education Law, section  
22 414, and a series of regulations promulgated under that  
23 statute.

24 We submit that the school district has  
25 essentially established a limited public forum, and it is

1 not an open public forum, in which certain uses are not  
2 permitted. And we further submit that we have -- in the  
3 course of using this facility and making it available to  
4 certain groups within the community, have been consistent  
5 in the uses that we have permitted.

6 We submit that the petitioner is erroneous --  
7 has taken an erroneous position in looking at this  
8 particular film series as being part of a larger picture,  
9 namely the use of the facility for social, educational,  
10 and community welfare activities.

11 In fact, if you -- if you look at the record,  
12 both in the district court from the testimony of Pastor  
13 Steigerwald and the submission of Pastor Steigerwald in  
14 his third application for the use of the premises, in both  
15 of those instances he's indicated that he is not prepared  
16 to abide by the regulation of the district, and, in fact,  
17 he intends to use the facility for educational institution  
18 after -- for educational -- religious education after  
19 hours in the school setting.

20 QUESTION: Well, what policy of the district was  
21 it that Paster Steigerwald said he couldn't or wouldn't  
22 abide?

23 MR. HOEFLING: It was -- it was number 7, Your  
24 Honor.

25 QUESTION: Well, you don't have -- I mean just

1 state it generally. You don't have to read it word for  
2 word.

3 MR. HOEFLING: Your Honor, the -- the policy of  
4 the school district with regard to this particular use was  
5 that the premises would not be used for religious  
6 purposes.

7 QUESTION: And that meant any sort of a  
8 presentation that had a religious connotation to it.

9 MR. HOEFLING: We submit, Your Honor, that that,  
10 as -- as the school district has used that policy, means  
11 that to the extent somebody -- someone is prepared to come  
12 forward and use the facilities for the purpose of  
13 proselytization or urging somebody to adopt a particular  
14 lifestyle which is based upon certain religious precepts,  
15 is an -- an inappropriate use in our forum.

16 QUESTION: Well, would the policy permit someone  
17 to come in and urge the adoption of a particular lifestyle  
18 that was not based on any religious precepts?

19 MR. HOEFLING: Yes, it would, Your Honor.

20 QUESTION: So you would allow lifestyle  
21 presentations, lifestyle proselytizing, so to -- so to  
22 speak, of a secular nature, secularly inspired but not  
23 religiously inspired.

24 MR. HOEFLING: Yes, Your Honor, that's correct.

25 QUESTION: You think that's consistent with our

1 opinion in Widmar?

2 MR. HOEFLING: Yes, Your Honor, I do. I -- I  
3 think that the opinion in Widmar, it's very clear that as  
4 to the university students in Widmar, the university is an  
5 open forum. That is not the case in our -- in our  
6 scenario here. And, in fact, in allowing an open forum,  
7 everybody is entitled to the access that the students --

8 QUESTION: But it seems to me what you're saying  
9 is that you have an open forum except for any religious  
10 viewpoint.

11 MR. HOEFLING: No, Your Honor, I respectfully  
12 submit that what we've done in this case is establish  
13 certain specific uses to which the facility may be put and  
14 certain uses to which the facility is -- is not allowed to  
15 be put.

16 QUESTION: Yes --

17 MR. HOEFLING: Including -- I'm sorry.

18 QUESTION: But it -- it is -- it isn't -- I mean  
19 I gather from what you say that a speaker could come in  
20 and urge the adaptation of a particular lifestyle so long  
21 as he was urging it on a secular basis, but that he -- so  
22 that that subject matter is permissible. But a speaker  
23 who urges the adoption of a lifestyle based on a religious  
24 theme or a religious passage could not do it.

25 MR. HOEFLING: That's correct, Your Honor.

1 And -- and -- and the focus of -- of the district in  
2 looking at religion in this particular regard is that --  
3 and it's not just the religious exclusions that we've --  
4 that we've fashioned in our regulations and tracked in the  
5 State statute, but there are prohibitions in terms of  
6 commercial use of the premises and prohibitions with  
7 regard to political uses of the premises.

8 In doing that, the school district is attempting  
9 to avoid certain controversial areas which, in terms of  
10 religion, if you open the forum to a particular religious  
11 use, may well bring you into conflict with establishment  
12 problems and may result in entanglement problems which the  
13 school district would rather avoid.

14 QUESTION: Entanglement.

15 MR. HOEFLING: And in order to avoid that --

16 QUESTION: Entanglement problems?

17 MR. HOEFLING: Yes, Your Honor.

18 QUESTION: Why -- why is that?

19 MR. HOEFLING: I submit, Your Honor --

20 QUESTION: That the -- the janitor who's going  
21 to be in the building. I don't understand who gets  
22 entangled.

23 MR. HOEFLING: No, Your Honor. I submit that --  
24 I submit that what happens is -- one of two things  
25 happens. Either we wind up allowing masses and baptisms

1 and communion and other religious services to occur on the  
2 premises.

3 QUESTION: Some school districts do that.

4 MR. HOEFLING: I understand that. And that's  
5 certainly --

6 QUESTION: They do it in Virginia.

7 MR. HOEFLING: That's certainly their right to  
8 do that, Your Honor. But there is no --

9 QUESTION: Well, not according to you. There's  
10 establishment problems.

11 MR. HOEFLING: No, there's no Constitutional  
12 requirement that that be allowed.

13 QUESTION: Mr. Hoeftling --

14 MR. HOEFLING: Yes.

15 QUESTION: Well, I'm -- I'm not talking about a  
16 Constitutional requirement. I'm talking -- you were  
17 talking about a Constitutional prohibition.

18 MR. HOEFLING: Uh-hum.

19 QUESTION: You said there's an establishment  
20 problem in doing that.

21 MR. HOEFLING: Yes, Your Honor. I -- I submit  
22 that in --

23 QUESTION: So then these Virginia districts that  
24 do it, and for all I know -- I live in Virginia so I know  
25 that it's there, it may well be in other States, you say

1       that -- that's a problem.

2               MR. HOEFLING:  Yes, I do, Your Honor.  I submit  
3       that --

4               QUESTION:  Why is that?

5               MR. HOEFLING:  I submit that -- I submit that  
6       the first -- the first prong of the three-pronged test is  
7       that it must have a secular purpose.  And, in fact, it has  
8       a religious purpose.

9               QUESTION:  Uh-hum.

10              MR. HOEFLING:  And not a secular purpose.

11              QUESTION:  Well, let's assume a school district  
12     that leases its -- its -- its facilities for any purpose  
13     at all.

14              MR. HOEFLING:  Uh-hum.

15              QUESTION:  You know, commercial, political,  
16     anything at all.  They -- they must, however, not allow a  
17     church group that wants to lease it of a Sunday to conduct  
18     a service there.

19              MR. HOEFLING:  Yes, Your Honor.  I think that  
20     runs into --

21              QUESTION:  The Constitution requires that.

22              MR. HOEFLING:  Yes, sir.  And I think it also  
23     runs into a problem in terms of the primary effect tends  
24     to -- to advance religion as a proposition, and that that  
25     is also the second prong of the establishment clause test

1       that we run into difficultly with.

2               I think that in recognition of those problems,  
3       the school district has stepped back and attempted to  
4       distance itself from religious organizations and kept them  
5       out of this otherwise limited forum, as it properly may do  
6       under the Constitution.

7               QUESTION:   Mr. Hoeftling.

8               MR. HOEFLING:   Yes.

9               QUESTION:   If -- if the university in the Widmar  
10       case had adopted the same policy as your school district,  
11       do you think the result in the case would have been  
12       different?

13              MR. HOEFLING:   Well, Your Honor, I submit that  
14       in Widmar, as this Court has held, that was an open public  
15       forum as to those students because --

16              QUESTION:   Excuse me.   The question I asked you,  
17       though, was whether if the university there had adopted  
18       the same policy you've adopted, whether the result in the  
19       case would have been the same?

20              MR. HOEFLING:   I think the result in Widmar  
21       probably should be the same, because the framework of  
22       forum analysis in that case, even with this policy in  
23       place in the university, would be a different analysis  
24       than the analysis here.   In Widmar --

25              QUESTION:   Why -- why is that, because it's a

1 university and this is not?

2 MR. HOEFLING: Yes, Your Honor.

3 QUESTION: Is that the distinguishing mark,  
4 then?

5 MR. HOEFLING: That is -- that is the  
6 significant difference in the two cases. As to the  
7 students at the university, the university is, in fact, an  
8 open forum for ideas and discussion and learning in all  
9 types, in all levels. In our particular case, as to the  
10 students who attend the school during the daytime --

11 QUESTION: What if the university in Widmar  
12 had --

13 MR. HOEFLING: I'm sorry, Your Honor?

14 QUESTION: What if the university in Widmar had  
15 adopted exactly the same rule? It didn't limit access to  
16 the university grounds to students or student activities,  
17 it said the university facilities are open to all groups  
18 for social, welfare organizations, et cetera. It had  
19 exactly the -- had exactly your rule but just excluded the  
20 political speech and religious speech.

21 MR. HOEFLING: In terms of student groups?

22 QUESTION: Wouldn't there -- wouldn't Widmar  
23 have come out differently?

24 MR. HOEFLING: In terms of student groups, Your  
25 Honor?

1 QUESTION: No, no.

2 MR. HOEFLING: Or the community?

3 QUESTION: No, no, no, no. The same church --  
4 the same church wanted to come in and do what -- what the  
5 church in this case wanted to do.

6 MR. HOEFLING: I understand, Your Honor.

7 QUESTION: As the community nonstudent group and  
8 there had been hundreds of other nonstudent groups allowed  
9 on the university campus, would Widmar have come out  
10 differently?

11 MR. HOEFLING: Your Honor, we submit that if it  
12 was an off campus nonstudent group who sought access in  
13 Widmar, the forum is a different forum than the university  
14 forum for students and the result there should have been  
15 the same result that we got in the district court and the  
16 Second Circuit here.

17 QUESTION: You -- you seem to be making --

18 MR. HOEFLING: Yes.

19 QUESTION: -- Two -- coming up with two  
20 categories that you think are important. One is a  
21 category of university forums, is that correct, that makes  
22 a different and that's your -- basically, your answer to  
23 Justice White's question, I guess?

24 MR. HOEFLING: Well, Your Honor, I -- I think  
25 that the university itself is an example of an open public

1 forum.

2 QUESTION: So it's a -- it's necessarily a  
3 subset of -- of -- of what, a designated public forum?

4 MR. HOEFLING: It -- the university, in and of  
5 itself as to the students, is an open public forum under  
6 Widmar.

7 QUESTION: Well, it's -- is it a -- maybe I'm  
8 just getting mixed up in definitions, but are you saying  
9 it's a designated public forum which is necessarily open?  
10 Once you open a university, you have -- so far as the  
11 students are concerned, you necessarily have a public  
12 forum for the students?

13 MR. HOEFLING: Your Honor, we submit that in  
14 terms of a university setting such as the university in  
15 Widmar, it was indeed an open public forum. It has  
16 traditionally been --

17 QUESTION: I know that's what you're saying, but  
18 my question is is that a necessary conclusion that follows  
19 from your view of what a university is for First Amendment  
20 purposes?

21 MR. HOEFLING: Yes, Your Honor.

22 QUESTION: Okay. Now, do you -- are you also  
23 suggesting that in order to win, we recognize -- we must  
24 recognize in this case a -- a fourth forum category, that  
25 is the -- the limited designated public forum?

1 MR. HOEFLING: Your Honor, I think that the  
2 language that comes out in our brief is -- is a function  
3 of, as much of anything, the language that this Court has  
4 used and the language in the Second Circuit . And we've  
5 tried to accommodate those two terms together.

6 I'm not sure that it's necessary to determine  
7 that there is specifically a fourth category of -- of  
8 speech regulation, but that in our particular case it  
9 certainly -- this forum, as to outside groups, takes on  
10 the appearance of a limited public forum or a designated  
11 public forum that has not been opened up to the  
12 petitioners.

13 QUESTION: Okay. So you're -- you're saying  
14 a -- a designated public forum can have limitations, but  
15 it cannot in a university setting with respect to  
16 university students, considered in isolation.

17 MR. HOEFLING: As -- as to those students, it is  
18 an open public forum, Your Honor.

19 Your Honor, I think that this Court has  
20 certainly hinted at that besides the case of Widmar.  
21 There -- in Perry, the language of this Court is the right  
22 of access extends only to other entities of a similar  
23 character, and there is nothing wrong with having some  
24 distinction in access on the basis of subject matter and  
25 speaker identification. And --

1 QUESTION: But you exclude -- could you exclude  
2 communists from conducting any -- any family movies? You  
3 could say except those that -- that have a communist or  
4 socialist viewpoint.

5 MR. HOEFLING: I don't think --

6 QUESTION: Limited public forum, no communist or  
7 socialist viewpoints, is that okay?

8 MR. HOEFLING: I think that may well run into a  
9 different set of problems than the problem we're  
10 discussing here today.

11 QUESTION: Why -- why different?

12 MR. HOEFLING: Because I don't think you have  
13 the same establishment clause problems and entanglement  
14 problems that you confronted in a --

15 QUESTION: I see --

16 MR. HOEFLING: -- In a religious setting.

17 QUESTION: Oh, I see. You -- you defend --  
18 that's the defense of your statute, then, that the  
19 establishment clause makes you do it.

20 MR. HOEFLING: No, Your Honor. We submit that  
21 it's a limited public forum --

22 QUESTION: Well, then -- then don't make that  
23 argument then. Wherein does the example that I gave you  
24 differ?

25 If you are not relying on the establishment

1 clause to say that you cannot do this, then why is it  
2 different to exclude a religious viewpoint than to exclude  
3 a socialist or communist viewpoint in -- in these movies?  
4 Why can't I have a limited public forum, movies on  
5 anything you like but no socialists or communists?

6 MR. HOEFLING: I submit that, again, in terms of  
7 areas involving political speech and religious speech --

8 QUESTION: Uh-hum.

9 MR. HOEFLING: -- The school district has  
10 elected in this particular locality, and in the State of  
11 New York, to exclude those types of speakers.

12 QUESTION: I know that.

13 MR. HOEFLING: And I submit that --

14 QUESTION: Justice Scalia gave you a  
15 hypothetical question.

16 MR. HOEFLING: Yes.

17 QUESTION: You ought to try to answer it.

18 MR. HOEFLING: Yes, Your Honor. I -- I submit  
19 that the school district, if it were to characterize those  
20 types of speech as political speech, could, in fact,  
21 exclude those speakers.

22 QUESTION: Is that right? Just -- just that  
23 type of political speech.

24 MR. HOEFLING: Yes, Your Honor.

25 QUESTION: That's very interesting.

1 QUESTION: But do I understand your statement  
2 you made earlier that supposing you had a communist group  
3 that wanted to address the subject of family values and  
4 they thought there was a value in not having children  
5 waste their time going to Sunday school or church and  
6 therefore they had a point of view that was definitely  
7 antireligious, they would be permitted, under your policy,  
8 to discuss family values in that context?

9 MR. HOEFLING: Yes. Yes, Your Honor, that's  
10 correct.

11 QUESTION: And now why is that not -- the  
12 contrast between that and what you have here, why is that  
13 not viewpoint discrimination?

14 MR. HOEFLING: Your Honor, we -- we submit that  
15 the -- the statute, the scheme that's been established by  
16 the statute and the regulations closes the forum to  
17 certain particular groups. One of those groups are people  
18 who use the forum to proselytize a particular religious  
19 point of view. That is not something we'd be confronted  
20 with by the example you cite.

21 QUESTION: But in my -- my communist example,  
22 why couldn't one make the argument that they are trying to  
23 proselytize a nonreligious point of view. And you're, in  
24 effect, discriminating against religions as opposed to  
25 those who are totally against religion.

1 MR. HOEFLING: Well, Your Honor, I think, again,  
2 that comes down to the focus of how -- how narrow it is  
3 you look at the speech that's being engaged in. We've  
4 looked at this in terms of religious speech and we haven't  
5 compared it to nonreligious speech or irreligious speech  
6 or antireligious speech, and we submit that in terms of  
7 religious speakers we have been consistent in our policy  
8 and that that is permitted within a limited public forum.

9 QUESTION: It is lawful because it is. It is --

10 MR. HOEFLING: It is --

11 QUESTION: -- Therefore it is lawful.

12 MR. HOEFLING: Well, Your Honor, it --

13 QUESTION: No.

14 MR. HOEFLING: -- It is lawful to the extent  
15 that it has been a longstanding policy and it exhibits the  
16 intention of this district and the State of New York not  
17 to open up their school districts, across the board, to  
18 any and all comers.

19 QUESTION: Your -- your -- your -- do I  
20 understand your entanglement argument correctly that what  
21 you're saying is if we let this particular religious point  
22 of view be expressed, well the next step will be the mass  
23 and the ceremony. You're going to have to draw a line  
24 somewhere which will involve entanglement in religious  
25 decision making, in effect. Is that what you're arguing?

1 I don't have the --

2 MR. HOEFLING: Well, I submit that someplace  
3 even inbetween there, Your Honor, we -- we come up with  
4 the question as to what is the next film series --

5 QUESTION: Right.

6 MR. HOEFLING: -- That Lamb's Chapel wants to  
7 show and who is it that is going to be speaking at that  
8 film series and how much are we to censor or look at or  
9 wonder about whether this is permissible or not  
10 permissible religious speech --

11 QUESTION: Well, it seems --

12 MR. HOEFLING: -- On behalf of --

13 QUESTION: -- To me your entanglement argument  
14 is -- doesn't carry much with me because you -- because in  
15 order to exclude under your no religion rule, you've got  
16 to decide whether this -- whether this is going to be  
17 religion.

18 MR. HOEFLING: Your Honor, we submit that they  
19 have already decided that when they've told us in their  
20 application that, in fact, it's going to be religious in  
21 nature. And that's enough for us.

22 QUESTION: Well that may be so in this case, but  
23 you -- you're -- you're bound to have to decide whether --  
24 some group that is going to come in with some program,  
25 whether in fact it's a religious program.

1 MR. HOEFLING: We submit that --

2 QUESTION: And -- and -- and that is the -- so  
3 you're never going to avoid your entanglement problem.

4 MR. HOEFLING: Your Honor, we submit that there  
5 are often situations in which questions must be asked of a  
6 religious group, at least on the surface, to see if they  
7 qualify for certain tax benefits or certain other  
8 entitlements, but that doesn't necessarily involve  
9 entanglement.

10 But when we get to the point where we are  
11 prescreening what they're going to show to see whether or  
12 not it's too religious or too close to a mass or a  
13 service, too close to proselytizing, that becomes a very  
14 difficult issue and really does create entanglement  
15 problems for the district.

16 QUESTION: Is there a difference between speech  
17 with a religious viewpoint and a religious exercise?

18 MR. HOEFLING: Again, I suspect that depends on  
19 the nature of the speech, Your Honor, and it's an issue  
20 that the school district would rather not get involved in  
21 screening.

22 QUESTION: Well, the Constitution itself talks  
23 about free exercise, so might not that be a workable  
24 category?

25 MR. HOEFLING: I have not problem with free

1 exercise in -- in a public forum, Your Honor. But in a  
2 limited public forum such as we advocate and the Second  
3 Circuit has -- the district court and the Second Circuit  
4 has found we have here, we see no need to open the forum  
5 up to the religious speaker.

6 QUESTION: The problem is -- is that if you  
7 define religion -- a limited forum in terms of content, it  
8 can be self-defeating because the whole idea of limited --  
9 of -- of a public forum of some kind is to allow for the  
10 expression of speech, so you have to be very careful that  
11 you're not just engaging in a circular definition.

12 MR. HOEFLING: I understand that, Judge, but  
13 I -- Your Honor, Justice Kennedy, I think that if you look  
14 at the picture that this Court has drawn, the framework  
15 that this Court has put together through the years from  
16 Greer and Widmar and Perry and the cases that outline  
17 forum analysis, I think it is a useful framework for the  
18 school district and for other local government officials  
19 to govern what they can and cannot do without running into  
20 Constitutional problems in the free speech area.

21 QUESTION: Under some of our cases talking about  
22 public forum, I think you find an indication that the  
23 Court has said that reasonable and neutral limitations can  
24 be imposed. Do you assert that the limitation here on  
25 religious content is reasonable and neutral?

1 MR. HOEFLING: Yes, Your Honor, we do. It's  
2 neutral in that --

3 QUESTION: That's a little hard to propose. I'd  
4 like you to explain that.

5 MR. HOEFLING: Yes, Your Honor. We submit that  
6 it's neutral because, in fact, nobody with a religious  
7 perspective is permitted to use the facility in terms of  
8 proselytizing their faith.

9 QUESTION: But people with an antireligious  
10 viewpoint are, and so you think that's neutral.

11 MR. HOEFLING: I'm -- I'm not certain that  
12 that's a fair characterization, but if -- if we were to  
13 look at that as a hypothetical, I'm not sure --

14 QUESTION: You did with Justice Stevens a few  
15 minutes ago and I understood you to confirm that.

16 MR. HOEFLING: Yes, I have no problem with that  
17 as a hypothetical.

18 QUESTION: So you say that's neutral.

19 MR. HOEFLING: Yes, Your Honor.

20 QUESTION: Well, that's like saying that a ban  
21 on left wingers is neutral because it includes both  
22 communists and socialists.

23 (Laughter.)

24 MR. HOEFLING: Well, in terms of the area of  
25 religious freedom in a limited public forum, the school

1 district is concerned with not only the free speech  
2 aspects of allowing religious speakers to come in, but  
3 they're concerned about establishment problems and they're  
4 concerned about entanglement problems.

5 That is those other categories are not problems  
6 that we are confronted with with regard to nonreligious  
7 speakers, and on that basis I see a distinction that is  
8 worth -- worth making.

9 QUESTION: Mr. Hoeftling --

10 MR. HOEFLING: Yes, Your Honor.

11 QUESTION: This -- this may be a little unfair  
12 because it's really not brief, but you -- you are here  
13 representing both respondents, I -- I gather, in this  
14 argument, and the Attorney General of New York, in his  
15 brief defending the -- the New York rule says that -- I'm  
16 quoting, "Religious advocacy serves the community only in  
17 the eyes of its adherents and yields a benefit only to  
18 those who already believe."

19 Does New York State -- I grew up in New York  
20 State and in those days they -- they used to have a tax  
21 exemption for religious property. Is that still there?

22 MR. HOEFLING: Yes, Your Honor, it still is.

23 QUESTION: But they've changed their view,  
24 apparently, that --

25 MR. HOEFLING: Well, Your Honor --

1                   QUESTION: You see -- it used to be thought  
2                   that -- that religion -- it didn't matter what religion,  
3                   but it -- some code of morality always went with it and it  
4                   was thought that, you know, what was called a God-fearing  
5                   person might be less likely to mug me and rape my sister.  
6                   That apparently is not the view of New York anymore.

7                   MR. HOEFLING: Well, I'm not sure that that's --  
8                   that --

9                   QUESTION: Has this new regime worked very well?  
10                  (Laughter.)

11                  MR. HOEFLING: I think that might be a question  
12                  better posed to politicians who have been elected in the  
13                  State of New York than myself, Your Honor.

14                  We -- we submit that -- that particular sentence  
15                  that's in the attorney general's brief is not necessarily  
16                  something that -- that I personally would subscribe to.  
17                  That does not -- that does not mean, however, that there  
18                  is some type of Constitutional compulsion to open the  
19                  school district to a religious speaker simply because  
20                  there is some moral force which religious speakers bring  
21                  with them that otherwise betters the community.

22                  QUESTION: However, there may be some compulsion  
23                  to treat it -- to treat religion like other civic goods.  
24                  And when you open up the forum to other social and  
25                  civically beneficial things, you cannot exclude it to

1 religion on the theory that religion, after all, is just  
2 private and only serves -- only yields a benefit to those  
3 who already believe. That certainly hasn't been our --  
4 our tradition in -- in this country in viewing the role of  
5 religion in public life.

6 MR. HOEFLING: I agree with that, Your Honor. I  
7 have no problem with that, the position you've just  
8 stated. I just don't think that, again, the fact that  
9 religion has a particular positive influence in the  
10 community that extends even beyond believers is, of  
11 itself, enough to require a school district to grant  
12 access to religious speakers.

13 Your Honor, Justice O'Connor asked a question  
14 about the reasonableness before. There are -- although,  
15 to be -- to be honest with you, I don't think the record  
16 has developed this.

17 I think there are good reasons for the school  
18 district to have a distinction between religious speakers  
19 and nonreligious speakers in a limited public forum such  
20 as we've established here. I think the same thing can be  
21 said for political speakers and in terms of avoiding  
22 controversy, allowing the school system to be about the  
23 business of -- the principal business of educating the  
24 children entrusted to its care. That those types of  
25 purposes are reasonable purposes and reasonable enough to

1 support the invocation of this particular rule.

2 QUESTION: May I ask you if there's any --  
3 there's not at issue here any right to use the school  
4 facilities to advertise the fact that there's going to be  
5 the program, is there? Did they drum up their customers  
6 or their attendees independently of the -- of the school?

7 MR. HOEFLING: That's my understanding, Your  
8 Honor.

9 QUESTION: Yeah.

10 MR. HOEFLING: I have no -- we have no reason to  
11 believe that it was done otherwise.

12 QUESTION: I don't -- I don't --

13 QUESTION: Counsel, just --

14 QUESTION: -- I don't really understand what the  
15 entanglement problems are, even if it were a matter of  
16 allowing religious services. Let's assume that -- that  
17 the -- that the school district leases its building --  
18 it's just a building. It's a building and once the kids  
19 are out and it's in the evening and they're nothing --  
20 it's a building that they rent out to anything.

21 Let's assume they rent it even to for-profit  
22 organizations for conducting sales meetings, training of  
23 sales representatives, or whatever, but there is somehow  
24 an -- an entanglement problem if -- if they would lease it  
25 to a religious group that wants to conduct a service

1       there.

2               MR. HOEFLING:   Your Honor, I submit that if --  
3       if this facility were leased to a religious organization  
4       that wanted to use it for its own services, you wind up  
5       with questions about the character and purposes of the  
6       institution that's benefitted, which becomes -- becomes  
7       the religious institution itself, by virtue of having a  
8       space that it doesn't otherwise have available to it.

9               QUESTION:   Well, but -- but you allow -- you  
10      allow, you know, General Motors or whoever commercial.  
11      You don't inquire into, you know, do -- do we agree with  
12      all the -- all the things that General Motors does.   You  
13      just lease it out, but you can't do that for religious  
14      groups somehow.

15              MR. HOEFLING:   It does increase --

16              QUESTION:   They suffer that special disability,  
17      that's what entanglement means.

18              MR. HOEFLING:   I -- I submit to you that General  
19      Motors -- leasing the premises to General -- General  
20      Motors does not create the same establishment types of  
21      problems, establishment clause types of problems that you  
22      have with a religious institution.

23              QUESTION:   Counsel, in your earlier discussions  
24      with Justice Stevens you indicated that communists would  
25      be able to give their perspective on family.   I -- I

1     assume from that that atheists would be able to give  
2     theirs under your rules.

3             MR. HOEFLING:   Yes, Your Honor.

4             QUESTION:   Would an atheist be allowed to debate  
5     a minister from a religious perspective under your rules?

6             MR. HOEFLING:   I think that you -- we wind up  
7     with a situation where if -- if the purpose of the  
8     debate --

9             QUESTION:   Let's just say it's -- the debate is  
10    the religious value versus the atheistic value or content  
11    of a family, or family from a religious or atheistic  
12    perspective.

13            MR. HOEFLING:   I hadn't really given that any  
14    thought, Your Honor.   It -- it seems to me that you,  
15    again, begin to bring into play the question of whether or  
16    not the -- the religious speaker is -- is going to use the  
17    forum to proselytize their faith.

18            QUESTION:   Well let's say it's an atheist and an  
19    agnostic debating one minister.

20            MR. HOEFLING:   And so the question becomes how  
21    many people on the part of the --

22            QUESTION:   Well, I'm just wondering which --  
23    what is it about the debate that changes when you add a  
24    minister to an atheist and an agnostic.

25            MR. HOEFLING:   Again, Your Honor, I submit that

1 the question that we're concerned about is whether or not  
2 proselytization is something that starts to happen in the  
3 school facility. And --

4 QUESTION: Well how could that be proselytizing  
5 if it's simply two debating one. Let's say 10 atheists  
6 debating one minister in front of --

7 MR. HOEFLING: I don't think the numbers have  
8 anything --

9 QUESTION: -- An atheist audience.

10 MR. HOEFLING: I don't think the numbers have  
11 anything to do with that, Your Honor.

12 QUESTION: Well, I'm trying to move away from  
13 the proselytizing and also to move away from a situation  
14 in which the minister dominates the discussion.

15 MR. HOEFLING: I understand, Your Honor. I  
16 submit that the school district nonetheless has the right  
17 to keep that particular type of activity from occurring  
18 because of our concern about religious uses.

19 QUESTION: So the addition of the minister is a  
20 problem, regardless of what the content is or the  
21 composition is.

22 MR. HOEFLING: Yes, Your Honor, under those  
23 circumstances I would submit so.

24 Thank you, Your Honor.

25 QUESTION: Thank you, Mr. Hoefling.

1 Mr. Sekulow, you have 3 minutes remaining.

2 REBUTTAL ARGUMENT OF JAY ALAN SEKULOW

3 ON BEHALF OF THE PETITIONERS

4 MR. SEKULOW: Thank you, Mr. Chief Justice. The  
5 way I understand the respondents' argument, the atheists  
6 are in, the agnostics are in, the communists are in, the  
7 religion is not in. In fact, even if it was a debatable  
8 point, as Justice Thomas just said, only one side of the  
9 debate is heard.

10 That's exactly what we've been asserting in our  
11 briefs and that's exactly what they've conceded in their  
12 briefs. This is the type of viewpoint discrimination that  
13 this Court has not sanctioned.

14 And I'd also point out that this establishment  
15 clause concern has already been addressed. This case is  
16 not in a vacuum. Widmar is this Court's precedent,  
17 Mergens is this Court's precedent. We're talking about a  
18 policy of equal access, and if the communists can come in  
19 and give their view on family life and others could give  
20 their view on family life, but you allow religion -- I  
21 think if there's an establishment clause, it -- it  
22 violates -- their policy violates the establishment clause  
23 by interfering with religion.

24 QUESTION: Do you think -- that all -- that the  
25 only exclusion with respect to religion was religious

1 ceremonies, actually religious services?

2 MR. SEKULOW: In the context, Justice White, of  
3 this existing policy?

4 QUESTION: Yes.

5 MR. SEKULOW: I think it's the same argument,  
6 because a religious service does have a religious  
7 perspective, especially if the sermon is addressing the  
8 family issues that were -- that -- in the debate, so to  
9 speak.

10 You had the secularist groups come in and give  
11 their view and then you had a religious service, they sang  
12 religious songs, they gave hymns, and then the sermon was  
13 family values and family issues from the Bible. To deny  
14 that is viewpoint discrimination, to make -- to make no  
15 Constitutional --

16 QUESTION: Well, what if it wasn't a sermon  
17 about family values?

18 MR. SEKULOW: I --

19 QUESTION: What if it was a -- what if the --  
20 what if the only thing that happened was that they read  
21 from the Bible, they read from the scriptures?

22 MR. SEKULOW: I believe in that case the -- the  
23 biblical admonition, whatever it might be, is still a  
24 religious perspective and probably, based on views of the  
25 Bible that people hold, would be valid as to civic,

1 social, and recreational use.

2 The policy here is not different than Widmar.  
3 Widmar limited it to student groups, the school district  
4 opened it to outside groups. They've -- the speaker  
5 identity is not an issue and the subject matter's an  
6 issue. There is one thing that is an issue. The  
7 communists are in, the atheists are in, the agnostics are  
8 in, but religion's out because we don't like their  
9 viewpoint and that's what we're objecting to here.

10 Thank you, Mr. Chief Justice.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
12 Sekulow. The case is submitted.

13 (Whereupon, at 11:05 a.m., the case in the  
14 above-entitled matter was submitted.)  
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## 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:*

*Lamb's Chapel and John Steigerwald, Petitioners, v. Center*

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*Moriches Union Free School District, Et Al. Case No:91-2024*

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

BY *Lona M. May*

(REPORTER)