

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: BOARD OF EDUCATION OF KIRYAS JOEL VILLAGE
SCHOOL DISTRICT, Petitioner v. LOUIS GRUMET, ET
AL.; BOARD OF EDUCATION OF MONROE
WOODBURY CENTRAL SCHOOL DISTRICT, Petitioner
v. LOUIS GRUMET, ET AL.; and ATTORNEY
GENERAL OF NEW YORK, Petitioner v. LOUIS
GRUMET, ET AL.

CASE NO: No. 93-517, No. 93-527 and No. 93-539

PLACE: Washington, D.C.

DATE: Wednesday, March 30, 1994

PAGES: 1-57

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BOARD OF EDUCATION OF KIRYAS :

4 JOEL VILLAGE SCHOOL DISTRICT, :

5 Petitioner :

6 v. : No. 93-517

7 LOUIS GRUMET, ET AL.; :

8 X

9 BOARD OF EDUCATION OF MONROE- :

10 WOODBURY CENTRAL SCHOOL :

11 DISTRICT, :

12 Petitioner :

13 v. : No. 93-527

14 LOUIS GRUMET, ET AL.; :

15 and X

16 ATTORNEY GENERAL OF NEW YORK, :

17 Petitioner :

18 v. : No. 93-539

19 LOUIS GRUMET, ET AL. :

20 - - - - -X

21 Washington, D.C.

22 Wednesday, March 30, 1994

23 The above-entitled matter came on for oral
24 argument before the Supreme Court of the United States at
25 10:05 a.m.

1 APPEARANCES:

2 NATHAN LEWIN, ESQ., Washington, D.C.; on behalf of the
3 school district Petitioners.

4 JULIE S. MERESON, ESQ., Assistant Attorney General of New
5 York, Albany, New York; on behalf of the State
6 Petitioner.

7 JAY WORONA, ESQ., Slingerlands, New York; on behalf of the
8 Respondents.

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C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	NATHAN LEWIN, ESQ.	
4	On behalf of the school district Petitioners	4
5	ORAL ARGUMENT OF	
6	JULIE S. MERESON, ESQ.	
7	On behalf of the State Petitioner	19
8	ORAL ARGUMENT OF	
9	JAY WORONA, ESQ.	
10	On behalf of the Respondents	28
11	REBUTTAL ARGUMENT OF	
12	NATHAN LEWIN, ESQ.	
13	On behalf of the school district Petitioners	55
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 PROCEEDINGS

2 (10:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 93-517, the Board of Education of Kiryas
5 Joel Village School District v. Louis Grumet, and two
6 cases consolidated with it for argument.

7 Mr. Lewin.

8 ORAL ARGUMENT OF NATHAN LEWIN

9 ON BEHALF OF THE SCHOOL DISTRICT PETITIONERS

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

12 The statute that is being challenged in this
13 case as inconsistent on its face with the Establishment
14 Clause of the First Amendment involves no governmental
15 participation in the teaching and propagation of religious
16 doctrine and underwrites no public employee to participate
17 directly in religious indoctrination.

18 These were factors that were present in the
19 Government program that the Court sustained last term in
20 the Zobrest case, and they led Justices Blackmun and
21 Souter to dissent in that case.

22 By contrast, the New York legislature has
23 authorized the residents of a legally incorporated village
24 that has existed since 1977 that elects a mayor and a
25 village board and enacts ordinances that comprise the code

1 of the Village of Kiryas Joel to operate a wholly secular
2 public school.

3 QUESTION: Mr. Lewin, may I inquire, this is a
4 special act of the legislature just directed to form this
5 one school district?

6 MR LEWIN: It is an independent -- yes,
7 Justice --

8 QUESTION: Were the laws of the State of New
9 York not such that other people similarly situated could
10 form their own special school district? Why did a special
11 law have to be enacted here?

12 MR LEWIN: The legislature in New York has --
13 does enact laws that creates school districts and bounds
14 of school districts. That's referred to specifically in
15 the complaint in this case. That's the way the --

16 QUESTION: Is every school district in the State
17 of New York formed by a special act of the legislature?

18 MR LEWIN: It's formed by acts of the
19 legislature.

20 QUESTION: Rather than by a general provision
21 that allows residents of areas to form their own district.

22 MR LEWIN: My understanding is that that's
23 correct. The enactment of the boundaries of school
24 districts is done by legislative enactment.

25 QUESTION: It's always done that way --

1 MR LEWIN: Yes.

2 QUESTION: -- not by some general law --

3 MR LEWIN: Not by some general law.

4 QUESTION: -- that would allow similar groups to
5 form districts.

6 MR LEWIN: Correct.

7 QUESTION: Is it fair to say that governmental
8 power was transferred here to a geographic entity based on
9 the religious beliefs and practices of its residents?

10 MR LEWIN: I think, Justice Kennedy, that that's
11 not a fair characterization. It was transferred to the
12 residents of a village. Those residents are indeed all of
13 a particular religious denomination, and very devoutly so,
14 but the -- it was not that the statute in any way itself
15 drew lines that distinguished on the basis of religion.

16 QUESTION: If my characterization that I used in
17 the question were deemed the appropriate characterization,
18 would you lose the case?

19 MR LEWIN: Well, I don't think so, not even
20 under those circumstances, although that's not this case,
21 Justice Kennedy, because I think that if in fact, as a
22 matter of legislative accommodation, a group of
23 individuals residing in a particular geographic area would
24 warrant having a separate public school for secular
25 reasons, which is what happened in this case, it would be

1 permissible to accommodate to them, and -- or even to
2 accommodate to their religious practice.

3 Our view is that accommodation by the
4 legislature to the needs of a religious community is
5 permissible. My example would be, for example, this book
6 covers garbage disposal within the Village of Kiryas Joel.
7 There's a code that talks about trash disposal.

8 If a community, for example, said, we will not
9 accept trash disposal on the Sabbath, on Saturday -- we
10 think it's inappropriate for religious reasons -- if the
11 legislature then said, all right, for that reason we'll
12 allow you to conduct your own trash disposal on some other
13 day of the week, and you do it yourself, we think that's
14 within the spirit of what the free exercise laws --

15 QUESTION: Well, Mr. Lewin, if -- if such a law
16 were to neutrally extend to everybody in New York, so that
17 anybody similarly situated could dispose of their own
18 trash, I think you have a very good argument.

19 I have a little trouble seeing why the same
20 analysis applies when the law that you're examining is not
21 neutral. It's just limited to this one situation. It
22 isn't a broadly based law that says people living in a
23 village can have their own school district, whoever they
24 are, whether they're this group or some other group, and
25 yet it seems that New York has chosen to do this quite

1 separately, so I hope you will address that aspect.

2 One other question, preliminarily. I guess we
3 wouldn't be here today but for this Court's decision in
4 Aguilar.

5 MR LEWIN: That's correct, Justice O'Connor.
6 It's this Court's decision in Aguilar that precipitated
7 the situation that required some action to be taken
8 regarding the disabled children of Kiryas Joel.

9 QUESTION: If Aguilar --

10 QUESTION: And had we held --

11 QUESTION: Excuse me.

12 QUESTION: -- otherwise, then the services would
13 be provided with the Federal aid on the premises of the
14 religious schools.

15 QUESTION: And if that were happening, would the
16 mechanism of the accommodation that is in question here
17 have been permissible?

18 MR LEWIN: I think, Justice Kennedy, it would
19 have been permissible. Indeed, it appears from the
20 position of the Monroe-Woodbury School District that from
21 the vantage point of the overall school district, this is
22 a preferable accommodation. The Monroe-Woodbury School
23 District did not want to provide teaching at a neutral
24 site in Kiryas Joel. They --

25 QUESTION: No, no, no, my question, following

1 Justice O'Connor's, was, had Aguilar v. Felton come out
2 the other way --

3 MR LEWIN: Yes.

4 QUESTION: And these services had been provided
5 in the private schools themselves, would you then
6 nevertheless have had the constitutional option to have
7 the district formed as it was here?

8 MR LEWIN: No. If -- we agree that if, in fact,
9 the services were being provided under the pre-Aguilar
10 procedure, there would not have been any justification for
11 the legislature saying we have to accommodate or we have
12 to take this step. Under those circumstances, there would
13 be much more basis to argue that this is only being done
14 to provide some kind of authority to these citizens who
15 happen to be religious.

16 QUESTION: Well, Mr. Lewin, may I ask you a
17 question of fact there? You have spoken several times of
18 the fact that they happen to be religious. Is it part of
19 the record in this case that the village district upon
20 which the school district was superimposed was -- was
21 defined geographically by reference to the religious
22 affiliation of the people in it, so that non-Satmar
23 Hasidim were excluded, and those within the village all
24 fell within the category of the Satmar sect?

25 MR LEWIN: Justice Souter, I think the record

1 really establishes the contrary.

2 The record establishes that what happened in
3 this case -- and it appears in the very first pages of the
4 Joint Appendix -- that what happened in this case was that
5 the original village that was proposed -- and that's at
6 page 12 of the Joint Appendix -- the Satmars presented a
7 petition to form a new village of very large dimensions
8 which included many properties and people not of the
9 Satmar belief, so that consequently the original petition
10 was not in any way limited by where Satmar Hasidim
11 happened to live.

12 What happened, the real basis for the creation
13 of the village was a zoning dispute. Since Satmar Hasidim
14 have large families -- indeed, I think the record shows
15 there's over 60 percent of the population is under 17
16 years of age, they needed homes which would accommodate
17 larger families, and that precipitated, as I say, a zoning
18 dispute.

19 The consequence ultimately was, as page 13 of
20 the Joint Appendix shows, that a new village on a much
21 smaller scale than originally proposed was presented only
22 because the people who were to be included in the larger
23 area said they did not want to be in this village, so that
24 the --

25 QUESTION: Well, that maybe unconstitutional

10

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1 too, Mr. Lewin, I guess. If people for religious reasons
2 have larger families we can't have special communities
3 with special zoning rules for them, either.

4 MR LEWIN: Well, Justice Scalia, of course, our
5 view is that the accommodation authority that legislatures
6 have and that this Court has recognized -- indeed, even as
7 strong a proponent of the Establishment Clause as Justice
8 Brennan in his Texas Monthly case in footnote 8
9 specifically referred to the fact that the authority to
10 accommodate is far broader than the mere confines of the
11 Free Exercise Clause.

12 QUESTION: But the argument being made is that
13 if they had large families for some other reason, not a
14 religious reason, you could -- you could establish a
15 special community with different zoning laws for that
16 group, but if they have large families for religious
17 reasons, just as this community has certain customs that
18 make it difficult for them to go to another community for
19 their schooling for religious reasons, then it's bad.

20 MR LEWIN: Well, our view, of course, is that
21 that --

22 QUESTION: It seems to me that's the argument
23 being made.

24 MR LEWIN: That turns the First Amendment on its
25 head. That essentially means that the free exercise of

1 religion, which is protected by the Constitution, becomes
2 the one impermissible vice that invalidates anything
3 that's done, and we think --

4 QUESTION: But leaving that argument aside, I
5 take it that the upshot of the creation -- of the forces
6 that led to the creation of the village was that in fact
7 the village was defined by adherence to this sect.
8 Whether the precipitant for that was concern over zoning,
9 that was the result, I take it.

10 MR LEWIN: The consequence was -- yes, Justice
11 Souter, that they are -- all the residents of the village
12 are Satmar Hasidim, but the point that I'm trying to
13 make --

14 QUESTION: Mr. Lewin, am I right that there's no
15 dispute in this record that compliance with the New York
16 law in establishing villages isn't at issue. It's rather
17 easy to form a village, and although this opinion that you
18 cited allows the village rather grudgingly makes the point
19 that whatever this group was, that they met all the
20 requirements of New York State law to form a separate
21 village, so that's --

22 MR LEWIN: There's no dispute, Justice Ginsburg,
23 and I think the petitioners have never challenged the
24 existence of the village. They've

25 QUESTION: Your case I think would be

1 considerably harder if you didn't have the school district
2 that coincided with the preexisting village boundaries.

3 MR LEWIN: We acknowledge that. It would be
4 more difficult. The question then would be squarely
5 presented whether, in order to accommodate a religious
6 group living within an area which had not previously
7 defined, it would be permissible for the legislature to
8 draw lines to accommodate that religious group, but that's
9 not this case.

10 QUESTION: Well, you'd say that would be okay,
11 too.

12 MR LEWIN: Well, again, with the caveat that
13 that is not by any means this case --

14 QUESTION: I understand.

15 MR LEWIN: We believe that that is part of the
16 spirit of accommodation, that if in fact --

17 QUESTION: But it would not be all right if,
18 say, a religious body -- say, the board of the
19 synagogue -- had been appointed the board members of the
20 school board. That would --

21 MR LEWIN: Absolutely not. We agree with that,
22 Justice Ginsburg. It would be impermissible, and here the
23 important point is that this property of the village is
24 privately owned by its residents. They have chosen to
25 purchase the property and to live together, and anybody --

1 anybody in this room, anybody in New York State, is
2 permitted, and indeed, under New York law, may not be
3 discriminated against if they choose to seek to purchase
4 property in that village.

5 QUESTION: Mr. Lewin, will you clear up one
6 factual situation that I'm confused about? Were all of
7 the students here residents of this school district?

8 MR LEWIN: All -- no, Justice Blackmun.
9 Currently -- again, initially when the school district was
10 created, it was created with the intention of serving the
11 students in Kiryas Joel, the children of Kiryas Joel.

12 Once it was created, since it provides a
13 bilingual and bicultural program, there are other students
14 who have -- who are disabled from other neighboring
15 communities who have been permitted, under procedures
16 which, Justice O'Connor, in line with your question as to
17 whether this is universal, with procedures which are
18 universal with regard to other school districts and other
19 circumstances have been permitted to attend this public
20 school which neighbors or adjoins their own home
21 districts.

22 QUESTION: Roughly how many of them are there,
23 percentagewise?

24 MR LEWIN: I think the percentage runs maybe 10
25 to 20 percent or so. I don't think it's higher than that.

1 It is a very --

2 QUESTION: May I --

3 MR LEWIN: It is a relatively small number, but
4 there are a number of them that --

5 QUESTION: May I ask one other factual question?

6 MR LEWIN: Yes, Justice.

7 QUESTION: Are the children separated by sex, or
8 are they all -- boys and girls take training together?

9 MR LEWIN: In this school, Justice Stevens, boys
10 and girls go to class together.

11 QUESTION: That puzzles me, because is that
12 consistent with the religious doctrine?

13 MR LEWIN: It is consistent with the religious
14 doctrine, because the views of the Satmar Hasidim and of
15 their religious authorities is that when the purpose of
16 education is this kind of remedial education, which is
17 to -- it is permissible to have boys and girls study
18 together, and so that that has been approved by -- or has
19 long been the practice within the religious community.

20 QUESTION: Was that also true during the pre-
21 Aguilar special education program?

22 MR LEWIN: My understanding is yes, it was
23 always true.

24 QUESTION: Thank you.

25 QUESTION: Is this place geographically located

1 up around Rochester?

2 MR LEWIN: It's near Harriman -- Monroe, is it
3 near Rochester -- it's further south, I'm sorry.

4 QUESTION: So it's not Monroe County, then.
5 It's on the Hudson.

6 MR LEWIN: I'm sorry, I -- Orange County. It's
7 in Orange County. I'm sorry.

8 The points that we wish to emphasize with regard
9 to this statute is that it is a legislative determination.
10 Justice O'Connor asked whether this applied uniformly. As
11 we have indicated, accommodations, we believe, can be
12 applied, and always are applied, indeed, to particular
13 situations.

14 This Court said in its Employment Division v.
15 Smith case, for example, that if there were a legislative
16 exemption for the smoking of peyote, that would be
17 permissible. Now, that by its very nature applies only to
18 one religious group, because -- for its religious
19 practice, and consequently we --

20 QUESTION: How about the Sabbatarian case?

21 MR LEWIN: The Sabbatarian --

22 QUESTION: Well, that was struck down, wasn't
23 it --

24 MR LEWIN: Well, that was --

25 QUESTION: -- because it didn't apply neutrally

1 to people with other needs for a day off.

2 MR LEWIN: With all respect, Justice O'Connor, I
3 think the Sabbatarian case was one in which this Court
4 felt that there was a burden on others to pick up for the
5 Sabbatarian, and in that footnote in which Justice Brennan
6 in his Texas Monthly case speaks of accommodations, he
7 refers to the fact that that's a distinction, whether the
8 nonobservers are burdened by the statute.

9 In this case, there's no burden on anyone else.
10 This is simply a statute which applies to this
11 municipality and essentially what the courts below have
12 said is that these people, because they are religious,
13 cannot be trusted to run a public school system.

14 QUESTION: Mr. Lewin, I took you a moment ago in
15 your answer to Justice Kennedy's question about the
16 significance of Aguilar to accept the proposition that in
17 judging what is a permissible, permissive accommodation,
18 that the range of possible alternatives for the
19 accommodation should be considered. Is that -- do you
20 think that's a -- basically a fair premise?

21 MR LEWIN: Well, the need for accommodation, I
22 don't think the range of accommodations. In other words,
23 this is not an area -- and I know that there is one judge
24 in the court below, Judge Kaye --

25 QUESTION: Yes. I was getting at that, yes.

1 MR LEWIN: Judge Kaye, who said, look, this --
2 the least restrictive alternatives standard should apply.
3 We think that's wrong. When the legislature --

4 QUESTION: Well, I think I would agree with you
5 there, but you can reject the least alternative theory and
6 still accept the view that alternatives should be
7 considered in deciding just how far the accommodation can
8 legitimately go.

9 MR LEWIN: I think that's true, and I think it's
10 particularly important in deciding whether there should be
11 any accommodation at all, and under Justice Kennedy's
12 hypothetical, it appeared to me there's no need for any
13 accommodation because this very same service is being
14 performed neutrally by the regular procedures in a way
15 that is perfectly consistent with the religious
16 observance.

17 I'd like to reserve --

18 QUESTION: Mr. Lewin, I have one question about
19 one of your copetitioners.

20 There was a reference by the Monroe-Woodbury
21 School Board in their brief that compared the alleged
22 restraint on sale and rental of property to people outside
23 the Satmar community to a church tithe that the individual
24 is free to pay or not to pay, and I found that disturbing,
25 because as I understand it, there is no choice.

1 The State law and the Federal law requires that
2 sale and rental be on a nondiscriminatory basis. The
3 Satmar does not have a choice to refuse to sell to an
4 outsider. Is that your understanding?

5 MR LEWIN: We agree with that entirely, Justice
6 Ginsburg. They have no choice, and if anybody comes in
7 and wants to live in that community and purchase a home,
8 they're entitled to do so.

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

11 QUESTION: Very well, Mr. Lewin. Ms. Mereson.

12 ORAL ARGUMENT OF JULIE S. MERESON

13 ON BEHALF OF THE STATE PETITIONER

14 MS. MERESON: Mr. Chief Justice, and may it
15 please the Court:

16 Do I need to lower the microphone?

17 QUESTION: It might help.

18 MS. MERESON: Okay.

19 The issue here is whether the State's action was
20 one that tolerated religious and lifestyle differences, or
21 whether it advanced, promoted, or furthered the Satmar
22 sect itself. The former is commanded by the Constitution,
23 but the latter is prohibited.

24 QUESTION: Do you see a difference between the
25 two? I mean, is that a usable test? By tolerating it and

1 facilitating it, you advance it. I mean, do we have to
2 pretend that there's a difference between the two?

3 MS. MERESON: I believe there's a great
4 difference between the two.

5 QUESTION: There is?

6 MS. MERESON: In fact, there's a red line
7 between the two that sometimes is hard to discern,
8 perhaps, but on the one hand you have an ability to
9 tolerate and to acknowledge something that preexists the
10 legislation or State act, and then on the other side, you
11 have things that actually encourage religious practice or
12 make it particularly advantageous to practice a
13 religion -- for instance, the prayer in the schools.

14 Tolerance is a recognition of differences and an
15 alleviation of a burden. On the other side of the
16 Establishment Clause, the free exercise right, the
17 tolerance is an accommodation. It's a means of making
18 somebody's religious life not disadvantageous.

19 QUESTION: Well, do you think that the State's
20 accommodation needs to be neutrally applied, if possible,
21 so that all people similarly situated have the same
22 option, or can the State single out one sect or one
23 religious group and provide some benefit there, but not
24 make it generally applicable? Is there a difference, in a
25 neutrally applied scheme open to all?

1 MS. MERESON: The neutrality here is not in the
2 sense of applying to all. There is neutrality here, and
3 yes, the State needs to be neutral, but the neutrality
4 exists in the context of the particular problem. When
5 you're dealing --

6 QUESTION: Well, how is this neutral, if the
7 legislature set up just a special school district for this
8 one situation, instead of passing a law to the effect that
9 groups of people or villages or towns can form their own
10 school district by applying neutral criteria?

11 MS. MERESON: Because here the legislature was
12 reacting to a particular local problem. There was a local
13 problem that did not need a general statute for other
14 groups in the State. The problem here --

15 QUESTION: Isn't it a dangerous precedent to let
16 the legislature tackle a so-called accommodation by
17 singling something out like this, as opposed to passing a
18 neutrally applicable law?

19 MS. MERESON: There's no need for a broader law,
20 and no, I don't think that it's dangerous for the reason
21 that when you need accommodation sometimes you have a
22 specific problem.

23 The burden that were on -- that were on the
24 Hasidic parents and children of this community is not a
25 burden that was shared by the rest of the State or the

1 rest of the country.

2 QUESTION: Ms. Mereson, doesn't the legislature
3 always single out a school district? Doesn't it create --
4 I thought from Mr. Lewin's description that it always
5 creates school districts single case by single case.

6 MS. MERESON: When there needs to be new lines
7 drawn other than the historically existing school
8 districts, yes.

9 QUESTION: On the basis of any general criteria,
10 or on the basis of whether a particular group seems to be
11 a community? I assume that's how they do it, isn't it?

12 MS. MERESON: Well, normally these special lines
13 that are drawn by the legislature are called special acts
14 school districts, and they are coterminous with
15 institutions, so they would be created in response to a
16 need for them, which is what happened here. There was a
17 need for this, because what the State was faced with was
18 an impasse between the parents of handicapped students
19 living in the village and their school district, which is
20 Monroe-Woodbury, over whether these special needs --

21 QUESTION: Ms. Mereson, does the need carry the
22 State as far as the State went, because even assuming that
23 it's appropriate for the State to deal with these problems
24 on a case-by-case basis, the State could have done so
25 here, I presume, by a statute simply mandating that some

1 kind of a special school in a neutral place be set up by
2 the existing school district to accommodate these
3 particular children, and by doing that it would not have
4 involved the -- in effect the identification of the
5 governance of the school district with a particular
6 religious sect. The State could have done the former,
7 couldn't it?

8 MS. MERESON: I don't think -- they could have
9 done the former. They could have done anything.

10 The problem with the former is that there would
11 be more of an argument to be made that in this impasse, in
12 this dispute between the Monroe-Woodbury School District
13 and the Kiryas Joel parents, that they would be taking
14 sides more by taking the discretion that Monroe-Woodbury
15 enjoys along with the rest of the school districts of the
16 State of New York in terms of where they choose to
17 apply --

18 QUESTION: Well, there might have been -- there
19 might have been an argument that they were taking -- I
20 don't -- I'm not sure that I think the argument is any
21 stronger than the argument that they're taking sides here,
22 but leaving that aside, there may have been that argument
23 but there wouldn't have been an Establishment Clause
24 issue, would there?

25 MS. MERESON: I think there would have been?

1 QUESTION: Why?

2 MS. MERESON: In fact, you can make the exact
3 same arguments that they're making here.

4 QUESTION: Wasn't that Judge Kaye's position in
5 the New York Court of Appeals, though? Isn't -- didn't
6 she say you could have the same facility, only it would be
7 under the aegis of the Monroe-Woodbury School Board and
8 not the Kiryas Joel Village School Board, and that would
9 be all right? Wasn't that essentially her position?

10 MS. MERESON: That was her position, but we
11 disagree with her position, because if the New York State
12 legislature and Governor enacted a law that said to
13 Monroe-Woodbury you must relinquish your discretion and
14 you must provide a neutral site against your judgment,
15 against your wishes, to these religious people in this
16 religious community, there would be people back in court
17 saying, you have favored the Satmar sect, you have -- you
18 are advancing their religion by --

19 QUESTION: Well, they would have, but you would
20 have had a much easier case, wouldn't you?

21 MS. MERESON: Well, I actually believe we would
22 have had a harder case.

23 QUESTION: Well, but they would not have been
24 able to say that the solution to the accommodation that
25 you adopted was the transfer of power, governmental power,

1 based on the religious beliefs and practices of the
2 recipients.

3 MS. MERESON: We believe you still can't say
4 that, because the transfer of the power was not to any
5 religious organization, it was to the residents of a
6 community.

7 QUESTION: Well, is that a question of fact?

8 MS. MERESON: Yes. That is in the record. The
9 power was given by the statute to the residents of the
10 community, and not to any religious organization.

11 QUESTION: Yes, but I had thought that it was
12 the whole basis of both sides in this case that the
13 conceded fact that the rationale for the drawing of the
14 geographic lines of this district was the religious
15 beliefs and practices of its residents, pure and simple.

16 MS. MERESON: There's one factor in between,
17 which is that this is a cultural and sociological problem
18 which arose out of these people's religion, so it's one
19 step removed from the religion. What the State did was to
20 address the cultural, secular, sociological side of he
21 problem without preferring or promoting or advancing the
22 actual religious tenets.

23 QUESTION: Would you explain that a little more?
24 You started to answer a question earlier, what the need
25 was that the State was accommodating. Would you state

1 again exactly what the need for this legislation was?

2 MS. MERESON: Certainly. There was a deadlock.
3 It was an absolute deadlock between the parents of
4 disabled, handicapped children who need specially
5 appropriate educational services --

6 QUESTION: Which were being provided.

7 MS. MERESON: Which were not being provided --
8 the parents felt --

9 QUESTION: Which were available. Let me say,
10 which were available.

11 MS. MERESON: They were not appropriate
12 according to these parents. They felt that these services
13 were not being provided by Monroe-Woodbury, because the
14 services that they were offering was not appropriate to
15 these children's unique and special needs. They did not
16 address --

17 QUESTION: In what respect were the services
18 inappropriate? I don't understand that.

19 MS. MERESON: They felt that they were not
20 addressing their unique vulnerabilities and needs because
21 they come from a very insular environment, where they
22 don't have television, they don't have radio, they don't
23 have English language newspapers, they don't watch a
24 cartoon, and when they go to the Monroe-Woodbury Schools
25 with children who dress differently, who speak

1 differently, these -- the Kiryas Joel children don't
2 particularly speak English. Their first language is
3 Yiddish.

4 This environment was so alien to them that they
5 felt that it had a very negative effect. The emotional
6 and psychological trauma that they suffered had a very
7 negative effect on their educational process, so much so
8 that they felt that that overpowered their need to be in
9 school.

10 QUESTION: The "they" you're referring to is the
11 parents or the children.

12 MS. MERESON: The parents of these children, and
13 they took them out of the school, so when this came to the
14 State -- this did not come to the State in the first
15 instance. This problem was with the parties for a while.
16 It went through the entire appellate court process, and at
17 the top of the process --

18 QUESTION: But the critical fact is, they didn't
19 want these children exposed to these out-of-district
20 influences that they would be exposed to out of the
21 district.

22 MS. MERESON: It was more than that, Justice
23 Stevens. It was that they felt that the insularity of the
24 community did not permit them to participate in the
25 education in such a way that they could get anything

1 positive out of it, because they were so traumatized by
2 being in an environment that was alien to theirs.

3 QUESTION: Thank you, Ms. Mereson.

4 Mr. Worona.

5 ORAL ARGUMENT OF JAY WORONA

6 ON BEHALF OF THE RESPONDENTS

7 •MR. WORONA: Mr. Chief Justice, and may it
8 please the Court:

9 This case is about the limits of the
10 Establishment Clause. The respondents urge this Court to
11 affirm the decision below because the statute clearly
12 violates that clause.

13 As this Court has explained, a statute cannot be
14 divorced from the circumstances existing at the time it
15 was passed. The circumstances leading to the enactment of
16 the statute before this Court today at the Village of
17 Kiryas Joel demonstrate that the law was enacted in direct
18 response to the New York State Court of Appeals' decision
19 in its Monroe-Woodbury v. Wieder decision, where the
20 Village of Kiryas Joel residents unsuccessfully sought to
21 acquire a religiously segregated environment in which
22 their children could receive special education services.

23 QUESTION: Excuse me, you say religiously
24 segregated. That sort of begs the question, doesn't it?
25 It was culturally segregated, certainly, you might say

1 linguistically segregated, but why necessarily religiously
2 segregated?

3 MR. WORONA: Well, when I refer to religiously
4 segregated, Your Honor, I'm referring to the fact that
5 this community is comprised exclusively of Satmar Hasidic
6 individuals, and as Mr. Lewin indicated, the boundary
7 lines were specifically drawn to only include those
8 members.

9 QUESTION: Well, but -- well, you could say it
10 was drawn to include those members, or you could say it
11 was drawn to include people who speak Yiddish. Their
12 customs spring out of their religion, but the State was
13 accommodating primarily their customs, wasn't it?

14 MR. WORONA: That's correct, Your Honor, but --

15 QUESTION: Was it accommodating any of their
16 religious practices, their religious ceremonies, anything
17 of that sort?

18 MR. WORONA: Well, Your Honor, all I can respond
19 to is that in the Monroe-Woodbury v. Wieder case before
20 the appellate division, the residents of the Kiryas Joel
21 Village maintained a free exercise claim for their need to
22 acquire a religiously segregated environment for the
23 children to be educated.

24 QUESTION: I think what they were saying is, if
25 you do not make accommodation for a culture which springs

1 out of the religion, you are discriminating against the
2 religion, but that isn't the same thing as saying cultural
3 accommodation is necessarily accommodating their religious
4 beliefs. I don't see how the State is accommodating any
5 of their religious beliefs. It doesn't allow any worship
6 in this school district, does it?

7 MR. WORONA: Not that I'm aware of, Your Honor.
8 Of course, that's not the issue before this Court, but as
9 the court of --

10 QUESTION: That would be a different challenge.
11 There's a facial challenge here. You're saying, even if
12 they follow all the rules of the State of New York for
13 secular education.

14 MR. WORONA: Yes, Your Honor, because the
15 specific issue before you today is not what the residents
16 of Kiryas Joel may be doing constitutionally or
17 unconstitutionally, it's what the State of New York did
18 when it enacted this particular piece of legislation.

19 And in response to Justice Scalia's question
20 from before, in the court of appeals decision in Wieder,
21 the Monroe-Woodbury Central School Districts, the court
22 acknowledged, undertook efforts to accommodate the
23 cultural bilingual needs of the Satmar community,
24 including the employment of Yiddish-speaking teachers and
25 the provision of reports for the Satmar parents in

1 Yiddish, so there were accommodations to that specific
2 cultural basis that were made.

3 QUESTION: The parents didn't think it was
4 enough.

5 MR. WORONA: Well, that may be true, Your Honor,
6 but when we look at a statute to determine whether we are
7 responding to bilingual, bicultural needs of a community,
8 and we see a school district has in fact responded to
9 those needs, certainly we cannot ignore that particular
10 fact.

11 QUESTION: You're saying the record shows that
12 it is responding to the religious needs. In what way?

13 MR. WORONA: Well --

14 QUESTION: I really don't understand that. It
15 seems to me they're responding to purely cultural needs,
16 special language, special isolation from modernity such as
17 television, and so forth.

18 MR. WORONA: However, Your Honor, in the court
19 of appeals decision in Monroe-Woodbury v. Wieder, we saw
20 that the village residents were willing to forgo bilingual
21 services as long as they acquired a segregated environment
22 for their children to be educated --

23 QUESTION: Well, let's start with the --

24 MR. WORONA: -- and I think that's a very big
25 distinction with a difference.

1 Yes, Your Honor.

2 QUESTION: Can we start with the village, the
3 creation of the village?

4 MR. WORONA: Yes.

5 QUESTION: That came up in Mr. Lewin's argument.
6 Are you acknowledging that the creation of that village
7 was consistent with the Establishment Clause? There was
8 no violation of the Establishment Clause for the --
9 whatever it was, the zoning authority to issue this
10 decision giving approval -- the supervisor of the Town of
11 Monroe giving approval under the New York laws on the
12 creation of the village, to the creation of the Village of
13 Kiryas Joel.

14 MR. WORONA: Well, we are not conceding that the
15 village was necessarily incorporated in a constitutionally
16 permissible manner. Certainly, that's not directly before
17 this Court. I agree with Your Honor's question before,
18 which was addressed to Mr. Lewin with respect to the
19 village law in New York State, which does not allow
20 individuals to contest the formation of villages in the
21 same grandiose manner that other particular municipalities
22 may be contested.

23 QUESTION: But there was a contest at least to
24 the extent that the original boundaries proposed were much
25 broader than just the Satmar community, and there was

1 opposition to that --

2 MR. WORONA: That's right.

3 QUESTION: And they were cut back to the -- but
4 the original proposal was for a larger village that would
5 incorporate more than just this one community.

6 MR. WORONA: That's correct, Your Honor, but the
7 reality that we cannot ignore is that those boundary lines
8 were specifically drawn to only include members of the
9 Satmar Hasidic community.

10 In the petition which is before you on Joint
11 Appendix page 10, in the first full paragraph, the
12 supervisor of the Town of Monroe in signing this petition
13 indicated that the residents are and will be all of the
14 Satmar Hasidic persuasion. He indicated that the
15 sociological way of life for the Satmar Hasidim is one of
16 disdained isolation from the rest of the community.

17 QUESTION: Well, let's take it that we have the
18 village as it is. Would there be any constitutional
19 problem if the same facility existed but it was operated
20 by the Monroe-Woodbury School Board instead of the elected
21 people from this particular community?

22 MR. WORONA: If that facility, Your Honor, was
23 based upon secular concerns and not solely religious
24 concerns, I suppose that facility would be constitutional
25 permissible.

1 QUESTION: Make it the same facility that now
2 exists, except that instead of having a Kiryas Joel county
3 or village school board you have the same Monroe-Woodbury
4 School Board that is administering all the other schools
5 in the Monroe-Woodbury area. Everything's the same,
6 except the board that runs it is different.

7 MR. WORONA: Your Honor, if I may respond in two
8 parts, firstly, the establishment of that type of a school
9 for these individuals would certainly not have an element
10 that is involved in this particular case, which is that we
11 would not be imbuing a religious community with
12 governmental powers and functions, and we certainly would
13 not be --

14 QUESTION: Well, do you see a difference -- you
15 keep saying, religious community. The cases that are
16 closest to this one, the precedents that are closest, as
17 you know, involve a religious body being given the
18 authority, a church body, where here it's citizens of a
19 village who belong to a particular religious community but
20 are not themselves church, synagogue officials.

21 Isn't there a distinction -- you keep talking
22 about a religious community. If the power were given to
23 the board of a religious community, then you would have a
24 clear case.

25 MR. WORONA: Well, I think we do have a clear

1 case. I agree with the point that you're making. I think
2 that in order to analogize this particular community to
3 that of a church, we do need to look at the entire context
4 in which this particular statute was enacted.

5 Mr. Lewin even in his reply brief has
6 acknowledged that this particular section -- or this
7 particular statute is in fact placing the Satmars in a
8 position where they would have been without the statute --

9 QUESTION: What you're saying is that the
10 Satmars, because they all live together, can't exercise
11 the ordinary kind of secular authority that any other
12 group living together could.

13 MR. WORONA: No, that's not what we're saying.

14 QUESTION: Well, it seems to me you are.

15 MR. WORONA: No. We're asking this Court to
16 examine the context in which this particular piece of
17 legislation was established. If a group of folks happen
18 to reside in an area, and it was mere happenstance that
19 they simply were able --

20 QUESTION: Supposing a large group of Roman
21 Catholics lived close together in some part of New York
22 State, and they decide they would like a separate school
23 district, and they go through the normal forms of it, and
24 the State legislature creates a special act school
25 district, is that suspect under the First Amendment?

1 MR. WORONA: It might be. I don't think it
2 would necessarily be unconstitutional, if indeed the
3 circumstances surrounding the passage of that legislation
4 are not as they are in this particular case, Your Honor.

5 QUESTION: Well, suppose they said, we'd like to
6 have our own school district. We think pretty much alike
7 on school issues, and we just want our own school
8 district --

9 MR. WORONA: Well --

10 QUESTION: -- and they're all -- 99.9 percent of
11 them are Roman Catholic.

12 MR. WORONA: I think the major problem that we
13 have in this particular case is that --

14 QUESTION: Well, will you answer my question?

15 MR. WORONA: I will try, Your Honor, and forgive
16 me --

17 QUESTION: Try right away, will you?

18 MR. WORONA: Yes.

19 (Laughter.)

20 MR. WORONA: I don't think it would necessarily
21 be unconstitutional for a group of individuals who happen
22 to be of one particular religious persuasion to be granted
23 the authority of having a school district within their
24 community. It's very different in this case, because we
25 have a situation where New York State specifically decided

1 to provide this community with the ability to run a
2 segregated school district, and that is --

3 QUESTION: But isn't -- wouldn't New York also
4 specifically provide a -- the same authority to the Chief
5 Justice's Roman Catholic group? Of course it would. If
6 the New York law is otherwise the same, and you can only
7 charter school districts on a case-by-case basis, it would
8 do the same thing there that it would do here.

9 MR. WORONA: Well, that's precisely the point
10 that the respondents are making, and we believe --

11 QUESTION: But isn't the difference that there
12 wouldn't be any alternative to having a school district in
13 the Roman Catholic case, where there is an alternative to
14 having this school district in this case?

15 MR. WORONA: That's correct, because this school
16 district, Your Honor, was one of a -- was part of an
17 existing school district at the time, which I think is a
18 very big distinction, and indeed, the establishment of
19 this school district I think would violate some
20 fundamental principles of the Establishment Clause.

21 QUESTION: Well, are you --

22 QUESTION: Supposing that my Roman Catholic
23 hypothesis, they want to break away from the school
24 district they're in, just like the people did here?

25 MR. WORONA: If they wanted to break away for

1 the reason of acquiring governmental powers and functions
2 to live an insular life style in conformity with their
3 religious precepts, I suppose that would be
4 unconstitutional as well, Your Honor.

5 QUESTION: Well, is it a necessary element of
6 your answer that they want to live an insular lifestyle?
7 What's that got to do with the First Amendment?

8 MR. WORONA: Well, it has to do with the First
9 Amendment in that I don't think this particular culture
10 can be divorced from its religious traditions and
11 practices.

12 QUESTION: How would you distinguish this from,
13 say, just a community in Utah, where the people in a
14 village are all coreligionist?

15 MR. WORONA: As I understand the formation of
16 Utah, certainly the United States Government required the
17 Mormons, who were predominantly occupying the State prior
18 to it becoming a State, they were required to put special
19 provisions in their Constitution to protect the United
20 States from acquiring a State that would be arguably
21 theocratic, and the difference, I think, is that if
22 somebody happens to move into a place where there isn't --
23 there is not already an existing school district that is
24 serving them, we have a situation where there is a secular
25 need. They need to be served. They need to acquire a

1 school district.

2 Here, the Kiryas Joel Village residents were
3 already part of the Monroe-Woodbury Central School
4 District.

5 QUESTION: That's the problem. They did it too
6 late. If they'd only gone out in the wilderness where
7 there was another --

8 (Laughter.)

9 QUESTION: Where there was not another school
10 district near them to start off with, they would have been
11 okay.

12 MR. WORONA: I don't know if --

13 QUESTION: So all they have to do is move
14 further out into New York State and they can start their
15 own -- they'll do it if you say that's okay, I'm sure.

16 MR. WORONA: Well, Your Honor --

17 (Laughter.)

18 MR. WORONA: As I understand it, Your Honor,
19 every single -- every single parcel of land in New York
20 State is presently occupied by the boundaries of a school
21 district, so I don't think that frontier type of a
22 scenario would necessarily exist.

23 QUESTION: Is it your contention that one of the
24 principal, or maybe the only purpose of forming the new
25 district was to transfer powers to people by reason of

1 their religious beliefs, or is that not your contention?

2 MR. WORONA: I'm sorry, Your Honor, could you
3 repeat that question?

4 QUESTION: Is it your contention that one of the
5 principal purposes of this statute was to transfer
6 governmental power to a group of persons by reason of
7 their religious practices and beliefs?

8 MR. WORONA: I suppose the answer to that
9 question is, we believe that a political constituency
10 defined along religious lines has in fact been established
11 by the statute, Your Honor.

12 The particular community of individuals who are
13 devoutly religious were imbued with governmental powers
14 and functions to allow them not simply to be exempted, as
15 this Court has in the past accepted, to privately pursue
16 their religious perspectives, but rather, New York State
17 has offered its arm to these individuals to be able to run
18 a school district with full governmental --

19 QUESTION: For what reason?

20 QUESTION: Why a town but not a school district?

21 QUESTION: May I just finish? For what reason?
22 For what purpose?

23 MR. WORONA: For what purpose what, your Honor?

24 QUESTION: For what purpose was the power given
25 to them?

1 MR. WORONA: To allow them --

2 QUESTION: Because it seems to me, otherwise you
3 cannot distinguish your case from the Chief Justice's
4 hypothetical.

5 MR. WORONA: Well, I think the purpose certainly
6 here is one of segregation along religious lines. It was
7 the pursuit of that particular principle that was
8 primarily sought after, and indeed was advanced by this
9 legislation.

10 QUESTION: The -- aren't you giving two
11 different answers? I mean, you're giving a purpose answer
12 to Justice Kennedy, and a moment ago you gave a no
13 alternative answer to me when we were discussing the
14 problem posed by the Chief's hypothetical on the Roman
15 Catholics.

16 Is the problem, as you see it, that there was an
17 express purpose to transfer power to a religious group, or
18 is the problem here that there were alternatives to doing
19 that, to accomplish the same result, and they didn't avail
20 themselves of the alternatives? Which is it?

21 MR. WORONA: Well, we're not suggesting it's
22 necessarily the latter. I think having the latter present
23 will perhaps provide a greater effect of
24 unconstitutionality of this particular piece of
25 legislation, but we are maintaining certainly that the

1 legislature designed this particular piece of legislation
2 to allow this particular religious community to dictate
3 what educational services would be provided in conformity
4 with their traditions and beliefs.

5 QUESTION: I don't see why that isn't present in
6 a good many communities, as Justice Ginsburg suggested, in
7 the State of Utah, where members of the Church of Latter
8 Day Saints live in certain communities and want to have
9 their own school districts, and they do, so under your
10 view, all those would be invalid.

11 MR. WORONA: No, I don't believe they would all
12 be invalid, Your Honor, I believe that this case can only
13 be analyzed in looking at the entire context in which this
14 particular legislation was effectuated.

15 If, indeed, we have a community, as I answered
16 the Chief Justice before, that happens to be of a
17 particular religious persuasion, which happens to have a
18 school district, that doesn't necessarily make it
19 constitutionally infirm. The constitutional infirmity
20 here is by setting up political constituencies defined
21 along religious lines --

22 QUESTION: Well, it's defined along cultural --
23 let me give you a two-part hypothetical. Suppose you have
24 a community divided by railroad tracks. One side of the
25 community is a very swinging, modern-type crowd, and they

1 like avant-garde education, sex education and all that.
2 The other side of the tracks, influenced by a reaction to
3 modernity, feminist aversion to obscenity and so forth,
4 they want old-fashioned education. They can have two
5 school districts if the State sees these people want
6 different things in education? That's okay?

7 MR. WORONA: Well, I presume in your
8 hypothetical there would not be religious beliefs that
9 were present.

10 QUESTION: Right. Right. Right.

11 MR. WORONA: Okay. I think that we would not be
12 dealing --

13 QUESTION: That would be okay.

14 MR. WORONA: -- with an Establishment Clause --

15 QUESTION: Right. Now, my second hypothetical
16 is --

17 (Laughter.)

18 QUESTION: -- they have the same beliefs, the
19 same -- some like sex ed, some don't. However, the reason
20 for it is not feminism, or avant-gardism, the same
21 cultural preferences spring from their religious beliefs.
22 Then you couldn't do it, right?

23 MR. WORONA: I suppose there would be an
24 Establishment Clause problem.

25 QUESTION: Oh, no.

1 MR. WORONA: Our position is not based upon
2 anything but the fact that there is an Establishment
3 Clause at this point.

4 QUESTION: You cannot accommodate any -- any
5 beliefs that spring from religious motivation?

6 MR. WORONA: No, that is not our position, Your
7 Honor. We believe that accommodation is certainly
8 acceptable. This accommodation, however, will in fact
9 place the balance off the kilter of the scale.

10 QUESTION: Was Judge Kaye's accommodation okay?
11 That is, she said in her most recent opinion that if
12 you -- as I understand it, you had this neutral facility,
13 same facility, but it was run by the Monroe County School
14 Board. That accommodation would be okay.

15 MR. WORONA: If, in fact -- yes, Your Honor, if
16 in fact that accommodation was in conformity with this
17 Court's pronouncement in Wolman v. Walter, which dealt
18 with the provision of neutral sites to children who were
19 attending parochial schools.

20 QUESTION: Well, let's take the if out of it.
21 Just -- everything that we have here, except that it's the
22 Monroe County School Board, not a separate school board,
23 that's running it.

24 If that's okay, then I think what you're
25 suggesting is that we have to look to the purpose -- one

1 of the hardest problems as I see it is that these people
2 are citizens of a community, and they're elected the way
3 representative elections are conducted, but they're also
4 members of a tightly knit religious community, and your
5 argument seems to hang on equating them, saying that they
6 can't take off their religious hats when they're elected
7 to be members of the school board. I think that's the
8 essence of your argument.

9 MR. WORONA: Well, it really isn't, Your Honor.
10 I think the essence of our argument, if we were looking at
11 Lemon v. Kurtzman and its three prongs, would be the
12 second prong, because chapter 748 of the laws of 1989
13 communicates a message of endorsement to the public, and
14 they may fairly understand that the purpose of this act
15 was to accommodate Satmar separatist beliefs, and the
16 public perception of endorsement is reinforced by this
17 statute in that it's not a statute of general
18 applicability, as many justices have already noted.

19 QUESTION: Well, if the New York law read that
20 school districts will always be coterminous with religious
21 districts, would you have an objection?

22 MR. WORONA: With religious districts, Your
23 Honor?

24 QUESTION: I'm sorry, with municipal districts.

25 MR. WORONA: No. I think that would be a

1 secular particular law, and if in application there was a
2 problem, certainly there could be a challenge at that
3 particular time. Here, we're dealing, as I started to
4 indicate --

5 QUESTION: Would you have a challenge to it?

6 MR. WORONA: Would I have a challenge? Not
7 based upon this particular facial challenge, Your Honor.

8 The respondents in this action believe that this
9 particular action of the New York State legislature, if
10 precedentially allowed to exist in this Nation, will not
11 only politically fragment our Nation, but will place
12 children in a position of understanding that the way we
13 deal with diversity and respect for ourselves religiously
14 is to have Government separate people along religious
15 lines, and that is something that we don't think is
16 palatable for the country or consistent with --

17 QUESTION: Let me test that if I may. Is it not
18 true that this district accepts students from outside the
19 particular neighborhood?

20 MR. WORONA: That's correct, Your Honor, but our
21 understanding, and it's in the record, all of those
22 children are also members of the Satmar community.

23 QUESTION: Do you know what language the
24 teaching is conducted in in this district?

25 MR. WORONA: I do not know. In the petitioner's

1 papers, they indicate that they are maintaining a secular
2 program, but since that is not the issue before the Court,
3 I do not have any personal knowledge of that.

4 QUESTION: Is there any New York law that
5 requires that school districts do their teaching in the
6 English language?

7 MR. WORONA: That -- that --

8 QUESTION: That English language be taught in
9 schools in New York?

10 MR. WORONA: Not that I am aware of,
11 particularly, but of course, that's not the issue before
12 us. The issue is not what, again, Kiryas Joel may be
13 doing in maintaining their program, but rather what New
14 York State did when it established this particular school
15 district.

16 I want to make one other point that I think is
17 very relevant, because I think we all are here today to
18 talk about the children, and I think one of the things we
19 cannot ignore is the fact that this particular statute in
20 essence precludes these children from acquiring the
21 protections of both Federal and State laws that serve
22 disabled children.

23 Those laws are predicated on the premise that
24 those children must be mainstreamed as much as possible,
25 and as much as feasible. These children are in --

1 QUESTION: That's a statutory violation. I
2 mean, you can bring another suit for that, I suppose.

3 Let me ask you this, Mr. -- let me ask you this
4 question about our Federal Congress. I'm reading from the
5 Congressional Record in which the Senate Majority Leader,
6 Mr. Mitchell, is describing the legislative schedule for
7 the 102nd Congress in 1991. He lists the nonlegislative
8 periods. He lists Presidents' Day, Lincoln's Birthday.
9 March 29th, Good Friday. March 30th, Passover. March 31,
10 Easter. September 9, Rosh Hashanah.

11 Is all that unconstitutional?

12 MR. WORONA: No, I don't believe so, Your Honor.

13 QUESTION: Why not?

14 MR. WORONA: Well --

15 QUESTION: It's just accommodating the religious
16 practices of people for Congress to go out of session in
17 order to accommodate people who want to observe Good
18 Friday or Rosh Hashanah. Why isn't that unconstitutional?

19 MR. WORONA: Because we're not imbuing any
20 particular governmental functions on any particular
21 religious person to carry out those -- his religion. We
22 are rather allowing people to privately pursue their
23 religion.

24 QUESTION: But you can have a minister be a
25 member of a legislative body.

1 MR. WORONA: Yes, Your Honor.

2 QUESTION: And so that's -- and so, why can't
3 you have a school board composed of people of a certain
4 religion who are not the political -- who are not acting
5 in their capacity as a governing body of a church?

6 MR. WORONA: Well, we are not, again, Your
7 Honor, maintaining that our argument is predicated upon a
8 belief that the Satmar religious leaders will necessarily
9 be incapable of exercising governmental powers and
10 functions. We maintain that that is true, but that's not
11 the basis upon which our argument lies. Rather, we are
12 indicating that we are taking --

13 QUESTION: You maintain that is true as opposed
14 to, say, a Catholic priest serving as a legislator?

15 MR. WORONA: No, Your Honor, but in this
16 particular record, when the school board was first
17 established, a gentleman tried to run for the school board
18 against the directives of the Grand Rebbeh, and as I
19 under --

20 QUESTION: Maybe you have some kind of an as-
21 applied challenge. There's been a lot of things outside
22 the record that have been suggested, that the claim that
23 this school is run in a secular way and that the school
24 board is acting as any secular school board would operate,
25 that that's not true. That would be a different case, not

1 the one that's here. This is a facial challenge, right?

2 MR. WORONA: Well, that's correct, Your Honor,
3 but we think the record is very clear about the points
4 that you are maintaining.

5 For example, prior to the establishment of this
6 school district, the Monroe-Woodbury Central School
7 District urged the Governor to sign this legislation, and
8 they indicated that if a non-Hasidic child requiring
9 regular education moved into the Kiryas Joel School
10 District's geographic boundaries, and then -- this is on
11 page 22 of the Joint Appendix, and this is virtually
12 impossible. The child would be tuitioned to Monroe-
13 Woodbury or another district.

14 The legislators who passed this action also were
15 well aware --

16 QUESTION: It seems eminently reasonable. He
17 would have a cultural problem in the Kiryas Joel district,
18 just as the Kiryas Joel children have cultural problems in
19 the other district. Why do you find that so
20 extraordinary?

21 MR. WORONA: Because if we look at what was
22 provided -- and Your Honor is quite correct, we are
23 dealing with a situation here where looking at
24 disabilities laws is a Federal statute and would not
25 necessarily be a constitutional impermissibility.

1 However, if these children are incapable of
2 acquiring their rights under Federal and State law, and we
3 understand why, and that is because their parents wished
4 to maintain a lifestyle, then --

5 QUESTION: It's like a parent in the
6 hypothetical I gave you who wants her child to have sex
7 education and seeks permission from the school district on
8 the one side of the tracks to send the child to the school
9 district on the other side. What's so wrong about that?

10 MR. WORONA: Well, again, I think the principal
11 point of where we maintain our argument, which a crucial
12 distinction is that there is not an imbuing of
13 governmental powers and functions upon an individual in
14 that situation. There is simply --

15 QUESTION: Isn't there --

16 MR. WORONA: -- that is provided.

17 QUESTION: Isn't there also another difference,
18 and that is the Monroe-Woodbury School District didn't
19 have a plan to tuition-out every student from this
20 community, whereas what you have just read to us sounds
21 like a plan to tuition out every one who is not a member
22 of the community.

23 MR. WORONA: Right. I think that is a crucial
24 distinction, Your Honor, and I think that certainly under
25 New York State law, Monroe-Woodbury could have provided

1 the benefits that are being sought here. Indeed, when
2 they began this litigation in Monroe-Woodbury v. Wieder,
3 the case that was looking for a neutral site, they
4 maintained that they could not serve these children any
5 other place but the public schools.

6 The court of appeals, New York State's highest
7 court, ruled that that was not necessarily true. They
8 also maintained that there was some constitutional
9 infirmities with segregating these children along
10 religious lines, and now they stand before you today and
11 indicate that it is not necessarily unconstitutional to do
12 the same thing by having New York State segregate children
13 along religious lines.

14 QUESTION: Mr. Worona, on the tuitioning out, do
15 I understand correctly that the people who tuitioned out
16 are the regular students for whom there are no facilities,
17 but if they were someone -- a disabled child who was
18 from -- who was not of the Satmar community, that person
19 wouldn't be tuitioned out, would that person?

20 MR. WORONA: Well, Your Honor, they can by this
21 statute have a regular school. The -- everyone envisioned
22 that this school --

23 QUESTION: But I'd appreciate an answer to that
24 question. Suppose there is a child in the school district
25 who is not of the same religion, and who is disabled, that

1 child would not be tuitioned out, would that child, under
2 the --

3 MR. WORONA: Not necessarily, but of course we
4 maintain that everyone understood quite well that that
5 would not happen. I'm sorry, Your Honor.

6 QUESTION: Then the distinction that I was
7 making wouldn't apply.

8 MR. WORONA: Well --

9 QUESTION: I thought you agreed with the
10 distinction I was making, but as I understand your answer
11 to Justice Ginsburg, that answer wouldn't be apposite.

12 MR. WORONA: Well, what we are asking this Court
13 to look at --

14 QUESTION: Well, regardless of what you're
15 asking the Court, what is the answer to my question?

16 MR. WORONA: Well, could you repeat the
17 question, Your Honor?

18 QUESTION: Well, I thought your answer to an
19 earlier question was that there was a distinction to be
20 drawn between a plan to tuition out all non-Hasidic
21 students, as distinct from a plan to tuition out of the
22 main school district all students who were Hasidic, and as
23 I understand your answer to Justice Ginsburg's question,
24 the plan that you referred to on page, I think 10 of the
25 record, was simply a plan to tuition out all nondisabled

1 students.

2 MR. WORONA: Well -- yes.

3 QUESTION: Is the latter correct?

4 MR. WORONA: That is correct. However, I think
5 the --

6 QUESTION: Then the distinction I was drawing
7 does not apply.

8 MR. WORONA: Well, we believe it does, because
9 even though those are the words in this particular
10 paragraph, I think the context of those words, when it
11 says virtually impossible, is referring to the fact that
12 no other non-Satmar individual would be residing in that
13 community. I don't think that's really in dispute here.

14 Mr. Lewin has admitted that most of the
15 residents, or all of the residents, are members of the
16 Satmar community. I think the essential question that
17 needs to be asked, and if, indeed, the Kiryas Joel Village
18 School District was indeed capable of becoming as
19 heterogenous as the Monroe-Woodbury Central School
20 District, what benefit would have actually been afforded
21 to these individuals? The statute would have had
22 absolutely no purpose.

23 So I think we can all move on from that
24 particular issue and answer the question as to whether
25 it's a violation of the Establishment Clause, not whether

1 it was indeed capable of being as heterogenous as the
2 school district that it was seceding from.

3 QUESTION: Let me ask you a different question
4 going back to something you said a few moments ago, and
5 I'm not sure that I understood you.

6 Did you indicate a few moments ago that you
7 thought the suggestion which I guess was made by Chief
8 Judge Kaye that the State could have set up a separate
9 neutral place for the education of these handicapped
10 children alone would have been unconstitutional?

11 MR. WORONA: It could have been
12 unconstitutional. I don't believe it necessarily would
13 have been unconstitutional. What we were indicating is
14 that it would still have to be in conformity with this
15 Court's pronouncements in Wolman v. Walter.

16 QUESTION: Thank you, Mr. Worona.

17 Mr. Lewin, you have 2 minutes remaining.

18 REBUTTAL ARGUMENT OF NATHAN LEWIN
19 ON BEHALF OF THE SCHOOL DISTRICT PETITIONERS

20 MR LEWIN: With respect to Judge Kaye's
21 suggestion, Justice Souter, we, in addition to thinking
22 it's the wrong test, we think it's not clear that that's
23 the least restrictive alternative by any means.

24 Providing responsibility, as well as authority,
25 is what this statute did, and what is one going to

1 conclude, what is the least restrictive alternative?
2 Monroe-Woodbury School District itself prefers this
3 solution, which apparently it believes is less restrictive
4 in terms of the overall school district, than the solution
5 of forcing them to provide neutral sites.

6 Justice Kennedy asked about the purpose, and I
7 think that clearly distinguishes this case and makes it so
8 much stronger than the hypothetical that the Chief Justice
9 suggested. In this case, there are a body of disabled
10 students. In the Chief Justice's hypothetical, it is a
11 community that wants to have its own school district, and
12 there's nothing unconstitutional, even if they're
13 religious, and we agree.

14 But all the more so is that true if there is a
15 reason for the legislature to deal with a group of
16 disabled students, and in this case, the record is clear
17 from the respondents' own expert, Joint Appendix page 88.
18 She says, "These parents kept their children out of the
19 public school to avoid the trauma they believe the
20 children would suffer because of their cultural
21 uniqueness." That's what their own expert said in an
22 affidavit that's in the record.

23 And in response to Justice O'Connor with regard
24 to other -- other school districts, the complaint itself
25 alleges in paragraph 63 of the second amended complaint,

1 at page 62 of the appendix, "the legislature has exercised
2 this authority most commonly for the purpose of creating a
3 public school in the case of -- "

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lewin.

5 MR LEWIN: Thank you.

6 CHIEF JUSTICE REHNQUIST: The case is submitted.

7 (Whereupon, at 11:05 a.m., the case in the
8 above-entitled matter was submitted.)

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