

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: RONALD W. ROSENBERGER, ET AL., Petitioners
v. RECTOR AND VISITORS OF THE UNIVERSITY OF
VIRGINIA, ET AL.

CASE NO: No. 94-329

PLACE: Washington, D.C.

DATE: Wednesday, March 1, 1995

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 RONALD W. ROSENBERGER, ET AL., :
4 Petitioners :
5 v. : No. 94-329
6 RECTOR AND VISITORS OF THE :
7 UNIVERSITY OF VIRGINIA, ET AL. :
8 - - - - - X

9 Washington, D.C.

10 Wednesday, March 1, 1995

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:09 a.m.

14 APPEARANCES:

15 MICHAEL W. McCONNELL, ESQ., Chicago, Illinois; on behalf
16 of the Petitioners.

17 JOHN C. JEFFRIES, JR., ESQ., Charlottesville, Virginia; on
18 behalf of the Respondents.

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1 PROCEEDINGS

2 (10:09 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 94-329, Ronald W. Rosenberger v. The Rector
5 and Visitors of the University of Virginia.

6 Mr. McConnell.

7 ORAL ARGUMENT OF MICHAEL W. McCONNELL

8 ON BEHALF OF THE PETITIONERS

9 MR. McCONNELL: Mr. Chief Justice, and may it
10 please the Court:

11 It is common ground in this case that if a group
12 of students satisfied all of the objective eligibility
13 requirements to form a student newspaper, or in the terms
14 of the university guidelines, a student news, information,
15 opinion, entertainment, or academic communications media
16 group, that they could not be excluded from funding under
17 the guidelines simply because they espouse a controversial
18 or otherwise political, ideological, philosophical
19 position of a secular sort.

20 Thus, if my clients this morning were the SDS,
21 if they were vegetarians, if they were members of the
22 Federalist Society, or black separatists, or whatever,
23 there would be no need to be here this morning.

24 QUESTION: What if they were Republicans?

25 QUESTION: That's just the question I was going

1 to ask.

2 (Laughter.)

3 MR. McCONNELL: Well, then I'll ask Democrats,
4 just to make it --

5 (Laughter.)

6 MR. McCONNELL: Your Honor, even if they were
7 Republicans or Democrats, they would not be excluded,
8 because under the university's guidelines, an otherwise
9 eligible organization is not excluded merely because it
10 espouses political viewpoints within its activities, no
11 matter how unpopular those may be.

12 Your Honor, this case is different because my
13 clients are not the SDS or the Republicans, they are --
14 their orientation is religious.

15 QUESTION: You have to help me a little more on
16 this question. I thought -- I don't have it in front of
17 me. I thought there was a provision that did exclude
18 political groups such as Republicans and Democrats. Am I
19 wrong on that?

20 MR. McCONNELL: Your Honor, there are two
21 relevant exclusions for political groups. One of those is
22 for political organizations, and it might very well be
23 that an organization set up affiliated with the Republican
24 or Democratic Party could be excluded at the University of
25 Virginia on that ground. Of course, that is not

1 applicable here. My clients are not affiliated with any
2 national or other religious organization.

3 QUESTION: Would not the rule that you are
4 arguing for entitle such a political group also to get
5 funding?

6 MR. McCONNELL: Your Honor, the guidelines
7 expressly provide, and I refer to page 66 -- 65 to 66a of
8 the appendix to the petition. The rules specifically
9 provide that these restrictions on funding political
10 activities are not intended to preclude funding of any
11 otherwise eligible student organization which espouses
12 particular positions or ideological viewpoints, including
13 those that may be unpopular, or that are not generally
14 accepted.

15 As I understand this rule, Your Honor, the point
16 is that if there's an organization that is simply engaging
17 in electioneering, or lobbying, which are much more
18 narrow -- much narrower categories than the espousal of a
19 viewpoint, that such groups can be excluded, but groups
20 cannot be excluded because they are expressing even
21 controversial political viewpoints in a student newspaper.

22 QUESTION: As I understand it, Mr. McConnell,
23 there are two bases for exclusion of religious
24 publications. One is if the organization practices
25 religion -- I mean, if it's a prayer group, or something

1 like that -- and then there's a separate one if the
2 publication exhibits religious belief?

3 MR. McCONNELL: That's right, Your Honor, and
4 there's been no --

5 QUESTION: And the latter does not apply to the
6 political exclusion. If you exhibit the belief of a
7 Republican, your publication is not necessarily excluded,
8 although if you are a Republican, Young Republicans or
9 something like that, you would be excluded.

10 MR. McCONNELL: That's exactly correct.

11 QUESTION: Whereas for religions, if you are
12 either a religious group or you exhibit religious belief,
13 you're out.

14 MR. McCONNELL: That's correct, and there's been
15 no claim in this case that my clients are a religious
16 organization.

17 QUESTION: Mr. McConnell, the religious
18 provision to which Justice Scalia refers is an activity
19 which primarily promotes or manifests a political belief
20 in and about a deity or an ultimate reality. That's the
21 provision you say is the equivalent of exhibiting.

22 MR. McCONNELL: Exactly.

23 QUESTION: Yes, I see, and the political one is
24 an organization primarily involved, and so forth and so
25 on. I don't see the dramatic difference between the two

1 provisions that you rely on.

2 MR. McCONNELL: The difference is the language
3 that I was just reading a moment ago, which excludes from
4 the definition of political activities the mere, 65a to
5 66a, very top of the page of 66a, are not intended to
6 include funding, preclude funding of any otherwise
7 eligible student organization which 3) espouses particular
8 positions or ideological viewpoints.

9 QUESTION: Yes, but they're not otherwise
10 eligible, if they fall within the political
11 organization --

12 MR. McCONNELL: By otherwise eligible, I assume,
13 Your Honor, that they're referring to the criteria for
14 being a news, information, opinion, entertainment, or
15 academic media group.

16 I might add here, I'm not sure that this is --

17 QUESTION: You acknowledge that the Young
18 Republicans would still be excluded, that that exception
19 would not let the Young Republicans run a newspaper that
20 espouses Republican views. They would be excluded as a
21 Republican political organization, no?

22 MR. McCONNELL: Your Honor, whether the -- the
23 Young Republicans would presumably be a political
24 organization, but that is not -- my clients have not been
25 excluded because they are a religious organization. They

1 are not a religious organization.

2 QUESTION: I understand. I'm just asking about
3 the Young Republicans. You acknowledge the Young
4 Republicans would not be able to publish a magazine of
5 Republican viewpoints.

6 MR. McCONNELL: Under the guidelines, that's
7 exactly correct.

8 QUESTION: But any other organization, if it's
9 not a Republican organization, would be?

10 MR. McCONNELL: That's right, and the very same
11 students could get together and put out a newspaper. In
12 fact, the Virginia Advocate, which is a funded
13 organization, looks very much like the sort of newspaper
14 the Young Republicans would publish, and that is funded.

15 QUESTION: Let me make sure I understand you.
16 You agree that a Republican publication would be
17 prohibited by the guidelines. Do you also agree that it
18 may constitutionally be prohibited by the guidelines?

19 MR. McCONNELL: Your Honor, the line that we
20 believe that this Court's cases establish, and that the
21 First Amendment imposes, is a line that prohibits
22 viewpoint discrimination. If the university is excluding
23 all political organizations whatever their orientation or
24 persuasion, our position is that that is not
25 unconstitutional.

1 Let me just point --

2 QUESTION: Well, do you agree that it would not
3 be unconstitutional to deny funding to a publication that
4 says, vote Republican in the next election?

5 MR. McCONNELL: Your Honor, if that rule were in
6 fact applied to all newspapers, that prohibited all
7 endorsements of political candidates, we would not claim
8 that that is unconstitutional. Of course, that is not the
9 guideline. In fact, student newspapers regularly endorse
10 candidates for office, and let me point out here that this
11 case is extraordinarily --

12 QUESTION: Those other newspapers are not
13 affiliated with an identified partisan organization, I
14 suppose, or at least in theory they're not.

15 MR. McCONNELL: Just as my clients are not
16 identified with any religious denomination or other
17 organization.

18 Let me point out --

19 QUESTION: Suppose -- just on this one point,
20 suppose the religious newspaper engaged in soliciting
21 members, proselytizing, coupons to fill out and return
22 that are contained in the newspaper, does that change the
23 case, or make it a more difficult case?

24 MR. McCONNELL: I don't know, Your Honor. I
25 assume that any student activity, and part of the student

1 activity is usually recruiting other members, and I
2 wouldn't think that Wide Awake would be any more precluded
3 from inviting others to join in Wide Awake's activity than
4 any other student group, and of course --

5 QUESTION: That cannot be equated with the
6 political restrictions against campaigning.

7 MR. McCONNELL: Well, again I don't think that
8 the Virginia Advocate is precluded from trying to persuade
9 students to join the Virginia Advocate, or to join in its
10 causes, and --

11 QUESTION: Yes, but the Virginia Advocate is not
12 a church.

13 MR. McCONNELL: Wide Awake is also not a church,
14 Your Honor.

15 QUESTION: No, but I mean, going back to Justice
16 Kennedy's question. If they were circulating coupons,
17 sign up for membership in the First Presbyterian Church,
18 that sort of thing.

19 MR. McCONNELL: Well, Your Honor --

20 QUESTION: It's one thing -- it seems to me the
21 distinction is made, it's one thing to recruit members of
22 one's organization, as such, and it's another thing to
23 recruit adherence to God, to religious tenets.

24 MR. McCONNELL: Your Honor, if you look at Wide
25 Awake magazine --

1 QUESTION: You admit the distinction, don't you?

2 MR. McCONNELL: Your Honor, I'm not at all sure

3 that a distinction of that sort would be administrable.

4 I'm not -- I don't know how you can tell the difference.

5 There -- one is not converted to membership in God. There

6 is a world view which is theistic in nature. One is

7 either convinced of the truth of that world view, or one

8 is not.

9 Just as there is a Marxist world view, there is

10 a libertarian world view, there are a number of world

11 views, and one is either convinced of the truth of those

12 world views or not, and those world views have application

13 to numerous issues, such as the questions that are

14 addressed in this magazine.

15 QUESTION: Well, Mr. McConnell, may I ask you a

16 question that I think fits into this same line of inquiry?

17 You argue for an overarching principle of

18 neutrality, and you say, if we will look at the program

19 and see if it's neutral, that should be the test, and do

20 you think that means that Government must never single out

21 religion in legislating, or do you think that the

22 constitutionality of a program under the Establishment

23 Clause depends on its effects, its overall effects with

24 respect to religion?

25 MR. McCONNELL: Well, Your Honor, I can imagine

1 situations in which the Government might be operating
2 according to formally neutral criteria that have such
3 disproportionate effects that one suspects that there's a
4 religious gerrymander going on.

5 QUESTION: Would some of our school funding
6 cases fall in that category, where the Court spoke in
7 terms of well, if we support this, 95 percent of the
8 schools that will benefit are religious schools, and so
9 forth?

10 MR. McCONNELL: Yes, Your Honor, and in each of
11 the parochial school cases the Court went out of its way
12 to point out that the category, ostensibly neutral,
13 private schools, is a category that in fact contained
14 overwhelmingly religious schools, and more than that,
15 overwhelmingly religious schools of one particular
16 religious denomination.

17 And I think that those cases can be understood
18 as the Court's reaction to -- not to aid which is general
19 in nature to viewpoints of all sorts, but rather to aid
20 which the legislature knew, everyone knew, this Court
21 knew, was being enacted in response to the needs of a
22 particular -- to religion in general, but especially to
23 one particular religious denomination.

24 QUESTION: Well, so if the student publication
25 in question were really a mechanism of getting more

1 members for the Presbyterian Church, for example, then you
2 think it's appropriate to look at the effects of the
3 publication?

4 MR. McCONNELL: Well, Your Honor no. I think
5 that it's appropriate to look at the effects of the
6 Government's action. That is, if the Government is
7 drawing categories that have disproportionate effect, thus
8 leaving us room to suspect that there's a religious
9 gerrymander going on, we should look at effects in that
10 sense, but just as in *Widmar v. Vincent*, this Court was
11 not concerned with the students benefiting from free
12 facilities at the university might try to gain members, or
13 recruit people to the Presbyterian Church, or whatever.

14 All that mattered to this Court was that all
15 groups, all student groups at the University of Missouri
16 were being given an equality of free speech rights, and
17 that is our position here.

18 I might -- on this -- on the question of the
19 political groups, I just want to remind the Court of one
20 thing. I'm not sure that our position depends in any
21 sense upon whether the university is allowing or
22 disallowing the Republicans, because remember in *Lamb's*
23 *Chapel*, two terms ago, a unanimous decision of this Court
24 that the school -- that the policy at issue, there,
25 expressly allowed political activities as well as -- and

1 excluded religious activities. The --

2 QUESTION: Mr. McConnell, may I ask you a
3 question directed specifically to religious activities and
4 the state of our precedent?

5 Is there any decision so far that has authorized
6 a direct cash contribution from the State organ in support
7 of a religious activity?

8 MR. McCONNELL: Your Honor, I think that the
9 closest case to that is the Witters decision, in which
10 direct cash payments were made for vocational education at
11 the Inland Empire School for Bible for courses in biblical
12 studies and training to become a minister.

13 QUESTION: Not for a purpose directed by the
14 State, that is, vocational education, but for a pursuit
15 that the religious group -- that the group engaged in an
16 avowedly religious activity has charted for itself. I
17 don't -- I'm not aware of such a case.

18 MR. McCONNELL: Well, Your Honor, in this case,
19 the University of Virginia is not channeling money to
20 religious groups. It is trying to support the activity of
21 students writing and editing and distributing newspapers.

22 QUESTION: Well, I just -- Mr. McConnell, I just
23 wanted to know if there was any precedent. You gave me
24 the case where the State was supporting vocational
25 education, and you said, that's the closest case to this

1 one.

2 MR. McCONNELL: And Your Honor, I'd like to urge
3 you that that is in fact a very close parallel, because --
4 and there the State was supporting vocational education.
5 Here, the State is supporting student journalism, and in
6 both cases the State is completely, or should be,
7 completely indifferent as to whether the individuals who
8 benefit or participate in those programs themselves decide
9 to participate, to use those benefits in a way that
10 participates in a religious activity, because the
11 establishment --

12 QUESTION: There's a distinction in this case,
13 because the claim is that the very nature of the
14 publication itself is an espousal of religion. It is, in
15 your phrase, a religious activity, so there's nothing left
16 to chance here.

17 MR. McCONNELL: But, Your Honor, the very
18 activity in Witters was a religious activity, too.
19 Witters was engaged in learning about -- he was studying a
20 religion, in a deeply, pervasively religious way.

21 The point is that the establishment --

22 QUESTION: Well, is it your point that so long
23 as the criterion for giving out the aid is at a
24 sufficiently high level of generality that it does not
25 identify religious purpose as its object, e.g., funds for

1 education, funds for publications, that that is the end of
2 the inquiry about a possible establishment violation?

3 MR. McCONNELL: Yes. To use this Court's words
4 in Texas Monthly, when a subsidy is distributed to a broad
5 array of organizations, both religions and secular on the
6 basis of objective criteria, the fact that some of the aid
7 may go to religious advocacy does not violate the
8 Establishment Clause.

9 QUESTION: Unless it's a gerrymander. You do
10 make that exception.

11 MR. McCONNELL: That's right.

12 QUESTION: You could have it at a very general
13 level, but if, in fact, the way it winds up is that all
14 the money is going to one sect, that might be a different
15 situation.

16 MR. McCONNELL: But here, of course, there is an
17 extraordinarily broad array of groups.

18 QUESTION: On your criterion, then, if the State
19 were to dispense funds for moral betterment, it could make
20 direct cash payments to any organized religious group.

21 MR. McCONNELL: Your Honor, if a group --

22 QUESTION: Well, isn't that the --

23 MR. McCONNELL: I do not think --

24 QUESTION: -- consequence of what you just said?
25 You said, if the level of generality is high enough so

1 that we know the object, absent a gerrymander, is not a
2 peculiarly religious object, that makes it okay.

3 MR. McCONNELL: No, Your Honor, because in order
4 to administer that category, money to morally uplifting
5 groups, the Government would have to decide whether a
6 religious group is in fact morally uplifting. I fully
7 agree that such an inquiry on the part --

8 QUESTION: Well --

9 MR. McCONNELL: -- of the Government is
10 unconstitutional.

11 Here, the only thing that the Government has to
12 determine is --

13 QUESTION: Let's make it a little easier.
14 Instead of saying, as you were putting it, morally
15 uplifting, those which simply espouse the pursuit of
16 action based on moral grounds. One ought to act morally
17 responsibly. That's the only criterion. That isn't going
18 to require very much by way of inquiry, and I take it on
19 your reasoning that direct cash payments could be made to
20 any church group on that theory.

21 MR. McCONNELL: Well, Your Honor, in Lamb's
22 Chapel, the --

23 QUESTION: Well, Lamb's Chapel, what about your
24 theory? Isn't it the case that on your theory the direct
25 payments could be made?

1 MR. McCONNELL: Your Honor, so much depends
2 upon -- it depends upon the practice with which such a
3 category was administered. If, in fact, that meant that
4 virtually anyone who espoused any views that was remotely
5 related to the good life received money, I think that
6 would be fine, but if in fact it meant that the Government
7 was engaged in a searching, case-by-case inquiry, deciding
8 this group promotes the moral life and this group doesn't,
9 then that kind of selective funding I think would be
10 unconstitutional, and religious groups could not be
11 included, because then the Government would be putting its
12 imprimatur upon particular religious views and saying
13 these are good views.

14 Here, the only thing that's going on is that the
15 Government has found that this is a student news, opinion,
16 entertainment, or academic media group. That is not an
17 entangling form of category.

18 QUESTION: Mr. McConnell, would your theory mean
19 that the case of *Regan v. Taxation With Representation*
20 have to be decided differently if the tax code provided
21 that organizations engaging in religious activities would
22 not be able to receive tax deductible contributions?

23 MR. McCONNELL: The -- where the tax code has
24 exempted -- provides tax exemptions for essentially the
25 entire nonprofit charitable world, if there were an

1 exclusion of charities that espoused religious views, I
2 think that I would be here contending that that's
3 unconstitutional.

4 The -- as I was saying, the religious nature of
5 the students is what makes this a case different from
6 cases that even the university concedes are correct about
7 prohibiting discrimination on the part of viewpoint.

8 Now, there are two ways in which the religious
9 character of their viewpoint might be considered relevant.
10 One is the university's position, which is to draw the
11 line between religious and nonreligious is not viewpoint
12 discrimination. Because it seems to me that that is
13 plainly foreclosed by this Court's unanimous decision two
14 terms ago in Lamb's Chapel, I would like to turn instead
15 to the arguments not endorsed by the university today, but
16 which were the basis of the Fourth Circuit's judgment
17 below. That is --

18 QUESTION: Before you do that, may I just ask
19 you one question about your understanding of the way the
20 regulation would apply?

21 Would funding be denied, as the reg is written,
22 to an organization espousing atheism?

23 MR. McCONNELL: Your Honor, I think it would.

24 QUESTION: What prevents the -- are you saying
25 the Constitution would prevent the university from

1 deciding to teach Buddhism unless they also wanted to
2 teach Hinduism, or the university's newspaper, edited by
3 students, to decide that they want to print liberal
4 articles but not conservative articles, or articles
5 involving, say, Buddhists but not Hindus, or whatever?

6 I mean, how does that interest in a university
7 to edit, decide how it spends its money, or decide what's
8 important for students to hear, how does that fit in to
9 your First Amendment analysis?

10 MR. McCONNELL: Well, Your Honor, absolutely
11 fundamental to our position is the distinction between the
12 Government's own speech, either through its employees or
13 through grantees --

14 QUESTION: These are State universities. I'm
15 assuming State universities.

16 MR. McCONNELL: Yes, but even with -- Your
17 Honor, even within the context of a State university, the
18 State university is in some cases speaking itself, and in
19 other cases it is providing a platform or a means for
20 private speakers to be able to speak their own minds.

21 That distinction is central to our position, and
22 it is our view that the Free Speech Clause protects
23 private speech where the content and viewpoint are
24 initiated by the private speakers, that it protects
25 private speech against viewpoint-based discrimination

1 whether it's -- the speech is religious or nonreligious.

2 QUESTION: But maybe the Government wants to
3 sponsor and speak through the views of private people but
4 only on subjects that the Government wants spoken about.

5 MR. McCONNELL: Yes, Your Honor.

6 QUESTION: And the line is pretty hard to draw,
7 isn't it?

8 MR. McCONNELL: Your Honor, we absolutely agree
9 that the university, that the Government, when it chooses
10 to present its own message through private speakers by
11 funding those speakers on account of their espousing the
12 Government's message, that in those cases the
13 Government's -- the Government may take a viewpoint. It
14 can espouse an antismoking campaign without funding a
15 prosmoking campaign.

16 QUESTION: Is that possibly what's going on
17 here?

18 MR. McCONNELL: Absolutely not, Your Honor. The
19 university has been completely clear that in its funding
20 of student groups it means it does not endorse the groups,
21 it does not agree with them, it doesn't even allow them to
22 use the University of Virginia's logo. It has separated
23 itself to the maximum possible extent from the content of
24 these groups, and of course, the groups themselves that
25 are funded --

1 QUESTION: And a good idea, too, if you read
2 some of them, right?

3 MR. McCONNELL: I --

4 QUESTION: But what they say that they're doing
5 is, they're funding educational activities by students,
6 and they don't want to fund noneducational activities.
7 Why can't they do that? Do they have to fund every
8 activity? I mean, why can't they?

9 MR. McCONNELL: Your Honor, and they've made the
10 further determination that the -- that writing a student
11 newspaper is an educational activity. That is, the act of
12 writing, editing, distributing, reading, engaging in
13 ideas, is itself an educational activity, not because the
14 content of the newspaper is educational, but because the
15 activity of engaging in student journalism is itself
16 educational.

17 That's why you can have an animal rights
18 oriented newspaper, and you can have a meat-eaters
19 oriented newspaper on the same campus. It isn't that one
20 of those views is better than the other, it's that the
21 participation in this activity is itself educational.

22 QUESTION: Mr. McConnell, what about the
23 university's having in mind student cases that are coming
24 up around the country, students who say, I don't want my
25 money, I don't want my activity fee to support something

1 with which I disagree? One of the amici presented those
2 cases to us. If this activity were to be supported, would
3 the university not have to allow all the people who don't
4 want their money to support a religious activity to get a
5 deduction?

6 MR. McCONNELL: Your Honor, the lower courts
7 have been split on these questions, and some have said
8 yes, but they have said yes with regard to controversial
9 political speech, too, so that a person opposed to
10 abortion is not required to contribute, or may get their
11 portion of the student activity fee back that goes to the
12 prochoice campaign. There's been no distinction between
13 controversial religious and political speech.

14 Now, other courts have upheld these programs and
15 not allowed a right to refund on the theory that so long
16 as the university is funding a broad array of viewpoints
17 of all sorts that no student is being required to support
18 any particular viewpoint, and that it's much like, you
19 know, taxpayers supporting postal subsidies, or supporting
20 public libraries that contain books that they don't agree
21 with.

22 QUESTION: Well, what about the student who says
23 it isn't like the post office because when we're dealing
24 with the Establishment Clause, this Court has recognized a
25 right that is not recognized in any other area, that is,

1 Flast v. Cohen, where the taxpayer can challenge the use
2 of her money to support a religious activity.

3 We don't allow taxpayer's challenges any place
4 else, and so a student might say, even if I can't
5 complaint about my dollars going to some political group
6 with which I disagree, I can make that complaint with
7 respect to a religious activity.

8 MR. McCONNELL: Well, Your Honor, all the courts
9 that have accepted this claim have in fact allowed
10 students to object to controversial political claims,
11 though all of the cases have involved secular speech, and
12 in cases like Aboud in this Court, this Court has
13 recognized a right of people not to be compelled to
14 support secular speech with which they disagree. In this
15 context, religious and secular speech, it seems to me, are
16 the same.

17 Now, I don't know whether the university should
18 be required to give refunds or not. I'd be perfectly
19 content for objecting students to receive refunds if they
20 object to some of the speech. The point is that the
21 university may not use its power to skew the marketplace
22 of ideas at the University of Virginia by favoring some
23 viewpoints over others.

24 QUESTION: Mr. McConnell --

25 MR. McCONNELL: If individual students want to

1 do that, fine.

2 QUESTION: -- a new subject, and I know your
3 time is about to expire. You may want to reserve some
4 time for rebuttal.

5 Is it your position that the State can never
6 recognize that there may be a gray area where we're not
7 sure that there's an Establishment Clause or not, and use
8 that determination as a ground for withholding support
9 from the activity?

10 MR. McCONNELL: Your Honor, I wouldn't say
11 never, but I would say that where citizens have a free
12 speech or free press right, a constitutional right under
13 the First Amendment, the university can't -- cannot defeat
14 that right or deny that right on the basis of some
15 nebulous fear of violating another provision of the
16 Constitution.

17 Indeed, it is not at all clear to me why one
18 clause of the Constitution should be read to trump the
19 other clause to begin with. It seems to me much more
20 sensible to take a step back and look at how the
21 Establishment Clause and the Free Speech Clause and the
22 Free Exercise Clause can be read as a consistent and
23 harmonious whole, all of them designed to guarantee a
24 neutrality between religion and its various ideological
25 competitors in the marketplace of ideas.

1 So that that way, instead of having the strange
2 situation in the Fourth Circuit where the -- where my
3 clients were held to have had a free speech right but the
4 Establishment Clause trumps that right, instead, the
5 enterprise of the First Amendment can be interpreted in a
6 consistent fashion.

7 MR. McCONNELL: I would like to reserve the
8 remainder of my time for rebuttal.

9 QUESTION: Very well, Mr. McConnell.

10 Mr. Jeffries.

11 ORAL ARGUMENT OF JOHN C. JEFFRIES, JR.

12 ON BEHALF OF THE RESPONDENTS

13 MR. JEFFRIES: Mr. Chief Justice, and may it
14 please the Court:

15 This case is not specifically about religion.
16 It is about funding, and the choices that inevitably must
17 be made in allocating scarce resources. Some funding
18 decisions do not involve speech, but in a public university
19 virtually all of them do. In public education, funding
20 speech based on content is legitimate, routine, and
21 absolutely necessary.

22 Under the university guidelines --

23 QUESTION: But not based on viewpoint, I take
24 it. You would agree with that.

25 MR. JEFFRIES: I do.

1 Under the university --

2 QUESTION: So this boils down to whether this is
3 a viewpoint case?

4 MR. JEFFRIES: I do think that's exactly the
5 heart of the question, and if I may just clear up one
6 issue that was left over from the earlier colloquy, under
7 the university's guidelines, the definition of political
8 activity, which is defined to mean lobbying or
9 electioneering, and the definition of religious activities
10 are not exactly alike, but they raise precisely the same
11 constitutional question.

12 Imagine that students organized themselves in
13 support of the President's reelection campaign, and
14 published a Clinton reelection newspaper. That would be
15 an electioneering activity. We would not fund it for that
16 reason.

17 Imagine that students lobby the State
18 legislature to pass or defeat the balanced budget
19 amendment. That would be a lobbying activity. We would
20 not fund it for that reason.

21 Students have a constitutional right to support
22 the reelection of the President. They have a
23 constitutional right to lobby the legislature. They have
24 a constitutional right to advocate their religious
25 beliefs. All of these cases present precisely the same

1 free speech issue, and they stand or fall on that basis.

2 QUESTION: But as I understand, Mr. -- I'm
3 sorry.

4 QUESTION: Mr. Jeffries, take a look at -- on
5 page 66a of the petition, the number 3 parenthetical in
6 the carryover paragraph on page -- where it's talking
7 about political activity, and apparently excepted are
8 student organizations which espouse particular positions
9 or ideological viewpoints. That would not include
10 political positions?

11 MR. JEFFRIES: The intent of the guidelines is
12 to allow in the political area a wide variety of point of
13 views, and to except two fairly narrow categories,
14 electioneering, by which I mean publication devoted
15 expressly to an election result, hence the Clinton
16 campaign newsletter, and lobbying legislatures.

17 QUESTION: Well then, suppose you have a
18 newspaper that simply espouses the Republican point of
19 view, or the Democratic point of view. Just as a more or
20 less -- liberal versus conservative, whatever you want to
21 call it, but it has party identification. Is that
22 permitted?

23 MR. JEFFRIES: Liberal and conservative points
24 of view are freely permitted. Indeed, all points of view
25 are permitted. The question is, which are funded --

1 QUESTION: Yes.

2 MR. JEFFRIES: -- and the exclusion from funding
3 would be those activities so closely allied with an
4 election result as to be found to be electioneering.

5 QUESTION: So that some might say the Americans
6 For Democratic Action, or something, a liberal group which
7 consistently supports Democratic candidates but doesn't
8 really electioneer for them, they could be funded?

9 MR. JEFFRIES: Yes, sir, would be eligible for
10 funding.

11 QUESTION: Now, why is that different from a
12 group that is not trying to recruit people to a particular
13 Christian sect, but simply espousing the truthfulness of
14 certain Christian doctrines, just as this other group,
15 while not trying to get you to vote for a particular
16 candidate, is espousing the truthfulness of that
17 candidate's position on a lot of issues? I don't see a
18 distinction.

19 MR. JEFFRIES: The guidelines make that
20 distinction. My point in suggesting that these raise the
21 same constitutional issue was to say that in all three
22 categories, electioneering, lobbying, and religious
23 activities, the guidelines say, rights which people have a
24 constitutional right to engage in, activities which people
25 have a constitutional right to engage in, we nonetheless

1 will not fund.

2 If that's an unconstitutional action in refusing
3 to fund religious activities under the Free Speech Clause,
4 it must follow that it's equally unconstitutional to
5 refuse to fund the Clinton campaign reelection newsletter
6 or to refuse to fund students engaged in lobbying
7 activities under the Free Speech Clause --

8 QUESTION: I'm talking about different things.
9 I'm talking about refusing to fund for religious
10 publications simply the espousal of general ideas, without
11 identification of a particular sect, without
12 proselytizing, whereas in the political context, so long
13 as you don't proselytize, so long as you're not
14 electioneering, it's okay. Why is it -- why is there that
15 distinction?

16 MR. JEFFRIES: Why do the guidelines make the
17 distinction they make?

18 QUESTION: You acknowledge that they make that
19 distinction.

20 MR. JEFFRIES: The guidelines --

21 QUESTION: Now, you used to say the reason they
22 make it is, the Establishment Clause made us do it, but
23 you're not taking that position today, right?

24 MR. JEFFRIES: Obviously, if the Establishment
25 Clause forbids us from giving direct aid to religion,

1 there is an end to the matter, but we do not stand on that
2 ground.

3 We take the following position. There is in
4 this country a long and honored tradition of financial
5 disengagement -- again, this is a question of funding, not
6 activities. There is a long tradition in this country of
7 financial disengagement between church and State. We
8 think it's entirely reasonable for the university to
9 adhere to that tradition.

10 QUESTION: This is not a church, though. I
11 mean, if you're -- you know, if your point were, we will
12 not fund any church organization that publishes something,
13 that's fine, but that's not what these guidelines say. It
14 says, any organization that espouses that viewpoint.
15 What's the term it uses?

16 MR. JEFFRIES: With respect, Justice Scalia, the
17 plaintiffs were not denied eligibility as a religious
18 organization. They are not a church, and they were not
19 denied funding on that ground.

20 QUESTION: Yes.

21 MR. JEFFRIES: They were denied funding because
22 the publication of this magazine was found to be a
23 religious activity, a conclusion that they have not --
24 never contested.

25 QUESTION: Because it manifests a particular

1 belief in or about a deity, right?

2 MR. JEFFRIES: Because it primarily manifests a
3 particular belief in or about a deity, yes, sir.

4 QUESTION: But that is different from lobbying
5 and campaigning. Your premise that you're submitting to
6 us is that because it is permissible to withhold funding
7 from active campaigning in the political sphere, therefore
8 it is permissible to hold -- to withhold funding for
9 abstract discussions of religious views, and it seems to
10 me the two do not follow at all.

11 MR. JEFFRIES: Well, in my judgment, Justice
12 Kennedy, the cases on which the petitioners rely are quite
13 consistently free speech cases. If the Court had meant to
14 specify something special about religion, it probably
15 would have relied on the Free Exercise Clause, so the
16 inference which I made is that under the Free Speech
17 Clause, lobbying, electioneering, religious activities are
18 all protected, and all comparably protected under the
19 Constitution.

20 QUESTION: But the university can say that these
21 are not educational activities, and draw the line there.
22 But it doesn't follow that it can draw the further line
23 that discussion of abstract views of religion is also
24 prohibited. It seems to me that that's where your
25 parallelism breaks down.

1 MR. JEFFRIES: It may be misleading to think of
2 the university's policy as refusing to fund a discussion
3 of abstract views. The university refuses to fund
4 religious activities. This magazine is a proselytizing
5 activity. Basically, religious activity means worship
6 services and prayer, or proselytizing, so there is little
7 doubt that this magazine fits the university's guideline.

8 QUESTION: Well, do you take the position that
9 any discussion of religious views is proselytizing?

10 MR. JEFFRIES: No, sir.

11 QUESTION: That's all your guidelines say,
12 manifests a particular view. If you primarily manifest a
13 particular view relating to, in or about a deity, you're
14 out.

15 MR. JEFFRIES: That constitutes a religious
16 activity.

17 Let me try to answer the rest of your question,
18 if I may, Justice Scalia. In addition to the longstanding
19 tradition of financial disengagement between church and
20 State, in this particular area, we feel there's a very
21 strong concern. By denying all religious activities
22 university funding, we avoid having to choose among them.
23 How would you choose among them?

24 QUESTION: Is the giving of religious
25 instruction a religious activity that calls -- makes it

1 outside the funding?

2 MR. JEFFRIES: Our policy on that is exactly the
3 policy reflected in the Religious Studies Department. We
4 study --

5 QUESTION: I mean, for example, if what -- this
6 magazine has articles in it that says Christianity and the
7 five-legged stool, and then it says, for example, how you
8 should lead a holy life, spread the Gospel, make social
9 justice, follow the Holy Spirit, and pursue intellectual
10 excellence, all of which are fine, but is that type of
11 article the kind of article that falls outside funding,
12 and why, precisely?

13 MR. JEFFRIES: Funding decisions, Justice
14 Breyer, are not made on the basis of articles or columns
15 or particular essays.

16 QUESTION: No, but I mean, the character of the
17 magazine.

18 MR. JEFFRIES: Yes, sir.

19 QUESTION: If the magazine did not have such
20 articles, but only said, we have a religious point of view
21 involving certain social issues, certain educational
22 issues. Would it then qualify for funding? I'm trying to
23 get the distinction as to what makes it a religious
24 activity and what doesn't --

25 MR. JEFFRIES: The distinction --

1 QUESTION: -- in terms of this magazine.

2 MR. JEFFRIES: On these facts, we think that
3 distinction is clear. A magazine which is devoted in all
4 of its content to proselytizing specific religious beliefs
5 is a religious activity under the guidelines.

6 QUESTION: I don't know what you mean by
7 proselytizing. That's not what the guideline says. It
8 says, manifests, promotes or manifests.

9 Now, suppose you had a magazine that just said,
10 we want to set forth the Christian or the Muslim or the
11 Jewish point of view on social issues. It's called,
12 Commentary. You know --

13 (Laughter.)

14 QUESTION: -- Student Commentary, or something
15 like that. It's all about social issues, but it intends
16 to bring a distinctively, to manifest a distinctively
17 religious point of view about all the social issues.
18 Wouldn't that be covered by you guideline?

19 MR. JEFFRIES: Let me answer that question this
20 way. In a standard which depends significantly on the
21 word, primarily -- the university guidelines does --

22 QUESTION: Yes.

23 MR. JEFFRIES: -- there are inevitably questions
24 of degree, and there may well be close cases, and there
25 may well be a line-drawing problem down the road. Now, I

1 willlll say, we've not had that problem before this
2 litigation.

3 But in this case, the fundamentally,
4 consistently, in the word of the Fourth Circuit, the
5 unflaggingly religious character of the publication has
6 never been contested or denied.

7 QUESTION: Mr. Jeffries, suppose that a student
8 newspaper decides that regular columns are good for the
9 newspaper. Readers like them.

10 MR. JEFFRIES: Yes, sir.

11 QUESTION: And it said, we want good writers,
12 and we want four regular columns, and they have a survey
13 of the best writers, and one of them is a religious
14 writer, a Christian writer, and that's all he writes about
15 in the column. Can the university promulgate a guideline
16 to withdraw funding by reason of the printing of that
17 column?

18 MR. JEFFRIES: We have not attempted to
19 promulgate such a guideline.

20 QUESTION: Can the university constitutionally
21 do it under the First Amendment?

22 MR. JEFFRIES: I doubt it.

23 QUESTION: Why is this case any different?

24 MR. JEFFRIES: We have -- the standard, as I
25 see, under the decisions of this Court, is basically a

1 standard of reasonableness. Public money cannot be a
2 public forum. There cannot be a right of access to the
3 budget of the University of Virginia.

4 So the standard is that of Perry Education
5 Association and other cases, and that standard says that
6 the approach must be reasonable, and it must not reflect
7 an effort to suppress expression because public officials
8 oppose the speaker's view.

9 QUESTION: But isn't there a difference between
10 when the university decides, you know, what kinds of
11 subjects to teach, say, in its Department of Religion,
12 where it's putting out its own message, and where the
13 university says, we're going to fund all sorts of student
14 activities, and we're going to disassociate ourselves from
15 their message?

16 MR. JEFFRIES: Mr. Chief Justice, the university
17 does not fund all sorts of student activities. They fund
18 some broad categories, and there are other broad
19 categories that are excluded.

20 The funds we're talking about here are raised by
21 mandatory fees. They're exactly like tuition and taxes.
22 They're distributed by a budgetary process, by an official
23 decisionmaking process, just like money raised from
24 tuition and taxes.

25 QUESTION: But they aren't devoted to espousing

1 something that might be called, the university's point of
2 view, or the university's idea of what education should
3 be.

4 MR. JEFFRIES: That is entirely correct.
5 They're not -- well, the first part is entirely correct.
6 They are not devoted to espousing a particular point of
7 view. They are devoted -- in funding, now, not access,
8 they are devoted to those activities which in the judgment
9 of the Board of Visitors are consistent with the
10 educational purpose of the university, and there are
11 several categories that are in, and there are several
12 categories that are out, religion being one of the out
13 categories.

14 QUESTION: But according to a case like Widmar
15 v. Vincent, where you're talking about student activities
16 like this, you can't exclude religion.

17 MR. JEFFRIES: Mr. Chief Justice, Widmar makes
18 explicit reference to the fact that it is not intended to
19 apply to funds.

20 QUESTION: So you say providing space, or
21 facilities and lighting and so forth, in doing that the
22 university can't discriminate, but if instead of that it
23 decides to make cash payments, it can?

24 MR. JEFFRIES: That's exactly right, and the
25 university does not discriminate in any way. These

1 plaintiffs have full access to university facilities.

2 If I may just explain why that --

3 QUESTION: Well, you could really help these
4 people out and even the playing field by not distributing
5 your student activity subsidies in cash, just provide
6 printing presses for all these organizations. Then it
7 would be okay to give these people what they want.

8 MR. JEFFRIES: Justice Stevens said in Widmar
9 that if access were short, that is, if it needed to be
10 rationed, that would warrant the university giving access
11 on the basis of the content of speech.

12 The distinctive fact about higher education, and
13 about public education generally, is that owing to the
14 demand at peak hours, classroom space always is in
15 abundant supply after hours, so on the facts of Widmar, on
16 the facts of Lamb's Chapel, there is no need to ration
17 anything. It's a benefit that can be provided at
18 practically no marginal cost.

19 QUESTION: Well, what if the activity involves a
20 controversial speaker and providing facilities to take
21 care of that? That can cost a lot of money. I'm not sure
22 that providing access to facilities is cost-free.

23 MR. JEFFRIES: It has been practically so in our
24 experience. I agree with --

25 QUESTION: But it might not be.

1 MR. JEFFRIES: Yes, ma'am, and I agree with
2 Justice Stevens that if access needed to be limited either
3 because of cost or because of a lack of physical space,
4 that would present a very different case from what was
5 presented in Widmar or what was presented in Lamb's
6 Chapel.

7 Funding must --

8 QUESTION: And you could say, because there's a
9 shortage of space we're going to decide religious
10 organizations are at the end of the line?

11 MR. JEFFRIES: If there were a shortage of space
12 that would present a --

13 QUESTION: That's what Widmar stands for?

14 MR. JEFFRIES: -- a very different question.

15 QUESTION: You're relying on Justice Stevens'
16 separate opinion in Widmar for that?

17 MR. JEFFRIES: For that point, I am.

18 (Laughter.)

19 QUESTION: I mean, I would have thought the
20 First Amendment would indicate that if you have to
21 restrict access it ought to be on some neutral ground.
22 We're not going to provide access if to do so requires us
23 to spend a lot of money.

24 MR. JEFFRIES: And we do not restrict access, so
25 to the extent that the concern is about access, these

1 plaintiffs have no quarrel with us. This entire case
2 involves the question of whether we write them a check.

3 Now, Justice O'Connor, very early you asked me a
4 question which I'd like to get to. I think it's the heart
5 of the case. As I hear the petitioners, they more or less
6 concede that in giving out scarce money, judgments just
7 inevitably be made. Choices must be made, there must be
8 priorities, so that the major ground of dispute here is
9 their claim that the university's guidelines are guilty of
10 antireligious viewpoint discrimination. That is not true.
11 The university funds, not opinions or viewpoints, but
12 activities. The university does not fund religious
13 activities. The university does not fund antireligious
14 activities.

15 If there were a journal of antireligion, if
16 there were a journal devoted primarily to denying the
17 existence of a deity, we would not fund it, it would not
18 be eligible for funding, and it would not be eligible on
19 precisely the ground that Wide Awake is not eligible.

20 If there were an anti-Christian newsletter
21 devoted primarily to denying the tenets of Christianity,
22 we would not fund it, it would not be eligible for
23 funding, and it would not be eligible for funding on
24 precisely the ground that Wide Awake is not eligible for
25 funding.

1 QUESTION: What about secular humanism?

2 MR. JEFFRIES: A journal devoted to secular
3 humanism?

4 QUESTION: Yes.

5 MR. JEFFRIES: As far as I know from the name
6 you've given it, that would be fine. I confess, I'm never
7 sure that I know what secular humanism is.

8 (Laughter.)

9 MR. JEFFRIES: Thank you.

10 QUESTION: If secular humanism says, we take
11 this position because all religion is rot, you wouldn't
12 fund it.

13 MR. JEFFRIES: If it were primarily devoted to
14 the all-religion-is-rot position, it would qualify as a
15 religious activity under the guidelines and would not be
16 funded.

17 My point in emphasizing this is to make a
18 statement to you that the University of Virginia feels
19 very strongly about. We are not picking out a religious
20 point of view and trying to suppress it.

21 QUESTION: No, but you're picking out theology.
22 I don't know that you would try to justify the exclusion
23 of some other area of thought, or discussion, or belief,
24 by saying, we're excluding this entire area, both those
25 who like it and those who don't like it.

1 MR. JEFFRIES: Yes, we do exactly that, Justice
2 Scalia, with respect, for example, to lobbying and
3 electioneering. In all these areas, we do the same thing.

4 QUESTION: Could the University of Missouri in
5 Widmar have said, we're going to deny access to this
6 religious group to these rooms, and we're also going to
7 deny access to any antireligious group, but we're going to
8 give it to everybody else?

9 MR. JEFFRIES: Mr. Chief Justice, my
10 understanding of the Widmar and Lamb's Chapel line of
11 cases, which say that so long as they have a surplus of
12 rooms, so long as there is no need to ration access to
13 them, so long as everyone can be accommodated, those
14 exclusions --

15 QUESTION: Well, did the Court opinion in Widmar
16 stress those facts?

17 MR. JEFFRIES: No, sir, it did not, but you have
18 to read Widmar and Regan at the same time. If those facts
19 are not stressed in the Widmar opinion -- and, by the way,
20 I think I spoke too quickly, Widmar does say, and this is
21 the majority opinion, nor do we question the right of the
22 university to make academic judgments as to how best to
23 allocate scarce resources, which is what we're dealing
24 with here.

25 Widmar does say that, but more importantly,

1 Regan is a unanimous decision of this Court. Regan
2 concerns funds and, frankly, we think Regan and our case
3 are on all fours.

4 QUESTION: Could I go to a question peculiar to
5 funds? Your opponents say that your argument there is
6 specious, because you rely upon cases in which the
7 Government is deciding, as it were, to speak for itself,
8 and it can decide what speech to make, whereas the
9 University of Virginia is not speaking for itself, it is
10 funding the speech of others, and it is because of that
11 distinction that it cannot make the distinctions that you
12 draw. What is your response to that?

13 MR. JEFFRIES: Justice Souter, the university
14 pays my salary. It's not true that I represent in the
15 classroom any particular university point of view, it's
16 not true that I am a spokesman for a particular campaign,
17 but it is certainly true that the university is not
18 indifferent to what I do there.

19 In other words, in the classroom there is a very
20 broad range of educational speech that is funded, but
21 that's not to say that all speech is funded. Exactly the
22 same is true of the student activities fees.

23 Is that responsive?

24 QUESTION: In effect you're saying, any subject
25 matter distinction can be made, and it doesn't matter at

1 the point in time, or the point in the legislative process
2 at which the Government says, this is my speech as
3 distinct from, this is what I will pay for.

4 MR. JEFFRIES: Any distinction can be made, so
5 long as it meets this Court's standard of being reasonable
6 and not an effort to suppress expression merely because
7 public officials oppose the speaker's view.

8 QUESTION: Suppose that there's a magazine put
9 out by hobbyists, or by fraternities, and the magazine has
10 some articles devoted to how wonderful it is to live at
11 theta beta whatever, or how to build model air planes, but
12 several other articles have to do with issues on campus
13 from the point of view of the fraternity, or issues on
14 campus from the point of view of model airplane builders.
15 Now, does that get funding, or not?

16 MR. JEFFRIES: Insofar as it's put out by
17 fraternities, I feel confident --

18 QUESTION: There are a group of people who
19 happen to belong --

20 (Laughter.)

21 QUESTION: -- to fraternities, or they build
22 model airplanes, and what they do is, they put out the
23 magazine I was talking about.

24 MR. JEFFRIES: It is eligible to be considered
25 for funding.

1 QUESTION: Mr. Jeffries, if we don't accept your
2 distinction placing this closer to the Government choosing
3 what subjects it wants discussed, and we do accept that
4 it's Government facilitating speech of others, not its own
5 choices, you -- how would you address the establishment
6 objection that you've assiduously stayed away from in your
7 brief?

8 Suppose we reject your position on the free
9 speech side of it?

10 QUESTION: Let me try to state as clearly as I
11 can, since the briefs are so different in their emphasis
12 on the Establishment Clause, what we think the relevance
13 of that question is to this case.

14 Petitioners say that the fact that this case
15 involves funding doesn't matter at all, and they rely
16 heavily on access cases, Widmar, Lamb's Chapel. We say
17 the fact that this case involves scarce dollars is
18 decisively important, and we rely very heavily on Regan,
19 and also on Rust v Sullivan.

20 From petitioner's point of view, the
21 Establishment Clause is a grave problem, because there are
22 many decisions of this Court stating that where religion
23 is involved funding does matter, that it matters quite a
24 lot.

25 So petitioners are essentially coming to the

1 Court and saying either that a lot of past Establishment
2 Clauses need to be distinguished within an inch of their
3 lives, or they need to be overruled. That is, as you can
4 tell from the exchange, including the exchange among
5 religious amici, that is a controversial proposition, but
6 it is only the first step in petitioners' argument.

7 Petitioners not only want this Court to overrule
8 Establishment Clause cases and permit Government to give
9 direct aid to religious activities where other activities
10 get such aid, petitioners want to go farther. They want
11 to take a second step which is truly radical, to say that
12 where other activities get Government aid, Government must
13 fund religious activities. Petitioners want to go --

14 QUESTION: You think that's a major step, a
15 major --

16 MR. JEFFRIES: Oh, yes, sir.

17 QUESTION: -- additional step?

18 MR. JEFFRIES: Yes, sir.

19 QUESTION: The step between providing a
20 classroom and providing the money to rent a classroom you
21 think is really --

22 MR. JEFFRIES: The step --

23 QUESTION: -- a step off a cliff.

24 MR. JEFFRIES: Access to a budget is a major
25 step.

1 QUESTION: But the classrooms are bought with
2 budget money, certainly.

3 MR. JEFFRIES: Yes, sir, and they are, once
4 they're there, virtually cost-free to allow two classes or
5 three classes as opposed to one or two, virtually cost-
6 free. No practical significance to that.

7 QUESTION: Well, that may affect the fisc. I
8 can understand how those who are interested in a balanced
9 budget may be concerned with that distinction, but I don't
10 know how those who are interested in unconstitutional
11 support of religion see a great difference between
12 providing that assistance in cash or that assistance in
13 some other -- in some other means, whether it's cost-free
14 or not.

15 MR. JEFFRIES: May I try to identify the
16 consequences?

17 If, as petitioners claim, Government funding of
18 speech activities must be accompanied by Government
19 funding of religious activities, if that's true, all of
20 public education as we know it is unconstitutional. Every
21 public school in America at every level in every State
22 does what we do. They fund speech --

23 QUESTION: But of course the only justification
24 for your using the word, religious activity, is because of
25 the special way in which this regulation defines it. What

1 we're talking about here is religious speech. That is
2 different.

3 MR. JEFFRIES: Different from --

4 QUESTION: Religious activities and religious
5 exercises.

6 MR. JEFFRIES: Well, our definition of religious
7 activity is stated in the guidelines that's been quoted to
8 you. It includes activities, and the activity here is the
9 publication of a magazine, and that involves religious
10 speech. Maybe I'm missing your point.

11 QUESTION: The only thing that's at issue here
12 is religious speech, not religious exercise.

13 MR. JEFFRIES: Justice Kennedy, you're drawing a
14 distinction that I do not clearly apprehend.

15 QUESTION: Well, if for example you have a
16 person who does -- a Republican and a Democrat and an
17 Episcopal minister all give exactly the same speech about
18 the homeless problem, one from a Republican point of view,
19 one Democratic, and one says I'm a minister and I have my
20 own experience. The speeches are identical.

21 MR. JEFFRIES: Yes, sir.

22 QUESTION: You fund the first two but not the
23 third.

24 MR. JEFFRIES: We would not be in a position of
25 funding any speech by speech. That's simply not the --

1 QUESTION: They write it a news -- they write it
2 in a little magazine.

3 MR. JEFFRIES: All those may be published, and
4 they all may be published in a newspaper which publishes
5 lots of points of view.

6 QUESTION: And isn't it the case that when you
7 were using religious speech in this argument, and when
8 Virginia is deciding what it means to fund, specifically
9 when Virginia uses the word manifest, aren't you, in each
10 instance, talking about speech which does not merely
11 explain a point of view, but espouses it, speech which in
12 effect recognize the difference between, this is a way of
13 thinking, and speech which says, this ought to be your way
14 of thinking. Isn't that the distinction that is implicit
15 in your entire argument, and in these guidelines as you
16 read them?

17 MR. JEFFRIES: Yes, sir, and as those guidelines
18 are applied, they focus for the hallmarks of a religious
19 activity on observances or proselytizing, which we do not
20 wish to fund.

21 QUESTION: Was there a finding of proselytizing
22 intent as the basis for the -- I don't find that anywhere
23 in the record. I think manifest means manifest.

24 Do you mean that it would be okay if this group
25 said, we're not going to try to convert anybody, we just

1 want to explain why Christian viewpoint provides certain
2 consequences on a whole range of public issues?

3 MR. JEFFRIES: The opening --

4 QUESTION: Would that be accepted? The
5 university will accept that publication?

6 MR. JEFFRIES: It might be, depending on the
7 facts more carefully defined. The magazine --

8 QUESTION: Oh, but in theory, it would. I
9 mean --

10 QUESTION: You have to say yes if you're going
11 to answer Justice Souter the way you did.

12 MR. JEFFRIES: The only reason I haven't said
13 yes is because I don't know enough about your hypothetical
14 magazine to have a confident reaction to it.

15 QUESTION: It may be tough to identify it as one
16 or the other, but the distinction is a distinction that
17 the university would honor, isn't it?

18 MR. JEFFRIES: And that is -- yes, sir, exactly.

19 QUESTION: And the university would -- who wrote
20 these regulations for the university, then? The
21 university would consider that that -- such a publication
22 does not manifest a particular belief? It's whole basis
23 is, Christianity provides these answers to a whole range
24 of certain -- that magazine does not manifest a particular
25 belief?

1 MR. JEFFRIES: I think the best answer I can
2 give you is that the magazines in the record do manifest a
3 religious belief. The letter from the editor in the
4 inaugural issue says that its mission is to challenge
5 Christians to live in word and deed according to the
6 faith.

7 Thank you, sir.

8 QUESTION: Thank you, Mr. Jeffries.

9 Mr. McConnell, you have 1 minute remaining.

10 REBUTTAL ARGUMENT OF MICHAEL W. McCONNELL

11 ON BEHALF OF THE PETITIONERS

12 MR. McCONNELL: Mr. Chief Justice, I'd just like
13 to conclude with a practical observation about the real
14 impact of -- on free speech of the Government's use of the
15 power of the purse.

16 Effectively, Ronald Rosenberger and his fellow
17 students were enabled to put together a newspaper, and
18 there's a carrot dangling in front of them, and the carrot
19 has attached to it something about their speech, that they
20 can address issues if they want to, but if they want to
21 receive the carrot, they have to do them in a particular
22 way.

23 They have to censor their own religious
24 viewpoints, they have to make sure that they don't quote
25 from one book, the Bible. They could quote from others.

1 They have to --

2 QUESTION: I don't think that's what your
3 brother is saying. I think what your brother is saying
4 is, they cannot cross that line between saying, this is
5 the Christian viewpoint, and this ought to be your
6 viewpoint. Now, that may be a tough line to draw. He
7 certainly admits it. But that, it seems to me, is the
8 only censorship that we're talking about.

9 MR. McCONNELL: Your Honor, if their viewpoint
10 were secular, they're certainly entitled to write a
11 magazine saying, this is our viewpoint, and you should
12 share that viewpoint. Animal rights groups are doing
13 precisely that. Feminist groups are doing precisely that.
14 Every other group is permitted to proselytize, which I'd
15 just like to note is nothing but an ugly word for
16 persuade, which is just exactly what the Free Speech
17 Clause is designed to protect.

18 QUESTION: They like the word manifest.

19 (Laughter.)

20 CHIEF JUSTICE REHNQUIST: Thank you,

21 Mr. McConnell.

22 The case is submitted.

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

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

RONALD W. ROSENBERGER, ET AL., Petitioners v. RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, ET AL.

CASE NO.:94-329

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

BY *Ann Marie Federico*

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