

BREYER, J., concurring in part

## SUPREME COURT OF THE UNITED STATES

No. 99–2036

GOOD NEWS CLUB, ET AL., PETITIONERS *v.*  
MILFORD CENTRAL SCHOOL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

[June 11, 2001]

JUSTICE BREYER, concurring in part.

I agree with the Court’s conclusion and join its opinion to the extent that they are consistent with the following three observations. First, the government’s “neutrality” in respect to religion is one, but only one, of the considerations relevant to deciding whether a public school’s policy violates the Establishment Clause. See, *e.g.*, *Mitchell v. Helms*, 530 U. S. 793, 839 (2000) (O’CONNOR, J., concurring in judgment); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, 774, 777 (1995) (O’CONNOR, J., concurring in part and concurring in judgment). As this Court previously has indicated, a child’s perception that the school has endorsed a particular religion or religion in general may also prove critically important. See *School Dist. of Grand Rapids v. Ball*, 473 U. S. 373, 389–390 (1985); see also *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U. S. 384, 395 (1993); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 592–594 (1989). Today’s opinion does not purport to change that legal principle.

Second, the critical Establishment Clause question here may well prove to be whether a child, participating in the Good News Club’s activities, could reasonably perceive the school’s permission for the club to use its facilities as an

BREYER, J., concurring in part

endorsement of religion. See *Ball, supra*, at 390 (“[A]n important concern of the effects test is whether . . . the challenged government action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices”). The time of day, the age of the children, the nature of the meetings, and other specific circumstances are relevant in helping to determine whether, in fact, the Club “so dominate[s]” the “forum” that, in the children’s minds, “a formal policy of equal access is transformed into a demonstration of approval.” *Capitol Square Review and Advisory Bd., supra*, at 777 (O’CONNOR, J., concurring in part and concurring in judgment).

Third, the Court cannot fully answer the Establishment Clause question this case raises, given its procedural posture. The specific legal action that brought this case to the Court of Appeals was the District Court’s decision to grant Milford Central School’s motion for summary judgment. The Court of Appeals affirmed the grant of summary judgment. We now hold that the school was not entitled to summary judgment, either in respect to the Free Speech or the Establishment Clause issue. Our holding must mean that, *viewing the disputed facts* (including facts about the children’s perceptions) *favorably to the Club* (the nonmoving party), the school has not shown an Establishment Clause violation.

To deny one party’s motion for summary judgment, however, is not to grant summary judgment for the other side. There may be disputed “genuine issue[s]” of “material fact,” Fed. Rule Civ. Proc. 56(c), particularly about how a reasonable child participant would understand the school’s role, cf. *post*, at 7 (SOUTER, J., dissenting). Indeed, the Court itself points to facts not in evidence, *ante*, at 17 (“There is no evidence that young children are permitted to loiter outside classrooms after the schoolday has

BREYER, J., concurring in part

ended”), *ante*, at 18 (“There may be as many, if not more, upperclassmen than elementary school children who occupy the school after hours”), identifies facts in evidence which may, depending on other facts not in evidence, be of legal significance, *ante*, at 17 (discussing the type of room in which the meetings were held and noting that the Club’s participants “are not all the same age as in the normal classroom setting”), and makes assumptions about other facts, *ibid.* (“Surely even young children are aware of events for which their parents must sign permission forms”), *ante*, at 18 (“Any bystander could conceivably be aware of the school’s use policy and its exclusion of the Good News Club, and could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement”). The Court’s invocation of what is missing from the record and its assumptions about what is present in the record only confirm that both parties, if they so desire, should have a fair opportunity to fill the evidentiary gap in light of today’s opinion. Cf. Fed. Rules Civ. Proc. 56(c) (summary judgment appropriate only where there is “no genuine issue as to any material fact” and movant “is entitled to a judgment as a matter of law”), 56(f) (permitting supplementation of record for summary judgment purposes where appropriate).