No. 99-2036

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

THE GOOD NEWS CLUB, *et al.*,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF CAROL HOOD (PETITIONER IN NO. 00-845) IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS*

Carol Hood respectfully submits this brief *amicus curiae* in support of Petitioners pursuant to Rule 37.3 of this Court.[1] Mrs. Hood is the Petitioner in *Hood v. Medford Township Bd. of Educ.*, No. 00-845, *petition for cert. filed*, Nov. 22, 2000, which presents a question closely related to the one at issue here: whether a public school that has a policy of rewarding reading achievement by allowing

[1]All parties have consented to the filing of this brief, and their letters of consent accompany this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus,* her counsel, and its members made any monetary contribution to the preparation or submission of this brief.

students to bring in a favorite story from home to read aloud to the class, but then bars a student from reading his otherwise appropriate selection solely because it was based on a Bible story, engages in viewpoint discrimination in violation of the Free Speech Clause of the First Amendment. After issuing and withdrawing two separate panel opinions premised on mutually exclusive theories, the Court of Appeals for the Third Circuit reheard the case *en banc*. It then affirmed—by a 6-6 vote—the district court's decision that the school's actions were not viewpoint discrimination. *C.H. v. Oliva*, 990 F. Supp. 341, 353 (D.N.J. 1997), *aff'd by an equally divided en banc court*, 226 F.3d 1204 (3d Cir. 2000).

Undersigned counsel, The Becket Fund for Religious Liberty, represents Mrs. Hood in her Petition. The Becket Fund is a bipartisan and interfaith public-interest law firm that protects the free expression of all religious traditions.

The present brief suggests a refinement of the principles applied in *Rosenberger* v. *Rector and Visitors of the Univ. of Va.,* 515 U.S. 819 (1995), and *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.,* 508 U.S. 384 (1993), for evaluating State restrictions on religious speech based on a fear that the State might appear to "endorse" such speech. In our view, when the State restricts private speech with that intent, the State necessarily engages in viewpoint discrimination. We understand that other briefs will discuss whether such viewpoint discrimination is justified in this case by a compelling governmental interest. Because of the narrow focus of this brief, we believe it will complement and not duplicate the briefs of the parties and so prove helpful to the Court in its resolution of this case.

SUMMARY OF ARGUMENT

Whenever the State excludes private religious speech from a government forum in order to avoid endorsing religion, the State discriminates based on viewpoint. Though that discrimination may be justified by a compelling state interest, it is nonetheless viewpoint discrimination.

As a matter of law and logic, the object of an endorsement is a viewpoint, not a subject matter. It is well established that, in assessing whether the government engages in viewpoint discrimination, this Court will assess the government's intent in regulating private speech. And when the government suppresses private speech with the intent to avoid endorsing that speech, it is a viewpoint that the government fears endorsing.

Accordingly, under this Court's Establishment Clause jurisprudence, "endorsement" involves government's expressing a particular viewpoint about religion, namely, an impermissibly favorable viewpoint. Correspondingly, the Establishment Clause also prohibits the government's expressing the viewpoint of impermissible hostility to religion. The government is otherwise free to engage in expression on the subject matter of religion, so long as it avoids these prohibited viewpoints. *See, e.g., School Dist. of Abington Township* v. *Schempp,* 374 U.S. 203, 225 (1963). Therefore, when the government intends to avoid endorsement in regulating a forum for speech, the government intends to avoid association with a *viewpoint*, not a *subject matter*.

Not surprisingly, then, where the government has restricted private religious speech in government fora with the intent to avoid endorsement, this Court has found those restrictions to be viewpoint-based. *See, e.g., Rosenberger* v.

Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.,* 508 U.S. 384 (1993).

Here, the Milford Central School intended to discriminate based on viewpoint. The School's stated purpose in excluding the Good News Club was to:

> ensur[e] that students in its charge are not left with the impression that [it] endorses religious instruction in its school, or that it advances the beliefs of a particular religion or group thereof.

The Good News Club v. Milford Central Sch., 202 F.3d 502, 509 (2d Cir. 2000) (second alteration in original). The School, however, was not similarly concerned with appearing to "endorse" other viewpoints, no matter how controversial. Thus, by regulating speech with the intent to avoid selectively endorsing that speech, the School engaged in viewpoint discrimination.

Amicus therefore respectfully urges this Court to reverse the holding of the Second Circuit that the School's discrimination against religious speech was merely content-based, and to clarify for courts below that the government engages in viewpoint discrimination whenever it suppresses private speech with the intent to avoid endorsement of that speech. *Amicus* leaves to the parties and others the argument that the state's viewpoint discrimination in this case is not justified by a compelling state interest.

ARGUMENT

I. WHEN THE STATE'S PURPOSE IN SUPPRESSING PRIVATE RELIGIOUS SPEECH IS TO AVOID ENDORSING ITS MESSAGE, THE STATE NECESSARILY DISCRIMINATES BASED ON VIEWPOINT.

A. Whether the State Engages in Viewpoint Discrimination Depends Largely on the State's Intent in Creating and Administering the Forum.

In assessing whether the regulation of speech is viewpoint-based or content-based, this Court has emphasized the importance of ascertaining the government's *intent* in creating public fora and restricting access to them. The "'principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech *because of [agreement or] disagreement with the message it conveys.*'" *Turner Broadcasting Sys. v. F.C.C.*, 512 U.S. 622, 642 (1994) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (emphasis added, alteration in original).

Thus, the "government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the *rationale* for the restriction." *Rosenberger*, 515 U.S. at 829 (emphasis added). *See also National Endowment for the Arts*, 524 U.S. 569, 587 (1998) ("If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas' . . .") (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550 (1983) (alteration in original);

Widmar v. Vincent, 454 U.S. 263, 280 (1981) (Stevens, J., concurring) ("[T]he university . . . may not allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted.").

Conversely, the Court has found restrictions to be viewpoint-neutral when it was satisfied that the governmental purpose in regulating was not to favor or disfavor the speaker's perspective. *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983) ("There is, however, no indication that the school board *intended* to discourage one viewpoint and advance another." (emphasis added));[2] *Finley*, 524 U.S. at 587 ("[A] more pressing constitutional question would arise if government funding resulted in the imposition of a disproportionate burden *calculated* to drive 'certain ideas or viewpoints from the marketplace.'" (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)) (emphasis added)).

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[2]Of course, in a forum genuinely limited to certain subject matter, the government may constitutionally censor religious speech that falls outside of that subject matter. If, for example, a school asked a student to bring in a favorite story to read to his class, but he instead brought in a hymn or a prayer, his speech could be barred as outside of the proper subject matter of the exercise. But if he chose a story based on the Bible, and the government censored him in order to avoid the appearance of endorsing his choice, that would be viewpoint discrimination. This is not a fanciful hypothetical. It is the factual scenario presented in a case now pending before this Court on a petition for writ of *certiorari*. *Hood v. Medford Township Bd. of Educ.,* Petition No. 00-845 (filed Nov. 22, 2000). *Amicus* is the petitioner in that case.

The point is a simple one: Whenever the government *intends* to discriminate on the basis of viewpoint, it *does* discriminate on the basis of viewpoint.

B. When the State Intends to Avoid Endorsement of Religion, the State Necessarily Intends to Avoid Association with a Religious Viewpoint.

According to both the precedents of this Court and common usage, if the State excludes private religious speech from a government forum in order to avoid "endorsing" that speech, what the State intends to avoid "endorsing" is a *viewpoint.* Indeed, it is difficult to imagine what else the government could meaningfully fear endorsing other than a viewpoint; one does not "endorse" a subject matter.

This conclusion also follows from this Court's Establishment Clause jurisprudence. Although the government may typically favor or disfavor particular viewpoints as a part of its own speech, *see Board of Regents of Univ. of Wis. Sys. v. Southworth,* 120 S. Ct. 1346, 1357 (2000), it must avoid certain forms of expression with respect to religion. The government is *not* prohibited from speaking on the *subject matter* of religion. *See, e.g., School Dist. of Abington Township* v. *Schempp,* 374 U.S. 203, 225 (1963) ("Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment."). Rather, the government is prohibited from expressing certain *viewpoints* on religion, namely, that of impermissible favor toward religion (endorsement), or of impermissible disfavor toward religion (hostility). *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 593-94 (1989) ("The Establishment Clause, at the very

least, prohibits government from appearing to *take a position* on questions of religious belief.") (emphasis added); *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) ("The endorsement test . . . preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.") (O'Connor, J., concurring); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (government "may not . . . promote one religion or religious theory against another or even against the militant opposite."); *Township of Abington v. Schempp,* 374 U.S. at 225 ("the State may not . . . affirmatively oppos[e] or show[] hostility to religion"); *Allegheny*, 492 U.S. at 625 ("The government violates [the Establishment Clause] if it endorses or disapproves of religion.") (O'Connor, J., concurring).

Thus, when the government regulates private speech in government fora with the intent to avoid government endorsement of religion, the government necessarily intends to avoid association with a certain *viewpoint* about religion. Consistent with these principles, this Court has twice refused to characterize as mere subject-matter regulation the suppression of private religious speech in government fora, where the regulation was intended to avoid endorsing the religious viewpoints expressed in that speech. *Rosenberger v. Rector and Visitors of the Univ. of Va.,* 515 U.S. 819 (1995); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.,* 508 U.S. 384 (1993).

This Court should insist that these decisions mean what they say and so should require a finding of viewpoint discrimination when the State has regulated private religious speech in a government forum with the intent to avoid government endorsement of that speech. Though that

viewpoint discrimination may be justified by a compelling state interest, it is viewpoint discrimination nonetheless.[3]

II. IN THIS CASE, THE MILFORD CENTRAL SCHOOL HAS ENGAGED IN VIEWPOINT DISCRIMINATION.

The present case is a perfect example. Milford Central School is clearly engaging in viewpoint discrimination because it suppressed speech to avoid association with its viewpoint without a corresponding concern to avoid the endorsement of other views.

> The School opened its forum for the purpose of:
>
> [S]ocial, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community.

202 F.3d at 504. And the School's intent in excluding The Good News Club is clear:

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[3]"This Court suggested in *Widmar v. Vincent,* 454 U.S. 263, 271 (1981), that the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgment of free speech otherwise protected by the First Amendment." *Lamb's Chapel,* 508 U.S. at 394 (parallel citations omitted, alteration in original). *Amicus* believes that this case, like *Widmar, Lamb's Chapel,* and *Rosenberger*, involves no Establishment Clause violation that may constitute a compelling interest. We leave that argument to the parties and other *amici*, but note that, even if the viewpoint discrimination here is found justifiable, it would remain viewpoint discrimination.

> [To] ensur[e] that students in its charge are not left with the impression that [it] endorses religious instruction in its school, or that it advances the beliefs of a particular religion or group thereof.

Id. at 509 (third alteration in original).

Notably, Milford Central School is not similarly concerned with "leaving the impression that it endorses" the policies of the 4-H Club or the Girl Scouts. Nor does it fear appearing to endorse the Boy Scouts' view that "homosexual conduct is not morally straight," or that they should not "promote homosexual conduct as a legitimate form of behavior." *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2453 (2000). The State intends to exclude from its facilities the ideas of The Good News Club precisely because they present a viewpoint that the School fears endorsing.

The Court of Appeals, however, held that this was not viewpoint discrimination at all. Rather, the court explained, "religious instruction and prayer" are somehow different from other discussions on the subject of morality. 202 F.3d at 510.[4] But this Court has already rejected precisely this view. In *Widmar*, this Court explicitly refused to manufacture a "constitutional difference between religious 'speech' and religious 'worship.' . . . [That] distinction . . . lacks a foundation in either the Constitution or in our cases,

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[4]The court below relied in large part on an earlier Second Circuit decision, *Bronx Household of Faith v. Community School Dist. No. 10*, 127 F.3d 207, 210 (2d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998), which held that New York City Board of Education regulations, which similarly permitted "uses pertaining to the welfare of the community," but forbade "religious services or religious instruction," were nonetheless viewpoint neutral.

and . . . is judicially unmanageable." 454 U.S. at 271 n.9. *See also id.* at 269 n.6 (listing reasons for rejecting "a distinction between the kinds of religious speech explicitly protected by our cases and a new class of religious 'speech act[s]' constituting 'worship.'" (internal citation omitted)). This Court should reiterate that clear rejection and should instruct the lower courts that whenever the government suppresses speech in order to avoid endorsing it, the government has suppressed the speech based on its viewpoint.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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