No. 99-2036

IN THE

Supreme Court of the United States

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 OF *AMICI CURIAE* THE AMERICAN CENTER FOR LAW & JUSTICE, FOCUS ON THE FAMILY, AND THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

The American Center for Law & Justice ("ACLJ") is a nonprofit, public interest law firm and educational organization dedicated to protecting First Amendment freedoms, human life, and the family. ACLJ attorneys have argued and participated as *amicus curiae* in dozens of cases before this Court and lower federal courts, and chief counsel Jay Sekulow has presented oral argument before this Court in numerous cases, including *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), and *Board of Educ. v. Mergens*, 496 U.S. 226 (1990). ACLJ has a particularly strong interest in this case because ACLJ represented the church that prevailed in *Lamb's Chapel*, and this case involves a virtually identical policy of discrimination against religion.

Focus on the Family is a California nonprofit religious corporation committed to strengthening the family in the United States and abroad. The president of Focus on the Family, James C. Dobson, Ph.D., is a child psychologist who has written extensively on child rearing and family relations. Focus on the Family produced and distributed the film series at issue in *Lamb's Chapel*.

The Ethics and Religious Liberty Commission of the Southern Baptist Convention is the ethics, moral concerns, public policy, and religious liberty agency of the Southern Baptist Convention, the Nation's largest Protestant denomination with nearly sixteen million members in 40,000 congregations. The Commission addresses moral and public policy concerns, such as the First Amendment issues raised in this case. All parties consent to the filing of this brief.[1]

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[1] No counsel representing a party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Milford Central School ("Milford Central") has adopted a community use policy that expressly discriminates against religion. Although Milford Central generally opens up its facilities to a broad spectrum of "social, civic and recreational meetings and entertainment events," it expressly prohibits any use of "school premises . . . for religious purposes." *See* Pet. App. at A2-A3 (quoting school policy).

Nothing in the Establishment Clause remotely justifies or permits this facial discrimination against religion. This Court repeatedly has rejected the argument that the Establishment Clause requires the exclusion of religious groups from school facilities made available to other groups. Allowing the Good News Club access to meeting space on a non-discriminatory basis would involve no government aid to religion. Instead, such a neutral policy that permits private religious speech on a non-discriminatory basis would comport with the Establishment Clause's command that the government neither advance nor inhibit religion.

Milford Central attempts to defend its facial discrimination against religion on the theory that allowing the Good News Club on school premises would create the same dangers as on-campus release-time programs and state-sponsored school prayers. Milford Central's suggested analogies reflect a fundamental misreading of this Court's precedents. While a school policy that gave the Good News Club special access to school premises or that adopted the religious speech of the Good News Club as the school's own might well violate the Establishment Clause, a neutral policy of non-discrimination does not pose the same risks. This Court long ago rejected the notion that the Establishment Clause forbids all religious speech on school grounds. Allowing the Good News Club access on a non-discriminatory basis raises none of the concerns that led the

Court to strike down on-campus release-time programs and school-prayer policies.

Indeed, Milford Central's policy, far from drawing any justification from the Establishment Clause, affirmatively violates the non-discrimination principles reflected in the Establishment, Free Exercise, and Equal Protection Clauses. These provisions all prohibit government action that expressly discriminates against religion or actions motivated by religion. Even in areas where the government enjoys some discretion, such as in imposing topical restrictions on a limited public forum, it may not use forbidden criteria, like race and religion, as the express basis for unfavorable treatment. Accordingly, Milford Central's effort to defend its prohibition on meetings convened "for religious purposes" as something other than viewpoint-discrimination is to no avail. Even if that restriction does not discriminate against religious viewpoints in violation of the Free Speech Clause, it clearly discriminates against religion and religious motivation in violation of the Establishment, Free Exercise, and Equal Protection Clauses.

ARGUMENT

This case is almost an exact clone of *Lamb's Chapel*, even down to the text of the challenged policies. Accordingly, Milford Central's policy clearly violates the Free Speech Clause. This brief, therefore, focuses on Milford Central's claim that the Establishment Clause requires a different result here than in *Lamb's Chapel*. As explained below, not only does the Establishment Clause not justify Milford Central's policy, the Establishment, Free Exercise, and Equal Protection Clauses prohibit the policy's discrimination against religion.

I. PROGRAMS THAT PERMIT PRIVATE GROUPS TO USE PUBLIC FACILITIES ON A NEUTRAL BASIS DO NOT RAISE ESTABLISHMENT CLAUSE DIFFICULTIES

A. This Court's Precedents Establish that Programs that Combine Neutrality and Private Speech Avoid Establishment Clause Problems.

This Court's religion cases uniformly have stressed the importance of government neutrality toward religion. The neutrality principle has played a role in almost every effort to interpret the Establishment Clause. *See, e.g., Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947); *Board of Educ. v. Allen*, 392 U.S. 236, 242-43 (1968).

Indeed, in the specific context of access to school facilities, this Court has emphasized that a policy of neutrality in no way necessitates or justifies the exclusion of religious speakers or religious topics. A neutral policy that puts religious speech on an equal footing with other speech does not violate the Establishment Clause. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel, supra*. Neutrality demands that a public school that opens its facilities to secular groups and speakers not only *may*, but *must*, offer those facilities to religious groups and speakers on an equal basis. *See, e.g., Lamb's Chapel*, 508 U.S. at 395-96. By treating religious and non-religious speech equally, the government ensures that "the message is one of neutrality rather than endorsement." *Mergens*, 496 U.S. at 248 (plurality).

The principle of neutrality takes on special importance with respect to private speech in public forums. When the government opens up a forum to private speech on designated topics, it must remain scrupulously neutral. "[S]chools may not discriminate against religious groups by denying them equal access to facilities that the schools make

available to all." *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring) (citing *Lamb's Chapel*). The government may not forbid speech from a religious perspective without violating the Free Speech Clause of the First Amendment.

In addition to neutrality, this Court repeatedly has emphasized the distinction between direct government involvement in religious speech or activity and government toleration of private religious expression. As *Mergens* recognized, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." 496 U.S. at 250 (plurality) (emphasis in original). The government avoids Establishment Clause difficulties when private groups—rather than the government—determine the content and topic of their speech. *See, e.g., Lamb's Chapel*, 508 U.S. at 395 (concluding that "permitting District property to be used [by a religious group] would not have been an establishment of religion under the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)").

In particular, programs that combine neutrality and private speech avoid any endorsement of religion. Facial neutrality lessens any perception of government endorsement of religion. What is more, the voluntary participation of outside groups and students ensures that the resulting speech is truly private speech, rather than government action. A school district does not endorse private speech that it permits on a non-discriminatory basis. *See, e.g., id.* at 395. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250 (plurality). With the guarantees of neutrality and individual choice and control over content, "there is no real likelihood that the speech in question is being either endorsed or coerced by the State." *Rosenberger*, 515 U.S. at 841-42; *accord id.* at 848 (O'Connor, J., concurring).

This Court emphasized both of these themes—neutrality and the importance of individual control over participation and content—in *Rosenberger*. First, the Court observed that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Id.* at 839. In addition, the Court highlighted the critical "distinction between the University's own favored message and the private speech of students." *Id.* at 834. The Court then applied these principles to conclude that a neutral policy of reimbursing the printing costs of student magazines, whose content was entirely the product of student decisions, did not violate the Establishment Clause.

Rosenberger, of course, involved the more difficult context of financial aid to religious groups. When the government simply opens up a forum to outside groups on a neutral basis without providing any financial aid, Establishment Clause concerns are minimized. *See, e.g.*, 515 U.S. at 846-47 (O'Connor, J., concurring) (acknowledging that the monetary aid given to religious groups in *Rosenberger* made it a more difficult case than *Lamb's Chapel*). A neutral program in which private speakers control the content of their speech and receive no direct government aid does not present any risk of endorsement or establishment.

B. Allowing the Good News Club to Use School Facilities on a Neutral Basis Would Not Pose any Establishment Clause Problem.

By permitting the Good News Club to use its facilities on a neutral basis, Milford Central would adopt a neutral program permitting private control over private speech without government aid or endorsement. The Establishment Clause poses no obstacle to the adoption of this policy, and clearly does not justify Milford Central's current policy of discrimination against religion. *See infra.*

Allowing the Good News Club to use the facilities would promote, rather than violate, the key principle of neutrality.

Milford Central's current policy makes the school facilities available for a variety of "social, civic and recreational meetings and entertainment events," but expressly provides that "[s]chool premises shall not be used by any individual or organization for religious purposes." *See* Pet. App. at A3 (quoting school policy). This policy evidences hostility to religion. By removing the express prohibition on meetings conducted "for religious purposes," Milford Central would restore the neutrality that is the touchstone of Establishment Clause analysis.

Likewise, it is clear from Milford Central's policy that participating organizations, not the school, exercise control over content and topic. Moreover, to the extent students take advantage of programs provided by outside groups, such as the Girl Scouts, they do so as a result of the private choices of students and parents. The resulting speech is clearly private speech attributable to the Girl Scouts, rather than government speech attributable to the school. "Under these circumstances . . . , there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed. . . ." *Lamb's Chapel*, 508 U.S. at 395.

Finally, it bears emphasis that allowing the Good News Club to use school facilities would involve no government funding of the Club. This is a case of speech without aid. Allowing the Good News Club access to school facilities would implicate none of the difficult questions raised by the provision of monetary aid that this Court approved in *Rosenberger*.

In short, the Establishment Clause provides no cover for Milford Central's exclusion of the Good News Club. To the contrary, Milford Central's facial discrimination against meetings convened "for religious purposes" creates, rather than avoids, Establishment Clause difficulties. As explained below, Milford Central's facial discrimination against

religion and religious motivations runs afoul of not just the Establishment Clause, but the Free Exercise and Equal Protection Clauses as well. What is more, Milford Central's decision to forbid meetings with "religious purposes" necessitates government monitoring of meetings to ensure the absence of religious motivation. This is precisely the kind of entanglement that the Establishment Clause prohibits.

This concern is far from hypothetical. Milford Central's Superintendent refused the Good News Club's request to hold meetings on school premises because "he understood the Good News Club's proposed use of the facilities to be 'the equivalent of religious worship . . . rather than the expression of religious views or values on a secular subject matter.'" Pet. App. at A9 (quoting denial letter). The Establishment Clause requires school districts to avoid such inquiries into religious content and motivation. *See, e.g., Rosenberger*, 515 U.S. at 836-37, 844-45.

A policy of neutrality would avoid this entanglement without violating the Establishment Clause. There would be no government control over speech and no monetary aid. Allowing the Good News Club to participate on a neutral basis, far from violating the Constitution, "follows the best of our traditions." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

II. ALLOWING THE GOOD NEWS CLUB TO USE SCHOOL FACILITIES ON A NEUTRAL BASIS RAISES NONE OF THE CONCERNS IMPLICATED BY POLICIES AUTHORIZING SCHOOL PRAYER OR ON-CAMPUS RELEASE-TIME PROGRAMS

Milford Central attempts to defend its decision to exclude the Good News Club on the theory that allowing the Club to use school facilities would be tantamount to authorizing

official school prayers or on-campus release-time programs. Opp. Cert. at 9-10. Milford Central reasons that this Court would find the Club's participation unconstitutional just as it struck down the on-campus release-time program in *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948), and the school-prayer policies in *Engel v. Vitale*, 370 U.S. 421 (1962), *Lee v. Weisman*, 505 U.S. 577 (1992), and *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266 (2000).

These suggested analogies ignore the nature of the school's actions and the emphasis this Court has placed on neutrality and private speech. First, Milford Central's argument ignores the reality that, far from authorizing a special benefit for religious groups, Milford Central discriminates against religion. Removing that discrimination—and allowing religious groups to participate on an equal basis—does not create the same dangers that troubled the Court in *McCollum* and the school-prayer cases. More broadly, Milford Central simply ignores the importance of neutrality and the fundamental distinction between private speech and government speech. A neutral program that allows private speakers to participate on an equal basis does not raise the concerns implicated when the government oversees religious education or composes official prayers.

A. Milford Central's Suggested Analogies Ignore the Fundamental Difference Between this Case and Those on Which It Relies.

Milford Central's analogy between what the Good News Club seeks and what the Court struck down in *McCollum* and the school-prayer cases is fundamentally flawed. In *McCollum*, *Engel*, *Lee*, and *Santa Fe*, the Court confronted school policies that provided some special benefit for religion. In *McCollum*, the school authorized certain religions to provide religious education on campus during school hours. In *Engel*, the State authorized the reading of

an official prayer. The school in *Lee* provided guidelines for the commencement prayer, while the Court found that the school sponsored the student prayers in *Santa Fe*. Here, by contrast, the school has not authorized any special benefit for religion. To the contrary, Milford Central has affirmatively discriminated against religion.

The Good News Club seeks only to end that affirmative discrimination. It does not ask for any special benefit or favored status. The Good News Club simply seeks equal treatment. As demonstrated below, a policy of equal—as opposed to special—treatment neither endorses nor establishes religion.

B. Eliminating Discrimination Against the Good News Club Does Not Amount to an On-Campus Release-Time Program.

Although Milford Central allows other clubs to use its facilities, it denies religious clubs access on equal terms. Eliminating that discrimination does not raise any of the concerns that led the Court to strike down the on-campus release-time program at issue in *McCollum*. The program in *McCollum* provided special benefits to religion and the participating religious groups. The Illinois schools excused students during school hours only if they took part in religious education provided by one of the participating religions. *See* 333 U.S. at 209-10. Students had no option to receive instruction from a non-religious outside group.

With the exception of the approved religions,[2] no other outside group received access to school facilities during school hours. Students' only choices were religious instruction and normal school instruction, with the caveat that the normal school instruction could not involve "courses or activities of compelling interest or importance" that would deter students from choosing religion. *Id.* at 223 (Frankfurter, J., concurring) (describing release-time programs generally). Here, by contrast, the Good News Club seeks no special status for religious instruction. It seeks only to remove a special disability imposed on religious speech and religious speech alone.

[2] While there was no suggestion of an express denominational preference in *McCollum* and any religion could apply to participate, the local school superintendent would "determine whether or not it is practical for said group to teach in said school system." *Id.* at 208 n.3 (quotation omitted).

In addition, the program at issue in *McCollum* involved a union of church and school functions with no analog in this case. First and foremost, religious instruction took place during school hours with the State's compulsory education laws ensuring student attendance. *See id.* at 209-10. To enforce those compulsory attendance laws, the religious instructors took attendance and reported absentees just like teachers of any other subject. *See id.* at 209 & n.5. Although the school did not pay the salary of the religious instructors, the superintendent approved each and every instructor. *See id.* at 208 & n.3 (noting that "[t]he superintendent was the last word so far as the individual was concerned"). More broadly, the religious instruction took place "subject to the approval and supervision of the Superintendent." *Id.* at 226 (Frankfurter, J., concurring) (quotation omitted). In light of this record, the Court had little difficulty striking down the Illinois program and distinguishing other release-time programs where religious instruction was not "patently woven into the working scheme of the school," *id.* at 227 (Frankfurter, J., concurring). *Cf. Zorach*, *supra* (approving New York's release-time program).

Although Milford Central admits, as it must, that the Good News Club does not seek to meet during school hours or to use the power of the state to enforce attendance, Milford Central attempts to minimize these key differences. Instead,

Milford Central suggests that the proximity of the meeting time to the end of the school day somehow raises constitutional concerns. Opp. Cert. at 9. However, *McCollum* emphasized the unique problems raised by in-school meetings during the school day, while this Court subsequently has approved after-school meetings.

First, the fact that the program in *McCollum* took place during the school day, when state law forces students to stay in school, was central to both the efficacy of the program and the Court's decision to strike it down. The Court focused on the fact that "[p]upils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes." *McCollum*, 333 U.S. at 209-10. Moreover, as Justice Frankfurter explained, proponents of release-time programs believed that providing religious instruction during the normal school day was critical to the program's success. After-school programs failed because "children continued to be children; they wanted to play when school was out, particularly when other children were free to do so. Church leaders decided that if the week-day church school was to succeed, a way had to be found to give the child his religious education during what the child conceived to be his 'business hours.'" *Id.* at 222 (Frankfurter, J., concurring).

At the same time, this Court has never expressed any concern with allowing religious groups to participate on a truly equal basis outside of school hours. For example, in *Mergens*, the Court confronted a program that allowed student groups to meet "after school hours on school premises." 496 U.S. at 231 (plurality). The Court expressed no concern with allowing a Bible club to meet after school on equal terms with the other student clubs. The Court specifically rejected the argument that the after-school meetings were constitutionally problematic because "the State's compulsory attendance laws bring the students

together." *Id.* at 249. Instead, the Court focused on the statute's requirement that meetings occur during "noninstructional time," and concluded that this provision "avoids the proble[m] of . . . 'mandatory attendance requirements.'" *Id.* at 251 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987)).[3]

In the end, Milford Central's effort to rely on *McCollum* fails because this Court long ago rejected any bright-line rule against the use of school facilities by religious groups. *Lamb's Chapel* and *Mergens* both make clear that a nondiscriminatory policy of access to school facilities does not raise the same concerns as an on-campus release-time program. Just last Term, this Court reaffirmed that "by no means" does the Establishment Clause "impose a prohibition on all religious activity in our public schools." *Santa Fe*, 120 S. Ct. at 2281.

School facilities do not bear some indelible taint of state endorsement that continues after normal school hours and attaches to private speech as well as government speech. If the school allows groups to participate on an equal basis and does not exert control over the content of private speech, the fact that religious speech occurs within the school's walls does not suffice to violate the Establishment Clause. Under these circumstances, there is "no realistic danger that the community would think that the District was endorsing religion or any particular creed." *Lamb's Chapel*, 508 U.S. at 395; *accord Mergens*, 496 U.S. at 250 (plurality)

[3] If Milford Central truly were concerned about the unique dangers of meetings that take place immediately after the school day, it would have limited its prohibition on religious meetings to that time period. Instead, Milford Central imposed a blanket ban on all religious meetings at any time, night or day. This fact betrays Milford Central's protestations about meetings immediately after the school day as a litigating position, rather than a legitimate concern.

(concluding that students "are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis").

Finally, it bears emphasis that although both *Lamb's Chapel* and *Mergens* suffice to distinguish *McCollum*, this case more closely resembles *Lamb's Chapel*. First, and most obviously, the restrictions on religious expression are virtually identical. This case, like *Lamb's Chapel*, arises out of a New York school district's adoption of a policy based on § 414 of the New York State Education Law. Both of the challenged school policies expressly discriminated against the use of school facilities for religious purposes. Second, like *Lamb's Chapel*, this case involves outside community groups—like the Boy Scouts and Girl Scouts—seeking access to school facilities, not school-sponsored groups as in *Mergens*. Accordingly, the Equal Access Act and the statutory analysis under the Act do not apply.

Equally important, the participation of outside community groups, rather than school-sponsored student groups, further reduces any risk of perceived endorsement. The "principal contention" raised against the Equal Access Act in *Mergens* was that "the student religious meetings are held under school aegis." *Mergens*, 496 U.S. at 249. Although *Mergens* ultimately rejected this objection, it addressed it at length. Here, by contrast, as in *Lamb's Chapel*, there is no school-sponsored club and, accordingly, far less risk of endorsement. Outside community groups involve a reduced risk of endorsement precisely because they are outside groups coming from the community rather than from the school itself. A meeting of the Boy Scouts or the Good News Club does not become a school function just because the meeting is held at school. The Court said as much in *Lamb's Chapel*. A State does not establish religion simply by allowing a religious group to meet on school premises on a non-discriminatory basis.

C. Eliminating Discrimination Against the Good News Club Does Not Amount to Authorizing School Prayer.

Milford Central's suggested analogy between allowing the Club to participate on an equal basis and authorizing official school prayers is even more strained. Allowing religious speech on a neutral basis does not raise the constitutional concerns implicated by having the state compose or impose official school prayers. This Court consistently has emphasized "the critical difference 'between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" *Rosenberger*, 515 U.S. at 841 (quoting *Mergens*, 496 U.S. at 250); *accord Santa Fe*, 120 S. Ct. at 2275 (reaffirming the importance of this distinction).

In all its school prayer cases, this Court has emphasized how government control over content made the resulting prayers impermissible religious speech by the government. *See, e.g., Santa Fe*, 120 S. Ct. at 2275; *Lee*, 505 U.S. at 590 (concluding that the "degree of school involvement" made clear that the "prayers bore the imprint of the State"); *Engel*, 370 U.S. at 425 (concluding that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government"). The Court made this point clearly last Term in *Santa Fe*. There, the Court reaffirmed the critical distinction between private and government speech, and analyzed the record at length to determine whether the speech at issue was properly attributed to the government. *See* 120 S. Ct. at 2275-79. The clear implication of the Court's analysis is that if the Court had construed the speech as truly private speech, it would have upheld the program. *See, e.g., id.* at 2275 (reaffirming that "an

individual's contribution to a government-created forum was not government speech").

Santa Fe recognizes that when the government exercises substantial control over topic and content and thereby favors prayer, the fact that a private speaker selects the exact words will not necessarily save the program.[4] Here, however, the school would not control the private speakers' content merely by giving the Good News Club equal access to a government forum.

Indeed, the government would relinquish, rather than exercise, content censorship by allowing the Club to use school facilities on a non-discriminatory basis. Currently, the government affirmatively prevents groups from engaging in religious speech and from meeting for religious purposes. This policy necessitates continuing government monitoring to ensure that meetings are not convened for illicit purposes and discussions do not stray into forbidden territory. By permitting religious speech on a non-discriminatory basis, Milford Central would relinquish its control over topic, which would obviate this problematic monitoring of content and viewpoint. Doing so would not raise any constitutional problems. As this Court explained in *Rosenberger*, *Lamb's Chapel*, and *Mergens*, programs that permit private speech on a neutral basis do not raise Establishment Clause concerns.

[4] Of course, the Court also found troubling other aspects of the school's program—aspects with no analog in this case, such as the school's historical practice of maintaining a student chaplain and the unusual majoritarian election system. All of these factors led the Court to conclude that "prayer is, in actuality, encouraged by the school." *Id.* at 2278. The facts of this case, especially the school's discrimination *against* the Good News Club, stand in stark contrast.

III. THE FREE EXERCISE, ESTABLISHMENT, AND EQUAL PROTECTION CLAUSES ALL PREVENT OVERT DISCRIMINATION AGAINST RELIGION AND OBVIATE ANY NEED FOR ARBITRARY AND UNWORKABLE DISTINCTIONS BETWEEN RELIGION AND RELIGIOUS SPEECH ON A SECULAR TOPIC

As explained above, nothing in this Court's Establishment Clause jurisprudence prevents Milford Central from allowing the Good News Club to use school facilities on a non-discriminatory basis. Indeed, far from requiring facial discrimination against meetings convened "for religious purposes," the Establishment, Free Exercise, and Equal Protection Clauses all affirmatively prevent it. Accordingly, Milford Central's effort to justify discrimination against religion as a valid content restriction on a limited public forum cannot succeed. There is no need for this Court to struggle to draw arbitrary distinctions between discrimination against religion as opposed to discrimination against religious viewpoints. The former violates the Establishment, Free Exercise, and Equal Protection Clauses, just as surely as the latter violates the Free Speech Clause.

A. The Difference Between Discrimination Against Religion and Discrimination Against Religious Viewpoints Is Elusive at Best.

In defending against the Club's free speech challenge, both Milford Central and the court below characterize Milford Central's discrimination against religion as a valid content restriction on speech in a limited public forum. While acknowledging—as it must in light of *Lamb's Chapel* and *Rosenberger*—that the Free Speech Clause forbids discrimination against religious viewpoints, Milford Central insists that a prohibition on religion is a valid content or topic limitation. Likewise, the court below emphasized that

no other group engages in "the type of religious instruction and prayer provided by the Club. Accordingly, the Milford School's decision to exclude the Good News Club from its facilities was based on content, not viewpoint." Pet. App. at A18.

This Court repeatedly has stressed that the Free Speech Clause forbids discrimination against religious viewpoints and religious perspectives, even when the speech occurs in a limited public forum. *See, e.g., Lamb's Chapel, supra*; *Rosenberger, supra*. In *Lamb's Chapel*, the Court found that the school had engaged in impermissible viewpoint discrimination when it denied the showing of a film on school property "solely because the series dealt with the subject from a religious standpoint." 508 U.S. at 394. The Court elaborated in *Rosenberger* that "discriminating against religious speech [is] discriminating on the basis of viewpoint," and that more generally, "[t]he 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." 515 U.S. at 832, 829.

In both *Lamb's Chapel* and *Rosenberger*, the government attempted to defend its restrictions on the use of its facilities by religious groups as valid content-based restrictions on the subject matter of religion. The government in both cases relied on precedents suggesting that schools can impose reasonable restrictions on a limited public forum that exclude the discussion of designated topics. *See, e.g., Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985).[5] In both cases, this Court rejected that argument and

[5] Of course, the government does not enjoy plenary authority to impose restrictions on a limited public forum. Such a restriction "*may* be permissible *if* it preserves the purposes of that limited forum," *Rosenberger*, 515 U.S. at 830, and must be "'reasonable in light of the purpose served by the forum,'" *id.* at 829 (quoting *Cornelius*, 473 U.S. at 806) (emphasis added). *See also Denver Area Educ. Telecom. Consortium v. FCC*, 518 U.S. 727, 750 (1996) (plurality) (reserving the question whether strict scrutiny applies to a content restriction defining the boundary of a limited public forum).

concluded that efforts to exclude religious groups constituted impermissible viewpoint discrimination. As explained in more detail in Petitioners' brief, Milford Central's exclusion of the Good News Club likewise constitutes impermissible viewpoint discrimination by limiting speech based on its "specific motivating ideology," *Rosenberger*, 515 U.S. at 829. However, as explained below, the Court need not definitely resolve whether Milford Central has discriminated on the basis of content or viewpoint to resolve this case.

The task of distinguishing between restrictions on religion as a subject and restrictions on speech from a religious perspective is difficult, if not ultimately impossible. In *Rosenberger*, the Court "acknowledged" that "the distinction is not a precise one." 515 U.S. at 831. "It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought." *Id.* The dissenting judge below made an even stronger point in the specific context of moral instruction: "when the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters." Pet. App. at A22 (Jacobs, J., dissenting). Indeed, having the constitutionality of school policies turn on murky distinctions between religion as a viewpoint and religion as a topic forces the courts to make inquiries into religion, which they generally prefer to avoid.

The Court made a similar point in *Widmar v. Vincent*, 454 U.S. 263 (1981). There, the Court rejected the dissent's proposed distinction between religious speech and religious worship as lacking "intelligible content." *Id.* at 269 n.6. Equally important, the Court observed that "even if the

distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer." *Id.*; *see also Rosenberger*, 515 U.S. at 835-36; *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) ("Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings."). "Merely to draw the distinction would require the [school]—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith." *Widmar*, 454 U.S. at 269 n.6. This Court long has wisely abjured such inquiries. Enforcing the distinction between religious speech and religious worship "would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.*

Despite these admonitions, the court below placed dispositive significance on a supposed distinction between religious speech and the practice of religion, and confidently asserted its ability to police that line. The court reiterated its belief that the school could prohibit prayer or religious instruction, as long as it did not discriminate against religious viewpoints in the discussion of a secular topic. The court then confidently proclaimed that "it is not difficult for school authorities to make the distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer." Pet. App. at A16 (citation omitted). Finally, the court "determined that the activities of the Club fall clearly on the side of religious instruction and prayer," and that "the Good News Club goes far beyond merely stating its viewpoint." *Id.* at A16-A17.

This analysis rests on twin fallacies. First, it ignores *Widmar* and erroneously asserts a competence to distinguish religious instruction and prayer from religious speech. Second, the court's reasoning relies on the equally flawed

premise that a statute that expressly discriminates against religious instruction and prayer constitutes a permissible content-based restriction on a public forum. The Establishment, Free Exercise, and Equal Protection Clauses clearly forbid such facial discrimination against religion.

B. The Establishment, Free Exercise, and Equal Protection Clauses Prohibit Facial Discrimination Against Religion.

This Court has long recognized that a core protection of the Establishment, Free Exercise, and Equal Protection Clauses is the prohibition of discrimination against religion or between sects. Although the Court at various times has relied on one constitutional provision rather than another, the Court consistently has treated these Clauses as embodying a non-discrimination principle. Most of the Court's cases have addressed the more difficult situation where a state policy is neutral on its face but has a disproportionate impact on religion generally or on a particular religious group. This case involves the straightforward case of express facial discrimination against religion.

The Court relied on this non-discrimination principle in striking down a statute that expressly prohibited ministers or priests from serving in the state legislature. *See McDaniel v. Paty*, 435 U.S. 618 (1978). Although *McDaniel* produced no opinion for the Court, the Court unanimously rejected the express disqualification under various legal theories. Chief Justice Burger and Justice Stewart decided the case under the Free Exercise Clause, while Justice White applied the Equal Protection Clause. Justice Brennan located the constitutional prohibition on such express discrimination in the Establishment and Free Exercise Clauses. He found the provision unconstitutional because "it establishes a religious classification—involvement in protected religious activity—governing . . . eligibility." *Id.* at 632 (Brennan, J., concurring).

More broadly, Justice Brennan concluded that with the exception of express accommodations of religion, *see, e.g.*, *Zorach*, *supra*; *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338-39 (1987), the government may not make express classifications on the basis of religion. "Beyond these limited situations in which government may take cognizance of religion for purposes of accommodating our traditions of religious liberty, government may not use religion as a basis for the imposition of duties, penalties, privileges or benefits." 435 U.S. at 639 (Brennan, J., concurring). Justice Brennan's analysis reflects a broader principle that the Court has long recognized in its Establishment Clause jurisprudence: "State power is no more to be used so as to handicap religions, than it is to favor them." *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). As Justice Kennedy explained more recently, "the Establishment Clause forbids the government to use religion as a line-drawing criterion." *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring); *see also id.* at 699-704 & n.6 (plurality) (finding statute unconstitutional because it reflected "legislative favoritism along religious lines" and "employed a religious criterion for delegating political power"); *id.* at 716 (O'Connor, J., concurring) (reaching the same result in part because "it seems proper to treat [the district] as a legislatively drawn religious classification").

The Court recognized a similar non-discrimination principle reflected in the Free Exercise Clause in *Employment Div. v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). *Smith* observed that the Free Exercise Clause makes clear that the government may not "impose special disabilities on the basis of religious views or religious status." 494 U.S. at 877. The Court concluded that "[i]t

would doubtless be unconstitutional" for a statute to ban "acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Id.* Indeed, *Smith* noted that statutes that expressly discriminate on the basis of religion raise concerns similar to race-based classifications. "Just as we subject to the most exacting scrutiny laws that make classifications based on race or on the content of speech, so too we strictly scrutinize governmental classifications based on religion." *Id.* at 886 n.3 (citations omitted).

In *Lukumi*, the Court went further and recognized that the Free Exercise Clause prohibits discrimination against religion even where the discrimination is not clear on the face of the statute. The Court reiterated that "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct *because it is undertaken for religious reasons.*" 508 U.S. at 532 (emphasis added). *Lukumi* reaffirmed that "the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at 533. The Court went on to hold that "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* at 534. Applying that test, the Court struck down a statute forbidding animal sacrifices despite the absence of any language expressly addressing the religious nature of the practice. *See id.* at 535-40.

Lukumi recognized that the Equal Protection Clause provides similar protections against discrimination on the basis of religion. The Court drew on its equal protection jurisprudence for support and noted that, in analyzing a statute, the determination concerning "'[n]eutrality in its application requires an equal protection mode of analysis.'" *Id.* at 540 (quoting *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). The Court

repeatedly has grouped religion with race as a forbidden basis for government action under the Equal Protection Clause. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (applying rational basis review because the government did not "classify along suspect lines like race or religion"); *American Sugar Ref. Co. v. Louisiana*, 179 U.S. 89, 92 (1900); *see also Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) (upholding "[t]he right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments").

Likewise, the Court employed an equal protection mode of analysis in striking down limitations on charitable solicitations in *Larson v. Valente*, 456 U.S. 228 (1982). *See id.* at 246 (concluding that "we treat the law as suspect and . . . we apply strict scrutiny in adjudging its constitutionality"); *accord Smith*, 494 U.S. at 886 n.3.[6] As Justice Kennedy summarized in *Kiryas Joel*, "the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account

[6] Although *Larson* viewed the statute as involving a denominational preference because its burdens fell disproportionately on less well-established churches, subsequent cases have cited it for the proposition that the Constitution forbids discrimination between religious sects and between religion and non-religion. *See, e.g., Kiryas Joel*, 512 U.S. at 705; *see also id.* at 703 (noting "that government should not prefer one religion to another, or religion to irreligion"). Of course, if (contrary to fact) Milford Central's policy imposed religion-neutral burdens, it might involve the same type of denominational preference at issue in *Larson* because the burdens might well have greater impact on less well-established churches that do not have their own facilities or cannot afford to bus children to other locations. However, the statute's facial discrimination against all religion obviates any difficult inquiry into whether it creates a denominational preference through its disproportionate impact.

of their race, so too it may not segregate on the basis of religion." 512 U.S. at 728.

In short, "the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Id.* at 715 (O'Connor, J., concurring). Unlike the more difficult question posed by facially-neutral statutes, this case involves the relatively rare (and relatively easy) case of a law that facially discriminates against religion. To borrow a phrase, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

Notwithstanding Milford Central's decision to open the school for a variety of "social, civic and recreational meetings and entertainment events," its policy expressly states that "[s]chool premises shall not be used by any individual or organization for religious purposes." Pet. App. at A3 (quoting school policy). As the court below accurately summarized, "[t]he Policy expressly forecloses use for religious purposes." *Id.*

This express discrimination against religion cannot be squared with the Establishment, Free Exercise, and Equal Protection Clauses. The Policy discriminates against religion on its face. By expressly denying access for religious instruction and worship, Milford Central imposes an unlawful "religious classification," *McDaniel*, 435 U.S. at 632 (Brennan, J., concurring), and engages in impermissible "[o]fficial action that targets religious conduct for distinctive treatment." *Lukumi*, 508 U.S. at 534.

Indeed, this policy goes beyond discrimination against religion to discriminate on the basis of religious motivation. By the policy's plain terms, an otherwise permissible social,

civic, or recreational meeting is forbidden if it is convened "for religious purposes." Under the policy, "it is only conduct motivated by religious conviction that bears the weight of the governmental restrictions." *Id.* at 547. The local cooking club can meet and break bread as long as those actions are devoid of religious motivation. This discrimination is flatly unconstitutional. The government cannot constitutionally prohibit meetings "only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Smith*, 494 U.S. at 877. This express discrimination violates the Constitution's commitment to religious tolerance.

C. An Express Prohibition on the Use of Facilities for Religious Purposes Is Not a Valid Content-Based Restriction.

The centerpiece of Milford Central's litigation strategy has been to characterize its policy as a content-based restriction that prohibits religious instruction or any discussion "for religious purposes," as opposed to a prohibition against addressing secular topics from a religious viewpoint. Indeed, before the litigation commenced, "Superintendent McGruder and counsel determined that 'the kinds of activities proposed to be engaged in by the Good News Club [a]re not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself.'" Pet. App. at A10 (quoting Milford Central's initial determination). The court below drew the same distinction in approving Milford Central's exclusion of the Good News Club. *See id.* at A16-A18.

The position of Milford Central and the court below proceeds from the fundamentally mistaken notion that the government can define the boundaries of a limited public forum along expressly religious lines. Of course, Milford

Central goes beyond merely prohibiting speech on a religious topic to take the clearly forbidden step of prohibiting speech "because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. But even putting that objection to one side, the Establishment, Free Exercise, and Equal Protection Clauses all forbid the government from using religion as a basis for determining whether a private speaker's message is permitted or *verboten*. Accordingly, Milford Central's effort to avoid the viewpoint discrimination label this Court applied in *Lamb's Chapel* and *Rosenberger* serves only to indict the school for violating the non-discrimination principle of the Establishment, Free Exercise, and Equal Protection Clauses.

Milford Central and the court below seem to think that Milford Central's ability to define the boundaries of its limited public forum somehow excuses it from compliance with the Establishment, Free Exercise, and Equal Protection Clauses. For example, in an earlier case, the court below concluded that the Constitution's prohibition on facial discrimination against religion only "pertain[s] to traditional public forums, or to a limited forum where the 'viewpoint neutral' rule has been violated." *Bronx Household of Faith v. Community Sch. Dist. No. 10*, 127 F.3d 207, 216 (2d Cir. 1997). That is simply not so.

This Court's public forum cases do not trump the commands of the Establishment, Free Exercise, and Equal Protection Clauses. To be sure, the government generally may make topical distinctions in drawing the boundaries of a limited public forum provided they are reasonably related to the purposes of the forum. *See, e.g., Rosenberger*, 515 U.S. at 829-30; *Cornelius*, 473 U.S. at 806. But that authority does not extend to drawing those boundaries on the basis of forbidden classifications, like race or religion. *See, e.g., Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring) ("[T]he Establishment Clause forbids the government to use

religion as a line-drawing criterion."). There are few functions where the government enjoys as much discretion as in deciding whom to prosecute. Nonetheless, this Court had little difficulty concluding that the government's exercise of prosecutorial discretion "may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Armstrong*, 517 U.S. at 464 (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

The government also enjoys substantial latitude in drawing political districts, but this Court forbids racial and religious gerrymandering. *See, e.g., Kiryas Joel, supra.* There is simply no justification for using race or religion to set the boundaries of a limited public forum, a context in which the government enjoys substantially less discretion.[7] Indeed, the government cannot draw racial or religious lines even in a non-public forum. For example, it cannot criminalize trespass on jailhouse grounds "for religious purposes," or obstruction of military bases by Asian-Americans. If the government must respect the non-discrimination principle in the non-public forum context (and, more generally, in enacting all criminal statutes, *see Smith, supra*), a restriction on speech in a limited public forum must respect this same principle, *a fortiori*.

This is not to say that Milford Central is powerless to place any restrictions on its forum. Milford Central clearly could close its schools to all outside groups. Likewise, it might impose content-based restrictions on permissible

[7] It bears emphasis that this Court's precedents require the boundaries of a limited public forum to be not only viewpoint-neutral, but reasonable as well. *See, e.g., Lamb's Chapel*, 508 U.S. at 392-93; *Cornelius*, 473 U.S. at 806. A limited public forum drawn along racial or religious lines is unreasonable per se. A religious classification, no less than a racial one, "is not reasonably related to any legitimate legislative objective." *Ray v. Blair*, 343 U.S. 214, 226 n.14 (1952).

speech, as long as it does not use forbidden classifications—such as race and religion—in drawing the boundaries. *See, e.g., Armstrong*, 517 U.S. at 464; *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring) ("The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial."). A municipality can declare an area of a school or park off-limits for groups of greater than 20 people and all sporting events. The neutral prohibition on gatherings in excess of 20 people may well have the effect of limiting the park's use for religious exercises without raising constitutional difficulties. However, if the municipality expressly adds religious services to the list of forbidden uses, it crosses a constitutional line. The Constitution simply forbids the government from using religion as a criterion for determining who will have access to a limited public forum.

The Constitution leaves Milford Central with substantial latitude in fixing the boundaries of its limited public forum. If Milford Central has legitimate reasons for limiting groups that raise particular problems, it should have no difficulty fashioning those restrictions in religion-neutral terms. But that is a discipline the Constitution imposes on the school. *See, e.g., Lukumi*, 508 U.S. at 546. Milford Central cannot take a short cut by expressly discriminating against religion or religious groups. The Constitution protects against the "inequality [that] results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 542-43. If there is some other characteristic of the Club that concerns school officials, they remain free to target that concern directly. Facial discrimination against religion is not an option.

CONCLUSION

For the foregoing reasons, and those expressed in Petitioners' Brief, this Court should reverse the judgment below.

Respectfully submitted,

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