No. 99-2036

IN THE
Supreme Court of the United States
OCTOBER TERM, 2000

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 *AMICUS CURIAE* SALLY CAMPBELL IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Establishment Clause *requires* the government to exclude a private religious group, because of its religious perspective, from use of an open and neutrally available public facility.

2. Whether the Free Speech, Free Exercise, and Equal Protection Clauses *permit* the government to exclude a private religious group, because of its religious perspective, from use of an open and neutrally available public facility.

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Sally Campbell has challenged a local policy in St. Tammany Parish, Louisiana, that is similar to the Milford policy at issue in this case. The school board of St. Tammany Parish allows after-hours use of its buildings for civic, recreational, and entertainment uses, and for other uses that pertain to the "welfare of the public." *Campbell v. St. Tammany School Bd.*, 206 F.3d 482, 484 (5th Cir. 2000). The St. Tammany policy expressly excludes partisan political activity, for-profit fundraising, and "religious services or religious instruction." *Id.* Ms. Campbell asked to use school facilities in St. Tammany School District for religious purposes. Relying on its policy, the School Board denied her request.

Ms. Campbell brought suit, alleging a violation of her First and Fourteenth Amendment rights. A panel of the United States Court of Appeals for the Fifth Circuit ruled that the Constitution does not require St. Tammany to allow religious speech in its facilities. *Id.* On October 26, 2000, over the dissent of Judges Jones, Smith, Barksdale, Garza, and DeMoss, the Court denied rehearing en banc. 2000 WL 1597749 (5th Cir.). Ms. Campbell intends soon to file a petition for writ of certiorari in this Court.

In their dissent from denial of rehearing en banc, Judges Jones, Smith, Barksdale, Garza, and DeMoss correctly contended that St. Tammany has created a public forum and that the content-based exclusion of religious speech from that forum is unconstitutional. For a forum to be considered a public forum, "[a]ll that is required is that the forum be 'generally open' to the public." *Id.* at *6 (Jones, J.). The St. Tammany facilities are "open 'indifferently' for use by private

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[1] The parties have consented in writing to the filing of this brief in letters that have been submitted to the clerk. *See* S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. *See* S. Ct. R. 37.6. No person or entity other than the amicus curiae and counsel for amicus curiae made a monetary contribution to the preparation or submission of this brief. *See id.*

groups. The content-based exclusion of religious speakers from access to the facilities is censorship pure and simple." *Id.* at *8.

These five Judges also correctly explained that St. Tammany's exclusion of religious speech is, in any event, unconstitutional even under the test applicable to limited public fora. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). Exclusions of speech from such fora must be both reasonable and viewpoint-neutral. The St. Tammany policy is unreasonable because it bears no relationship to the purposes of the forum: "To describe the exclusion as covering 'religious activity' somehow outside the pale of the community's welfare makes no sense." 2000 WL 1597749 at *9 (Jones, J.). In addition, the St. Tammany policy discriminates on the basis of viewpoint, as is inherent in the exclusion of religious speech: "The crux of the issue is this: when measured against the 'welfare of the public standard,' how can the prohibition of religious worship or instruction be anything other than viewpoint discrimination?" *Id.*

In summary, these five Judges stated: "It is unfortunate for the citizens of the Fifth Circuit that this court has seen fit to retreat from equal treatment of religious speech and to deviate from fifteen years of consistent Supreme Court jurisprudence on the subject. The St. Tammany school board was not required to open its facilities for the 'welfare of the public.' Once it did so, however, it could not arbitrarily discriminate against religious speakers." *Id.* at *10.

As this description reveals, the Milford case currently before the Court is not unique, but rather exemplifies a broader national problem of unjustified discrimination against religious speech in public facilities (as in St. Tammany). For that reason, and because the Court's resolution of this case is likely to affect the resolution of Ms. Campbell's case, Ms. Campbell respectfully submits this amicus curiae brief.

SCHOOL POLICY INVOLVED

The relevant portions of the Milford Community Use of School Facilities policy are as follows:

> The Board of Education will permit the use of school facilities and school grounds, when not in use for school purposes if, in the opinion of the District, use will not be disruptive of normal school operations, consistent with State law, for any of the following purposes:
>
> 1. For the purpose of instruction in any branch of education, learning or the arts.
>
> * * *
>
> 3. For holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public.
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> * * *
>
> Use for Nonreligious Purposes. School premises shall not be used by any individual or organization for religious purposes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Community Use policy for the Milford Central School District, members of the public may use public school facilities for (i) "instruction in any branch of education, learning or the arts," (ii) "holding social, civic and recreational meetings and entertainment events," or (iii) "other uses pertaining to the welfare of the community." Milford's expansive public access policy contains one – and only one – express exception: "School premises shall not be used by any individual or organization for religious purposes." Pursuant to this policy, the Milford Board of Education denied the request of the Good News Club (a community-based youth organization that provides moral instruction from a Christian perspective) to use its facilities. *See* 202 F.3d 502 (2d Cir. 2000).

The discriminatory policy enacted by Milford Central School District targets religious speech for a distinctive burden. Milford's discrimination against private religious speech in general, and against the Good News Club in particular, is unconstitutional. As the Court has concluded in several virtually identical cases, the Constitution demands that private religious speech, religious people, and religious organizations receive at least the same treatment as their secular counterparts in gaining access to public facilities and public property. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). Indeed, with respect to the precise issue of access to public school facilities that is raised in this case, the Court has repeatedly (and often unanimously) held that "schools 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). In so ruling, the Court has emphasized time and again that the Free Speech and Free Exercise Clauses protect "*private* speech endorsing religion." *Id.* at 841 (majority opinion).

Because the Court has already ruled decisively on the two central issues raised here, this case requires the Court to break no new ground, but merely to reaffirm its prior holdings. *First*, the Establishment Clause does not *require* the government to exclude private religious speech, because it is religious, from an open and neutrally available public facility. *Second*, the Free Speech, Free Exercise, and Equal Protection Clauses do not *permit* the government to exclude private religious speech, because it is religious, from an open and neutrally available public facility.

ARGUMENT

I. THE CONSTITUTION DOES NOT *REQUIRE* THE GOVERNMENT TO EXCLUDE PRIVATE RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM AN OPEN AND NEUTRALLY AVAILABLE PUBLIC FACILITY.

One fundamental question in this case is whether the Establishment Clause *requires* the government to exclude private religious groups such as the Good News Club from open and neutrally available public facilities. The answer is plainly no. The government may open public facilities on a neutral basis – for use by religious and secular groups alike – without violating the Establishment Clause.

To be sure, the Court has held that the Establishment Clause prohibits *government*-led or *government*-encouraged prayer to student audiences at certain public school events. *See, e.g., Santa Fe Indep. School District v. Doe*, 120 S. Ct. 2266 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Engel v. Vitale*, 370 U.S. 421 (1962). But the Court has flatly rejected the broader and more extreme proposition that the Establishment Clause requires the government to eradicate *all* religious expression, *public and private*, from public schools and other public facilities. The Establishment Clause "was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 767 (1995) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., Kennedy and Thomas, JJ.); *see also id.* at 775 (O'Connor, J., joined by Souter and Breyer, JJ., concurring) (Establishment Clause not contravened "where truly private speech is allowed on equal terms in a vigorous public forum" so long as there is no "government manipulation of the forum"). The Court thus has emphasized time and again the critical distinction "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 (quotation omitted).

Therefore, it is by now clear that the government does not violate the Establishment Clause when it allows religious individuals or groups to use public facilities or take public assistance that is available on a neutral basis to secular and religious alike. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Board of Ed. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981); *see also Mitchell v. Helms*, 120 S. Ct. 2530 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983). When the government provides facilities or aid on a neutral basis to religious and secular alike, there is no danger that the government has favored (and thereby endorsed) the religious over the secular – and thus no Establishment Clause violation. *Lamb's Chapel*, 508 U.S. at 395 ("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 . . . ."). A public facility open for use by private groups is "in a sense, surplus land" such that the government "conveys no message of endorsement" when it permits "privately organized and privately led groups of students (or others)" to use the facility. Laurence Tribe, *American Constitutional Law* § 14-5, at 1175 (2d ed. 1988).

If the rule were otherwise – that is, if the Establishment Clause barred the neutral extension of general facilities or benefits to religious groups – "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Widmar*, 454 U.S. at 274-75 (quotation

omitted). The Constitution requires no such discrimination against religious people and groups.

In assessing neutrality for purposes of the Establishment Clause, moreover, a government forum or benefit readily qualifies as neutral when (as here) the government makes the forum or benefit available to "a wide variety of private organizations." *Lamb's Chapel*, 508 U.S. at 395. *See also Rosenberger*, 515 U.S. at 842 ("It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises."); *Mergens*, 496 U.S. at 252 (neutrality requirement met given that "broad spectrum" of secular groups could use the facilities); *Widmar*, 454 U.S. at 277 ("provision of benefits to so broad a spectrum of groups is an important index of secular effect"). In other words, the fact that numerous secular groups enjoy the same rights as religious groups more than suffices to demonstrate that the government has not impermissibly favored religion.

The fact that younger (and at least potentially more impressionable) children may attend school or play at a particular public building or park does not alter the Establishment Clause analysis, or the significance of neutrality as the government's essential safe harbor in complying with the Establishment Clause. On the contrary, with younger and more impressionable children, it is doubly important for the government to be scrupulously neutral so as not to convey a message that religion is disfavored. Otherwise, "[w]ithholding access" to religious groups, because they are religious, "would leave an impermissible perception that religious activities are disfavored." *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring). Justice O'Connor's assessment applies to young as well as old. After all, if a young student cannot "understand toleration of [private] religion in the schools" – which is the necessary premise of the impressionability argument – he or she

would be just as "incapable of understanding exclusion of [private] religion from the schools." Douglas Laycock, *Equal Access and Moments of Silence: The Equal Access Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 19 (1987).[2]

In this case, the Establishment Clause does not require the exclusion of religious speech in general – or the Good News Club in particular – from Milford's open and neutrally available public facility. It is undisputed that the Good News Club is a private group, not a government organization, and it is undisputed that the Milford school is available to a broad class of secular educational events, "social, civic and recreational meetings and entertainment events," and other uses pertaining to the welfare of the community. The School District therefore would not be favoring (and thereby endorsing) religion over

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[2] If the Court were to accept the mistaken-attribution/impressionability argument, the appropriate remedy, as Justice Marshall stated in *Mergens*, would not be an outright ban on private religious speech, but merely a disclaimer making clear that the school does not endorse the groups or clubs that use its facilities. *See Mergens*, 496 U.S. at 270 (Marshall, J., concurring) (voting to uphold access program at issue in *Mergens* because school could allow private "religious speech" and affirmatively "disclaim[] any endorsement" of the private speech when necessary); *see also Pinette*, 515 U.S. at 794 n.2 (Souter, J., concurring) (if there is a danger of confusion, "no reason to presume that an adequate disclaimer could not have been drafted"); *id.* at 769 (plurality) ("If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the Square to be identified as such.").

As to any possibility of student peer pressure, as was stated in *Mergens*, "there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate." *Mergens*, 496 U.S. at 251. Again the appropriate remedy for the possibility of such pressure would not be an overbroad ban on religious speech, but a neutral mechanism for ensuring, for example, that only students with parental permission were allowed into meetings of private groups occurring in public school facilities. Of course, parental permission is already necessary to attend meetings of the Good News Club, which eliminates any such issue in this case.

non-religion simply by opening its doors on a neutral basis and allowing the Good News Club, among many others, to enter. When, as here, the government ensures neutrality by making its facilities available to religious and secular groups alike, "the message is one of neutrality rather than endorsement" and the Establishment Clause is not violated. *Mergens*, 496 U.S. at 248.

II. THE CONSTITUTION DOES NOT *PERMIT* THE GOVERNMENT TO EXCLUDE PRIVATE RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM AN OPEN AND NEUTRALLY AVAILABLE PUBLIC FACILITY.

Because the Establishment Clause raises no barrier to religious speech in an open and neutrally available public facility, the remaining question is whether the Constitution *permits* the Milford School District to exclude religious groups such as the Good News Club from school facilities. Stated more directly, can the government unapologetically and unabashedly discriminate against private religious speech in a public facility? The answer to that question as well is no.

The basic principles that guide the free speech analysis are settled. "[P]rivate religious speech . . . is as fully protected under the Free Speech Clause as secular private expression." *Pinette*, 515 U.S. at 760. A "free-speech clause without religion" would be, in the words of the Court, "Hamlet without the prince." *Id.* (opinion of Court for 7 Justices). The Constitution's protection for religious speech applies not just to speech from a religious perspective, but also to religious "proselytizing," *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981), and religious "worship," *Pinette*, 515 U.S. at 760; *Widmar*, 454 U.S. at 269 n.6.

It is "axiomatic" that the government "may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828. When the

government targets not just subject matter, "but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." *Id.* (internal citation omitted).

It is true that "speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State." *Pinette*, 515 U.S. at 761. But when the government maintains a forum open to at least some speakers and subject matters, the government's "right to limit protected expressive activity is sharply circumscribed." *Id.*

In a public forum (whether a traditional public forum such a a park or a public forum designated by the government such as an open bandstand), the government may impose reasonable content-neutral time, place, and manner restrictions. But content-based exclusions from a traditional or designated public forum are subject to strict scrutiny and presumptively unconstitutional. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). When the government operates not a traditional or designated public forum, but what is referred to as a "limited public forum" or a "non-public forum," the government's ability to impose content-based exclusions may be more expansive. But the government still "may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint." *Rosenberger*, 515 U.S. at 829 (internal quotations omitted); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985); *Perry*, 460 U.S. at 46.[3]

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[3] There is substantial confusion regarding the appropriate terms to describe these three categories. Some cases use the term "non-public forum" to describe what we refer to as a "limited public forum." *See, e.g., Cornelius*, 473 U.S. at 800. That, of course, creates no real confusion, but reveals that

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In this case, Milford's exclusion of Good News Club from its facilities is unconstitutional for any of four independent reasons.

- *First*, Milford has created a designated public forum, and Milford's exclusion of religious speech (the Good News Club) from that forum is content-based and viewpoint-based, is not justified by a compelling state interest, and thus is unconstitutional under the Free Speech Clause.

- *Second*, even if Milford has not created a designated public forum, it maintains a limited or non-public forum, and the exclusion of religious speech in general (and instruction about morals from a religious perspective in particular) is viewpoint-based and thus unconstitutional under the Free Speech Clause.

- *Third*, in order to exclude speech from a limited or non-public forum, the government's exclusion must also be reasonable in light of the purpose of the forum. The blanket exclusion of religious speech, because it is religious, from a forum is facially unreasonable where, as here, it bears no relationship to the purpose for which the forum was created. Milford's policy is thus unconstitutional under the Free Speech Clause for that reason as well.

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[3] (...continued)
there are two terms that may describe the same kind of forum. Some cases (including many in the Second Circuit) use the term "limited public forum" to describe what we refer to as a "designated public forum." *See Bronx Household of Faith v. Community School Dist. No. 10*, 127 F.3d 207, 211 (2d Cir. 1997) ("designated public forum, sometimes called the 'limited public forum'"); *see also Good News Club*, 202 F.3d at 508 (referring to "designated or limited public forums" as a single category). That can generate substantial confusion because the standards governing those two kinds of forums otherwise would be different. In any event, the terminology we use in this case – traditional public forum, designated public forum, and limited public forum – is consistent with *Rosenberger*, but we nonetheless caution that the use of terminology is not entirely consistent among courts, advocates, and commentators.

• *Fourth*, putting aside the intricacies of free speech doctrine (whether a forum is a designated public forum or merely a limited public forum, whether an exclusion is viewpoint-based or merely content-based), the Milford policy contains a more basic constitutional flaw. The government's exclusion of religious speech, *because it is religious*, from a public facility violates the Free Exercise and Equal Protection Clauses, both of which bar governmental discrimination against religious people, religious organizations, and religious speech.

1. The policy adopted by the Milford Central School District has created a designated public forum with respect to Milford's school facilities. As a result, the content-based exclusion of religious speech (including the Good News Club) from those facilities is unconstitutional.

A government entity's traditional public fora are those places such as streets and parks that have "immemorially been held in trust for the use of the public." *Hague v. CIO*, 307 U.S. 496, 515 (1939). In addition, the government can create a public forum for free speech (create the legal equivalent of, for example, a park) by opening public facilities to general use. *Perry*, 460 U.S. at 45. Public school facilities, in particular, become public fora when school authorities "by policy or practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (internal quotations omitted).

The Court's decision in *Widmar* is instructive on the forum definition issue. There, the University of Missouri at Kansas City made its facilities "generally available for the activities of registered student groups." 454 U.S. at 264-65. The school policy also stated: "No University buildings or grounds . . . may be used for purposes of religious worship or religious teaching." *Id.* at 265 n.3. Because the university had created a public forum, the Court subjected the content-based exclusion of religious speech from the forum to strict scrutiny: "[T]he

UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. . . . In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to *content-based exclusions*" – namely, strict scrutiny. *Id.* at 269-70 (emphasis added).

In *Lamb's Chapel*, the Court similarly considered whether the government policy at issue there – providing that school facilities were available to the public for educational, social, civic, and recreational purposes, and for other uses pertaining to the welfare of the community – created a public forum, or rather a limited public forum. The Court stated that the argument that the school district had created a public forum carried "considerable force," but the Court ultimately decided not to "rule on this issue" because the exclusion of religious groups was plainly viewpoint-based and unconstitutional regardless of the nature of the forum. 508 U.S. at 392-93.

The Court's "strong suggestion" in *Lamb's Chapel* that open school facilities may well be a public forum is a useful starting point, however, for considering the nature of the forum in this case. *See Bronx Household of Faith v. Community School Dist. No. 10*, 127 F.3d 207, 218 (2d Cir. 1997) (Cabranes, J., concurring). The Milford policy, in our view, plainly creates "a forum generally open to the public." *Perry*, 460 U.S. at 45. Indeed, it is hard to conjure up a more expansive access policy than one in which a public facility is open for any "social, civic, or recreational use," for uses pertaining to the welfare of the community, and for "instruction in any branch of education."[4] For that reason, numerous courts

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[4] To be sure, Milford requires that groups using its facilities also make its events "open to the general public." That is a "manner" restriction imposed on groups seeking to use the school facilities. That is not a

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of appeals analyzing similarly expansive policies where school facilities were open for social, civic, and recreational use by outside groups have held that the schools created public fora. *See, e.g., Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. No. 5*, 941 F.2d 45, 48 (1st Cir. 1991); *Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1378 (3rd Cir. 1990); *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973) (en banc).

For example, in the *Grace Bible* case, the First Circuit panel (including then-Chief Judge Breyer) assessed a policy that, as the Court characterized it, provided access for groups that were "good for the community unless, in the judgment of the school board, it is injurious to the school." 941 F.2d at 48. The school district excluded a group that wished to engage in religious speech. The First Circuit stressed that a school district opening its facilities for public use under such a policy "has no greater right to pick and choose among users on account of their views than does the government in general when it provides a park, or a hall, or an auditorium, for public use." *Id.* The Court concluded: "The bare fact is, [the school district] has volunteered expressive opportunity to the community at large, excluding some because of the content of their speech. This is elementary violation." *Id.*

This Court has looked not just to the policy, but also to the "practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius*, 473 U.S. at 802. In this case, the factual record buttresses what the plain terms of the policy reveal. In particular, Milford has granted access to numerous groups such as the Boy Scouts, Girl Scouts, and 4-H Club.

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[4] (...continued)
content-based restriction and thus does not in any way call into question the conclusion that Milford operates a public forum. Indeed, if anything, the non-exclusivity requirement buttresses the notion that this is a designated public forum.

This practice is persuasive evidence regarding the open nature of the forum.[5]

In sum, the policy and the record show that Milford Central School has created a public forum. Thus, Milford's indisputably content-based exclusion of religious speech in general (and the Good News Club in particular) from that forum is unconstitutional. *See Widmar*, 454 U.S. at 269; *see also Campbell*, 2000 WL 1597749 at *8 (Jones, J.) ("The St. Tammany facilities are "open 'indifferently' for use by private groups. The content-based exclusion of religious speakers from access to the facilities is censorship pure and simple.").[6]

2. If Milford's forum is not a designated public forum, it is a limited public forum from which viewpoint-based exclusions are unconstitutional. The decisions in *Lamb's Chapel* and

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[5] The government cannot rely on a vague definition of the forum to escape the conclusion that it has created a public forum. "If the concept of a designated open forum is to retain any vitality whatever, the definition of the standards for inclusion and exclusion must be unambiguous and definite." *Gregoire*, 907 F.2d at 1375. Were the rule contrary, "[a] school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal." *Mergens*, 496 U.S. at 244.

[6] The court of appeals suggested that the parties had agreed that Milford created only a limited public forum. 202 F.3d at 509. But as explained above, Second Circuit precedent conflates the categories of designated public fora and limited public fora by suggesting that the categories are governed by the same rules. *See Bronx Household of Faith*, 127 F.3d at 211 ("designated public forum, sometimes called the 'limited public forum'"); *see also Good News Club*, 202 F.3d at 508 (referring to "designated or limited public forums" as a single category). Any concession that a "limited public forum" was involved in this case is, therefore, not a concession at all given Second Circuit precedent that equates a designated public forum and a limited public forum. For that reason, the Court should independently assess the nature of the forum in this case, unconstrained by the parties' prior Second-Circuit-induced characterizations.

Rosenberger demonstrate, moreover, that Milford's exclusion of religious speech in general (and of the Good News Club in particular) from its school facilities is viewpoint-based and thus unconstitutional.

In *Lamb's Chapel*, the Court considered a school policy like the one at issue in this case that provided: "[S]chool premises shall not be used by any group for religious purposes." 508 U.S. at 387. Pursuant to that policy, the school denied a church's request to use school premises "to exhibit for public viewing and for assertedly religious purposes, a film series dealing with family and child-rearing issues faced by parents today." *Id.* The record did not indicate "that the application to exhibit the particular film series . . . was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective." *Id.* at 393-94. The Court held that this exclusion of religious perspectives was viewpoint-based and "plainly invalid." *Id.* at 394. The Court concluded that "it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious viewpoint." *Id.* at 393.

The Court reached the same result in *Rosenberger*. The University of Virginia authorized the payment of printing costs for a variety of student organization publications, but withheld payment for a religious student group. The Court held that the University had engaged in impermissible viewpoint discrimination by excluding those "student journalistic efforts with religious editorial viewpoints." 515 U.S. at 831. Relying on *Lamb's Chapel*, the Court stressed that "discriminating against religious speech [is] discriminating on the basis of viewpoint." *Id.* at 832 (emphasis added). In particular, "[r]eligion may be a vast area of inquiry, but it also provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831. As that language demonstrates, the *Rosenberger* Court concluded that the exclusion of religious speech, ideas,

thought, and uses from a forum is *inherently* and *by definition* viewpoint-based.

In this case, *Lamb's Chapel* and *Rosenberger* make clear that Milford's policy and exclusion of the Good News Club is patently unconstitutional. The Milford School District allows instruction about morals provided from a secular perspective, but disallows instruction about morals from a religious perspective. As Judge Cabranes observed in a factually similar case, "the District's policy banning religious instruction, while at the same time allowing instruction on any subject of learning from a secular viewpoint, is an impermissible form of viewpoint discrimination." *Bronx Household of Faith*, 127 F.3d at 220 (concurring and dissenting). Similarly, in *Campbell*, Judge Jones correctly analyzed a vague "welfare" standard similar to that in Milford: "when measured against the 'welfare of the public' standard, how can the prohibition of religious worship or instruction be anything other than viewpoint discrimination?" *St. Tammany*, 2000 WL 1597749 at *9.[7]

Of course, under *Rosenberger*, the express exclusion of religious uses is, in any event, *inherently* viewpoint-based, and thus unconstitutional regardless of the nature of the forum. As the Court said, "[r]eligion may be a vast area of inquiry, but it also provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831.[8]

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[7] Bound by Second Circuit precedent, Judge Cabranes' opinion in that case did not take issue with the circuit's distinction between religious speech and religious worship. Such a distinction is, however, flawed for the reasons discussed below.

[8] The four dissenters in *Rosenberger* likewise recognized that discrimination against religious speech was unacceptable. "The common factual thread running through *Widmar*, *Mergens*, and *Lamb's Chapel*, is that a governmental institution created a limited forum for the use of students in a school or college, or for the public at large, but sought to exclude speakers with religious messages. In each case the restriction was

(continued...)

Milford's exclusion of certain religious speech cannot be saved or cabined by positing a distinction between (i) speech from a religious perspective and (ii) religious prayer or worship. The court of appeals attempted to split the atom and to draw such a line, but that is impossible: Religious worship is religious speech and religious thought. As Judge Jacobs persuasively explained, moreover, "[d]iscussion of morals and character from purely secular viewpoints of idealism, culture or general uplift will often appear secular, while discussion of the same issues from a religious viewpoint will often appear essentially – quintessentially – religious." 202 F.3d at 515 (dissent).

So, too, the Court in *Widmar* flatly dismissed the idea that religious worship could be segregated from religious speech for purposes of free speech doctrine. The Court said that it is impossible to draw the line where singing, reading, and teaching transforms into "worship." 454 U.S. at 269 n.6. The *Widmar* analysis is surely correct, as there is no basis in precedent or logic for placing religious speech in one First Amendment category and religious worship in another First Amendment category.

In sum, even assuming that the Milford policy does not create a designated public forum, but only a limited or non-public forum, the exclusion of the Good News Club is viewpoint-based and thus unconstitutional.

3. A third independent reason why the exclusion of Good News Club violates the Free Speech Clause is the utter unreasonableness of the exclusion in light of the forum's

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[8] (...continued)
struck down either as an impermissible attempt to regulate the content of speech in an open forum (as in *Widmar* and *Mergens*) or to suppress a particular religious viewpoint (as in *Lamb's Chapel*). . . . Each case . . . drew ultimately on the unexceptionable Speech Clause doctrine treating the evangelist, the Salvation Army, the millennialist, or the Hare Krishna like any other speaker in a public forum." 515 U.S. at 888 (Souter, J., dissenting) (internal citations omitted).

purposes. In a limited public forum, the government's exclusion of particular speech not only must be viewpoint-neutral, but also must be "reasonable in light of the purpose served by the forum." *Cornelius*, 473 U.S. at 806; *see also Rosenberger*, 515 U.S. at 829 (same); *Perry*, 460 U.S. at 49 (same; government may limit activities in forum, but cannot exclude "activities compatible with the intended purpose of the property"). In this case, Milford's express exclusion of religious speech does not serve any legitimate purpose of the forum.

In *Lamb's Chapel*, having found that the exclusion was viewpoint-based and thus unconstitutional, the Court did not reach the additional question whether the exclusion was "unreasonable in light of the purposes of the forum." But the Court did pointedly note that the Second Circuit had "uttered not a word in support of its reasonableness holding" and that if the rule were unreasonable, "it could be held facially invalid." 508 U.S. at 393 n.6. As suggested by the Court in *Lamb's Chapel*, therefore, the reasonableness analysis is a separate and vitally important aspect of the inquiry in limited public forum cases. And it provides an independent basis for striking down Milford's action in this case.

The "reasonableness" inquiry necessarily focuses, first, on the purpose of the Community Use policy and, second, on how that purpose is allegedly thwarted by allowing the forum to be used for religious purposes. The Milford policy allows the forum to be used for instruction in any branch of education, for uses pertaining to the welfare of the community, and for holding social, civic, and recreational meetings and entertainment events. The clear purpose of the Milford policy on its face is to provide the community with a place to meet and to speak as individuals and groups – a public service provided by the government in the same way that parks are a public service to the people. It is inconceivable, however, that allowing religious speech in that public building would somehow undermine or thwart those purposes. That is especially so given that the policy allows uses pertaining to the "welfare of the community."

As Judge Jones said in analyzing a similar policy in *Campbell*, "[t]o describe the exclusion as covering 'religious activity' somehow outside the pale of the community's welfare makes no sense." 2000 WL 1597749 at *9.

Indeed, the only possible bases for excluding religious speech would be (i) a blatant desire to disfavor religious speech or (ii) a claim that the Establishment Clause required exclusion. The former argument is unreasonable as a matter of law (and unconstitutional, as discussed below), and the latter is unavailing under this Court's precedents. In short, then, the Community Use policy's exclusion of use for "religious purposes" is unreasonable in light of the purposes served by the forum. *See St. Tammany*, 2000 WL 1597749, at *8 (Jones, J.) (policy excluding religious speech is "unreasonable" and "doomed"); *see also* Br. of Amicus Curiae American Center for Law and Justice at 17-29.

4. Aside from the intricacies of free speech doctrine, a more fundamental point demonstrates that Milford's exclusion of the Good News Club is unconstitutional. Under the Free Exercise and Equal Protection Clauses (as well as the Establishment Clause), the government may not discriminate against religion, just as the government may not discriminate on the basis of race. The government thus may not impose a burden or deny a benefit because of the religious nature of a group, person, writing, speech, or idea. To use the words of Justice Brennan, the government "may not use religion as a basis of classification for the imposition of duties [and] penalties . . ." *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring). Of course, the non-discrimination principle articulated by Justice Brennan is by now firmly entrenched in this Court's jurisprudence. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (government may not "discriminate[] against some or all religious beliefs or regulate[] or prohibit[] conduct because it is undertaken for religious reasons"); *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) ("The government "may not

impose special disabilities on the basis of religious views or religious status.").

Except in the context of a permissible accommodation of religion, the government must act on a religion-neutral basis, based on objective and discernible criteria that do not refer to or target religion. For example, if the government bars certain categories of speech or activities from a public facility (say, events with more than 50 people in attendance) and defines the limitation without reference to religion, the Constitution is not violated even though a religious meeting with more than 50 people in attendance would be excluded from the facility. In such a case, the government has not *discriminated* against religion (putting aside, of course, any issue of required accommodation under the Free Exercise Clause).

On the other hand, where the government excludes religious speech – *because* it is religious – from a public facility, the government has plainly discriminated against religion and just as plainly violated the Constitution. And that is precisely what Milford has done in this case by targeting religion for a distinctive burden.

III. RESPONDENT'S POSITION WOULD REQUIRE THE GOVERNMENT TO INQUIRE INTO THE RELIGIOSITY OF SPEECH AND WOULD FORCE RELIGIOUS PEOPLE TO HIDE OR DISGUISE THEIR RELIGIOUS BELIEFS.

In closing, it bears mention that the Milford policy poses two additional and important threats to religious liberty and freedom – threats that this Court has emphasized before and that should inform the analysis in this case.

First, Milford's policy creates grave dangers of excessive entanglement – namely, of the government seeking to monitor and inquire into the content of speech to determine whether it is sufficiently "religious" to require exclusion. This Court on many occasions has emphasized the constitutional dangers implicated when the government intrudes in this way into the

nature of speech. *See Mergens*, 496 U.S. at 253 (plurality) (denial of the forum to religious groups "might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur"); *cf. Lee v. Weisman*, 505 U.S. at 616-17 (Souter, J., concurring) (regarding judicial review of speech for sectarian influences: "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible").

The Court in *Rosenberger* elaborated on the problem, stating that the "first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." 515 U.S. at 835. The Court continued: "The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. *That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion. . . .*" *Id.* at 845-46 (emphasis added).

Second, the School District's policy necessarily induces people seeking to use public facilities to water down their speech and to hide the religiosity of their message in order to satisfy a government administrator that a proposed meeting is not *really* for "religious purposes." That demeaning and disturbing exercise is neither mandated nor permitted by the Constitution. The Constitution is not "some sort of homogenizing solvent" that forces religious groups "to choose between assimilating to mainstream American culture or losing their political rights." *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 730 (1994) (Kennedy, J., concurring). The Constitution in no way licenses the government to operate a checkpoint where religious people who hide their beliefs and intentions are allowed through, but those who express their true beliefs and intentions are turned away.

In short, these two factors underscore the sound prudential and historical reasons why the Constitution neither requires nor permits discrimination against religious people and religious speech.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioners' brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

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