No. 99-2036

IN THE
SUPREME COURT OF THE UNITED STATES

THE GOOD NEWS CLUB, ANDREA FOURNIER, AND DARLEEN FOURNIER,
*Petitioners,*

v.

MILFORD CENTRAL SCHOOL,
*Respondent.*

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

# REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF

## I. MILFORD'S EXCLUSION OF THE CLUB FROM ITS FORUM WAS NOT VIEWPOINT NEUTRAL.

Milford has opened up its facilities after school to community groups for extremely broad purposes. Pet. Appx. D. In particular, Milford allows community groups to use its facilities for purposes pertaining to "the welfare of the community" and for the promotion of the moral and spiritual development of children. J.A. at N10-11, O8, Pet. Appx. D1, Brief of Milford (2nd Cir.) at 9.

The Good News Club ("Club") is a private community group that applied to use school facilities. [Lodging at W1]. Milford censored the Club's speech from its forum only because the speech was too religious. J.A. at G4(¶13), G6(¶18), N16-8, P47, V1 H1-2. The Second Circuit affirmed Milford's censorship on the theory that the Club's speech, by urging children to have faith in God, left the permissible realm of secular morality and entered the forbidden world of religion. Pet. Appx. A15-6.

The Second Circuit's decision was flawed because it literally ignored this Court's controlling precedent on viewpoint discrimination.[1] The law applicable to this case is well-traveled ground. This case involves the application of virtually the same policy held unconstitutional in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and virtually the same constitutionally protected religious viewpoint as in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

[1] The Second Circuit's opinion below did not cite *Lamb's Chapel* or *Widmar*, and mentioned *Rosenberger* once only in passing.

Moreover, Milford offers the same defense to justify its unconstitutional policy and viewpoint discrimination – a distinction between constitutionally protected singing, teaching, and reading and unprotected worship - that this Court found unworkable and unconstitutional in *Widmar v. Vincent*, 454 U.S. 263 (1981).

Milford has adopted an extremely broad community use policy similar to that at issue in *Lamb's Chapel*. The policy opens facilities to the public, "for the purpose of instruction in any branch of education, learning or the arts" and "for holding social, civic and recreational meetings and entertainment events" and "other uses pertaining to the welfare of the community." Pet. Appx. D1. Milford's policy, however, closes the facilities to otherwise eligible users who have a "religious purpose," (Pet. Appx. D2), a policy identical in all respects to that invalidated in *Lamb's Chapel*. *Compare Good News Club*, 202 F.3d at 504 *with Lamb's Chapel*, 508 U.S. at 387.

The Club has adopted essentially the same perspective as the student newspaper adopted in *Rosenberger* - that faith in God is necessary to have the strength to live a moral life.[2] The Club offers its members the same solution to deal with feelings of anger and jealousy as the student newspaper did – faith in God. Discriminating against the Club's perspective is no more constitutional now than it was in *Rosenberger*.

Finally, Milford adopts essentially the same unconstitutional framework to justify its discrimination against religious speakers that this Court rejected in *Widmar*. Milford

[2] The purpose of *Wide Awake* (the newspaper in *Rosenberger*) was "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." *Id.* at 826. *Wide Awake* urged students to seek God's help, for example, to overcome eating disorders and racism. *Id.* at 866-67 (dissent).



proposes that government officials scrutinize the significance of religious speech and then make essentially theological classifications as to whether that speech constitutes religion, worship, or instruction. Such classifications are unworkable and unconstitutional. *See* Brief of Douglas Laycock at 14-18 (arguing that a distinction between religion as viewpoint on morality and religious instruction is "untenable and readily subject to abuse"); Brief for the States of Alabama *et. al.*, at 16-18 (arguing that it is unconstitutional for state officials to distinguish constitutionally protected singing, teaching, and reading from unprotected worship). *See also* Brief for 20 Theologians and Scholars of Religion (surveying various religious traditions rejecting the coherence of distinguishing "religious instruction" from "moral instruction from a religious perspective"). This Court has already rejected Milford's framework, warning that inquiries into the significance of religious words and practices tend inevitably to entangle the state with religion in a manner forbidden by the Constitution. *Widmar*, 454 U.S. at 269-70. *Accord Rosenberger*, 515 U.S. at 844 (scrutinizing the content of speech lest it contain too great a religious content is inconsistent with the Establishment Clause).

Milford would distinguish *Lamb's Chapel* and *Rosenberger* in three ways, none persuasively. *First,* Milford notices that the age of the audience in *Rosenberger* and this case are different. True, but audience identity is unrelated to the question of whether the government discriminates against a speaker's viewpoint.

*Second,* Milford argues it has never actually had a religious or atheistic presentation in its forum. A forum, however, is defined by its policy as well as practice, and Milford's policy excludes religious speakers, but not atheistic speakers. By never allowing a "religious presentation" in its forum, Milford only proves that its discrimination is consistent,

not that its discrimination is constitutional.

*Third,* Milford's labeling of the Club's speech as religious instruction begs the question whether Milford discriminates against the Club because of its viewpoint. The issue is whether Club meetings, however one labels the speech, offer a perspective on how to promote the welfare of the community, or a perspective on how to influence a child's spiritual development, or perspective on how to promote morals of children. [3]

Recognizing no escape from this Court's viewpoint discrimination precedents, Milford claims that viewpoint discrimination is no longer at issue in this case: "Milford contends that *Lamb's Chapel* is not dispositive of this case. Although *Lamb's Chapel* may provide guidance to schools in viewpoint discrimination cases, this case is purely an Establishment Clause case." Brief of Respondent's ("RB") at 38 (emphasis added). See also RB at 41 ("Rosenberger dealt with the issue of viewpoint discrimination while the present case deals with an Establishment Clause issue").

## II. MILFORD'S STATEMENT OF FACTS IS INACCURATE.

Through almost four years of litigation, this case has focused almost exclusively on viewpoint discrimination under the Free Speech Clause. Now, suddenly, Milford shifts focus

[3] Milford never attempts to address petitioners' argument that a regime that prohibits religious instruction, but allows "secular moral" instruction, inherently discriminates against the religious viewpoint. See Brief for Petitioners' at 26-7; Brief of 20 Theologians and Scholars of Religion at 7-11 (explaining that when the government allows "secular" moral instruction but excludes religious instruction from its forum, it "tak[es] side in a long-standing theological and philosophical controversy.").



and claims that discrimination against the Club's speech is compelled by the Establishment Clause. [4] To support its new strategy, respondent and particularly its *amici* present to the Court "facts" not contained in the record; indeed, the record directly contradicts some of these facts. Petitioners, therefore, will correct the factual record before addressing respondent's legal arguments.

### A. Milford's Facilities Are Open to the Community After School at 3:00 p.m.

Several of the respondent's amici claim that Milford's facilities were not opened for community use until several hours after the end of the school day. The amici are wrong. The simple, undisputed fact, repeatedly conceded by Milford, is that "at all relevant times" (i.e, including precisely the time at which the Club wanted to meet) Milford's policy was in full effect and its facilities were "a limited public forum." See Brief of Milford (2nd Cir.) at 14, 9.

The issue in this case is not what time the Club can use Milford facilities, but whether the Club can use the facilities at all. Milford has explained to this Court that "its decision to exclude was ***based solely upon*** . . . [the fact] that Good News was engaged in religious instruction." RB at 32. See *Good News Club*, 202 F.3d at 509 n. 8, (Pet. Appx. A14). Milford

[4] In the Courts below, Milford never even cited the Establishment Clause cases that it now finds dispositive, namely *McCollum v. Board of Educ.*, 333 U.S. 203 (1948), *Engel v. Vitale*, 370 U.S. 421 (1962), *Everson v. Board of Educ.*, 330 U.S. 1 (1948), *School Dist. of Abington v. Schemmp*, 374 U.S. 203 (1963), *Lee v. Weisman*, 505 U.S. 577 (1992), or *Stone v. Graham*, 449 U.S. 39 (1980). Nor did Milford claim that the District Court's preliminary injunction allowing the Club to use school facilities was forcing Milford to violate the Constitution. Milford neither asked for a stay of nor appealed the preliminary injunction. Moreover, Milford did not close, or otherwise modify, the forum pending the outcome of the case so as to ameliorate any supposed Establishment Clause concerns.

declares that its "limited open forum [sic] was properly closed to [the Club's] program." RB at 32 (emphasis added). Milford would let the Club use the school at 3:00 p.m. if its speech were less religious. [G4(¶13), N16, N18, P47, V1, H1-2, G6(¶18)]. The sole basis for excluding the Club was not the time of its meetings, but that the Club's speech was too religious. See RB at 16 (objecting to the "deeply Christian and religious nature of the presentation").[5]

**B. The Club Does Not Solicit Students While at Milford.**

For the first time in this litigation, Milford claims that the Club seeks access to school facilities to solicit students to join the Club. This is not true. There is no evidence whatsoever that petitioners have ever used school facilities at any time for the purpose of soliciting students to attend Club meetings. The only students attending Club meetings are those sent there by their parents. See JA at E2(¶6).

Milford mischaracterizes the record to infer that the Club must have been seeking to solicit students because "[w]hen the District Court issued the preliminary injunction allowing the Petitioners to use the school building for meetings, the enrollment in Good News rose from 8 children to 28, an increase of 250%." RB at 11. The record does not support Milford's inference. The initial application for the Club to use Milford's facilities in 1996 indicated that the Club's membership was 20, not 8. Lodging at W1. When petitioners

[5]An *amicus* suggests that Milford's counsel chose not litigate the issue of what time the forum opened. Such a statement lacks a basic understanding of the facts. If the facilities were closed to the community at 3:00 p.m., Milford could have told the Club it could not meet then. The concession that the forum was open at 3:00 p.m. was not an oversight, but a reflection of reality. Although Milford now for the first time alleges that the Cub Scouts use the facilities at 6:00 p.m. Milford does not now argue, imply, or suggest that the Daisy Scouts, the, and the 4-H club at 3:00 p.m. RB at 29.



moved for a preliminary injunction, Darleen Fournier testified that the membership of the Club was 28, not 8. Lodging at AA2(¶8). Contrary to respondent's assertion, the Club's membership did not increase 250% during the year and a half it met at the school.[6]

Respondent imputes to the Club a sinister motive to meet at the end of the school day. Respondent conveniently ignores the fact that prior to making any application to use Milford's facilities, the Club met for a year and a half at 3:30 p.m. in a different location. JA at L1(¶4), P92-3, X1. The children were bused after school from Milford to the meeting site. JA at L1(¶5), P93. The Club had **no** desire to use the school facilities at all until the busing was stopped. JA at L1(¶7), P92, P31.

Meeting at 3:00 p.m. is not designed to recruit children into the Club, but for the convenience of parents. JA at P100-01. In a society ever pressed for time, parents find it difficult to make multiple trips to and from a location. If the Club met at 6:00 p.m. parents would be forced into the unenviable and wearying task of repeatedly transporting children. The Good News Club, like the 4-H club, the Junior Girl Scouts and the Daisy Scouts, wanted to use Milford's facilities at the conclusion of the school day.

**C. The Record Does Not Support Milford's Claim that Elementary Students Remain After School to Participate in School-Sponsored Activities.**

Milford describes 3:00 p.m. as the "finish" and "conclusion of the school day." RB at 2, 14, 18. Milford also

[6] The fiquire "8 to 10" was a "guess" offered by Steve Fournier after he repeatedly testified he was not involved and did not know the membership of the Club when the meetings were held at the church. JA at P12, P92-3.

states that "students remain after school to participate in school-sponsored activities." RB at 6-7. There is not a scrap of evidence to be found in the record that any school-sponsored activities for grade school children occur after "the conclusion of the school day." Milford has offered no such proof. Milford never represented, in its stipulation of facts, in arguments or briefs to the District Court or the Second Circuit, or to this Court in its opposition to certiorari, that elementary school children participate in any school-sponsored activities after the conclusion of the school day.

### D. Room 119 is Not an Elementary Classroom.

Respondent artfully colors its statement of the facts to imply that Room 119 (where the Club met) is an elementary classroom. It is not. JA at N12. Room 119 is a combination high school resource room and junior high school special education room. Id.[7] It is fiction to suggest that elementary education was being conducted when the Club arrived to use the high school resource room.[8]

At Milford, just like countless other schools around the country, when the school bell rings to end the day, the elementary children make haste for the exits. Instead of racing to their buses, Good News Club members from various grades

[7] Milford, not the Club, chose Room 119 for the Club meetings. The Club had requested the cafeteria. W1; JA at O11 (District Court ordered Milford to allow Club to use "cafeteria pending the final resolution of this case").

[8] Respondent states that the Club had to wait until "**students**" vacated Room 119 before the Club meeting started. RB at 6. The record does not support that assertion. Steve Fournier testified that he had to wait for "people" (not students) to leave the resource room before the Club meeting started. JA at P29.



walk through the halls of Milford Central to a high school resource room for their Club meetings.[9]

Respondent and its amici also assert that Club meetings are conducted like a class. They are not. The Club is a fun time with children from different age groups and grade levels. AA2(¶9). Moreover, children during a Club meeting are free not to participate in an activity and children at times actually do choose to abstain. JA at P21. Presumably students at Milford are not at liberty to choose in which part of a school class they will participate. Further, there is nothing in the record that the Club gives homework assignments. The record does not support the notion that Club meetings mimic a school classroom.

## III. MILFORD HAS THE BURDEN OF PROOF.

Milford had the burden of proving a sufficiently compelling state interest to justify censorship of the Club's speech from its extremely broad "limited" public forum. "When First Amendment compliance is the point to be proved, the risk of non-persuasion--operative in all trials--must rest with the Government, not with the citizen. When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entertainment Group*, 120 S. Ct. 1878, 1888 (2000). *See Greater New Orleans Broadcasting Ass'n., Inc.* v. *United States*, 527 U.S. 173, 183 (1999) (State bears burden of justifying its restrictions on speech).

Milford raised the Establishment Clause as a defense in its answer to petitioners' complaint. JA at D4. Respondent built

[9] One of respondent's amici asserted that students are escorted by their teachers to Club meetings. There is absolutely nothing in the record remotely suggesting that a teacher ever escorted a student to Club meetings.

its record and evidence during the almost two years of litigation in District Court that involved extensive discovery. Upon completion of discovery, the parties cross-moved for summary judgment, stipulated to the facts and waived a trial. JA at B7-10. Milford had the responsibility to identify all material facts supporting any affirmative Establishment Clause defense it wished to raise in opposition to the Club's motion for summary judgment. See *Playboy*, 120 S. Ct. at 1892-93. See also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986) ("Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"); *id.* at 323-24 ("one of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses").

Milford has not met its burden to show a compelling state interest in censoring the Club's speech from its extremely broad "limited" public forum. Milford and its *amici* have imagined and created facts not in the record to prop up a newly adopted Establishment Clause theory. Any case on appeal could be made stronger or changed to fit a new legal theory with "would of," "should of," and "could of." That, however, is not our system. As discussed below, respondent has not met its burden and has demonstrated neither that the Establishment Clause requires censorship of the Club's speech nor that censorship is the least restrictive means to comply with an alleged Establishment Clause violation.

## IV. MILFORD HAS NOT DEMONSTRATED THAT THE ESTABLISHMENT CLAUSE REQUIRES CENSORSHIP OF THE CLUB'S SPEECH.

Milford's theory that the Establishment Clause requires it to censor completely the Club's speech from its facilities has



radical implications. Milford urges the Court to reverse the long held proposition "that the Establishment Clause [does not] justif[y], much less require[], a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Rosenberger*, 515 U.S. at 839. Milford urges that the Establishment Clause, which was crafted to defend the rights of the religious from exclusion from the community, be used as a weapon to exclude religious speakers from participation in a community forum. Milford urges that a child's potential mistaken perception of government endorsement mandates government censorship of constitutionally protected speech. In sum, Milford urges that the endorsement test, a delicate tool forged to promote inclusiveness, communication, and education, be converted into a blunt instrument for exclusion, censorship, and ignorance. Petitioners urge the Court to reject such a radical and unprecedented interpretation of the Establishment Clause and the endorsement test.[10]

### A.

"The Establishment Clause prohibits government from appearing to take a position on questions of religious beliefs or from making adherence to religion relevant in any way to a person's standing in the political community." *Capitol Square Review Board v. Pinette*, 515 U.S. 753, 783 (1995) (internal quotation marks and citation omitted) (O'Connor, J., concurring). Based on this principle, Justice O'Connor has defined the observer under the endorsement test in the following manner:

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[10] *See generally* Brief of Douglas Laycock at 2, 9-11. Professor Laycock observes that the Court "has *never* held, in *any* context, that government may or must discriminate against a private speaker based on the religious content of his speech." *Id.* at 2-3 (emphasis in original).

> Because our concern is with the political community writ large, the endorsement inquiry is *not about the perception of particular individuals* or saving isolated adherents from discomfort. ... It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech] takes places.

*Id.*, at 779-80 (emphasis added).

A reasonable observer (aware of the history and context of the Milford forum and the community) would know that when the school bell rings at 2:56 p.m., school is over and the children are dismissed. RB at 2,14. A reasonable observer would know that the Milford school board has decided voluntarily to open the doors of its facilities to private community groups on a neutral basis at the "conclusion of the school day," (Pet. Appx. D), that private youth groups are allowed to use Milford's facilities "to influence the spiritual development of children," (JA at N10-11, O8, Pet. Appx. E4(¶23), Lodging at Y1,2(¶4),3), that a number of private community youth groups actually use the facilities "to promote the moral and character development of children," (JA at O6,8, Brief of Milford (2nd Cir.) at 9, Pet. Appx. E4(¶ 21-3), Lodging at Y1,2(¶ 4),3 Z1-3, AA3(¶ 17),5), and that other youth groups would be permitted to use the facilities upon request (JA at O8, Brief of Milford (2nd Cir.) at 9). A reasonable observer would also know that Milford's community use policy opens its forum for "the purpose of instruction in any branch of education, learning or the arts," and "for holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community." Pet. Appx. D. A reasonable observer would know that Milford has an application process and that the Club went through the process without the benefit of any preferential treatment. JA at P94-7, Lodging at W1.



A reasonable observer would know that just like countless other schools around the country, when the school bell rings to end the day, the elementary children make haste to the bus home and that, instead of racing to their bus, Club members go to a high school resource room (not an elementary classroom) for their meeting. JA at N12. A reasonable observer would know that neither teachers nor administrators in any way promote, publicize, distribute information about, or otherwise are involved in aiding or assisting the Club. JA at L2(¶9-10). A reasonable observer would know that because of the time and the location of the meeting (behind closed doors of a high school resource room), it is no more than a remote possibility that any other elementary students would see or hear what occurs in the Club. JA at O10. A reasonable observer would know that the Club is open to any child, children are not asked about their faith, and that children with no church background attend the Club meeting, (JA at P19-20), that the Club members are of various grade levels, (JA at P19), that Club members are free not to participate in an activity, (JA at P20), and some members actually do choose to abstain, (JA at P21), and that children can attend the Club ***only*** with the written permission of their parents. Pet. Appx E2(¶6). A reasonable observer would know that out of the approximately 450 secondary students at Milford, only about 28 students attend the Club, (Lodging at AA2(¶8)), and that the only children attending the Good News Club meetings are those sent there by their parents. Pet. Appx E2(¶6). A reasonable observer would know that no Milford employee is involved with the Club. JA at L2(¶9-¶10). A reasonable observer would know that at the end of the Club meeting children are brought home by their parents and not by a Milford bus. JA at P30. A reasonable observer would know that parents who do not subscribe to the Club's message have the opportunity to establish their own clubs after school and that petitioner Andrea Fournier (and other similarly situated children) stay after school for the other

youth groups like the 4-H Club, Junior Girl Scouts, and Daisy Scouts meetings. JA at O8, Pet Appx. D.

With such knowledge of the facts and circumstances, a reasonable observer would not view the Club's inclusion in Milford's limited public forum as "making adherence to religion relevant in any way to a person's standing in the political community." *Capitol Square*, 515 U.S at 783. A reasonable observer would not infer that Milford endorses the Club's message, but "rather the endorsement of the religious message is reasonably attributed to the individuals who select the [religious] path." *See Mitchell v. Helms*, 120 S. Ct. 2530, 2559 (2000) (O'Connor, J., concurring).

Most importantly, a reasonable observer would know that Milford expressly discriminates against religion. Milford's policy simply and starkly states that "School premises shall not be used by any individual or organization for religious purposes." Pet Appx. D2. Such discriminatory exclusion of the Club from Milford's public forum, and not the inclusion of the Club, would violate the Establishment Clause. "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion." *Board of Ed. of Kiryas Joel School Dist. v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J. concurring in part and concurring in judgment). By discriminatorily excluding the Club, Milford would be telling parents who want their children to hear the Club's religious perspective "that they are outsiders and less than full members of the political community." *Capitol Square*, 515 U.S. at 773 (internal quotation marks and citation omitted) (O'Connor, J., concurring).

This message of exclusion is not hypothetical, but one that Milford's school board president, Jim Haverner, actually conveyed to Darleen Fournier. Mr. Haverner, in his official capacity, approached Darleen and suggested that the Club



could use a location other than the school. JA at P99-100. He suggested that the "Christian" children leave the school and walk a short distance to the historical society building called the Zayre House. JA at P100. Under Milford's proposal, Good News Club members would assemble *outside* the school while members of the 4-H Club, Daisy Scouts, and Cub Scouts assemble *inside* the school. Club members would then march single file from the schoolhouse steps down the street to the historical society in full public view.

The school board president's message to Darleen was clear: you are welcomed as an activity leader for the 4-H club,[11] but unwelcome as the leader of the Good News Club. What conclusion would a reasonable observer draw under these circumstances about the relevance of Darleen's religion to her standing in the community? No doubt one similar to Ms. Fournier:

> [The proposal was unacceptable because] it reminded me of being in the 60s when black children were told that they could use a different black bathroom and they could sit in a different place on the bus, and that because of our message, being from a Christian perspective, that we were not welcome here. JA at P100.

Milford will send a message to the community by its actions -- either one of tolerance, inclusion, and neutrality, or one of intolerance, exclusion, and bias. The message Milford is proposing to send Andrea Fournier (and other little girls like her) is that if she wears her Daisy Scout uniform, then she is accepted and welcomed by the community, but when she wears her Good News Club "uniform," she would be rejected by and segregated from the community. That is a powerful message, especially for children.

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[11] Darleen is the activity leader of the 4-H Club. Lodging at AA3.

## B.

Milford argues that the relevant observer under the endorsement test is a hypothetical child. Predicating an endorsement argument upon a hypothetical child's potential misperception cannot be reconciled with the attributes with which the case law has endowed the reasonable observer.[12]

Even if a hypothetical child observer were the reasonable observer, Milford assumes, but does not offer any evidence, that primary school children cannot distinguish between a private group's after school speech and a teacher's classroom speech. See Brief of Laycock at 25-30 (explaining why the claim that primary students cannot understand that the Club's speech is independent of the school is dubious).

Moreover, it would take an incredible set of imagined circumstances for a hypothetical child to misperceive Milford's community use policy as an endorsement of religion. First, the hypothetical child would not have gone home at the end of the school day, but instead would wander through the school, and during that journey happen to walk by the high school resource room, pause outside the door, happen to hear a part of the Club meeting and interpret that as "religious instruction." Moreover, the hypothetical child would have to be unaware of Milford's extremely broad and inclusive community use policy and wrongly conclude for some inexplicable reason that Milford excludes non-adherents of the Club's message from

[12] The brief of Child Evangelism Fellowship (p.11-19), and the brief of Liberty Legal Institute discuss in detail why under this Court's precedents a reasonable observer under the endorsement test is not a child. Moreover, the Court has not hinged the constitutionality of government aid to private school upon the age of the student. Whether a 6-12 child might misinterpret the significance of government interpreters (*Zoberst*), computers (*Mitchell*), or remedial assistance (*Agostini*) did not factor in the Court's analysis.



using the school on an equal basis or pressures non-adherents to attend Club meetings.

Respondent had ample opportunity to present evidence to support its position, but failed to do so. As respondent correctly notes, Milford "had the rather unique circumstance, as presented by the record, of petitioners being permitted to use the school under the District Court's preliminary order [for a year and a half]." RB at 16. Yet even given these unique circumstances, respondent presented no evidence that any child was confused that Club meetings were not part of the school day. Respondent presented no evidence of any complaint arising from the Club's use. Respondent presented no evidence to contradict the District Court's finding that children who do not attend the Club are unlikely to hear or see a Club meeting. (O10). See *Capitol Square*, 515 U.S. at 811 (Stevens, J., dissenting) (noting that while a religious symbol visually displayed represents an image of endorsement, access to government facilities for "the religious practices" involved in *Widmar* and *Lamb's Chapel* "were simply less obtrusive, and less likely to send a message of endorsement").

This case involves an independent community group not promoted by the school. The group meets at a time and in a place where the meeting is unlikely to be seen or heard by other students. Thus, this is a significantly easier case than the school sanctioned religious club that this Court found constitutional in *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). In *Mergens*, after school clubs were "a vital part of the total education program."[13] *Id.* at 231. Furthermore, the school in *Mergens* gave official recognition to and incorporated student clubs into

[13] The Daisy Scouts, Cub Scouts and the 4-H club are not "a vital part of [Milford's] education program" – they are no part of Milford's education program.

official channels of communication such as "the school newspaper, [school] bulletin boards, the [school] public address system, and the annual Club Fair." *Id.* at 247. Despite school-sponsored clubs being "an integral part of [the school's] educational mission," this Court held it was not difficult for students to understand that the government does not endorse everything that is spoken on school grounds. *Id.* at 250 (plurality).

The truth is Milford does not endorse, promote, or encourage the Club's speech. But because false perceptions are possible, Milford claims it must expel Andrea Fournier and the Good News Club members from its facilities. Such a radical proposition ignores one of the Establishment Clause's most fundamental paradigms, that withholding equal access to religious speakers "would leave an impermissible perception that religious activities are disfavored." *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring).

## V. MILFORD HAS NOT DEMONSTRATED THAT CENSORSHIP IS THE LEAST RESTRICTIVE MEANS TO COMPLY WITH ALLEGED ESTABLISHMENT CLAUSE CONCERNS.

Even if the Establishment Clause somehow provided Milford with a compelling state interest (which it does not), Milford still has yet to show that a total ban of the Club from Milford's public forum would be the least restrictive means to comply with the Establishment Clause. *Cf. Playboy*, 120 S. CT. at 1888 (where government seeks to regulate constitutionally protected free speech, least restrictive means must be applied). In this case, as in *Capitol Square*, "a flat denial of the . . . application was not the [government's] only option to protect against an appearance of endorsement." 515 U.S. at 793 (Souter, J., concurring).



Milford takes the extreme position that only total exclusion of the Club from its facilities will satisfy the Establishment Clause. Milford urges that the endorsement test, a delicate tool forged to promote inclusiveness, communication, and education, be converted into a blunt instrument that imposes exclusion, censorship, and ignorance. In essence, Milford argues that censoring free speech is the only remedy to protect against the potential mistaken impression that the government favors religion.

Milford's theory is that the protections afforded the people under the First Amendment are in conflict with one another – and this Court must prefer Establishment Clause over the Free speech Clause. Judge Easterbrook of the Seventh Circuit, addressing a school district's ban on the distribution of "proselytizing materials" by junior high students, offered an analysis that is pertinent here:

> School districts seeking the easy way out try to suppress private speech. Then they need not cope with the misconception that whatever speech the school permits, it espouses. Dealing with misunderstandings – here, educating the students in the meaning of the Constitution and the distinction between private speech and public endorsement — is, however, what schools are for. . . . Yet [the school district] proposes to throw up its hands, declaring that because misconceptions are possible it may silence its pupils, that the best defense against misunderstanding is censorship. What a lesson [the school district] proposes to teach its students! Far better to teach them about the first amendment, about the difference between private and public action, about why we tolerate divergent views. . . . If pupils do not comprehend so simple a lesson, then one wonders whether [the school district] can teach anything at all. Free Speech, free exercise, and the ban on establishment

> are quite compatible when the government remains neutral and educates the public about the reasons.

*Hedges*, 9 F.3d at 1299-1300.

Any fear that Milford has that the public may perceive that it is endorsing the Club's speech can be met with education rather than censorship. More speech has always been the First Amendment's solution to misunderstanding. More speech, not less, should be the solution to this case as well.

## CONCLUSION

For the reasons argued above, and those expressed in Petitioners' Brief on the merits, the Good News Club, Andrea Fournier, and Darleen Fournier request that this Court reverse the judgment of the Second Circuit with instruction to grant Petitioners the relief they requested in the District Court.

Respectfully Submitted,

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