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**

BRIEF OF LIBERTY COUNSEL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*

Liberty Counsel is a non-profit civil liberties education and legal defense organization.[1] Liberty Counsel provides education and legal representation regarding the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment to the United States Constitution. Attorney Mathew D. Staver and Liberty Counsel have been actively engaged in defending the right of equal access to public fora throughout the nation.

Liberty counsel defends the right of equal access to public fora. Liberty Counsel is very concerned about the Second Circuit's treatment of the public forum doctrine. Allowing the Second Circuit's public forum doctrine to go unabated by this Court will cause grave harm to the public forum doctrine. Today the disfavored speech in the Second Circuit is religious. Tomorrow the disfavored speech may include a much broader category.

Liberty Counsel defends the right of all people to have equal access to public fora, and believes that if a subject matter is banned from the fora, the government must show a compelling interest of the highest order, which interest must be achieved in the least restrictive means available.

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[1] Liberty Counsel files this brief with the consent of all parties. The letters granting consent are on file with this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

The Supreme Court has created the public forum doctrine to determine when regulations or restrictions on speech violate the First and Fourteenth Amendments of the United States Constitution. The public forum doctrine recognizes three types of fora: (1) the traditional public forum, (2) the designated public forum, and (3) the non-public forum. A traditional public forum is a place that has historically been used for communicative activity. Traditional public fora include public streets, parks, and sidewalks. Any regulation on the content of speech in a traditional public forum must be necessary to serve a compelling governmental interest and narrowly drawn to achieve that interest. If the regulation is content-neutral, the government may impose reasonable time, place and manner regulations if they are narrowly tailored to serve a significant government interest and if they leave ample alternative channels of communication open.

A designated public forum is a place where, by designation, the state has created a generally open forum for expressive activity. Any regulation on the content of speech in a designated public forum must be necessary to serve a compelling governmental interest and narrowly drawn to achieve that interest. If the regulation is content-neutral, the government may impose reasonable time, place and manner regulations if they are narrowly tailored to serve a significant government interest and if they leave ample alternative channels of communication open. The test applied to a designated public forum is identical to the test applied to a traditional public forum. The difference between the two fora is that the government may close the designated public forum.

A nonpublic forum is a place that is neither traditionally held out to the public, nor designated by the government, to be used for communicative activity. Examples of nonpublic fora

include, but are not limited to, international airports and telephone poles. Any regulation on the content of speech in a nonpublic forum must be reasonable in light of the purpose served by the forum and viewpoint neutral.

The Second Circuit has abandoned the public forum doctrine created by the United States Supreme Court in two ways. First, while the Second Circuit recognizes the three forums created by this Court, the Circuit has created a new sub-category under the designated public forum, which the Circuit refers to as a limited public forum. Second, the Circuit changed the standard of review for content-based restrictions in the designated public forum. The Second Circuit applies a reasonableness standard to restrictions on the content of speech in a designated public forum, and to content-based restrictions under the "sub-category" forum called a limited public forum. By applying a reasonableness standard instead of a strict scrutiny standard, the Second Circuit has allowed a state actor to escape the constitutional restrictions on content-based restrictions. The state can now do an end-run around the Constitution and discriminate against certain groups or ideas under the guise of a "limited" public forum.

The proper constitutional framework for the public forum doctrine should include the three classifications of public fora as created by this Court. There are three classifications of public fora: (1) a traditional public forum, (2) a designated public forum, and (3) a nonpublic forum. Traditional public fora include streets, parks and places that by long tradition have been devoted to assembly and debate. Restrictions of speech in a traditional fora must be narrowly drawn to achieve a compelling state interest. In addition, reasonable time, place and manner regulations are permissible if they are narrowly tailored to serve a significant government interest and if they leave ample alternative channels of communication open.

A designated public forum consists of public property which the state has generally opened, either by policy or practice, for the public as a place for expressive activity or indiscriminate use. A state may not enforce content-based exclusions from a designated public forum unless the restrictions serve a compelling state interest and are narrowly drawn to achieve that interest. A designated public forum may be created for a limited purpose such as use by certain groups or for the discussion of certain subjects. However, subject matter restrictions must survive a strict scrutiny test. Reasonable time, place and manner regulations are permissible if they are narrowly tailored to serve a significant government interest and if they leave ample alternative channels of communication open.

A nonpublic forum is government property that has not been opened for public speech either by tradition or by designation. Any content-based restriction must be reasonable in light of the purpose served by the forum and viewpoint neutral.

ARGUMENT

I.

APPLYING A REASONABLENESS STANDARD TO EVALUATE THE EXCLUSION OF A SUBJECT MATTER FROM A GENERALLY OPEN FORUM WOULD UNDERMINE THE SUPREME COURT'S PUBLIC FORUM DOCTRINE.

The Supreme Court utilizes the public forum doctrine in determining when regulations excluding speech on state property violate the First and Fourteenth Amendments of the United States Constitution. There are two guiding principles behind the Supreme Court's public forum doctrine. First, the government must not discriminate against speech based on the

substantive content of that speech. "It is axiomatic that the government may not regulate speech based on its substantive content of the message it conveys." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-643 (1994) (stating that discrimination against speech because of its message is presumed to be unconstitutional). This principle of non-discrimination should be the predominate concept behind the public forum doctrine. As Judge Jacobs said in his dissent below, "Even if one could not say whether the Club's message conveyed religious content or religious viewpoints on otherwise-permissible content, we should err on the side of free speech. The concerns supporting free speech greatly outweigh those supporting regulation of the limited public forum." *Good News Club v. Milford Central School*, 202 F.3d 502, 515 (2nd Cir. 2000).

The second principle guiding the Supreme Court's public forum jurisprudence (outside the traditional public forum) is that the government, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated. *See Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985). This Court's public forum doctrine incorporates these two principles in determining if restrictions on the content of speech are unconstitutional. The public forum doctrine should not, however, be used to allow the state to make an end-run around the Constitution by discriminating against any group based on the content of speech. The principle that the government may legally preserve the property under its control for its dedicated use should be applied cautiously. It should only be used to the extent it allows the government to properly manage its property, in a manner similar to a business, according to the purpose for which the property was dedicated. However, allowing government to manage its property does not mean the government has a license to engage in content-based discrimination.

In determining whether a regulation of speech by a state actor on property owned by the government violates the First and Fourteenth Amendments, the first inquiry is to determine the type of forum subject to the regulation.

The Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum. *See Cornelius*, 473 U.S. at 800.

This Court has recognized three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum. *Id.* at 802.

A.

The Traditional Public Forum.

Traditional public fora are places "which by long tradition or by government fiat have been devoted to assembly and debate," and where "the rights of the state to limit expressive activity are sharply circumscribed." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1982). Traditional public fora include streets, sidewalks and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939); *see also Perry Educ. Ass'n*, 460 U.S. at 45.

In order to regulate the content of speech in a traditional public forum, the regulation must pass strict scrutiny. "Because

a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Perry Educ. Ass'n.*, 460 U.S. at 45; *see also Carey v. Brown*, 447 U.S. 455, 461 (1980) ("For the state to enforce a content-based exclusion [in a traditional public forum] it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.") The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, if the regulation is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication. *See Perry Educ. Ass'n.*, 460 U.S. at 45; *see also United States Postal Service v. Council of Greenburgh*, 453 U.S. 114, 132 (1981).

B.

The Designated Public Forum.

The designated public forum is the second type of forum under this Court's public forum doctrine. In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects. *See Perry Educ. Ass'n.*, 460 U.S. at 45-46, n. 7; *Widmar v. Vincent*, 454 U.S. 263 (1981); *City of Madison Joint Sch. Dist. v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167 (1976). A designated public forum consists of public property which the government has opened for use by the public as a place for expressive activity. The Constitution requires exclusions from a forum *generally* open to the public to survive a strict scrutiny test even if the government was not required to create the forum in the first place. *See Perry Educ. Ass'n.*, 460

U.S. at 45-46.

While the state is not required to keep open a designated forum, the state may only discriminate against the content of speech in a designated public forum if the restriction is necessary to serve a compelling state interest and is narrowly drawn to achieve that interest (the same test applied to content restrictions in a traditional public forum). *Id*; *see also Widmar*, 454 U.S. at 269-270 ("Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.") Reasonable time, place and manner regulations are permissible if they are narrowly tailored to serve a significant government interest and if they leave ample alternative channels of communication open. *See Perry Educ. Ass'n.*, 460 U.S. at 45-46.

A central inquiry into designated public fora that this Court has not yet fully addressed involves the bounds and limits of a designated public forum. In other words, how open does a forum have to be before it is considered a designated public forum? In *Lamb's Chapel v. Center Moriches Union Free School District*, the church argued, in essence, that because the school district had opened the doors to its facilities so wide, that it had created a designated public forum so that "restrictions on communicative uses of the property were subject to the same constitutional limitations as restrictions in traditional public forums such as parks and sidewalks." 508 U.S. 384, 391 (1993). While recognizing that the church's argument had considerable force, the Court concluded that it need not decide the issue in that case. *See Id.* at 391-92. Instead, the Court held that the school district engaged in unconstitutional viewpoint discrimination as it denied the church access to school property solely on the basis that it did not want a Christian viewpoint to be presented. *See Id.* at 392.

This Court has hinted at standards to be used in determining whether a designated public forum had been created. The government creates a designated public forum by intentionally opening a nontraditional forum for public discourse. *See Cornelius*, 473 U.S. at 802. This Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. *See Perry Educ. Ass'n.*, 460 U.S. at 47. In addition, this Court has examined the nature of property and its compatibility with expressive activity to determine the government's intent. In *Widmar*, this Court found that a state university with an express policy of making its meeting facilities available to registered student groups had created a public forum for their use. *See Widmar*, 454 U.S. at 267. The Court noted that the university's policy evidenced a clear intent to create a public forum. *See Id.* Also important to the Court's analysis was that a university campus, at least as to its students, possessed many of the characteristics of a traditional public forum. *See Id.* at 267 n. 5. Finally, this Court will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will it infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity. *See Cornelius*, 473 U.S. at 788.

Courts have often confused the "designated" and the "limited" forums and have used those terms interchangeably. For example, in *Perry*, this Court, while describing the second classification of fora subject to strict scrutiny, stated, "a public forum may be created for a *limited* purpose such as use by certain groups or for the discussion of certain subjects." *Perry Educ. Ass'n*, 460 U.S. at 46 n.7 (emphasis added). In *Lamb's Chapel*, this Court, in describing the holding of the Second Circuit, stated, "It held that the school property, when not in use for school purposes, was neither a traditional nor a designated public forum; rather, it was a *limited* public forum open only for

designated purposes." *Lamb's Chapel*, 508 U.S. at 390 (emphasis added). The confusion usually arises when the courts suggest that the government may *limit* the *designated* public forum for its intended use. The confusion is magnified in the Second Circuit where they have combined the limited and the designated forum into one category. *See Bronx Household of Faith v. Community School Dist. # 10*, 127 F.3d 207 (2nd Cir. 1997), *cert. denied*, 523 U.S.1074 (1998) (referring to the second category of fora as "the designated public forum, sometimes called the 'limited public forum.")

C.

The Nonpublic Forum.

The third forum in the public forum doctrine is the nonpublic forum. This Court has recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service*, 453 U.S. at 129. Public property which is not by tradition or designation a forum for public communication is a nonpublic forum, governed by different standards. *See id.* "The State, no less than a private owner or property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.*

In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because of the speaker's view. *See id.*; *Perry Educ. Ass'n.*, 460 U.S. at 49. ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.") Consequently, this Court has stated that a speaker may be excluded from a

nonpublic forum if the speaker wishes to address a topic not encompassed within the purpose of the forum. *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974).

The nonpublic forum, however, should not be used to provide an end-run around the public forum doctrine. Following the lead of the Second Circuit, the Fifth and Tenth Circuits have essentially replaced the designated forum with the nonpublic forum, and thus changed the standard of review for any speech restriction in a designated public forum. *See Campbell v. St. Tammany Parish School Board*, 2000 WL 1597749 (5th Cir.); *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997); *Bronx Household of Faith*, 127 F.3d at 207. The Second Circuit has upset the designated public forum by applying a reasonableness standard to any content based restriction in a designated public forum.

For example, in *Good News Club*, the school opened its facilities to use by the general public "for holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community." 202 F.3d at 504. Access was limited in that the facilities were not permitted to be used by any individual or organization for religious purposes. *See id.* In essence, the school was "generally" open to the public, except if such use had a religious purpose. The Second Circuit approved this speech restriction, claiming that the school had created a limited public forum, and applied a reasonableness test to the restriction. *See id.* at 509.

A review of Supreme Court cases which defined the boundaries and parameters of the nonpublic forum illustrate the narrow application that should accompany this forum. In *Perry*, a union and its members brought suit challenging a provision of a collective bargaining agreement between a school district and the exclusive bargaining representative that granted the bargaining representative exclusive access to teacher mailboxes

and the interschool mail system to the exclusion of rival unions. *See Perry Educ. Ass'n*, 460 U.S. at 37. This Court held that public property which is not by tradition or designation a forum for public communication may be reserved by the state for its intended purposes, communicative or otherwise, as long as regulation on speech is reasonable and not an effort to suppress expression merely because the public officials opposed the speaker's views. *Id.* at 55.

Perry was decided under a nonpublic forum category. The Court held that the "normal and intended function of the school mail facilities is to facilitate internal communication of school related matters to teachers." *Id.* at 46. The internal mail system was not held open to the general public. This Court held that the school district mailboxes were a nonpublic forum, and consequently applied a reasonableness test in denying the request to have access to the mail system. *Id.*

This Court addressed the issue of nonpublic fora two years later in *Cornelius*. *See* 473 U.S. at 788. In *Cornelius*, a legal defense fund ("Fund") was denied access to the Combined Federal Campaign ("CFC"), a charity drive aimed at federal employees and military personnel. The Fund sued, claiming that its exclusion from the fund raising campaign violated the First Amendment right to free speech. This Court held that the government does not violate the First Amendment in a nonpublic forum when it limits participation in a charity drive aimed at federal employees in order to minimize disruption of the federal workplace, to ensure the success of the fund raising effort or to avoid the appearance of political favoritism without regard to the viewpoint of the excluded groups. *See id.* at 808. The case, however, was remanded to determine whether the Fund's exclusion was due to viewpoint discrimination.

In reaching its holding, the Court applied a public forum analysis. The Court recognized the three classifications of fora:

(1) a traditional public forum, (2) a designated public forum, and (3) a nonpublic forum. *See id.* at 799. This Court stated that the first two categories required the government to pass a strict scrutiny test in order to regulate the content of speech in those forums. The third category, a nonpublic forum, required a more lenient test. In this category, access can be restricted as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view. *See id.* at 805. This Court held that the fund raising campaign was a nonpublic forum, and consequently applied the reasonableness standard. It is important to note that this case cites to *Perry* where this Court stated that in a designated public fora, the state can place regulations on the identity of the speaker and the subject matter if the regulations pass a strict scrutiny review. *See id.* at 799 (*citing Perry Educ. Ass'n.*, 460 U.S. at 46) ("A public forum may be created for a limited purpose such as use by certain groups or for the discussion of certain subjects."). Again, the forum in question was a fund-raising campaign that was only open to certain groups. The forum in question was not a forum that was generally open to the public.

In *Lamb's Chapel*, a church brought suit alleging that a school district violated its constitutional rights by refusing the church's request to use school facilities for a religious oriented film series on family values and child rearing. *See* 508 U.S. at 384. The Court held that the school district violated the free speech clause of the First Amendment by denying the church access to the school premises solely because the film dealt with the subject from a religious standpoint. *See id.*

While the prior "forum" cases clearly discussed this issue within the three distinct public fora , i.e., traditional, designated and nonpublic, the Court in *Lamb's Chapel* decided not to classify the forum because the case clearly involved viewpoint discrimination (which is always unconstitutional irrespective of

the forum). In other words, even assuming that the forum was a nonpublic forum, the restrictions could not survive because they were not viewpoint neutral. *See id.* at 392-93.

Finally, in *Rosenberger*, a university student organization which published a newspaper with a Christian editorial viewpoint brought suit against the university challenging its denial of funds from a fund created by the university to make payments to outside contractors for printing costs of publications of student groups. *See* 515 U.S. at 819. This Supreme held that the denial of funding amounted to viewpoint discrimination. *See id.* at 835. This Court, in applying the nonpublic forum standard to the decision to exclude the religious paper, held that the denial of funding amounted to viewpoint discrimination and thus unconstitutional. *See id.*

In summary, this Court has never declared that a public facility that is generally opened to the public, similar to the forum opened by Milford Central School, is a nonpublic forum, or a even a limited forum, subject to a reasonableness review. Some instances of a nonpublic forum which this Court has addressed include a post office, a school mail room, a military base, airports, utility poles, and transportation facilities. *See e.g., id.*; *ISKCON v. Lee*, 505 U.S. 672 (1992); *Bd. of Airport Comm's of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987); *Cornelius*, 473 U.S. at 788; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Perry Educ. Ass'n.*, 460 U.S. at 37; *United States Postal Service.*, 453 U.S. at 114 *Greer v. Spock*, 424 U.S. 828 (1976); *Adderley v. Florida*, 385 U.S. 39 (1966). These nonpublic fora were not generally open to the public for expressive activity. However, the fora in Milford Central School has been opened to the community for various forms of expression. The forum in the Milford Central School is clearly a designated public forum. Subject matter exclusions from this forum must survive strict scrutiny.

II.

THE DEVELOPMENT OF THE PUBLIC FORUM DOCTRINE BY THE SECOND CIRCUIT COURT OF APPEALS.

While the Second Circuit claims to follow this Court's public forum doctrine, the Circuit has significantly altered the doctrine. In essence, the Circuit has replaced a strict scrutiny standard with a reasonableness standard to content based restrictions in the second classification of forums, which the Second Circuit describes as "the designated public forum, sometimes called the 'limited public forum.'" *Bronx Household of Faith v. Community School Dist. # 10*, 127 F.3d 207 (2nd Cir. 1997), *cert. denied*, 523 U.S.1074 (1998). The limited public forum created by the Second Circuit looks like the designated public forum created by this Court, yet applies a reasonableness test to any speech restrictions in the limited public forum. According to the Second Circuit, the nature of restrictions on speech is based on "the nature of the forum in which the speech is delivered." *Id.* at 211. There are three general types of forums in this regard: (1) traditional public forums, (2) designated or limited public forums, and (3) nonpublic forums. *See id.*

The Second Circuit describes this Court's treatment of the public forum doctrine as follows:

> The Supreme Court has identified three types of forums: the traditional public forum; the designated public forum, sometimes called the "limited public forum"; and the nonpublic forum. . . . Limited public forums are "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain

> speakers, or for the discussion of certain subjects." But restrictions on access based on speaker identity and subject matter are permissible only if "the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Where the proposed use falls outside of the limited forum, "the State is subject to only minimal constitutional scrutiny." A nonpublic forum is government property that has not been opened for public speech either by tradition or by designation. In such a forum, the government may make "distinctions in access on the basis of subject matter and speaker identity."

Id. at 211 (citations omitted).

The Second Circuit has misread this Court's opinion concerning the public forum doctrine. In *Bronx Household of Faith*, the Second Circuit, in describing the limited public forum, quoted from *Cornelius*, stating that limited public forums are "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Bronx Household of Faith*, 127 F.3d at 211, *quoting Cornelius*, 473 U.S. at 802. The Second Circuit then stated that "restrictions on access based on speaker identity and subject matter are permissible if 'the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'" *Bronx Household of Faith*, 127 F.3d at 211, (*quoting Cornelius*, 473 U.S. at 806).

The Second Circuit erred, however, as the section of *Cornelius* that *Bronx Household of Faith* cites to refers to a designated public forum, and not a nonpublic forum. This is a critical distinction as this Court in *Cornelius* stated that "when

the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest." *Cornelius*, 473 U.S. at 800. In other words, the Second Circuit cited to *Cornelius* for support to apply a reasonableness standard to restrictions in the second forum classification, which the Second Circuit describes as designated or limited, while *Cornelius* actually requires a strict scrutiny standard.

The Second Circuit effectively has abolished the designated public forum by combining the designated public forum with the limited public forum and applying a reasonableness standard. Based on the public forum analysis applied by the Second Circuit, there is no difference between a "designated public forum, sometimes called the "limited public forum" and a "nonpublic forum." According to the Second Circuit, limited public fora are those that the government has *designated* as a "place . . . of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Bronx Household of Faith*, 127 F.3d at 211 (quotations omitted). According to the Second Circuit, N.Y. Education Law § 414 and policies promulgated thereunder create limited public fora. *See, e.g., Full Gospel Tabernacle v. Community Sch. Dist., 27*, 164 F.3d 829, 829 (2nd Cir. 1999) (per curiam), *aff'g* 979 F. Supp. 214, 220 (S.D.N.Y. 1997); *Bronx Household of Faith*, 127 F.3d at 215; *Deeper Life Christian Fellowship, Inc. v. Bd. of Educ.*, 852 F.2d 676, 680 (2nd Cir. 1988).

The Second Circuit has applied the same reasonableness standard, i.e., content based restrictions are permissible if they are reasonable in light of the purpose served by the forum and are viewpoint neutral, to the designated public forum, which the Circuit sometimes refers to as a the limited public forum. *See Bronx Household of Faith*, 127 F.3d at 211. The Second Circuit has misconstrued the proper standard to apply to restrictions in

a designated and limited public forum. The Second Circuit does not apply the strict scrutiny test, but rather a reasonableness test. In the Second Circuit, restrictions on speech in a limited public forum will withstand First Amendment challenge if they are reasonable and viewpoint neutral. *See Good News Club v. Milford Central School*, 202 F.3d 502 (2000); *Bronx Household of Faith*, 127 F.3d at 214. The Second Circuit applies strict scrutiny to content-based restrictions if the subject matter is permitted (which under the Supreme Court's precedent would be viewpoint) and reasonableness to exclude subject matter that is not permitted (where the Supreme Court precedent would apply strict scrutiny). The Second Circuit's approach to the public forum doctrine destroys the public forum.

A.

The Fifth Circuit Has Erroneously Adopted the Second Circuit's Forum Analysis.

The Second Circuit's approach is a cancer that is eating away at this Court's public forum doctrine. Now, this cancer has spread and is contaminating the public forum doctrine in other circuits. The Fifth Circuit has now joined the Second Circuit in misconstruing the public forum doctrine, and particularly, the appropriate standard of review for content based restrictions to a designated public forum. In *Campbell v. St. Tammany Parish School Board*, 2000 WL 1597749 (5th Cir.), a case similar to *Good News Club*, the plaintiff requested to use the school facilities to "worship the Lord in prayer and music" and to "pray about" and "engage in religious and Bible instruction with regard to" various issues. The school board denied the plaintiff's request, citing a school board policy that permitted its facilities to be used for "civic and recreational meetings and entertainment and other uses pertaining to the welfare of the community," but not for partisan political activity,

for-profit fund-raising, and "religious services or religious instruction." *Id.* at *1. The court stated:

> In sum, the record shows that St. Tammany schools were overwhelmingly used by groups for activity of interest to students or parents. Such a limited set of uses does not create a public forum, as the Supreme Court held in *Perry Education Association v. Perry Local Educators' Association* . . . St. Tammany's policy is supported by rational reasons sufficient to rebut any inference that its decision to exclude religious services was viewpoint discriminatory. Especially where, as here, the school district has affirmative evidence that its motive was not viewpoint discrimination, such reasons need only be rational. They need not be compelling.

Id. at 2-3.

In a holding similar to the Second Circuit's, the Fifth Circuit held that although the school board had created a forum that was open to the general public for uses pertaining to the welfare of the community, yet had specifically excluded any religious instruction, it had created a limited public forum subject only to a reasonableness standard. *Id.* 5.

Judge Jones, writing for the dissent of five judges to the denial of *en banc* review, recognized that the majority was recognizing the wrong forum and applying the wrong standard, stating "[w]ith due respect, the panel is looking through the wrong end of the telescope. Such a *narrow* view of the conditions under which a designated public forum can arise is incorrect." *Id.* at 6. Judge Jones stated that the approach taken by the majority "conflicts with the Supreme Court's equal access and viewpoint discrimination cases, decisions of five other

circuit courts, and previous Fifth Circuit cases." *Id.* at 6.

In the dissent, Judge Jones stated, "When public facilities are available for 'indiscriminate use by the general public', a designated public forum exists, and content-based exclusion of speakers must survive strict scrutiny review.'" *Id.* at 6. In determining whether a designated public forum had been created, "all that is required is that the forum be 'generally open' to the public." *Id.* "Once a forum is opened up to assembly or speaking by *some groups*, government may not prohibit others from assembling or speaking on the basis of what they intend to say." *Id.* The dissent concluded that "since the broad 'welfare of the community' standard and the actual use of the facilities, rather than the district's exclusion of three categories of speech, determine the type of forum" it was obvious that the school board had created a public forum subject to strict scrutiny review. *Id.* at 7.

B.

The Tenth Circuit Has Erroneously Adopted The Second Circuit's Forum Analysis.

The cancer that is eating away at the First Amendment has also spread to the Tenth Circuit. In *Summum v. Callaghan* 130 F.3d 906 (1997), a county denied a church's request to erect a religious monolith display near a Ten Commandments monolith located on the front lawn of the county courthouse. The Court adopted the Second Circuit's flawed public forum doctrine by recognizing a subcategory to the designated public forum, called a limited public forum, subject to a reasonableness standard. *Id.* at 915. By allowing for the circuits to create a new classification of fora, the limited public forum as a subset of the designated public forum, the stage is set for state actors to openly discriminate against religious expression while only having to comply with a reasonableness standard.

III.

THE PROPER CONSTITUTIONAL FRAMEWORK OF THE PUBLIC FORUM DOCTRINE.

This Court should maintain the three classifications of public fora, as described in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983). There are three classifications of public fora: (1) a traditional public forum, (2) a designated public forum, and (3) a nonpublic forum. Traditional public fora include streets, parks and places that "by long tradition ... have been devoted to assembly and debate." *Id.* at 45. Restrictions on speech in a traditional public forum are "subject to the highest scrutiny" and "survive only if they are narrowly drawn to achieve a compelling state interest." *ISKCON v. Lee*, 505 U.S. 672 (1992). In addition, reasonable time, place and manner regulations are permissible if they are narrowly tailored to serve a significant government interest and if they leave ample alternative channels of communication open. *See Perry Educ. Ass'n.*, 460 U.S. at 45-46.

A designated public forum consists of public property which the state has generally opened, either by policy or practice, for the general public as a place for expressive activity or indiscriminate use. Even though a state is not required to open a public forum, a state may not enforce content-based exclusions from a forum *generally* open to the public unless the restrictions serve a compelling state interest and is narrowly drawn to achieve that interest. A designated public forum may be created for a limited purpose such as use by certain groups or for the discussion of certain subjects. *See Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 806 (1985); *Widmar v. Vincent*, 454 U.S. 263 (1981); *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167 (1976). However, subject matter

exclusions must be subject to strict scrutiny. Reasonable time, place and manner regulations are permissible if they are narrowly tailored to serve a significant government interest and if they leave ample alternative channels of communication open. *See Perry Educ. Ass'n.*, 460 U.S. at 45-46.

A nonpublic forum is government property that has not been opened for public speech either by tradition or by designation. *See id.* at 46. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.* at 129. However, any restriction must be construed in light of the purpose to which the property was "lawfully dedicated." For example, if the property is *generally* open to the public for civic, recreational, and community welfare uses, then it is not a limited, nonpublic forum. In such a nonpublic forum, the government may make distinctions in access on the basis of subject matter and speaker identity only if the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. *Id.* at 49. For example, in *ISKCON v. Lee*, this Court held that an airport was a nonpublic forum and that any restrictions on access only had to be reasonable in light of the purpose of the forum and viewpoint neutral. *See* 505 U.S. at 672.

In determining whether a forum is a designated public forum or a nonpublic forum, the courts should not engage in a "counting" exercise. Just because a state has opened its facilities to only ten groups does not mean that the forum is nonpublic and limited. When a state has opened its facilities to nine out of ten subject matters, then the proper exercise for the courts is to determine if excluding the tenth subject matter is supported by a compelling governmental interest and narrowly tailored to achieve that interest. This is the only way to keep the vibrancy of the designated forum. This Court should not engage in counting the number of subject matters permitted to

determine whether the forum is a designated or nonpublic forum. To be "generally" opened to the public does not require a mathematical subject matter count.

By using the public forum doctrine adopted by the Second Circuit, state actors are allowed to make an end-run around the First Amendment, and are essentially given a green light to discriminate based on speech content. The state actor in the Second Circuit may open the use of its facilities to any subject matter, except the subject matter with which it disagrees. For example, in the present case, the Milford Central School has opened the use of its facilities to essentially any subject matter, except religion. New York law states that the district facilities may be used for "holding social, civic, and recreational meeting and entertainment events and other uses pertaining to the welfare of the community." However, "school premises shall not be used by any individual or organization for religious purposes." *See Good News Club*, 202 F.3d at 503-04. It is difficult to imagine a use that would not fit under the description of "pertaining to the welfare of the community." Consequently, by specifically omitting anything with a religious purpose, yet opening up its facilities to the general public for anything pertaining to the welfare of the community, Milford Central School has made an end-run around the Constitution and has discriminated against religious speech. By declaring that the forum created by Milford Central School District is a limited forum, the Second Circuit has essentially eliminated the designated public forum category.

Applying the proper constitutional framework to the case at hand results in the Milford Center School's exclusion of the Good News Club to be found unconstitutional. First, when Milford Central School opened its facilities to the general public for "uses pertaining to the welfare of the community", the forum had been "generally open" to the public, and a designated public forum was created. In order for the exclusion of the

Good News Club to be upheld, the exclusion must serve a compelling governmental interest and be the least restrictive means of accomplishing that interest. Milford Central School does not have a compelling interest to exclude the Good News Club. Their only possible interest is to avoid an Establishment Clause violation, which this Court has rejected as a valid reason to deny free speech rights to religious organizations. *See Rosenberger*, 515 U.S. at 839; *Capitol Square Review Advisory Bd. v. Pinette*, 515 U.S. 753, 762 (1995); *Lamb's Chapel*, 508 U.S. at 392; Even assuming that the state has a compelling interest to exclude the Good News Club (which it clearly does not), total exclusion of any group with a "religious purpose" is not the least restrictive means of achieving that interest. Consequently, the exclusion of the Good News Club violates the First and Fourteenth Amendments of the United States Constitution.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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