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 ON THE MERITS FOR PETITIONERS

Thomas Marcelle
Counsel of Record
71 Devonshire Drive
Slingerlands, NY 12159
Tel.: (518) 475-0806

John W. Whitehead
Steven H. Aden
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, VA 22901
(804) 978-3888
Counsel for Petitioners

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QUESTIONS PRESENTED

1. Whether a public school that permits speakers to use its facilities after school hours to instruct "in any branch of education, learning or the arts," to "benefit the welfare of the community," and to "promote the morals of children," but forbids speakers whose speech it deems to be too religious from using its facilities, engages in viewpoint discrimination in violation of the Free Speech Clause of the United States Constitution?

2. Whether a governmental official's determination whether speech is "a discussion of morals from a religious viewpoint" (which is deemed to be permissible speech) or is "religious instruction" (which is deemed to be impermissible speech) unconstitutionally entangles the state with religion in violation of the Establishment Clause of the United States Constitution?

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to this proceeding.

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BRIEF ON THE MERITS FOR PETITIONERS

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners The Good News Club, Andrea Fournier, and Darleen Fournier respectfully submit their Brief on the Merits to this Honorable Court. Petitioners seek reversal of the decision of the United States Court of Appeals for the Second Circuit in *Good News Club v. Milford Central School*, 202 F.3d 502 (2000), that Respondent may, without violating the First Amendment, open its facilities to the public for "the purpose of instruction in any branch of education, learning or the arts," but exclude members of the public who wish to engage in instruction "for religious purposes."

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, *The Good News Club v. Milford Central School*, is reported at 202 F.3d 502 (2nd Cir. 2000) and appears in Appendix A of the Petition for Writ of Certiorari. The opinion of the United States District Court for the Northern District of New York is reported at 21 F. Supp. 2d 147 (N.D.N.Y. 1998) and appears in Appendix C of the Petition for Writ of Certiorari.

JURISDICTION

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1254(1). Jurisdiction was had in the first instance pursuant to 28 U.S.C. §1331, insofar as Petitioners filed suit in the United States District Court for the Northern District of New York on March 7, 1997, alleging causes of action under 42 U.S.C. §1983. The District Court entered judgment against Petitioners on all claims on

October 23, 1998. Pet. Appx. at C1, C32-33. Petitioners filed timely Notice of Appeal to the Second Circuit Court of Appeals on October 30, 1998 pursuant to Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure. Joint Appendix ("J.A.") at B10 (Notice of Appeal docketed). The Second Circuit Court of Appeals filed its Judgment affirming the District Court on February 3, 2000. J.A. at A4. Petitioners' Petition for Rehearing was denied by Order dated March 21, 2000. J.A. at A4, Pet. Appx. B1. Petitioners timely filed their Petition for Writ of Certiorari on June 16, 2000, and certiorari was granted on October 10, 2000. The time for filing Petitioners' Brief on the Merits and Appendices was extended by this Court to November 30, 2000.

RELEVANT STATUTES AND REGULATIONS

UNITED STATES CONST. AMEND. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech ....

NEW YORK EDUCATION LAW § 414 (2000):

§ 414. Use of schoolhouse and grounds

1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all

portions thereof, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for such other public purposes as are herein provided; ....

* * * *

(a) For the purpose of instruction in any branch of education, learning or the arts.

* * * *

(c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community, but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.

Milford Community Use of School Facilities Policy:

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:

For the purpose of instruction in any branch of education, learning or the arts.

[Paragraph 2 is omitted]

> 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.
>
> [Paragraphs 4-7 are omitted]
>
> **Use for Nonreligious Purpose:** School premises shall not be used by any individual or organization for religious purposes.

Pet. Appx. D1-D3.

STATEMENT OF THE CASE

1. Milford's Community Use Policy.

Milford Central School ("Milford") is a public school district in a small upstate New York community, consisting of a single school building that houses all grades K-12. Milford has opened its facilities for after school hours use by private speakers after the close of the instructional day for a host of purposes, but has prohibited use to those speakers with "religious purposes." There is no dispute that Petitioners, The Good News Club, Darleen Fournier, its leader, and Andrea Fournier, a member of the club (collectively "the Club") are otherwise eligible users of Milford's school facilities, and that youth clubs may use school facilities after school hours for expressive activities. However, Milford denied Petitioners equal access to the after-hours use of its facilities solely because the Club had a religious purpose.

The question squarely presented herein is whether Milford may selectively bar the Club from access because the Club wanted to use the facilities for religious purposes, without violating the Free Speech Clause of the First Amendment.

Milford has adopted a formal policy that governs use of its facilities by community groups when not in use for school purposes. There are two sweeping provisions that are relevant to this case. The policy's first provision opens the school to community speakers on a broad spectrum of subjects. Speakers may use the school for "the purpose of instruction in any branch of education, learning or the arts." Pet. Appx. at D1. According to Milford's Superintendent, this provision would permit, for example, community groups to teach children moral values from literature like Aesop's Fables, J.A. at N11 (Plaintiffs' Ex. 10, Deposition Testimony of Superintendent Livshin), to teach that the world was created by God as literally described in the book of Genesis, J.A. at N11 (Livshin Testimony), and to teach the Bible as literature or history. J.A. at N18 (Livshin Testimony).

Milford's policy also opens its facilities for "social and civic meetings, entertainment events, and other uses pertaining to the welfare of the community." This includes after-hours use of its facilities by youth organizations to "promote the moral and character development of children." See Milford's Brief before the Second Circuit at p. 9. For example, The Boy Scouts use school facilities "to influence a boy's character development and spiritual growth." Lodging at Y1, ¶4, Y3 (Plaintiffs' Ex. 4, Affidavit of Randal Lamb). The Girl Scouts use school facilities "to inspire girls with the highest ideals of character, conduct, patriotism, and service...." Lodging at

Z1, ¶7, Z2 (Plaintiffs' Ex.5, Affidavit of Paula Kiser). The 4-H club uses the school for the purpose of "enabling youth to develop knowledge, skills, abilities, attitudes, and behaviors to be competent, caring adults." Lodging at AA1, ¶18, AA5 (Plaintiffs' Ex.6, Affidavit of Darleen Fournier).

Although Milford's community use policy appears to have thrown open the schoolhouse doors for after hours use by any speaker for virtually all topics relating to "learning" and the "welfare of the community," Milford imposes one barrier to entry – a speaker may not have a religious purpose. Milford's policy provides that "School premises shall not be used by any individual or organization for religious purposes." Pet. Appx. at D2.

2. Milford's Denial of Access to Petitioners.

On September 22, 1996, the Club requested use of the school cafeteria for the Club's after-school meetings. Lodging at AA1-AA2, ¶12 (Plaintiffs' Ex. 6, D. Fournier Affidavit). The request form described the Club as "a group of boys and girls meeting one hour a week for a fun time of singing songs, hearing a Bible lesson, and memorizing Scripture." Lodging W1 (Plaintiffs' Exhibit 2, Use of Facilities Request Form). That same day, Dr. Robert McGruder, then superintendent of Milford, informed Petitioners that they could not use the school facilities. Lodging at AA3, ¶13 (Plaintiffs' Ex. 6, D. Fournier Affidavit). Petitioners tried to arrange a meeting with Dr. McGruder to discuss the situation, but were rebuffed. Pet. Appx. at H2, ¶17 (S.D. Fournier Affidavit).

Milford offered evolving reasons for excluding the Club from school facilities. Initially, in September, Milford notified Petitioners

that under school policy "religious groups could not use the school building." Lodging at AA3, ¶13 (Plaintiffs' Ex. 6, D. Fournier Affidavit) On October 3, 1996, Milford told Petitioners that it considered "[the Club's] proposed use to be the equivalent of religious worship, which is prohibited under our District Policy." J.A. at H1-H2 (Defendant's Ex. 2, Letter from R. McGruder to Rev. S.D. Fournier dated October 3, 1996). On March 3, 1997, Milford sent another letter to Petitioners informing them that the Club was being denied use of the school "for the purpose of conducting religious instruction and Bible study." Lodging V1 (Defendant's Ex. 2, Letter from R. Magruder to Rev. S.D. Fournier dated March 3, 1997). Finally, the Milford Superintendent testified in deposition that the Club would not be allowed use of the facilities because it was not using the Bible from a "historical" perspective, but was using it "to promote the Gospel." J.A. at N18 (Plaintiffs' Ex. 10, Livshin Deposition).

3. The Purpose and Organization of the Club.

The Good News Club is a private Christian youth organization that develops children's moral values by using Bible stories, games, scripture, and songs in a fun setting. Pet. Appx. at H1, ¶5 (S.D. Fournier Affidavit). The Club adopts a viewpoint that a relationship with God is necessary to have the spiritual strength to live out moral values. The Club has approximately 25 members (ages 6–12) and is led by Petitioner Darleen Fournier and her husband Steve. The Fourniers are neither affiliated with nor employed by Milford. J.A. at L2, ¶¶9-10 (D. Fournier Affidavit). Written parental permission is required for a child to attend. Lodging X2 (Plaintiffs' Ex. 3, Parental Permission Form). Parents are welcome to attend Club meetings. Lodging X1 (Plaintiffs' Ex. 3, Invitation).

Club meetings center on a Bible story that teaches children a moral value. The Bible stories are not taken verbatim from the scriptures.[1] The Club teaches such moral values as resisting jealousy and obedience to parents.

A brief prayer of thanks opens a typical Club meeting. Next a song is sung that references God. The children then play games designed to teach them a Bible verse that focuses on the moral value being taught that week. After the games, the children are told a Bible story that reflects a moral value. After the value is presented, the children are then challenged and invited to gain the spiritual strength necessary to live out moral values by establishing a relationship with Christ. J.A. at P18-P30 (S.D. Fournier Test.); P109 (D. Fournier Test.).

Children are invited to see Ms. Fournier privately if they would like a time of individual discussion and prayer about establishing a relationship with God. J.A. at P70-71 (D. Fournier Test.). Club meetings end with a game that involves giving the children treats.

[1] Sample instructional materials are provided at Lodging BB1-BB70. Among the materials not used in Club meetings, however, is a booklet entitled *Daily Bread.* Lodging at S3-S20. In its brief before the Second Circuit (Br 27-30), Milford quoted extensively from *Daily Bread.* Prior to the commencement of this litigation, Petitioners' counsel sent a copy of the *Daily Bread* to Respondent's counsel and incorrectly indicated that the Club used the booklet as part of its meetings. This error was later corrected during discovery. Steve Fournier's deposition testimony concerning the use of *Daily Bread* made clear that it was not used during Club meetings. J.A. at P82-P83 (Plaintiffs' Ex. 12, Deposition Testimony of S.D. Fournier and D. Fournier); Pet. Appx. H5, ¶9 (S.D. Fournier Affidavit).

These games are unrelated to the moral value. After the game, the children are dismissed from the Club to go home with their parents. J.A. at P30 (S.D. Fournier Test.).

The Club is not an exclusive organization. Pet. Appx. H5, ¶¶41-45 (S.D. Fournier Affidavit). Its membership is open to children of all faiths or of no faith provided that the child has parental permission to attend the club meetings. *Id.*; Lodging at AA2, ¶¶9-10 (Plaintiffs' Ex. 6, D. Fournier Affidavit). Children are not asked about their denomination or faith. Pet. Appx. H5, ¶43 (S.D. Fournier Affidavit). Children are not required to agree to or accept any religious statement of faith. *Id.*, ¶45. Club members are from diverse religious backgrounds. J.A. at P20 (S.D. Fournier Test.). Children are free not to participate in an activity. *Id.*

While the Club's perspective is decidedly Christian, it neither promotes nor teaches any particular religious denomination's doctrine or theology. Lodging at AA2, ¶11 (Plaintiffs' Ex. 6, D. Fournier Affidavit). The Club neither teaches nor catechizes the tenets of a faith. Pet. Appx. H5, ¶40 (S.D. Fournier Affidavit). The Club is neither affiliated with, sponsored by, nor under the control of any church or denomination. *Id.*, ¶37.

The Club ultimately used Milford facilities from April 1997 to June 1998 pursuant to a preliminary injunction issued by the District Court. *See* J.A. at B4 (Docket Refs.); J.A. at O1-O11 (Plaintiffs' Ex. 11, Decision of Hon. Thomas J. McAvoy dated April 17, 1997, Granting Plaintiffs' Motion for a Preliminary Injunction). There is no evidence in the record of any complaint arising from the Club's use. Nor is there any evidence of any confusion over the Club's status as a private organization.

4. Legal Proceedings Below.

Petitioners brought a civil rights action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Northern District of New York challenging Milford's exclusion of religious groups as unlawful and discriminatory. J.A. B1. Petitioners moved for and obtained a preliminary injunction to prevent Milford from enforcing its discriminatory ban against groups that have religious purposes. J.A. at O1-O11 (Plaintiffs' Ex. 11, Decision Granting Plaintiffs' Motion for a Preliminary Injunction). After the Second Circuit Court of Appeals' decision in *Bronx Household of Faith v. School Dist. No. 10*, 127 F.3d 207 (2nd Cir. 1997), the court directed further briefing on that case's application to the instant action. J.A. at B6 (Docket Ref. 3/30/98).

The parties ultimately cross-moved for summary judgment. J.A. B7-B8. The District Court, following *Bronx Household*, vacated the preliminary injunction and granted Milford's motion. Pet. Appx. C1 (Memorandum Decision and Order dated October 23, 1998); J.A. at B10, and the Club appealed. *Id.*

A divided panel of the Second Circuit affirmed the District Court's decision. Judge Miner, writing for the majority, agreed that Milford had opened its facilities to allow groups to teach moral values and that the Club teaches "secular values such as obedience or resisting jealousy." 202 F.3d at 509, Pet. Appx. at A15. Nevertheless, the majority held that Milford could discriminate against the Club. Critical to the majority's analysis was its conclusion that the Club's speech went beyond the presentation of moral values and included the "Christian viewpoint." The court opined that "[t]he Christian viewpoint, as espoused by Reverend Fournier contains an additional layer [of speech]:"

> these morals or these values are senseless without Christ, that's to the children who know Christ as Savior, we would say, you know you cannot be jealous because you know you have the strength of God. To the children who do not know Christ, we would say, you need Christ as your Lord and Savior so that you might overcome these, you know, feelings of jealousy.

Id. at 509-10, Pet. App. A15-A16 (quoting Deposition Testimony of S.D. Fournier, J.A. at P25).

This "additional layer" of speech, according to Judge Miner's opinion, transformed the subject matter of the Club's speech from the permissible teaching of moral values from a Christian perspective to impermissible religious instruction. *Id.* at 510, Pet. Appx. at A15-A16. Judge Miner concluded, therefore, that Milford's exclusion of the Club from its facilities was based on constitutionally permissible subject matter discrimination, rather than constitutionally impermissible viewpoint discrimination. *Id.;* Pet. Appx. at A18.

Judge Jacobs dissented. He charged that the majority's analysis irreconcilably conflicted with this Court's decision in *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993). *See Good News Club*, 202 F.3d at 513; J.A. at A20-A21. Judge Jacobs believed that Milford had discriminated against the Club because of its Christian viewpoint. 202 F.3d at 512; Pet. Appx. at A27-A28. The crux of the dissent's disagreement with the majority was that "when the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters." *Id.* at 512, Pet. Appx. at A22. Judge

Jacobs opined:

> the subject matter (of morals and character) is "secular" in the sense that it is often informed by secular perspectives; but the subject matter does not change when it is informed by viewpoints that are sectarian .... No one should be surprised that the religious viewpoint on morality looks very much like religion itself.

Id. at 514; Pet. Appx. at A26-A27. Judge Jacobs concluded that "the club's message is in fact the teaching of morals from a religious perspective" and that exclusion of the Club from the use of school facilities therefore violated the First Amendment. *Id.* at 515.

SUMMARY OF ARGUMENT

Milford Central has decided to allow a broad range of Milford community groups to meet in its facilities after the close of the instructional day, including youth organizations that seek to develop children's moral and spiritual character. Out of all the methods and perspectives that could be employed to develop a child's moral and spiritual character, Milford has singled out one perspective for adverse treatment – the religious perspective.

The United States Constitution did not require Milford to open its facilities after hours for expressive speech. However, once Milford opened its facilities to some speech, it triggered constitutional scrutiny of its decisions which speech to include and which to exclude. Milford's discriminatory exclusion of speakers with "religious purposes" was neither viewpoint neutral nor reasonable, and thus was unconstitutional in the limited public forum at issue in this case.

Petitioners will advance three arguments why Milford's exclusion of the Club from its forum was unconstitutional. First, Milford's exclusion of the Club was not viewpoint neutral. Milford has no objection to renting to groups that teach moral precepts without reference to God. Indeed, Milford has no apparent objection to a group using facilities to teach children that God is unnecessary for moral growth. Respondent objects only when the speaker adopts the viewpoint that a relationship with God is necessary to have the spiritual strength to live out moral values. In other words, the subject matter is fine, but the Christian viewpoint is not. Such viewpoint discrimination violates the Constitution absent a compelling state interest. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993).

Second, the exclusion of religious subject matters, and only religious subject matters, from a forum whose purpose is to serve the welfare of the community, advances no state interest and is unreasonable. The forum created by Milford is eminently compatible with Petitioners' speech. *Cornelius v. NAACP Legal Defense and Ed. Fund*, 473 U.S. 788, 803 (1985). Moreover, it is fundamentally unreasonable, and therefore unconstitutional, to make the sole test of entrance to school facilities a "religious purpose" examination. It is axiomatic that "government may not use religion as a basis for the imposition of duties, penalties, privileges or benefits." *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J. concurring). The Constitution, as expressed by the Free Exercise Clause and the Establishment Clause, does not view religious segregation as a reasonable exercise. *See Board of Ed. of Kiryas Joel School Dist. v. Grument*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring).

Third, Milford can demonstrate no compelling interest sufficient to justify its suppression of the Club's viewpoint on morality. In particular, allowing the Club to use Milford's facilities on the same terms as other youth groups does not violate the Establishment Clause. *Widmar v. Vincent*, 454 U.S. 272 (1981). Any Establishment Clause violation must be moored in governmental speech or action. There are no government actions or speech shown in this case that tend to establish a preference for or endorsement of religion.

Milford has not composed, sponsored, or promoted the Club's speech. Since Milford allows virtually unfettered access to school facilities, it has not communicated to the community that it affords special treatment to children who attend the Club based upon their religious beliefs. Milford has not manipulated its forum to smuggle Christianity into the school as the exclusive method of promoting moral and spiritual development. The contrary is true – it has allowed a number of youth organizations to use its facilities, while singling out the Club for exclusion. Under these circumstances this Court has repeatedly rejected the proposition that the Establishment Clause can be used to silence speech. *See Rosenberger*, 515 U.S. at 845-46, *Board of Educ. v. Mergens*, 496 U.S. 226, 248-51 (1990)(plurality), *Widmar v. Vincent*, 454 U.S. 272, *Lamb's Chapel,* 508 U.S. at 395, *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 765 (1995).

ARGUMENT

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

A. Milford Has Created a Limited Public Forum.

A public school may, at its discretion, open its facilities to the community to create a forum for speech. *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993). A school may create its forum either by policy or practice. *Perry Educational Ass'n v. Perry Local Educators' Ass'n*, 406 U.S. 37, 47 (1983). Once a school opens its facilities to the general public for speech unrelated to school functions, it has created a public forum. *Perry*, 460 U.S. at 46. *See ISKCON v. Lee*, 505 U.S. 673, 678 (1992) (where government opens it property as a service to the general public for expressive activities, it has created a public forum). *Accord Grace Bible Fellowship v. Maine School Admin. Dist. 5*, 941 F. 2d 45, 48 (1st Cir. 1991) (Breyer, J., on panel).

In a government created limited public forum, government may ordinarily *limit* eligibility to the forum to a certain category of speakers or subjects. *See Widmar v. Vincent*, 445 U.S. 272 (1981) (recognizing a public university could limit the use of its facilities to its students). If the government places limits on which subject matters and speakers to allow in its forum, such limitations must, at a minimum, be viewpoint neutral and reasonable in light of the purposes the forum serves. *Rosenberger,* 515 U.S. at 829 (applying viewpoint neutrality test to strike down the exclusion of religious speech in a limited public forum). *But see ISKCON*, 505 U.S. at 678 (a restriction on speech in a "public forum, *whether of a limited or unlimited character* ... is subject to [strict scrutiny].") (emphasis added). *See also Widmar*, 454 U.S. at 273-76 (applying the strict scrutiny analysis to the exclusion of religious

speech from a limited public forum).[2] Nonetheless, where, as here, the government has intentionally designated a place or means of communication as a public forum, speakers who are otherwise eligible for the forum without regard to their viewpoint cannot be excluded absent a compelling government interest. *Perry*, 460 U.S. at 45; *see also Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (while government may limit a forum to specific subject matters, it can not confine the forum "to one category of interested individuals").

In applying the forum doctrine in the context of religious speech, this Court has held that government cannot exclude religious speakers from a limited public forum, *Lamb's Chapel*, 508 U.S. at 393, because religious speech can be both an area of inquiry and a viewpoint on various subjects. *Rosenberger*, 515 U.S. at 831. In particular, when an otherwise eligible group or speaker seeks to use a limited public forum to worship or to teach biblical principles, the government must demonstrate a compelling state interest to censor such speech from its forum. *Widmar*, 454 U.S. at 269-70.

The Second Circuit agreed with the parties below that Milford's facilities, after school hours, are a limited public forum. 202 F.3d at 509; Pet. Appx. at A13. Milford, by policy, has opened its facilities to the general public for the "limited" purposes of uses "pertaining to the welfare of the community" and "for the purposes of instruction in any branch of education, learning or the arts." Pet.

[2] *See also Denver Area Educ. Telecom. Consortium v. FCC*, 518 U.S. 727, 750 (1996) (plurality opinion of Breyer, J., joined by Stevens, O'Connor, and Souter, JJ.) (noting that it is an open question whether content limitations on the scope of a designated public forum trigger strict scrutiny).

Appx. at D1. In addition to its policy of general access, Milford, by its practice, has opened its facilities to youth organizations for the purpose of developing children's moral and spiritual character. *See generally* Lodging at Y1-AA5.[3]

There is no dispute that the Club is otherwise eligible to use school facilities and that youth clubs may use school facilities after school hours for expressive activities. The Club is a youth organization that seeks to aid children's moral and spiritual development by using Bible stories to teach such "[moral] values as obedience or resisting jealousy." *Good News Club*, 202 F.3d at 509; Pet. Appx. at A15. The question presented herein is whether Milford may selectively expel the Club from school facilities because it has a religious purpose.

B. Respondent Excluded Petitioners from Its Forum Because of the Club's Viewpoint.

This case at its core is not complicated. Milford has opened its facilities after school hours to speech that develops the moral and spiritual character of children and to uses that pertain to the welfare of the community. Milford has no objection to groups that teach

[3] The Boy Scouts use school facilities to influence a boy's character development and spiritual growth. See Lodging at Y3 (describing the Scouts as having the following purpose: "[To] influence a boy's character development and spiritual growth"). The Girl Scouts use school facilities "to inspire girls with the highest ideals of character, conduct, patriotism, and service." Lodging at Z2, ¶4. The 4-H Club uses the school for the purpose of enabling youth to develop knowledge, skills, abilities, attitudes, and behaviors to be competent, caring adults. Lodging at AA5, ¶8.

moral precepts without reference to God. Indeed, Milford has no apparent objection to a group using facilities to teach children that God is unnecessary for moral growth.

It is undisputed that the Club speaks to the moral and spiritual development of children. Milford objects to the Club's speech only because it adopts the viewpoint that a relationship with God is necessary to have the spiritual strength to live out moral values.[4]

In other words, the subject matter is fine, but the Christian viewpoint is not. Because "[t]he prohibited perspective, not the general subject matter," triggered the decision to bar private expression, Milford's exclusion of the Club from its facilities is not viewpoint neutral.

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[4] Superintendent Livshin testified:

> Q: Pursuant to the description of the Good News Club as outlined in Exhibit D [the school use application which described the club's meetings as consisting of a fun time of singing songs, hearing a Bible lesson, and learning scripture], would the Good News Club qualify for use of the school facilities?
>
> A: Again, the problem that I have that I would need clarification on, children hear Bible story [sic] and learn Scripture, I don't know in what sense – in what sense that would mean. Is the Scripture being presented – how do I want to say this? In a historical approach ... – or is it used to promote the gospel. And if that's indeed the case, then I have a problem with it in terms of using the school for that purpose.

J.A. at N17-N18.

This is certainly not the first time this Court has examined the exclusion of an otherwise eligible user from a limited public forum because of its religious purpose. In *Lamb's Chapel*, this Court reviewed a church's request to use public school facilities after hours to show a six-part film series that exhorted parents in the community to fight "society's slide towards humanism" by instilling Christian values in their children. 508 U.S. at 388. One portion of the series related to viewers how to rely on God to handle difficult family problems. *Id.* at 388-89, n.3. The school district in *Lamb's Chapel* relied upon a school use policy almost identical to the policy involved in this case. The policy allowed virtually all community speakers, except those with a "religious purpose," to use school facilities. 508 U.S. at 387. Pursuant to this policy, the school district denied the church use of its facilities because the film "proselytiz[ed] the Christian [religion's] approach to family values." *See* Brief on the Merits for Respondent Center Moriches School Dist. at p.1, 4, 26. The Second Circuit (per Judge Miner) upheld the school district's decision, finding that the film had a religious purpose. *Lamb's Chapel*, 959 F.2d 381 (2nd Cir. 1992).

This Court, reversing the Second Circuit, noted that the issue was not whether the film had a religious purpose, but whether it spoke to child rearing from a religious standpoint. *Id.* at 393. Similarly, the issue in this case is not whether the Club's speech has a religious purpose, but whether its speech fits within the subject matter of "the promotion of the moral and spiritual development of children" or "uses pertaining to the welfare of the community."

It is not disputed that Club meetings help to promote the moral and spiritual development of its child members, and that the Club's use pertains to "the welfare of the community." In particular, the Club explains to children how to deal with such issues as jealousy

and anger. Such discussions are plainly within the boundaries of the forum. Milford did not exclude the Club because its activities did not fit within the religion-neutral boundaries of the forum. Rather, Milford excluded the Club because of its religious purpose. The Club's speech deserves the same First Amendment protection as a church's speech urging that parents return to Christian family values. *Lamb's Chapel* is squarely on point and thus controls this case.

It is difficult to discern why the Second Circuit in the present case declined to hold that *Lamb's Chapel* supplied controlling authority in this case, since Judge Miner's opinion fails to cite the Supreme Court's *Lamb's Chapel* decision.[5] The Second Circuit reasoned that the Club, by inviting its members to establish a relationship with Christ, was teaching more than moral values – it was teaching religion. Nonetheless, presuming that *Lamb's Chapel* theoretically left the door open to such an approach, this Court's subsequent decision in *Rosenberger* unequivocally closed it. In *Rosenberger*, a student organization requested, but was denied, funding for a Christian periodical called *Wide Awake*. 515 U.S. at 825-27. The purpose of *Wide Awake* 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. The masthead of every issue contained St. Paul's exhortation in Romans 13:11 of the New Testament that "[t]he hour has come for you to awake from your slumber, because our salvation is nearer now than when we first believed." *Id.* at 865-66. Each issue of *Wide Awake* invited

[5] Petitioners relied upon *Lamb's Chapel* in their brief before the Second Circuit, and Judge Jacobs in dissent said, "I cannot square the majority's analysis in this case with *Lamb's Chapel*." 202 F.3d at 513.

the students to accept Jesus Christ as their savior:

> The only way to salvation through Him is by confessing and repenting of sin. It is the Christian's duty to make sinners aware of their need for salvation. Thus, Christians must confront and condemn sin, or else they fail in their duty of love. Mourad & Prince, A Love/Hate Relationship, November/December 1990, p. 3.

Id. at 865.

Wide Awake's essays on other topics also challenged and invited students to establish a relationship with Christ. For example, while an article on racism had some general discussion on the subject, it "proceed[ed] beyond even the analysis and interpretation of biblical texts to conclude with the counsel to take action because that is the Christian thing to do." *Id.* at 866-67. In similar fashion an article on eating disorders challenged and invited students to ask Christ for help with their problems. *Id.* at 867.

After reviewing *Wide Awake*'s speech, this Court rejected the proposition that speech with an evangelistic component occupies second-class status. The Court expressly rejected the view that the government could constitutionally undertake to distinguish between "works characterized by evangelism and writing that merely happens to express views that a given religion might approve." *Rosenberger*, 515 U.S. at 844. Rather, the Court held that *Wide Awake* presented a Christian perspective on how to overcome racism and eating disorders and that censorship of that perspective was unconstitutional. *Id.* at 845.

A challenge to Christians and an invitation to believe to non-Christians are integral elements of a Christian viewpoint. The

propagation of ideas by asking listeners to adopt them is not unique to Christianity– it is the essence of advocacy. *See, e.g., Thomas v. Collins*, 323 U.S. 516 (1945). Milford will not let the Club use school facilities because of the Club's viewpoint. Milford's discrimination violates the First Amendment absent a compelling state interest.[6]

C. The Second Circuit's Decision Destroys the Viewpoint Discrimination Doctrine and Excessively Entangles Government With Religion.

The decision below is deeply flawed. The Second Circuit detoured from this Court's precedents on viewpoint discrimination and strayed into an analysis based on a semantic shell game. The Second Circuit engaged in a two-step analysis. First, the court labeled the Club's speech as religious instruction rather than instruction of morals from a religious perspective. Second, the court

[6] Respondent, in the courts below, has attempted to distinguish this Court's precedents on viewpoint discrimination on the basis that the Club's speech is directed to a child audience. This distinction is irrelevant. Whether a government rule discriminates against a speaker's viewpoint is independent of the nature of the audience. While the identity of the audience might supply a potential justification for state censorship in certain arenas (*e.g.*, pornography), the state has no interest in restricting private religious expression to children. State restrictions on a private speaker's religious expression directed towards children who are assembled at the behest of parents would be constitutionally suspect. *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

reasoned that religious instruction is a "quintessentially" religious subject matter that demonstrated that the Club had a "religious purpose."202 F.3d at 510. *See* Pet. Appx. at D2 (Milford's policy excludes speakers with religious purposes from using school facilities).

There are multiple problems with the Second Circuit's analysis. It is a logical fallacy to conclude, as the Second Circuit did, that expression which may be characterized by one subject label ("religious instruction"), cannot also be described by another ("instruction in any branch of education, learning, or the arts" or a use "pertaining to the welfare of the community"). The *Widmar* Court spoke to this issue, noting that distinctions between religious speech and religious worship lack an "intelligible content." 454 U.S. at 269, n. 6. Speech can fit easily into multiple topical categories. In particular, a speaker's perspective on a subject matter can almost always be labeled as instruction on the perspective. Thus, teaching moral virtues from a religious perspective may qualify both as teaching morality and teaching religion, just as teaching economics from a Marxist perspective qualifies both as teaching economics and teaching political philosophy.

The Second Circuit failed to recognize that religious speech, like other types of philosophical speech, may be *both* a "vast area of inquiry" and also a "perspective, a standpoint from which a variety of subjects may be discussed and considered." *Rosenberger*, 515 U.S. at 831. This is particularly true when the subject under discussion is morality and the viewpoint is religious. *See Good News Club*, 202 F.3d at 512 ("when the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters").

Such arbitrary and ultimately subjective line-drawing exercises do not further the purposes of this Court's forum analysis. Permitting the state to label speech at will eviscerates the concept of viewpoint discrimination, since every viewpoint exclusion could be recast as a subject matter exclusion. Government officials could avoid the First Amendment prohibition on viewpoint discrimination in a limited public forum by gerrymandering the forum along viewpoint lines and calling the restrictions merely limits on the forum. It would be a perverse result to allow the illegal act of government discrimination against a speaker's viewpoint to become a legitimate justification for creating a limitation on the scope of the forum. *See Denver Area Educ. Telecom. Consortium v. F.C.C.*, 518 U.S. 727, 801 (1996) (Kennedy, J. joined by Ginsburg, J., concurring in part and dissenting in part).

The appropriate test, in order to give meaning to this Court's forum analysis, is whether the speech fits within the subject matter allowed in the forum, not whether the speech could also be characterized as a subject matter excluded from the forum. As Judge Jacobs explained in his dissent below: "religious answers to questions about morality tend to be couched in overtly religious terms and to implicate religious devotions, but that is because the sectarian viewpoint is an expression of religious insight, confidence or faith– not because the religious viewpoint is a change of subject." *Good News Club*, 202 F.3d at 514, Pet. Appx. at A25.

The Second Circuit's endeavor to determine if religious speech should be labeled as religious instruction or worship inexorably operates to entangle school officials with religion. In *Widmar*, this Court warned that inquiries into the significance of religious words and practices tend inevitably to entangle the state with religion in an unconstitutional manner. *Widmar*, 454 U.S. at 269-70. *Accord*

Rosenberger, 515 U.S. at 844 (cautioning against "scrutinizing the content of speech, lest the expression in question – speech otherwise protected by the Constitution – contain too great a religious content"). The Second Circuit ignored this warning and explicitly commended school officials for scrutinizing the significance of religious speech and then making essentially theological classifications as to whether that speech constituted religion, worship or instruction.

The Second Circuit's decision forces school officials to probe into private matters of conscience protected by the Constitution. Each time an applicant requests to use school facilities for what arguably might be construed as a "religious purpose," school officials must interrogate the applicant as to his beliefs and practices to determine if he is engaging in religious worship or instruction. That is precisely what happened in the case before the Court. First, Respondent and its lawyers scrutinized the religious dimension of the Club's intended use. Then, in litigation, Milford asked intrusive, probing questions about religious elements of Club activities. *See, e.g.*, J.A. at P16 (Q: "What are the nature of the prayers that are said by the Good News Club as part of its regular activity?"): *id.* at P22 (Q: "And in the opening prayer, what specifically are you praying for?"); *id.* at P25 (Q: "Are there references to God or Jesus Christ in any of the songs that you sing in the club meetings?") (Plaintiffs' Ex. 12, S.D. Fournier Deposition Testimony).

If determining whether speech should be labeled "religious" becomes the touchstone of constitutional freedoms, then school administrators must become theological authorities and federal courts will become a battleground for theological disputes. The Constitution forbids this. See *Widmar*, 454 U.S. at 269-70, n.6 (To draw a distinction between religious worship and religious speech does not "lie within judicial competence to administer.").

See also Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) ("Nor is it in the competence of the courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings."). To draw such a distinction would require the courts to inquire into the religious significance of words and practices and, in the words of this Court, "inevitably [] entangle the State with religion in a manner forbidden by our cases." *Widmar*, 454 U.S. at 270, n.6.

D. The Prohibition of Religious Instruction in Favor of Secular Instruction Inherently Discriminates Against the Religious Viewpoint.

The Second Circuit's analysis distills Milford's policy, in essence, to prohibit religious instruction but not secular instruction. Such a regime inherently discriminates against the religious viewpoint.

Milford has never asserted that speech that instructs listeners to reject religion (*e.g.*, advocacy of the teachings of Karl Marx, Bertrand Russell, and Jean-Paul Sartre, *see Rosenberger*, 515 U.S. at 837) is excluded from its forum. In fact, on the subject matter of morality, Milford's policy allows community groups to discuss the subject and to instruct others from their secular perspective. In contrast, where religious viewpoints on the same subject are presented, community groups may not instruct. Such a policy is not viewpoint neutral. *Bronx Household of Faith v. School Dist. No. 10*, 127 F.3d 207, 220 (2nd Cir. 1997) (Cabranes, J., dissenting). As the Tenth Circuit observed in *Church on the Rock v. City of Albuquerque,* 84 F.3d 1273 (10th Cir. 1996):

> A prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint. Instruction becomes "sectarian" when it manifests a preference for a set of religious beliefs. Because there is no nonreligious sectarian instruction (and indeed the concept is a contradiction in terms), a restriction prohibiting sectarian instruction intrinsically favors secularism at the expense of religion.

Id. at 1279.

There are few more fundamental divides than the divide between those who believe that morality is independent of the will of a divine Sovereign and those who believe the two are indivisible. The Club, of course, adopts the viewpoint that morals without God are "senseless." J.A. at P25 (Plaintiffs' Ex. 12, Deposition Testimony of S.D. Fournier). By insisting that the Club's speech does not qualify as "pure" moral instruction, 202 F. 3d at 511, the Second Circuit has sanctioned the expulsion of religious viewpoints from the discussion of morality in the limited public forums within its jurisdiction. This Court should firmly repudiate such a decision as fundamentally incompatible with its historical protection of the views of all members of the community.

II. MILFORD'S DISCRIMINATORY EXCLUSION OF THE CLUB FROM ITS FORUM WAS UNREASONABLE.

Even if Respondent's exclusion of the Club from its property were viewpoint neutral, Respondent must still demonstrate that its exclusion of Petitioners was reasonable in light of the purposes served by the forum. *See Rosenberger*, 515 U.S. at 829-30 (content discrimination is only permissible where it preserves the

purposes of the limited public forum). As the Court suggested in *Lamb's Chapel*, the exclusion of all speakers with a religious purpose may be unreasonable on its face. 508 U.S. at 393, n. 6. Further, the purpose of Milford's forum, as expressed by its own policy statement, is to serve "the welfare of the community." The exclusion only of religious subject matters from a forum whose purpose is to serve the welfare of the community is unreasonable. The chief end of most religious instruction is to provide a sense of duty beyond one's own selfish interest. To instruct and teach others to place the community's good above their own would seem to be the paradigmatic example of speech that promotes the community's welfare. The inclusion of religious content in Milford's forum does not threaten to change the nature or the purposes of the forum.

Moreover, it was constitutionally impermissible to make the sole test of entrance to school facilities a "religious purpose" examination. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue ... regulates or prohibits conduct because it is undertaken for religious reasons."). To exclude only speakers with religious purposes in a forum that is otherwise open to the entire population of Milford is the essence of unreasonable religious discrimination. It is axiomatic that "government may not use religion as a basis for the impositions of duties, penalties, privileges or benefits." *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J. concurring). Neither the Free Exercise Clause nor the Establishment Clause contemplates religious segregation as a reasonable exercise. See *Board of Ed. of Kiryas Joel School Dist. v. Grument*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring) ("Just as the government may not segregate people on the account of their race, so too it may not segregate on the basis of religion.").

Milford has never argued that religious subject matters do not serve the welfare of the community. The reason Milford offered to justify its exclusion of the Club, and the Second Circuit accepted, "was that activities of the Club clearly and intentionally communicate Christian beliefs by teaching and by prayer, and ... it [is] eminently reasonable that Milford school would not want to communicate to students of other faiths that they were less welcome than students who adhere to the Club's teachings." *The Good News Club*, 202 F.3d at 509; Pet. Appx. at A15.

It is not at all reasonable to suppress one private speaker in order to make others feel "welcome." It strains credulity to read a school's allowance of religious speakers on the same terms as non-religious speakers as a deprecation of non-adherents' beliefs. Allowing the Club's religious speech on the same basis as the Boy Scouts, Girl Scouts, 4-H Club, or other eligible youth organizations does not mean that Milford has communicated to certain students that they are not welcomed.[7] The converse is true – Milford has communicated to members of the Club that they and they alone are unwelcome because of their Christian beliefs. Such a selective exclusion is inherently unreasonable. Milford allows the Boy Scouts and Girl Scouts to use its facilities, although both groups require an oath of fealty to God – a "religious exercise" (*see Lee v. Weisman*, 505 U.S. 577 (1992)) – to participate. What inference would an atheistic student draw from being excluded from the Scouts? Obviously, Milford does not itself take seriously the notion that such

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[7] All clubs or organizations appeal to a subset of the community. Indeed, in *Lamb's Chapel*, a film about instilling Christian values in children may have had limited appeal to non-Christians, but that fact alone was not a reason for the school to deny use of its facilities to show the film, nor should it be in this case.

a student would infer that Milford did not welcome atheistic students, since it allows the Scouts to use its facilities.

III. MILFORD CAN DEMONSTRATE NO INTEREST SUFFICIENTLY COMPELLING TO JUSTIFY ITS SUPPRESSION OF THE CLUB'S RELIGIOUS VIEWPOINT.

Respondent, like the school district in *Lamb's Chapel*, offers compliance with the Establishment Clause as a state interest sufficiently compelling to justify its suppression of the Club's religious viewpoint. No Establishment Clause violation arises, however, from allowing the Club to use Milford facilities on equal terms with other youth organizations. *Widmar;* 454 U.S. at 273-75, *Mergens,* 496 U.S. at 247-49; 252, *Lamb's Chapel,* 508 U.S. at 395; *Capitol Square,* 515 U.S. at 770; *Rosenberger,* 515 U.S. at 845-46.

A. By Allowing the Club to use Milford's facilities On the Same Basis as Other Youth Groups, Milford Does Not Violate the Establishment Clause.

One constant and guiding star in the vast and uncertain universe of Establishment Clause jurisprudence is the principle that if government remains neutral towards religion, it is unlikely to violate the Establishment Clause. *See Rosenberger*, 515 U.S. at 839 ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."); *id.* at 846 (O'Connor, J., concurring) ("The insistence on government neutrality toward religion explains why we have held that schools may not discriminate

against religious groups by denying them equal access to facilities that the schools make available to all."). *Capitol Square*, 515 U.S. at 764 (plurality) ("As a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral polices.").

Many times government has pressed this Court to eschew principles of neutrality and to accept discrimination against religious speakers on the basis of the Establishment Clause. This Court has "[m]ore than once ... rejected the position that the Establishment Clause justifies, much less requires, 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.

This Court, in a series of cases, has applied the principle of neutrality in the context of private religious speakers seeking equal access to a government created forum.[8]

The Court first addressed the issue in *Widmar*, *supra,* where a religious student group sought to use university facilities on the same basis as other student groups to sing hymns, pray, and discuss the Bible. 454 U.S. at 265. The University contended that it could

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[8] Petitioners in this section have not included an analysis of equal access cases in the funding context such as *Rosenberger*, *supra* and in the context of government forums created expressly to aid a government mission. *See e.g.*, *Mergens*, *supra* (the federal government mandated that secondary schools officially recognize student religious clubs and give them equal access to school facilities on the same basis as other officially recognized non-curricular student clubs.) These cases do have application by analogy, however.

not permit religious student groups to use its facilities on the same basis as other groups without violating the Establishment Clause. *Id.* at 265. This Court disagreed, holding that insofar as the forum was available to a broad class of speakers the University did not "confer any imprimatur of state approval" on religious speakers. *Id.* at 274. Thus, there was no Establishment Clause violation.

Similarly, in *Lamb's Chapel*, this Court unanimously held that a school district could not rely on the Establishment Clause to bar a church group from showing a religious film that urged parents to instill Christian values in their children. The Court stated:

> We have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded. The showing of this film would not have been during school hours, would not have been sponsored by the school, and would have been opened to the public, not just church members. The forum is opened to a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.

508 U.S. at 395.

Finally, in *Capitol Square*, the Court held that the Establishment Clause did not bar a private group from erecting a large Latin cross in a park that the government opened for expressive activities. The Court explained:

> The factors that we considered in *Lamb's Chapel* and *Widmar* exist here as well. The State did not sponsor [the] expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups.

515 U.S. at 763.

The Court's decisions addressing access by religious speakers to government-created forums yield two guiding principles. First, religious speech conducted in the forum must be truly private; the state must neither sponsor, promote, nor encourage the religious expression. Second, the forum must be open to a variety of groups and not manipulated by the government to give religious speakers preferential treatment.

The record adduced in this case clearly demonstrate that the Club meetings involve purely private speech and that Milford's facilities are opened to a variety of private youth organizations. Consequently, as in *Widmar*, *Lamb's Chapel*, and *Capitol Square*, there is no Establishment Clause violation in permitting the Club access to school facilities on the same basis as other youth organizations. First, the Club's speech is private. As this Court has said, "There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250 (plurality opinion) (emphasis in original). Milford does not prompt, compose, suggest, nor mandate Petitioners' speech. Milford does not distribute ads or flyers or in any way promote Club meetings. Mr.

and Mrs. Fournier are neither employed by the school nor any other government agency, and conversely, no teacher or Milford employee is involved with the Club. Children attend the Club meetings by parental choice and are in no way coerced to attend Club meetings.

Second, Milford has not given the Club preferential treatment. Milford has not manipulated its forum to smuggle Christianity into the school as the exclusive method of promoting moral and spiritual development. The contrary is true. The school allows after-hours use of its facilities to the Scouts, 4-H Club, sporting programs, and other community groups, while the Club has been selectively excluded.

Allowing the Club to participate in Milford's forum would promote rather than violate the neutrality principle. Under these circumstances this Court has repeatedly rejected the proposition that the Establishment Clause can be used to silence speech. *See Rosenberger*, 515 U.S. at 839 ("more than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design"). *See also Mergens*, 496 U.S. at 252 (the broad spectrum of groups that are free to enter the forum counteract any possible message of official endorsement of or preference for religion).

B. By Granting the Club Equal Access to Milford's Facilities, Milford Does Not Communicate an Endorsement of the Club's Message.

Milford seeks dispensation from this Court's precedents and the neutrality requirement of the Establishment Clause because the

Club's speech (like other youth organizations) is directed towards grade school children. Milford posits that a Club member might falsely perceive that the Club's speech is actually the school's speech. There are numerous conceptual difficulties with Milford's argument, however.

First, impressionability must be seen as the two way street that it is. Allowing equal access to school facilities by all youth organizations conveys a message of neutrality toward religion and not government endorsement of religion. Denying the Club access would communicate to children that the government disfavors religious activities. "[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion [in violation of the Establishment Clause]." *Mergens,* 496 U.S. at 248 (plurality); *accord Rosenberger*, 515 U.S. at 845-46. Milford cannot selectively invoke a child's misperception that Milford has endorsed a religion while disregarding a child's perception that Milford has an antipathy towards religion.

Second, Milford's fear of a mistaken inference of endorsement of the Club's speech "is largely self-imposed, because the school itself has control over any impressions it gives its students." *Mergens*, 496 U.S. at 251. Speech is the best weapon to combat false impression, not censorship.[9] Milford would have this Court

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[9] Additional speech to dispel false impression is not only the best weapon, it is the constitutionally required weapon. *See Whitney v. California*, 274 U.S. 357, 375-76 (1927) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary"). As in *Capitol Square*, "a flat denial of the ... application was not the

jettison that principle for the sake of a hypothetical child who might falsely perceive that Milford has established or endorsed the Christian religion. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 553 (1986) (Burger, C.J., dissenting on other grounds) ("utterly unproven, subjective impressions of some hypothetical students should not be allowed to transform individual expression of religious belief into *state* advancement of religion") (emphasis in original).

Third, if Milford's argument were accepted, then this Court's precedents concerning the free speech rights of religious speakers would have to be rewritten to accommodate the myriad of situations in which a small child could observe, and potentially misunderstand, the exercise of religious speech in a public forum or by a public person. Suppose, for example, that a Milford grade school student were to pass by a high school classroom and observe a *Mergens* Bible club; is the *Mergens* club unconstitutional in Milford and other small schoolhouses around the country simply because younger students may be nearby? The constitutional right to free speech is extremely fragile if it can be shattered by the *potential* false perception of a six-year-old child. The First Amendment was not meant to be fragile, but robust. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

[government's] only option to protect against an appearance of endorsement." 515 U.S. at 793 (Souter, J., concurring). Even if Milford's fear of endorsement were legitimate, this would not justify a total exclusion of the Club from school facilities where other alternatives were available. *Cf. United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (where content-specific prior restraint established, least restrictive means must be applied).

Moreover, Respondent's own actions betray the weakness of its argument. If Milford were truly concerned that children were unable to distinguish between Club meetings and classroom instruction, after the preliminary injunction was issued, Milford would have issued some sort of disclaimer or taken similar steps to make clear to the children that the Club's speech was not the school's speech. No such disclaimer or explanation was offered to the children or their parents.[10]

Further, Milford has presented no evidence, either actual or theoretical, to support Milford's contention that children between 6 and 12 years of age cannot distinguish a private group's after school speech from a teacher's classroom speech. Indeed, the facts suggest it is unlikely that any child would be confused that a Club meeting is classroom instruction. This is not a case where a public school teacher has used the classroom as a forum to promote the activity of the Club. This is also not a case where an elementary school teacher or administrator is in any way involved with the operation of the Club. There is a clearly comprehensible distinction between a multi-aged youth meeting conducted after school which a child (with parental consent) voluntarily chooses to attend, on the one hand, and speech conducted by a teacher in the classroom which a child has no choice but to attend on the other.

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[10] The District Court granted Petitioners' motion for a preliminary injunction on April 14, 1997. J.A. at O1-O11. In the spring of 1997, the Club began using Respondent's facilities. The Club continued to hold its meetings at Respondent's facilities (in a location of Respondent's choice) for the 1997-98 academic year. There is no evidence in the record of any complaint arising from the Club's use. Nor is there any evidence of any confusion over the Club's status as a private organization.

Moreover, the District Court found that children who do not attend the Club meetings were unlikely to see or hear a Club meeting:

> The fear that [Milford] has expressed of confusion of the young non-member students at Milford is sufficiently minimized by the fact that the meetings are not being held during school hours and in a location other than the classrooms. Thus, there is less chance that the students will witness the meetings or mistakenly perceive the meetings as part of their state sponsored curriculum.

J.A. at O10 (Decision of Hon. Thomas McAvoy dated April 17, 1997). *Cf. 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.")

Finally, and perhaps most importantly, Milford does not communicate endorsement of the Club's message to the community at large. *See Capitol Square*, 515 U.S. at 779 (O'Connor, J., concurring) (endorsement test is concerned "with the potential community writ large, ... not about the perceptions of particular individuals"). Given the openness of the Club meetings and the unfettered access to Milford's facilities after school (allowing uses pertaining to the welfare of the community), no parent reasonably would feel that their child is being excluded from opportunities that the government affords to the children who attend the Club. Parents who do not subscribe to the Club's message have the opportunity

to establish their own clubs after school or to send their child to the other youth groups who already use the school. As in *Widmar*, "by creating a forum [the school] does not thereby endorse or promote any of the particular ideas aired there." 454 U.S. at 271, n.10.

As Justice O'Connor has explained in a different context, when government indirectly aids a religious mission only through independent choices made by parents, "no reasonable observer is likely to draw from the facts an inference that the State is endorsing a religious practice or belief. Rather the endorsement of the religious message is reasonably attributed to the individuals who select the [religious] path." *See Mitchell v. Helms*, ___ U.S. ___, 120 S. Ct. 2530, 2559 (2000) (O'Connor, J., concurring). The same is true in this context – a reasonable observer would not infer that Milford endorses the Club's message, but would attribute the endorsement of the Club's message to the parents who allow their children to attend club meetings.

In the end, Milford essentially argues that impressionability of its students requires it to shed the protective cloak of neutrality and to display hostility towards religion. As this Court has said, however, 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). *See also Mergens*, 496 U.S. at 248 (plurality opinion) ("[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion"). Milford's argument that it should be exempt from this Court's equal access precedents and the neutrality requirement of the Establishment Clause is without merit.

CONCLUSION

The Good News Club asks only the same opportunity that Milford gives every other youth organization in the community – the opportunity to use school facilities to conduct its meetings. Milford has decided to open a forum, a market place, for community groups to promote the moral and spiritual development of children. The Good News Club is forbidden from entering that marketplace and offering the parents of the Milford community the opportunity to choose to have their children to hear about morality from a religious perspective. This is contrary to the decisions of this Court and contrary to our nation's most fundamental belief that the blessings of freedom and liberty are secured by a marketplace of ideas free from viewpoint discrimination. Wherefore, Petitioners respectfully request that the judgment of the Second Circuit be reversed.

Respectfully submitted,

Thomas Marcelle, Esq.
Counsel of Record
71 Devonshire Drive
Slingerlands, NY 12159
Tel.: (518) 475-0806

John W. Whitehead, Esq.
Steven H. Aden, Esq.
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, VA 22901
(804) 978-3888
Counsel for Petitioners

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