IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Sally Campbell, et al.,	)	
	)	
Plaintiffs,	)	
	)	C.A. No. 98-2605
v.	)	
	)	SECTION "C"
St. Tammany Parish School Board,	)	
et al.,	)	MAGISTRATE "1"
Defendants.	)	
	)	

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON REMAND

INTRODUCTION AND INTEREST OF THE UNITED STATES

Sally Campbell ("Campbell") and the Louisiana Christian Coalition ("LCC") have sued the St. Tammany Parish School Board, individual members of the school board, the superintendent, and the administrative supervisor for alleged violations of the First and Fourteenth Amendments of the United States Constitution. Plaintiffs allege that defendants violated their rights by excluding LCC from a public forum created by the school district

because, in defendants' view, the meeting would include "religious services or instruction." (Compl., ¶¶ 1, 3, 46.)

This case presents important questions of how Supreme Court precedent concerning viewpoint discrimination should be applied to non-governmental religious speech in a limited public forum open to a wide range of expressive activities. The United States has participated in numerous cases addressing this issue, including Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993), and Bronx Household of Faith v. Board of Education, 226 F. Supp.2d 401 (S.D.N.Y. 2002), appeal pending, No. 02-7781 (2nd Cir.). The United States also has an interest and has participated in cases raising Establishment Clause issues of the type presented here because it is the proprietor of public property, including government-operated schools.

Further, the United States has an interest in enforcing laws that prohibit discrimination in public schools on the basis of religion. Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c, et seq., prohibits the denial of the equal protection of the law in public schools based on religion. The United States is also authorized under Title IX of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2, to intervene in cases of general public importance alleging violations of the Fourteenth Amendment's Equal Protection Clause. This case, brought under the First Amendment and the Equal Protection Clause, raises such issues. See Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 715 (O'Connor, J., concurring) ("the Free Exercise Clause, the Establishment Clause . . . and the Equal Protection Clause as applied to religion – all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits").

Pursuant to these interests, the United States hereby submits this amicus brief in support of plaintiffs, which argues that defendants' exclusion of their proposed activities as forbidden "religious services or instruction" constitutes viewpoint discrimination, both because the activities fit well within the forum created by defendants' facility use policy, and because there is no constitutionally permissible means to distinguish in a forum such as this between religious viewpoints on a topic and "religious services or instruction."

STATEMENT OF FACTS

In 1997, the School Board adopted a "Use of School Facilities Policy" that opened the use of school facilities to a wide range of community, youth and adult activities. In relevant part, the Policy provides:

> While, from time to time, the Board may permit the use of some of the public school buildings as a limited public forum, the primary function and use of the buildings is first for the education of children, then community, youth and adult group activities, not the proprietary needs of any particular organization.
>
> Public school buildings may also be used for holding civic and recreational meetings and entertainment and other uses pertaining to the welfare of the community. Such uses shall be non-exclusive and open to the general public. . . .
>
> No outside organization or group may be allowed to conduct religious services or religious instruction on school premises. However, the use of school facilities by outside organizations or groups outside school hours for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible if it does not interfere with one of the primary uses of such facilities.

Exhibit 1.[1] Since the policy's adoption, a wide variety of groups have used school facilities, including various church groups, the Lions Club, the Kiwanis Club, the Boy Scouts, the Girl

[1]All citations to "Exhibit __" are to the exhibits submitted by plaintiffs with their Motion for Summary Judgment on Remand.

Scouts, PRIDE (Parents Resource Institution for Drug Education), as well as many neighborhood associations, for a wide variety of purposes. See, e.g., Exhibit 2 at 2, 5, 8, 13, 29; Exhibit 36 at 20-23, 28, 32.

In June, 1998, Campbell requested use of the facilities at Mandeville Elementary School for an LCC meeting. Initially, Campbell placed several phone calls to Mandeville Elementary. Exhibit 10. After these calls went unreturned, Campbell sent a letter to Mandeville Elementary's principal. Id. As explained in Campbell's letter, plaintiffs wished to use the school facility for a prayer meeting open to the community at which those attending would "plan to worship the Lord in prayer and music[,] . . . to discuss family and political issues, pray about those issues, and seek to engage in religious and Biblical instruction with regard to those issues." Id. After not receiving a response, Campbell sent a second letter to Mandeville Elementary, again requesting use of the facilities. Exhibit 11.

One month after the first letter, Defendant William H. Brady, administrative supervisor for the school district, rejected Campbell's request. Exhibit 12. In his letter, Brady gave three grounds for the denial: (1) use of school facilities for a prayer meeting is prohibited because the facility policy does not allow religious services or religious instruction on school premises; (2) use of school facilities for proprietary uses is prohibited; and (3) Mandeville Elementary does not have a meeting space appropriate for the requested use. Id.[2] After receiving the letter denying the request, the parties exchanged several more letters, in which Brady continued to refuse

[2]Although the defendants initially cited these three grounds for denying plaintiffs' facility request, this litigation has focused only on the first.

access. Exhibits 13, 14. The school board upheld his decision, after which plaintiffs filed this lawsuit.

PRIOR SUBSTANTIVE RULINGS IN THIS CASE

In July 1999, this Court granted summary judgment in plaintiffs' favor, holding that the Board's facility use policy was unconstitutionally vague because it neither defined nor provided guidance as to what constitutes "religious service or religious instruction,"or "religious material or material which contains a religious viewpoint." Campbell v. St. Tammany Parish Sch. Bd., 1999 WL 562736, at *3 (E.D. La. July 30, 1999). Thus, this Court found, "there is no intelligible way of determining when religious speech is permissible under the policy as 'religious material or material which contains a religious viewpoint,' or when it crosses some imaginary line and becomes prohibited 'religious instruction.'" Id.

The Fifth Circuit reversed, rejecting on three grounds the conclusion that the Board's policy was unconstitutionally vague. Campbell v. St. Tammany Parish Sch. Bd., 206 F.3d 482 (5th Cir. 2000). First, it held that "as applied to [plaintiffs'] request, which includes verbatim some of the prohibited terms, the policy is not even arguably vague." Campbell, 206 F.3d at 485. Second, the court held that plaintiffs failed to show that the Board had arbitrarily applied the policy to them. Id. Although the Board had permitted other religious groups to use school facilities for "musical concerts or banquets," the Fifth Circuit found these activities distinguishable from the "prayer meeting" at issue here. Id. Third, the court found a "clear core meaning" to the terms "religious instruction" and "religious worship" which defeated any claim of vagueness. Although these terms "might be subject to ambiguity at the margins – for example, the line between [religious] instruction and discussion may blur at the edges – that effect," the

Fifth Circuit concluded, was "no more than the limits of language stretched by the active imagination of hypothesized application." Id.

The Fifth Circuit then granted summary judgment in the Board's favor. Finding that the Board had created a limited public forum, the Fifth Circuit applied the rule that the limits on access to the forum must reasonably relate to the forum's purposes and not discriminate on the basis of viewpoint. Id. at 487 (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995)). Drawing a distinction between religion as "a perspective on a topic" and as a "substantive activity in itself," the Fifth Circuit held that plaintiffs' proposed speech fell in the latter category, and that the Board's exclusion of that speech is "discrimination based on content, not viewpoint." Id. Similarly, the Fifth Circuit rejected plaintiffs' argument that the Board had opened the forum for religious uses by permitting a church banquet and a gospel choir performance because those events "involved no religious instruction and were not prayer meetings." Id.

The Fifth Circuit then denied rehearing and rehearing en banc. Campbell v. St. Tammany Parish Sch. Bd., 231 F.3d 937 (5th Cir. 2000). In a per curiam opinion, the Fifth Circuit reaffirmed its findings that the Board had created a limited public forum whose access the Board could reasonably regulate, that the Board's exclusion of "religious services" was a reasonable regulation, and that the distinction between prohibiting "religious services" and prohibiting "expression from a religious viewpoint" could be readily – and constitutionally – drawn. Campbell, 231 F.3d at 942-43.

Five judges dissented from the en banc rehearing denial. Id. at 945-49 (Jones, J., joined by J. Smith, Barksdale, E. Garza and DeMoss, JJ.). The dissenters believed that the Board's

exclusion of plaintiffs or any other speaker seeking to engage in religious speech was a content-based exclusion and viewpoint discrimination. Id. at 947, 949. They disagreed with the majority's characterization of the type of forum created by the Board. In their view, the Board in effect had created a traditional public forum by opening school facilities to "a wide variety of private organizations." Id. at 946. And "the content-based exclusion of religious speakers from access to the facilities is [unconstitutional] censorship pure and simple." Id. at 947. But even if the Board's policy only created a limited public forum, the exclusion of religious services and religious instruction was unreasonable in light of the school board's policy of opening up the facility to any and all groups that generally serve the "welfare of the public," and was also viewpoint discrimination because subject matters permissible to other groups were not permissible when determined to be part of religious activity. Id. at 948.

In June 2001, subsequent to the Fifth Circuit's decision, the Supreme Court decided Good News Club v. Milford Central School, 533 U.S. 98 (2001). Good News Club, a private Christian children's organization, sought permission from Milford Central School to use the school cafeteria for weekly after-school meetings in which members would recite Biblical verses, listen to Biblical stories, and pray. Good News Club, 533 U.S. at 103. Milford's facilities use policy opened school property to a broad range of activities, including, inter alia, "social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community." Id. at 102. Milford acknowledged that these categories encompassed programs addressing a child's moral and character development from a religious perspective. Id. at 108. Milford, however, rejected the club's request because it considered the Club's activities to be "the equivalent of religious worship." Id.

The Supreme Court held that Milford engaged in viewpoint discrimination when it denied permission for the club "to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint." Id. at 109.[3] Significant to this case, the Court rejected the lower court's characterization of the club's activities as "different in kind" because they were "religious in nature." Id. at 110-11. The Court explained that characterizing something as "quintessentially religious" did not mean that it could not be considered simultaneously a secular program to benefit the "welfare of the community" consistent with Milford's facility use policy. Id. at 111. Because "religion is the viewpoint from which ideas were conveyed" by the club, id. at 112 n.4, Milford's exclusion of the club was unconstitutional viewpoint discrimination. Id.

The Court concluded its opinion by rejecting Milford's argument that excluding speech with a religious viewpoint was necessary to avoid violating the Establishment Clause. Id. Milford, the Court found, had "no valid Establishment Clause interest" given that the club's meetings were to be held after school hours, would not be sponsored by the school, and would be open to non-member students. Id. at 113.

After deciding Good News Club, the Supreme Court granted certiorari in this case, vacated the Fifth Circuit's panel opinion, and remanded the case for further consideration. Campbell v. St. Tammany Parish Sch. Bd., 533 U.S. 913 (2001). The Fifth Circuit, in turn, remanded this case to the district court to consider, in light of Good News Club, "any change in

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[3]The Court noted that the Fifth Circuit's decision in this case was part of the "conflict among the Courts of Appeals on the question whether speech can be excluded from a limited public forum on the basis of the speech," which the Court granted certiorari to resolve. Id. at 105-06.

positions by the parties as well as any further development of the record." Campbell v. St. Tammany Parish Sch. Bd., 300 F.3d 526 (5th Cir. 2002).[4]

ARGUMENT

This brief addresses two questions in light of Good News Club: (1) whether the school board's exclusion of plaintiffs' proposed meeting – which included prayer, worship, singing of spiritual and patriotic music, discussion of family and political issues, and refreshments – from its broadly defined limited public forum on the grounds that the meeting would be "religious instruction or worship" constitutes viewpoint discrimination; and (2) whether there is any practical or constitutionally permissible distinction that the school board can make between "worship" or "religious instruction" on the one hand and "material which contains a religious viewpoint" on the other in evaluating access to its broadly drawn limited public forum.

First, the Board has established a limited public forum with very broad parameters, opening up its facilities to a wide range of community, youth and adult groups to use school facilities for "civic and recreational meetings and entertainments and other uses pertaining to the welfare of the community." By excluding plaintiffs, whose proposed activities fit well within the broadly defined purpose of the forum, solely because of the religious nature of these activities, defendants engaged in impermissible viewpoint discrimination. Good News Club, 533 U.S. at 106 (citations omitted).

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[4]One member of the panel concurred in the decision to remand to the district court, but wrote separately to identify differences between this case and the Supreme Court's decisions in Good News Club, Lamb's Chapel, and Rosenberger, namely that the defendants' prohibition on "religious services and instruction" is a permissible content-based exclusion rather than an impermissible viewpoint-based one. Id. at 528 (Gifford, J.). For the reasons discussed below, the United States respectfully disagrees.

Second, defendants' attempts to distinguish categorically between religious worship and instruction on the one hand and "material which contains a religious viewpoint" on the other is one that simply cannot be made in the context of a broadly defined forum like the one at issue in this case. See Good News Club, 533 U.S. at 111; Bronx Household of Faith v. Board of Educ., 226 F. Supp.2d 401, 415-17 (S.D.N.Y. 2002), appeal docketed, No. 02-7781 (2nd Cir. July 9, 2002). The Supreme Court recognized this when holding in Widmar v. Vincent, 454 U.S. 263 (1981), that no intelligible distinction that can be made between singing, teaching, and reading in general, and those same activities when used for worship. Id. at 270. Even if such a distinction could be made, the process would necessarily drag forum regulators and courts into a degree of parsing of religious practice and doctrine that would violate the Establishment Clause's non-entanglement principle, Widmar, 454 U.S. at 270 and Bronx Household, 226 F. Supp.2d at 424-25, as well as the First Amendment's free speech protections. Rosenberger, 515 U.S. at 831-37.

A. Plaintiffs' Proposed Activity Falls Well Within the Broad Contours of the School Facility Use Policy and its Exclusion is, thus, Viewpoint Discrimination.

It is undisputed that the school district has created a limited public forum in its schools. Specifically, under the district's facility use policy, private organizations may use school property for "community, youth and adult group activities;" "civic and recreational meetings and entertainment and other such uses pertaining to the welfare of the community;" and "for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material." However, they are forbidden from "conduct[ing] religious services or religious instruction." Although "not required to . . . allow persons to engage in every type of speech," the district cannot discriminate against speech on the basis of viewpoint. Good News

Club, 533 U.S. at 108. Here, as explained below, the Board's decision to deny access to the LCC is impermissible viewpoint discrimination because the group's proposed activities fall well within the broad category of permitted forum uses.

In Good News Club, the Supreme Court considered the application of a broadly worded community-use policy that was virtually identical to the one at issue here: the school district permitted residents to use school facilities for "holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community," but barred use "for religious purposes." 533 U.S. at 102-03. Relying on this policy, the school district denied access to the Good News Club, a private Christian organization for children ages 6 to 12. Id. at 103. The Good News Club program typically consisted of prayer, religious songs, Bible reading, telling a story with a lesson about values or morals, and religion-themed games. Id.

The Court found that the district's exclusion of the Club's meetings as "religious instruction," was viewpoint discrimination because the school district conceded that teaching "morals and character development to children" was a permitted use. Id. at 104, 108-09. The Supreme Court stated that "we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons." Id. at 111. This was true, the Court held, even though many of the activities engaged in by the Club were "quintessentially religious." Id.

In another post-Good News Club case involving facts substantially similar to those at issue here, the district court granted a preliminary injunction to a church group that was seeking to use school facilities for weekly worship meetings. Bronx Household, 226 F. Supp.2d at 424-25. Initially, the school board had denied the request because the facility use policy, which

established a limited public forum and was virtually identical to the one at issue in Good News Club, allowed uses pertaining to the welfare of the community, but prohibited religious services or instruction. Id. at 403. The district court, relying on Good News Club, concluded that the plaintiffs had shown a likelihood of success in demonstrating that they were wrongfully denied access to the school facility. In reaching this conclusion, the court made three holdings. First, the court found that the activities of the church group at the weekly worship service, which included planning of charitable activities, refreshments, social interaction, and singing, were not "mere worship." Id. at 413-15. Second, the court found that even if the activities of the group were properly labeled "worship," worship is not an activity different in kind from other activities permitted in the school facilities. Id. at 415-17. Third, the court found that even if worship is different, it cannot and may not be effectively regulated by school officials. Id. at 417-25.[5] See Moore v. City of Van, Tex., 238 F. Supp.2d 837, 845-59 (E.D. Tex. 2003) (holding that defendant engaged in unconstitutional viewpoint discrimination when it denied proposed use of community center because it included religious speech but was otherwise consistent with permitted facility uses).

Like the school districts in Good News Club and Bronx Household, defendants here labeled LCC's activities as "worship" and "religious instruction," and thus treated them as being different in kind from other activities permitted in the forum, without considering the substance of the planned activities. The Supreme Court has made clear that a school district cannot simply label a group's proposed activities as worship because "what matters is the substance of the

[5]The Second Circuit held oral argument in the defendants' appeal of the district court's decision on November 4, 2002. A decision is pending.

Club's activities." Id. at 112 n.4. It is not enough to simply say that all of the proposed activities are linked by religion or hold a significance for a particular religious faith.

An examination of LCC's proposed activities shows that there is no substantive difference between LCC's proposed prayer meeting and the wide array of activities encompassed in the defendants' broad invitation to groups to use school facilities for "social, civic and recreational meetings and entertainment and other uses pertaining to the welfare of the community." Campbell's letter requesting access for the meeting states that the group plans to "worship the Lord in prayer in music. We also plan to discuss family and political issues, pray about those issues, and seek to engage in religious and Biblical instruction with regard to those issues." LCC's meetings typically include patriotic music, spiritual music, prayer, praise, the serving of refreshments, and the discussion of issues "that directly impact the family, the education issues." Campbell Deposition ("Dep.") at 38:15-19, 39:6-8; 42:17-18 (Exhibit 28). At most meetings, one or more speakers discuss these and other issues relevant to the community. Id. at 40:15-16. Past speakers included the local Registrar of Voters, who had come to explain the precinct process, as well as members of local school boards, city councils, and other elected bodies. Id. at 23:10-14. To the extent that plaintiffs would engage in the religious and Biblical instruction referenced in Campbell's letter, that instruction would involve considering Bible passages that address the particular family, political, and education issues being discussed. Id. at 41:9-19.

The proposed meetings are also "recreational" in that they involve the serving of refreshments and opportunities for fellowship, like the serving of food at the Kiwanis Club pancake breakfast and the Mt. Zion Methodist Church Annual Tea. The proposed meeting

involves musical performance, like the Primary Colors Pre-School Christmas Program, as well as lecturing, like the Young Blood International Seminar and the PRIDE Seminar addressing "How To Talk So Kids Will Listen." Finally, the proposed meeting is "a use pertaining to the welfare of the community," generally, and specifically with regard to the discussion of topics relevant to government, family, and schools, again like the many other meetings held at school facilities by numerous homeowners associations, the Northwest St. Tammany Civil Association, the Lake Pontchartrain Basin Foundation Teachers' Meeting, and the American Association of University Women's Sister-to-Sister Summit.

Defendants wish to simply label LCC's activities as "religious services and instruction" and exclude them for this reason alone. Notwithstanding that some of LCC's activities, such as prayer, are religious in nature, the other proposed activities, including the discussions of issues relevant to families and schools, are clearly consistent with the type of activities permitted by the policy. In many ways, LCC's proposed activities are further removed from any conception of "mere religious worship divorced from any teaching of moral values," Good News Club, 533 U.S. at 112 n.4, than the meetings allowed in both Good News Club and Bronx Household.

In Good News Club, the meetings involved praying, Biblical story telling, and reciting Biblical verses. 533 U.S. at 103. Indeed, in Good News Club the Court noted that one of the dissenting Justices thought the Club's meeting could best be described as "an evangelical service of worship." Id. at 112 n.4. Nonetheless, the majority made clear that "[r]egardless of the label . . . , what matters is the substance of the Club's activities," and thus found viewpoint discrimination" in the school's exclusion of the Club. Id. Similarly, in Bronx Household, the proposed activities were Sunday worship services, which included teaching about the Bible,

prayer, communion, the giving of testimonials, and preaching. 226 F. Supp.2d at 409. As in Good News Club, the Bronx Household Court found the plaintiffs' exclusion to be viewpoint discrimination. LCC's proposed meeting, in contrast, includes, in addition to activities which are religious in nature, the singing of patriotic music and, at most meetings, the presentation of speakers on secular matters such as educational issues and other community issues. Campbell Dep. at 38:15-19, 39:6-8, 42:17-18.

Yet even more important than the individual components of LCC's proposed meeting, its overall thrust is plainly a "civic" meeting and a "use pertaining to the welfare of the community" – only from a religious approach. Excluding plaintiffs because they are pursuing a civic activity that pertains to the welfare of the community, but which happens also to have a religious character, is viewpoint discrimination under Good News Club.[6]

B. There is No Workable or Constitutionally Permissible Basis to Distinguish Between "Religious Services or Instruction" and "Religious Viewpoint" in a Broadly Defined Forum Like the One at Issue Here.

In refusing access to plaintiffs, defendants never explained how LCC's activities were different from the various permitted activities in the forum, except to simply point to the Board's policy of excluding "religious services" and "religious instruction." As discussed above, because

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[6]The Court can reach the same conclusion – that the district's exclusion of LCC is unconstitutional – if it views the case under the requirement that when the government offers a benefit to eligible persons, it must do so on a religion-neutral basis. See, e.g., Rosenberger, supra (funding of student activity groups); McDaniel v. Paty, 435 U.S. 618, 626 (1978) (eligibility to serve as delegate); Prince v. Jacoby, 303 F.3d 1074, 1094 (9th Cir. 2002) (access to school staff, supplies and vehicles) Davey v. Locke, 299 F.3d 748, 760 (9th Cir. 2002) (state scholarship program). Or, as succinctly stated in Davey, "a state . . . may not offer a benefit to all . . . , but exclude some on the basis of religion." 299 F.3d at 754. Here, the district has decided to offer the benefit of a limited public forum to community groups and individuals. Having done so, the district cannot withhold this benefit on the basis of religion.

LCC proposes to hold a meeting that falls well within the bounds of the school board's opening of its facilities to civic uses and other uses pertaining to the welfare of the community, excluding it simply because of the religious character of its otherwise permissible proposed use is viewpoint discrimination.

Defendants' rationale for excluding plaintiffs seems to be grounded in a belief that their proposed activities are properly described as "religious services" or "religious instruction," purportedly analytically distinct categories of expressive activity that may be excluded entirely from the forum without implicating viewpoint discrimination. The Fifth Circuit, in its pre-Good News Club decision upon denial of rehearing, took a similar view, stating: "A religious service is an activity, a manner of communicating which carries a very special and distinct meaning in our culture." 231 F. 3d at 943. The Court opined that while a Catholic group could assemble on school property to discuss abortion, it could not hold "a Catholic mass featuring a prayer for the welfare of the unborn and for the reform of American abortion law." Id.

In light of Good News Club and other Supreme Court precedent, however, this rigid dichotomy between religious services and other expressions of religious viewpoints cannot be maintained. First, there is no workable distinction between activities that could be labeled as "discussions of religious material" or "material containing a religious viewpoint" – which would be permissible under the district's facility use policy – and "religious services" or "religious instruction" – which would not. Second, any attempts to distinguish between these "classes" of activity would wrongly place government officials in the position of determining when a group's expressive activity is "too religious," thereby ceasing to be merely expression of a religious viewpoint, and instead becomes "religious services" or "religious instruction."

1. There is no Legitimate Distinction Between "Worship" and "Religious Services," on the One Hand and "Religious Instruction," and "Discussions of Religious Material" on the Other.

The Board's efforts to cabin worship into a sui generis category of expression that is readily excludable from a forum open to a wide range of activities should be rejected. The substance of worship cannot be so facilely dismissed as a human activity that is easily distinguishable by government decision-makers from other activities. Worship has characteristics that are unique, certainly, but that is also true of religion generally, and the Supreme Court in Good News Club was quite clear in rejecting the notion that religion's uniqueness lends itself to treatment as a separate subject rather than as a viewpoint. The Supreme Court stated that activities like religious instruction or prayer that are "quintessentially religious" or "decidedly religious in nature" can nonetheless express a viewpoint. Id. at 111.

To further demonstrate the point, the Court cited Judge Jacobs' dissenting opinion in the Second Circuit's Good News Club decision, which explained concisely how religious devotional acts such as prayer and Bible study can be an expression of viewpoint rather than a separate or distinct subject:

> [R]eligious answers . . . 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 v. Milford Central School, 202 F.3d 502, 514 (2d Cir. 2000) (Jacobs, J., dissenting). Indeed, even aspects of religious practice most readily susceptible to being dismissed as "mere worship," such as liturgical prayer or ritual such as communion,

communicate specific messages to participants and to observers about the participants' world view.

The notion that worship is a distinct, readily excludable category of speech was rejected by the Court in Widmar v. Vincent, 454 U.S. 263, 265, 273 n.13 (1981). The University of Missouri had permitted numerous student organizations to use its facilities, but denied access to Cornerstone, a Christian group that held meetings that included "prayer, hymns, Bible commentary, and discussion of religious views and experiences." Id. at 265 n.2. The Supreme Court held that the university's ban on Cornerstone's use of university facilities for "religious worship" or "religious teaching" violated the group's First Amendment's rights to free speech and association, and that the university engaged in impermissible "content-based exclusion of religious speech." Id. at 273 n.12, 277. The Supreme Court explicitly rejected the dissent's distinction between "worship" and other forms of religion-related speech and concluded that there is no "intelligible content" or basis to determine when "singing hymns, reading scripture, and teaching biblical principles,' cease to be 'singing, reading, and teaching' – all apparently forms of 'speech,' despite their religious subject matter – and become unprotected 'worship.'" Id. at 269-70.

Thus the Supreme Court, in Widmar and Good News Club, has recognized that making such a distinction is unworkable. It assumes a formalistic definition of worship or religious instruction that does not transfer to actual experience. The children taking part in the Good News Club activities were engaged in what might be called "an evangelical service of worship," as Justice Souter suggested in dissent. Good News Club, 533 U.S. at 138. But the Court nonetheless found the Club's activities involved expression of a particular viewpoint about

character development and youth activities. While the format of religious worship, tradition, and services varies greatly among religions, a viewpoint is expressed in both informal services as well as more ritualistic and liturgical worship.

For example, expression of viewpoints on a variety of subjects is readily apparent in homilies or sermons, but a ritual that is part of worship each week or the saying of a prayer learned by rote also is an expression of adherents, both individually and collectively as a religious community, of their viewpoints on the sources of truth and meaning, and on a myriad of subjects and ideas. See, e.g., Brief Amicus Curiae for 20 Theologians and Scholars of Religion in Support of Petitioners (filed in Good News Club v. Milton Cent. Sch., No. 99-2036), 2000 WL 1803627, at *7 ("For some, including all secularists and the adherents to a few religions, ethics and religion are distinct subjects. For others, including adherents to many of the mainstream religious traditions of the West, ethics and religion are inextricable: to do God's will is to do the good, and knowledge of the good is ultimately derived from knowledge of the character of God.").

It is therefore not surprising that Defendant Brady, the person charged by the St. Tammany Parish School Board to determine permissible facility uses, was unable to apply the distinction between religious viewpoints and religious services or instruction in any coherent manner. Sally Campbell's request was to have a prayer meeting at which those attending would, in part, engage in religious and Biblical instruction with regard to political and family issues. Yet, Brady denied the request although he subsequently admitted that he did not know the difference between religious instruction that is prohibited under the policy and discussion from a religious viewpoint that is permitted under the policy. Brady Dep. at 63:9-24 (Exhibit 3).

2. Attempts to Distinguish Between "Worship" or "Religious Services" and "Religious Instruction" or "Discussions of Religious Material" Unconstitutionally Entangle Government Actors with Religious Matters.

Not only does the cabining of worship into a separate, excludable category of speech fail to recognize the subtle ways in which such an undertaking constitutes viewpoint discrimination, it also puts government actors in the position of scrutinizing and dissecting religious practice and doctrine. This is not merely impracticable, but also requires a degree of involvement in religious matters that violates the Free Speech and Establishment Clauses of the Constitution. Cf. Lee v. Weisman, 505 U.S. 577, 616-17 (1992) (Souter, J., concurring) ("I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible," than "comparative theology.") (quoted in Good News Club, 533 U.S. at 127 (Scalia, J., concurring)).

In Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819 (1995), the Supreme Court concluded that the University's denial of funding for a student-run Christian public policy magazine constituted viewpoint discrimination. The Supreme Court held that government actors parsing religious expression implicated both the Free Speech Clause and the Establishment Clause:

> [t]he viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right to free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.

Id. at 845-46.

Similarly, the Supreme Court in Widmar, after observing that the distinction between religious worship and protected religious speech lacked "intelligible content," went on to note that even were such a distinction possible, it would violate the non-entanglement prong of the Establishment Clause:

> Merely to draw the distinction would require the university – and ultimately the courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.

454 U.S. at 269-70 n.6 (citation omitted); see also Good News Club, 533 U.S. at 127 (Scalia, J., concurring) (Even if "courts (and other government officials) were competent, applying the distinction would require the state monitoring of private, religious speech with a degree of pervasiveness that we have previously found unacceptable.").

Thus, both as a practical matter and as a constitutional one, government actors who have opened a forum to an extremely broad range of private expression cannot distinguish between speech from a religious viewpoint and "religious services or instruction."

CONCLUSION

For the foregoing reasons, this Court should grant plaintiffs' motion for summary judgment.

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DATED: April 25, 2003

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2003, I served copies of the foregoing pleading to counsel of record by facsimile and first class U.S. mail, postage prepaid.

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Javier M. Guzman