No. 06-1633

IN THE
Supreme Court of the United States

FAITH CENTER CHURCH EVANGELISTIC MINISTRIES
and HATTIE HOPKINS,

Petitioners,

v.

FEDERAL D. GLOVER, MARK DE SAULNIER,
JOHN M. GIOIA, MILLIE GREENBERG,
JOHN W. SWEETEN, ANNE CAIN, PATTY CHAN,
LAURA O'DONAHUE and GAYLE B. UILKEMA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF THE PETITION FOR CERTIORARI

DOUGLAS G. SMITH
Counsel of Record
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

Counsel for Amicus Curiae Eagle Forum ELDF

August 7, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, *amicus* states that it has no parent companies or nonwholly owned subsidiaries.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

REASONS FOR GRANTING THE WRIT 3

I. The Ninth Circuit's Decision Is Contrary To This Court's Well-Settled Precedent And Creates An Unwarranted Intercircuit Conflict. 3

II. The Ninth Circuit's Decision Is Based On An Interpretation Of The Establishment Clause That Is Inconsistent With This Court's Precedents. 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases

Board of Education of the Westside Community School v. Mergens By and Through Mergens,
496 U.S. 226 (1990) 9, 11

Bronx Household of Faith v. Board of Education of the City of New York,
331 F.3d 342 (2d Cir. 2003) 9

Good News Club v. Milford Central School,
533 U.S. 98 (2001) ..... passim

Lamb's Chapel v. Center Moriches Union Free School District,
508 U.S. 384 (1993) 4, 6, 7, 11

Lemon v. Kurtzman,
403 U.S. 602 (1971) 9

Police Dept. of the City of Chicago v. Mosley,
408 U.S. 92 (1972) 5

Rosenberger v. Rector and Visitors of the University of Virginia,
515 U.S. 819 (1995) 3, 5, 6, 11

Widmar v. Vincent,
454 U.S. 263 (1981) ..... passim

Constitutional Provisions

U.S. CONST. amend. I 10

TABLE OF AUTHORITIES (Cont.)

Page(s)

Other Authorities

AMERICAN HERITAGE DICTIONARY (4th ed. 2000) 8

CAMBRIDGE ONLINE DICTIONARY 8

MERRIAM-WEBSTER'S ONLINE DICTIONARY 8

INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. For over twenty years it has defended principles of limited government, individual liberty, and moral virtue. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the Constitution be interpreted according to its original meaning. Eagle Forum ELDF has supported longstanding principles of morality in American society, and has consistently defended the right of religious expression. Eagle Forum ELDF has a strong interest in protecting the right of religious organizations to equal access to public property.

SUMMARY OF ARGUMENT

The Ninth Circuit's 2-1 decision conflicts with this Court's precedents and creates an unwarranted split among the circuit courts. The panel majority's opinion is internally inconsistent in its attempt to circumvent this Court's precedents guaranteeing religious organizations equal access to facilities that are open to the public. Judge Karlton's concurrence, while more direct and to the point, manifests a blatant hostility to this Court's prior rulings, lamenting the "sorry state of the law" articulated in this Court's decisions and "pray[ing] for the court's enlightenment." (App. 37a, 40a.) Seven judges on the Ninth Circuit (the "Ninth Circuit dissenters") recognized that the panel's split decision

---

[1] This brief is filed with the written consent of all parties. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief; pursuant to Supreme Court Rule 37.2, letters evidencing this consent have been filed with the Clerk.

warrants further review, filing a vigorous dissent from the court's denial of rehearing en banc. (*See* App. 87a-104a.)

The issue presented here is of fundamental importance. The Ninth Circuit held that the district court abused its discretion when it found that a county library must give equal access to a Christian group seeking to utilize one of its public meeting rooms. (App. 2a.) The library offered these public meeting rooms for "educational, cultural and community related meetings, programs and activities." (App. 2a-3a.) However, it specifically prohibited certain religious activities, stating that the library's meeting rooms "shall not be used for religious services." (App. 3a.) The district court correctly held that petitioners were denied equal access to the facilities and properly granted their motion for a preliminary injunction. (App. 67a.)

The Ninth Circuit's ruling to the contrary defies both law and logic. The court did not dispute that petitioners "engaged in protected speech when [their] participants met in the Antioch library for prayer, praise, and worship." (App. 11a.) Nonetheless, it held that petitioners could not engage in religious worship because the library meeting room was a "limited public forum" and "the County's policy to exclude religious worship services from the meeting room is reasonable in light of the forum's purpose." (App. 15a.) However, the county specifically defined that purpose as *excluding* religious worship. The court's reasoning is therefore circular and allows public entities to define away religious organizations' equal access rights by merely defining the "limited" forum as one that excludes certain religious practices.

At the same time, the Ninth Circuit's reasoning is internally inconsistent. In attempting to circumvent this Court's well-settled precedents guaranteeing religious organizations equal access to public facilities, the panel majority held that petitioners had a right to engage in "prayer", but not "religious worship". This is a distinction

without a difference. More fundamentally, the court's decision requires public officials to engage in hair-splitting to discern what constitutes "prayer" as opposed to a "worship service" and make judgments that entangle the government in private religious practices, thereby violating the Establishment Clause.

For these reasons and others stated below, the petition should be granted.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Decision Is Contrary To This Court's Well-Settled Precedent And Creates An Unwarranted Intercircuit Conflict.

This Court has unequivocally held that "religious worship and discussion . . . are forms of speech and association protected by the First Amendment." *Widmar v. Vincent*, 454 U.S. 263, 269 (1981). "The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." *Id.* at 267-68. Accordingly, "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001); *see also Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 828 (1995); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 387, 393-94 (1993).

Amicus agrees with petitioners that the court of appeals erred in finding that the library constituted a "limited public forum" as opposed to a "designated public forum." (*See* Pet. 23-29; App. 15a.)[2] However, regardless of the classification,

---

[2] The dissent specifically found that the library was a designated public forum, and not a "limited" public forum, but held that the library's policy

the Ninth Circuit's decision violates the guarantee of equal access set forth in *Widmar* and *Good News Club*. The panel majority conceded that "the County's purpose was to invite the community at large to participate in use of the meeting room for expressive activity." (App. 15a.) Nonetheless, it asserted that the library did not open its meeting rooms "for indiscriminate use" because it required the submission of an application that "must be reviewed and approved in advance" and specifically excluded "religious services." (App. 17a.) The panel majority claimed, without any citation to the record, that the library's exclusionary policy was designed to "preserve the character of the forum as a common meeting space, an alternative to the community lecture hall, the corporate board-room, or the local Starbucks." (App. 19a.)

However, excluding religious "worship" has nothing to do with "preserving" such characteristics of the space. To the contrary, religious worship inherently involves utilizing the meeting rooms as a "common meeting space." Moreover, even if the library had such an objective, as the panel majority conceded, the library may not "discriminate against a speaker's viewpoint." (App. 20a.) Accordingly, the library cannot discriminate against religious organizations by defining the "limitation" on the public forum to specifically exclude those with a religious viewpoint.

This Court's well-settled precedent makes clear that the library may not exclude "religious worship" any more than it

---

was unconstitutional under either designation. (App. 53a n.5.) The district court made no finding on this issue. (*See* App. 76a n.9.) As discussed below, much of the Ninth Circuit's error may be traced to its determination that the library was a "limited public forum" and its interpretation of that doctrine as allowing government actors to impose limitations that are defined in such a way as to specifically exclude whole categories of religious speech.

may exclude the promotion of atheism or libertarian philosophy. *See Good News Club*, 533 U.S. at 112; *Rosenberger*, 515 U.S. at 828. Nonetheless, the panel majority allowed the library to do just that, relying upon a *dissent* issued by two Justices to conclude that such limitations were "reasonable" and thus constitutional, asserting that it would be "remarkable" if a "'public [building] opened for civic meetings must be opened for use as a church, synagogue, or mosque.'" (*See* App. 20a (quoting *Good News Club*, 533 U.S. at 139 (Souter and Ginsburg, JJ., dissenting).)

Nor is the county's discriminatory behavior justified by an "interest in screening applications and excluding meeting room activities that may interfere with the library's primary function as a sanctuary for reading, writing, and quiet contemplation." (App. 20a) The panel improperly *assumed* that religious worship was "controversial" and "alienating" and that the library must have reasonably wanted to exclude it. (App. 20a-21a.) Whether "offensive" or not, worship remains protected by the First Amendment, as are controversial views generally. *See Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."). By allowing the library to define the "limited forum" to exclude religious worship and then claim that petitioners "exceeded the boundaries of the library's limited forum" (App. 28a), the Ninth Circuit effectively eviscerated petitioners' equal access rights.

In the process, the court misconstrued or ignored well-settled precedent holding that such limitations are impermissible. This Court has repeatedly held that access may not be restricted if the restriction is based on "the specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger*, 515 U.S. at 829. In *Widmar*, for example, the Court ruled unconstitutional a policy that

barred the use of university buildings "for purposes of religious worship or religious teaching" on the grounds that "[t]hese are forms of speech and association protected by the First Amendment." 454 U.S. at 265 & n.3, 269. In *Rosenberger*, the Court likewise held that the University of Virginia's policy of excluding religious publications from eligibility for student funds violated the Constitution because the University "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." 515 U.S. at 831. In *Lamb's Chapel*, the Court held that a school district acted unconstitutionally when it opened its property for "social, civic, and recreational uses," but specifically prohibited its use for "religious purposes." 508 U.S. at 387, 393-94. Finally, in *Good News Club*, the Court held that a school district engaged in viewpoint discrimination when it refused to allow a Christian children's club to offer a religious perspective on moral and character development in a school forum that was open to the public. 533 U.S. at 108. The Court found that the school district engaged in impermissible viewpoint discrimination when it banned such religious speech. *See id.*

These cases involved facts legally indistinguishable from those at issue here. Nonetheless, the panel majority attempted to circumvent these decisions on the ground that a footnote in *Good News Club* allegedly draws a distinction between religious speech and "'mere religious worship, divorced from any teaching of moral values.'" (App. 25a (quoting *Good News Club*, 533 U.S. at 112 n.4); *see also id.* at 29a.)[3] As petitioners and the Ninth Circuit dissenters

---

[3] Judge Karlton's separate concurrence is more candid. Instead of attempting to engage in the "laborious" effort to parse this Court's prior decisions to uphold the library's exclusionary policies, Judge Karlton simply disagreed with this Court's decisions in *Good News Club* and *Lamb's Chapel*, claiming that they misread the First Amendment because they do not recognize that "religious speech is categorically different than secular speech and is subject to analysis under the Establishment

correctly observe (*see* App. 99a-101a; Pet. 16-19), this argument plainly misreads the Court's opinion, which made no such distinction and did not authorize the exclusion of any particular forms of religious speech. Moreover, as petitioners and the Ninth Circuit dissenters also observe (*see* App. 96a-101a; Pet. 19-21), this reading is inconsistent with this Court's decisions as a whole, which have made clear that there is no such purported distinction.

In *Widmar*, for example, this Court specifically held that such a distinction had no "intelligible content." 454 U.S. at 270 n.6. "There is no indication when 'singing hymns, reading scripture, and teaching biblical principles,' cease to be 'singing, teaching, and reading'—all apparently forms of 'speech,' despite their religious subject matter—and become unprotected 'worship'." *Id.* The Court further found that "even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer." *Id.* "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." *Id.*

More fundamentally, the panel majority's attempt to circumvent this Court's precedents is internally inconsistent. It conceded, for example, that petitioners' "Wordshop" meeting, which included "fervent . . . prayers," "teaching" and "singing", was permissible under the county's policy and

---

and Free Exercise Clause without regard to the jurisprudence of free speech." (App. 38a.) However, the First Amendment contains no such exclusion. Moreover, because Judge Karlton's vote was necessary to the panel's 2-1 determination, his critique of this Court's prior decisions is an implicit concession that the panel majority's ruling cannot be reconciled with that well-settled law.

that "*Good News Club* makes clear that such speech in furtherance of communicating an idea from a religious point of view cannot be grounds for exclusion." (App. 26a-27a.) Yet, at the same time, the panel asserted that the library properly excluded petitioners' "religious worship." (App. 28a-29a.) There is simply no principled distinction between these activities. Indeed, standard definitions of "religious service" and "religious worship" make clear that such activities are merely a form of "prayer". *See, e.g.*, MERRIAM-WEBSTER'S ONLINE DICTIONARY (defining "prayer" as "a religious service consisting chiefly of prayers"); CAMBRIDGE ONLINE DICTIONARY (defining "pray" as "to speak to a god either privately or in a religious ceremony" and "worship" as "when you worship God or a god, often through praying or singing"); AMERICAN HERITAGE DICTIONARY (4th ed. 2000) (defining "prayer" as "a reverent petition made to God, a god, or another object of worship").

In any event, this Court observed in *Widmar* that if any such distinction could be made, discerning where it applied would impermissibly entangle the government with religion. 454 U.S. at 269; *see id.* at 272 n.11 ("[T]he University would risk *greater* 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.'") (emphasis added). Here, the county would be faced with the "impossible task" of determining "which words and activities fall within 'religious worship and religious teaching.'" *Id.* at 272 n.11. "There would also be a continuing need to monitor group meetings to ensure compliance with the rule." *Id.*

Such entanglement is not merely undesirable—it is plainly prohibited under the Court's Establishment Clause jurisprudence. *See Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971) ("state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids"). By contrast, "an open-forum policy, including nondiscrimination against

religious speech ... would in fact *avoid* entanglement with religion." *Board of Education of the Westside Community School v. Mergens By and Through Mergens*, 496 U.S. 226, 248 (1990) (citing *Widmar*, 454 U.S. at 272 n.11) (emphasis in original).

In sum, the Ninth Circuit's decision severely misreads this Court's precedents and creates a significant intercircuit conflict. As petitioners correctly observe (*see* Pet. 13-16), the Second Circuit properly adhered to this Court's precedents in reaching the opposite conclusion on nearly identical facts. *See Bronx Household of Faith v. Board of Education of the City of New York*, 331 F.3d 342 (2d Cir. 2003). (*See also* App. 57a-59a.) The panel majority's attempt to distinguish *Bronx Household* on the ground that it involved "'elements of worship' that further secular goals" (App. 30a) fails for the same reason that its attempt to distinguish *Good News Club* fails. This Court has simply not articulated an exception to the First Amendment for "mere religious worship." The Ninth Circuit created this exception out of whole cloth. In doing so, the court "disregarded equal-access cases stretching back nearly three decades, turned a blind eye to blatant viewpoint discrimination, and endorsed disparate treatment of different religious groups." (*See* App. 88a-89a (Bybee, J., dissenting).)

II. The Ninth Circuit's Decision Is Based On An Interpretation Of The Establishment Clause That Is Inconsistent With This Court's Precedents.

The Ninth Circuit's decision, however, suffers from a more fundamental flaw. As in *Rosenberger*, the religious exclusion the Ninth Circuit sanctioned here is premised on a reading of the Establishment Clause that this Court has repeatedly rejected. (*See* App. 48a (Tallman, J., dissenting); App. 80a.) Thus, the panel majority asserts that religious worship is inherently "controversial" and "alienating" and that the government must exclude such conduct from public property because it is "not a secular activity." (App. 28a,

36a.) Likewise, Judge Karlton criticizes this Court's analysis in *Good News Club* and *Lamb's Chapel* on the ground that the Establishment Clause creates a "wall of separation between church and state" that expressly prohibits any government role in religious life. (App. 39a.) Rather than guaranteeing religious liberty, he contends that the First Amendment "serves the salutary purpose of insulating civil society from the excesses of the zealous" and laments "[t]he *Good News Club* and *Lamb's Chapel* majorities' disdain of [this] Jefferson model." (App. 40a.)

As a threshold matter, in engaging in such analysis, the Ninth Circuit misunderstood the issue before it. As this Court observed in *Widmar*: "The question is not whether the creation of a religious forum would violate the Establishment Clause. The [library] has opened its facilities for use by [community] groups, and the question is whether it can now exclude groups because of the content of their speech." 454 U.S. at 273. (*See also* App. 59a (Tallman, J., dissenting).) There is "no realistic danger" that the community would think the library "was endorsing religion or any particular creed" by allowing equal access to its facilities. *Lamb's Chapel*, 508 U.S. at 395. Any "benefit to religion or to the Church" would have been incidental. *Id.*

More fundamentally, the Constitution neither requires nor permits the government to expunge from public property all religious speech in order to ensure a purely "secular" forum. To the contrary, this Court has repeatedly held that the expression of religious viewpoints on public property does not offend the Constitution. *See, e.g., Good News Club*, 533 U.S. at 112-19; *Lamb's Chapel*, 508 U.S. at 394-96; *Widmar*, 454 U.S. at 271-75. Indeed, the Constitution expressly *protects* the right to engage in such expression. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* ....") (emphasis added).

Accordingly, this Court has repeatedly "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." *Rosenberger*, 515 U.S. at 839; *see also Lamb's Chapel,* 508 U.S. at 393-94; *Mergens,* 496 U.S. at 248, 252; *Widmar,* 454 U.S. at 274-75. In sum, the Ninth Circuit's opinion manifests a hostility to public religious expression that is neither required nor permitted by the Constitution.

CONCLUSION

For the foregoing reasons, Eagle Forum ELDF respectfully requests that the Court grant the petition for a writ of *certiorari*.

Respectfully submitted,

DOUGLAS G. SMITH
Counsel of Record
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

Dated: August 7, 2007