No. 05-16132

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FAITH CENTER CHURCH
EVANGELISTIC MINISTRIES, *et al*.,

Plaintiffs-Appellees

v.

FEDERAL D. GLOVER, *et al*.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEES AND URGING AFFIRMANCE

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RULE:

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INTEREST OF THE UNITED STATES

This case presents important questions regarding how Supreme Court precedent concerning viewpoint discrimination should be applied to private religious speech in a public library setting.

The United States has participated in numerous cases addressing similar First Amendment issues of equal access for religious speakers, including *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Child Evangelism Fellowship of N.J., Inc.* v. *Stafford Township School District*, 386 F.3d 514 (3d Cir. 2004); *Child Evangelism Fellowship of Md., Inc.* v. *Montgomery County Public Schools*, 373 F.3d 589 (4th Cir. 2004); *Donovan* v. *Punxsutawney Area School District*, 336 F.3d 211 (3d Cir. 2003); and *Bronx Household of Faith* v.

Board of Education, 331 F.3d 342 (2d Cir. 2003). As the United States stated in *Lamb's Chapel*, "[t]he United States is the proprietor of numerous non-public and 'designated' or 'limited' public forums," and accordingly has an interest in the outcome of cases involving this subject matter. U.S. Amicus Br. 1.

In addition, the United States has an interest in enforcement of First Amendment principles providing equal treatment of persons irrespective of their religious beliefs. This is especially true when, as here, a complaint also raises parallel Fourteenth Amendment equal protection claims. This interest arises from the United States' ability to intervene, pursuant to Title IX of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2, in equal protection cases of general public importance.

The United States files this brief as *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29(a), arguing that appellants engaged in unconstitutional viewpoint discrimination against appellees when they denied appellees access to a channel of communication open to other community groups that sponsor educational, cultural and community related meetings, programs and activities for the public.

STATEMENT OF THE ISSUES

1. Whether appellants engaged in unconstitutional viewpoint discrimination when they barred a religious organization from using library meeting rooms to conduct meetings that included worship.

2. Whether granting access to a public library meeting room to a religious organization seeking to engage in expressive activities on equal terms with other

organizations would violate the Establishment Clause.

STATEMENT OF THE CASE

Contra Costa County (the County) has established a written policy for its county libraries in which it "encourage[s] the use of library meeting rooms for educational, cultural and community related meetings, programs and activities." *Faith Ctr. Church Evangelistic Ministries* v. *Glover*, No. C04-03111 JSW, 2005 WL 1220947, at *1 (N.D. Cal. May 23, 2005) (attached as Addendum A). In addition to certain general provisions, the policy has restricted religious use of the facilities. The policy initially provided that "[l]ibrary meeting rooms shall not be used for religious purposes." *Ibid.* That language was amended in August 2004 to prohibit use of the meeting rooms for "religious services or activities," and amended again in December 2004 to bar their use for "religious services." *Ibid*.

The County's library policy at issue in this appeal provides that "non-profit and civic organizations, for-profit organizations, schools, and governmental organizations" may use the County's library meeting rooms subject to certain restrictions. *Faith Ctr.*, 2005 WL 1220947, at *1. The library policy restrictions require that persons or entities wishing to use a meeting room complete an application to be approved by the County. If the purpose for which the meeting room is used involves solicitation, is closed to the general public, or if an admission fee is charged, the applicant must pay a fee. Schools may not use a meeting room for "instructional purposes as a regular part of the curriculum." *Id*. at *2.

Faith Center Church Evangelistic Ministries (Faith Center) is a non-profit

religious corporation whose leader is Hattie Mae Hopkins (Dr. Hopkins). *Faith Ctr.*, 2005 WL 1220947, at *1. Faith Center holds meetings at which "participants discuss educational, cultural, and community issues from a religious perspective, engage in religious speech and religious worship, discuss the Bible and other religious books, teach, pray, sing, share testimonies, share meals, and discuss social and political issues." *Ibid*.

In May 2004, Faith Center submitted applications to use a meeting room at the County's Antioch Branch Library (Antioch) on May 29 and July 31, 2004. *Faith Ctr.*, 2005 WL 1220947, at *2. Antioch has made its meeting rooms generally available to the community and Contra Costa residents and groups. The County has approved applications to use Antioch's meeting rooms submitted by the Sierra Club for purposes of letter writing, Narcotics Anonymous for a recovery meeting, and the East Contra Costa Democratic Club for educating residents regarding Democratic candidates and political issues. *Ibid.* Faith Center's applications stated that its purpose for using the room was for "prayer, praise and worship open to public, purpose to teach and encourage salvation through Jesus Christ and build up [the] community." *Ibid*. Faith Center's advertisement for its May 29, 2004 meeting divided the day's activities into a two-hour "Wordshop," followed by an hour of refreshments, and a two-hour "Praise and Worship" service which included a sermon by Dr. Hopkins. Br. 3-4.[1] Following Faith Center's May

[1] "Br." is used to denote the County's brief.

29 meeting, Antioch advised Faith Center that the policy barred the room's use for religious activities and purposes and informed Dr. Hopkins that Faith Center would not be permitted to use the room on July 31 because Faith Center would use it for "religious purposes." Br. 4.

On July 30, 2004, Faith Center sought a preliminary injunction to enjoin the County from prohibiting the use of its library meeting rooms for religious purposes. *Faith Ctr.*, 2005 WL 1220947, at *1, *3.[2] Faith Center alleged that the policy violated: (1) its rights to freedom of speech under the First Amendment; (2) its rights to free exercise of religion under the First Amendment; (3) the Establishment Clause of the First Amendment; and (4) the Equal Protection Clause of the Fourteenth Amendment. *Id*. at *1 n.1. The district court granted Faith Center's motion for a preliminary injunction, ruling that Faith Center's First Amendment allegations were substantially likely to be proven at trial. *Id*. at *1. The district court, however, did not address the equal protection claim.

The district court held that Faith Center established a likelihood of success on the merits of the First Amendment challenge to the policy. *Faith Ctr.*, 2005 WL 1220947, at *3. According to the district court, Faith Center's expressive activity was protected by the First Amendment. The district court noted that the County did

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[2] Appellants are Federal Glover, Mark DeSaulnier, John Gioia, Millie Greenberg, Gayle Uilkema, members of the Contra Costa County Board of Supervisors, John Sweeten, Contra Costa County Administrator, Anne Cain, Patty Chan, librarians at Antioch, and Laura O'Donoghue, Administrative Deputy Director of Antioch. "The County" refers to all appellants as well.

not dispute that Faith Center's meetings would encompass discussions of otherwise permissible topics from a religious perspective and conceded that religious worship is protected under the First Amendment. *Id*. at *4.

Faith Center demonstrated that the County's policy was substantially likely to result in restricting speech based on viewpoint. *Faith Ctr.*, 2005 WL 1220947 at *4. In so holding, the district court rejected the County's contention that "religious worship" could be "divorced from . . . other activities permitted in the forum." *Ibid*. The district court relied on *Widmar* v. *Vincent*, 454 U.S. 263 (1981), in which members of a religious group challenged a state university's policy excluding religious groups from the university's generally available facilities that were deemed an open public forum. See *Widmar*, 454 U.S. at 264-265. The *Widmar* exclusion prohibited the use of university buildings or grounds "for purposes of religious worship or religious teaching." *Id*. at 265. The Supreme Court held that religious worship and teaching were both forms of speech and association protected by the First Amendment. *Id*. at 268-269. *Widmar* eschewed distinguishing between "religious speech explicitly protected by our cases and a new class of religious 'speech act[s],' constituting 'worship.'" *Id*. at 270 n.6 (citation omitted).

The district court similarly relied on *Good News Club* v. *Milford Central Schools*, 533 U.S. 98 (2001), in which the Supreme Court concluded that the school district engaged in viewpoint discrimination when it denied a Christian youth club's request to hold weekly meetings on school grounds because the club sought to address a topic clearly within the bounds of the forum – the moral and character

development of children. *Id.* at 107-108. In *Good News Club*, the Supreme Court explained that "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." *Id.* at 112.

Applying *Widmar* and *Good News Club*, the district court reasoned that the County did not show a compelling state interest to justify the restriction on religious services. See *Faith Ctr.*, 2005 WL 1220947, at *6. In response, the County argued that it must enforce the policy to avoid violating the Establishment Clause. *Ibid*. Dismissing the County's argument and again applying *Widmar*, *Good News Club*, and *Lamb's Chapel*, the district court concluded that the "Supreme Court has foreclosed this argument by consistently holding that a policy of equal access does not violate the Establishment Clause." *Ibid*.

The district court analyzed the County's Establishment Clause defense pursuant to *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), as applied in *Widmar*. Under *Lemon*, "[a] policy will not offend the Establishment Clause if * * * (1) [the policy] has a secular legislative purpose; (2) its principal or primary effect would be neither to advance nor to inhibit religion; and (3) [the policy] does not foster 'an excessive government entanglement with religion.'" *Widmar*, 454 U.S. at 271 (quoting *Lemon*, 403 U.S. at 612-613). The parties agreed that the County in opening the meeting rooms had a secular purpose, thereby passing the first prong. Regarding the second prong, the district court held that this was similar to *Good News Club*; *Lamb's Chapel; Bronx Household of Faith* v. *Board of Education*, 331

F.3d 342 (2d Cir. 2003); and *Campbell* v. *Saint Tammany Parish School Board*, No. Civ. A. 98-2605, 2003 WL 21783317 (E.D. La. July 30, 2003) (attached as Addendum B), in which the courts held that opening limited public fora to religious groups would not have the primary effect of advancing or inhibiting religion. See *Faith Ctr.*, 2005 WL 1220947, at *7. Thus, the policy passed *Lemon*'s second prong. Finally, the district court concluded that requiring equal access to the library meeting room would not result in an excessive government entanglement with religion. *Ibid*. Accordingly, the district court held that the Establishment Clause defense failed. Given that conclusion, Faith Center established a substantial likelihood of success on the merits that the County violated its First Amendment right to freedom of speech and would incur irreparable harm were the injunction not granted. *Id*. at *8.

SUMMARY OF ARGUMENT

Consistent with the Supreme Court's analysis in *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001), the district court correctly held that Faith Center established a likelihood of success in proving that the County violated its free speech rights. Faith Center's meetings come within the scope of the County's written policy, which permits non-profit organizations to use Antioch meeting rooms for "educational, cultural and community related meetings, programs, and activities." *Faith Ctr. Church Evangelistic Ministries* v. *Glover*, No. C04-03111 JSW, 2005 WL 1220947, at *1 (N.D. Cal. May 23, 2005). Faith Center's meetings offer the public opportunities for just such activities. Through these meetings,

Faith Center strives to educate the public on religious, social, and political matters and to engage in discussion on various social, cultural, and political issues. That Faith Center pursues these goals from a religious viewpoint does not change the fact that its activities meet the forum's purpose of encouraging "educational, cultural, and community related meetings, programs, and activities." *Ibid.* See *Good News Club*, 533 U.S. at 112; *Board of Educ.* v. *Mergens*, 496 U.S. 226, 247, 250-252 (1990). Because the County refused to permit Faith Center to use the meeting rooms solely because of the religious perspective of the activities at its meetings, the County engaged in impermissible viewpoint discrimination. This is true whether the meeting rooms are deemed a limited public forum or a non-public forum. See *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-393 (1993).

The County also would not violate the Establishment Clause by allowing Faith Center to promote its activities on equal terms with other organizations. To the contrary, permitting access on an equal basis would preserve the neutrality toward religion required by the Establishment Clause. See *School Dist.* v. *Ball*, 473 U.S. 373, 382 (1985) (holding that the Establishment Clause "requir[es] the government to maintain a course of neutrality among religions, and between religion and nonreligion"). Permitting Faith Center access also avoids impermissibly entangling the state in religion by preventing the County from attempting to discern which elements of Faith Center's activities are pure worship

and which are religious speech. See *Widmar* v. *Vincent*, 454 U.S. 263, 269 n.6 (1981).

ARGUMENT

I

THE COUNTY ENGAGED IN UNCONSTITUTIONAL VIEWPOINT DISCRIMINATION BY DENYING FAITH CENTER EQUAL ACCESS TO THE ANTIOCH MEETING ROOMS

The County engaged in unconstitutional viewpoint discrimination by denying Faith Center the same opportunity to promote its activities that other community organizations enjoy. This is true whether the library meeting rooms are deemed a limited public forum or a non-public forum. In either type of forum, restrictions on private speech must be viewpoint neutral. In all relevant respects, Faith Center's meetings did not differ from other community organizations that the County permitted to use the Antioch meeting room pursuant to its written policy and practice. Rather, only because of the religious perspective of Faith Center's activities did the County deny Faith Center the use of the meeting room. The County, therefore, engaged in unconstitutional viewpoint discrimination in violation of Faith Center's First Amendment rights.

A. The County Must Permit Use Of The Antioch Meeting Rooms In A Viewpoint Neutral Manner

The County only may restrict access to the Antioch meeting rooms, regardless of whether they are deemed a limited public forum or a non-public forum, if its restrictions are viewpoint neutral. "It is axiomatic that the government

may not regulate speech based on * * * the message it conveys." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (citing *Police Dep't* v. *Mosley*, 408 U.S. 92, 96 (1972)). The Supreme Court long has held that even in purely non-public fora, the government may not engage in viewpoint discrimination: "[C]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-393 (1993) (quoting *Cornelius* v. *NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985)); see also *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 106-107 (2001) (requiring viewpoint neutrality in a limited public forum); *Rosenberger*, 515 U.S. at 829 ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."). Regardless of whether the library meeting rooms are a limited public forum or even a non-public forum, the County's restrictions on the use of the meeting rooms must be viewpoint neutral.[3]

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[3] Various courts have concluded that public libraries are limited public fora. See, *e.g.*, *Neinast* v. *Board of Trs. of the Columbus Metro. Library*, 346 F.3d 585, 591 (6th Cir. 2003) (holding that a library was a limited public forum in part because "[t]raditionally, libraries provide a place for 'reading, writing, and quiet contemplation'"), cert. denied, 541 U.S. 990 (2004); *Kreimer* v. *Bureau of Police*, 958 F.2d 1242, 1259 (3d Cir. 1992) (ruling that a library "constitute[d] a limited public forum"). The Fifth Circuit has even affirmed a judgment holding that a library's meeting was a designated public forum. See *Concerned Women for Am., Inc.* v. *LaFayette County*, 883 F.2d 32, 34 (5th Cir. 1989) (agreeing with the

(continued...)

B. Excluding Faith Center's Use Of The Antioch Meeting Rooms Constitutes Viewpoint Discrimination

The County engaged in viewpoint discrimination when it excluded Faith Center from using the Antioch meeting rooms. The County created and operated a forum that enabled organizations to promote activities and events that "encourage[d] the use of library meeting rooms for educational, cultural and community related meetings, programs, and activities." *Faith Ctr. Church Evangelistic Ministries* v. *Glover*, No. C04-03111 JSW, 2005 WL 1220947, at *1 (N.D. Cal. May 23, 2005) (quoting policy). In practice, this policy is as broad as it sounds. Groups given access to the Antioch meeting room have included the Sierra Club, which used a meeting room for a letter-writing campaign, Narcotics Anonymous, which used a meeting room for a recovery meeting, and the East Contra Costa Democratic Club, which used a meeting room to promote Democratic candidates and political positions. *Id*. at *2.

Faith Center easily meets the "speaker identity" and "subject matter" requirements for the forum the County created. See *Cornelius*, 473 U.S. at 806. First, the parties do not dispute that Faith Center is a member of the class that the

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[3](...continued)
district court that a party was likely to prove that a library's auditorium was a public forum, as opposed to a limited public forum). Because the district court concluded that Faith Center would likely sufficiently prove viewpoint discrimination, the district court did not reach the issue of whether a public library constitutes a designated public forum, as Faith Center espoused, or a limited public forum, as the County asserted. See *Faith Ctr. Church Evangelistic Ministries* v. *Glover*, No. C04-03111 JSW, 2005 WL 1220947, at *4 n.9 (N.D. Cal. May 23, 2005). This Court need not resolve this issue to affirm the judgment.

County permits to use the Antioch meeting rooms. Second, Faith Center satisfies the policy's criteria of encouraging "educational, cultural, and community related meetings" because Faith Center promotes "discuss[ing] educational, cultural, and community issues from a religious perspective, engag[ing] in religious speech and religious worship, discuss[ing] the Bible and other religious books, teach[ing], pray[ing], sing[ing], shar[ing] testimonies, shar[ing] meals, and discuss[ing] social and political issues." *Faith Ctr.*, 2005 WL 1220947, at *1. Given that the County has previously allowed other community organizations to use the meeting rooms for social and political causes, the specific activities described by Faith Center are indistinguishable from those the County has permitted other users, save for the fact that Faith Center engages in its activities from a religious viewpoint and holds "religious services" that the policy prohibits. By denying Faith Center's request to use the meeting rooms simply because some of its topics for discussion or activities are Christian-based, the County engaged in precisely the type of viewpoint discrimination held unconstitutional in *Good News Club*.

In *Good News Club*, a local Good News Club chapter sought permission to hold its weekly meetings on school grounds after school hours. The school district's community use policy permitted school property to be used for a broad range of activities, such as "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community." 533 U.S. at 102. The school district rejected the Club's request because it considered its activities to be religious in nature. *Id.* at 108. The Supreme Court

held that the school district engaged in unconstitutional viewpoint discrimination when it denied the Club's request because the Club sought to address a topic clearly within the bounds of the forum. *Id.* at 107-108. The Court explained that "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." *Id.* at 112; see also *Rosenberger*, 515 U.S. at 831 (holding that a public university could not deny funding to student publication presenting religious viewpoints); *Lamb's Chapel*, 508 U.S. at 386 (ruling that a public school opening facilities after hours to "social, civic and recreational meetings * * * and other uses pertaining to the welfare of the community" could not prohibit groups wishing to present a film series on child rearing and family values from a Christian perspective). See also *Child Evangelism Fellowship of N.J., Inc.* v. *Stafford Township Sch. Dist.*, 386 F.3d 514 (3d Cir. 2004) (holding that school district discriminated based on viewpoint when it, among other things, refused to distribute religious group's informational pamphlets through the distribution forum created by school district and denied group access to staff a back-to-school night); *Child Evangelism Fellowship of Md., Inc.* v. *Montgomery County Pub. Schs.*, 373 F.3d 589 (4th Cir. 2004) (holding that a religious group had demonstrated a clear likelihood of success on the merits that school system that refused to distribute its informational pamphlets through school's information distribution forum had discriminated against it based on viewpoint); *Donovan* v. *Punxsutawney Area Sch. Dist.*, 336 F.3d 211, 227 (3d Cir. 2003) (holding that when school denied a Bible club "access to the school's limited

public forum" of morning activity time because the club "was religious in nature, it discriminated against the club because of its religious viewpoint in violation of the Free Speech Clause of the First Amendment").

Here the County unquestionably permits other organizations to "discuss educational, cultural, and community issues" under its broadly worded library policy (*e.g.*, the County "encourage[s] the use of library meeting rooms for educational, cultural, and community related meetings, programs, and activities"). Just as in *Good News Club*, it may not discriminate against Faith Center merely because it engages in such activities from a religious perspective.

II

THERE IS NO PRACTICAL OR CONSTITUTIONALLY PERMISSIBLE BASIS TO DISTINGUISH WORSHIP FROM RELIGIOUS VIEWPOINTS IN A BROADLY DEFINED FORUM

The County characterizes the afternoon portion of the Faith Center meeting – the "Praise and Worship" portion – as a "pure religious worship service[]" (Br. 5) that "need not be given free space in a public library meeting room during normal operating hours," (Br. 11). The County argues (Br. 17) that its policy is "directed to a distinct type of subject matter and separate category of speech, not a particular religious 'viewpoint' on an otherwise permissible subject." The district court correctly rejected the County's argument that "'worship' activities can be 'divorced from . . . other activities permitted in the forum,'" *Faith Ctr. Church Evangelistic Ministries* v. *Glover*, No. C04-03111 JSW, 2005 WL 1220947, at *4 (N.D. Cal. May 23, 2005) (quoting *Bronx Household of Faith* v. *Board of Educ.*, 331 F.3d 342,

354 (2d Cir. 2003)), and correctly concluded that it could not "classify [Faith Center's] proposed use of the Library meeting room as 'mere religious worship.'" *Id*. at *6. At the same time, even if Faith Center's expressive activities are "worship," exclusion on that basis would be impermissible viewpoint discrimination.

The County's efforts to cabin worship into a *sui generis* category of expression should be rejected. *Good News Club* v. *Milford Central Schools*, 533 U.S. 98 (2001) addressed the issue of the distinctions that may exist between religious worship as a subject matter and worship as expression of a religious viewpoint. The Court explained that something that is "quintessentially religious" or "decidedly religious in nature" can nonetheless express a viewpoint, *id*. at 111, observing in this connection that the "[c]lub's activities do not constitute mere religious worship, divorced from any teaching of moral values," *id.* at 112 n.4. The Court explained further that worship could also "be characterized properly as the teaching of morals and character development from a particular viewpoint." *Id*. at 111. The prayer, Bible readings, and Bible games in which the Club engaged expressed a viewpoint about "morals and character." *Ibid.* The *Good News Club* dissent found relevant the fact that the Club's meetings might be best described as "an evangelical service of worship" and thus impermissible. *Id*. at 138 (Souter, J., dissenting). In response, the majority explained that "[r]egardless of the label * * *, what matters is the substance of the Club's activities," and found exclusion of the meetings to be viewpoint discrimination. *Id*. at 112 n.4.

The Supreme Court repudiated the contention that the government distinguish between "purely religious worship" and "religious speech" in *Widmar* v. *Vincent*, 454 U.S. 263, 269 n.6 (1981).[4] *Widmar* observed that attempting to recognize such distinctions lacks "intelligible content." *Ibid*. Finding no principled distinction for the courts to draw, and believing that any such hypothetical distinction would impermissibly entangle the State in religious affairs, *Widmar* concluded that proposed distinctions between religious speech and religious worship were irrelevant to a First Amendment analysis. *Ibid*.

The County also erroneously argues (Br. 12-13) that the district court erred in deviating from Ninth Circuit precedent allegedly requiring lower courts to "parse out religious worship services from other types of religious speech." In support of their contention that the County may exclude religious worship services from other types of religious speech, the County relies on *Hills* v. *Scottsdale Unified School District*, 329 F.3d 1044 (9th Cir. 2003), cert. denied, 540 U.S. 1149 (2004); *Lassonde* v. *Pleasanton Unified School District*; 320 F.3d 979 (9th Cir.), cert. denied, 540 U.S. 817 (2003); *Prince* v. *Jacoby*, 303 F.3d 1074 (9th Cir. 2002), cert. denied, 540 U.S. 813 (2003); and *Cole* v. *Oroville Union High School District*, 228 F.3d 1092 (9th Cir. 2000), cert. denied, 532 U.S. 905 (2001). These cases,

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[4] The standard applied for an open forum in *Widmar*, 454 U.S. at 270, – whether the regulation is "necessary to serve a compelling state interest" and is "narrowly drawn" to achieve that objective – is more stringent than that applicable to the limited forum at issue here, but that distinction has no consequence for the issue of whether worship is distinguishable from a religious viewpoint.

however, are all readily distinguishable in that they each involved religious speech broadcast to a general audience that had not chosen to participate in their activities. As the County concedes, "[p]articipants, if they so chose, could attend the 'wordshop' and not the worship service or vice versa." Br. 14.

Applying *Good News Club*, the Second Circuit rejected a very similar argument regarding separating religious speech from religious worship in *Bronx Household*. Bronx Household, a Christian church, sought to rent space in a New York public school on Sunday mornings for services consisting of singing Christian hymns and songs, prayer, Bible preaching and teaching, communion, social fellowship, and a meal. 331 F.3d at 347. The school board denied the church's application based on board policy that religious services or instruction were prohibited on school grounds after school hours. The Second Circuit could "find no principled basis upon which to distinguish the activities set out by the Supreme Court in *Good News Club* from the activities that the Bronx Household of Faith has proposed." *Id*. at 354. Accordingly, the Second Circuit declined to parse out as a separate, excludable category those elements of the meetings that could be called worship, and held that, under *Good News Club*, the meetings could not be excluded. Moreover, the court noted that the whole notion of drawing lines between "religious worship" and "religious speech" was probably untenable after *Good News Club*. *Bronx Household*, 331 F.3d at 355.

The County's argument (Br. 10) that "[t]his case involves a distinct and separate religious worship service that the Church itself distinguished and separated

in time from its other activities," necessarily fails in light of *Good News Club* and the persuasive authority of *Bronx Household*. That Faith Center's own schedule provides for distinct activities during the five-hour period for which it would use the meeting room is irrelevant to the constitutionality of the library's policy banning "religious purposes," "religious services and activities," or "religious services." Rather, the requisite question is whether Faith Center's meeting can be "characterized properly" as a community, cultural, or educational meeting from a particular viewpoint. It clearly can be.

Furthermore, the premise on which the County's argument rests is faulty. The assumptions animating the County's argument are that Faith Center's worship service did not itself address permissible issues and, more generally, that a worship service could never meet the criteria of the limited public forum it has created in the library meeting rooms. But religious worship by its nature involves educational, cultural, and community aspects. That is, religious worship on its terms meets the purposes established by the County for the library meeting rooms. See, *e.g.*, *Campbell* v. *Saint Tammany Parish Sch. Bd.*, No. Civ. A. 98-2605, 2003 WL 21783317, at *9 (E.D. La. July 30, 2003) ("It is difficult to imagine any religious service, no matter how traditional or nontraditional that does not include sermons, homilies or lessons directed at moral and ethical conduct or how one should live one's life."). Religious worship is also communicative. This is readily apparent when a leader preaches or reads to the congregation, but even corporate worship

activities such as hymns and prayers are expressions among believers, and to observers, of their common faith. As the Fifth Circuit has observed:

> The assembly of those bound by common beliefs and observances not only serves to create a sense of community among the members through the shared expression of their beliefs, it also communicates to outsiders the church's identity as a group devoted to a common ideal. By group worship, each worshipper communicates to outsiders the identity of the group and his own identity as a member of it, a form of self- expression.

Islamic Ctr. of Miss., Inc. v. *City of Starkville*, 840 F.2d 293, 300 (5th Cir. 1988).

The County specifically encourages "the use of library meeting rooms for educational, cultural and community related meetings, programs and activities." While this "Praise and Worship" portion of the Faith Center program may well be "quintessentially religious" or even "decidedly religious in nature," it can also "be characterized properly" as a community meeting, a cultural meeting, or an educational meeting. See *Good News Club*, 533 U.S. at 111. Additionally, Faith Center's worship communicates something about the group itself, just as the East Contra Costa Democratic Club's meetings and the Sierra Club's meetings communicate something about their shared ideals. Consequently, this "Praise and Worship" is protected by the First Amendment.

III

PERMITTING FAITH CENTER TO USE ANTIOCH'S MEETING ROOM ON EQUAL TERMS WITH OTHER COMMUNITY GROUPS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

The County's contention that it discriminated against Faith Center to avoid an Establishment Clause violation is without merit. First, the Supreme Court has never

held that a State's interest in avoiding an Establishment Clause violation justifies viewpoint discrimination. "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." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995). "We have said that a state interest in avoiding an Establishment Clause violation may be characterized as compelling, and therefore may justify *content-based* discrimination. However, it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify *viewpoint discrimination*." *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 112-113 (2001) (internal quotation marks and citation omitted) (emphasis added). Therefore, the district court correctly concluded that allowing Faith Center to hold its meetings in the library meeting rooms on equal terms with other organizations engaging in expressive activities would not violate the Establishment Clause. Permitting access on an equal basis in fact preserves the neutrality toward religion required by the Constitution. See *id.* at 114 ("Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, [the school district] faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club."); *School Dist.* v. *Ball*, 473 U.S. 373, 382 (1985) (holding that the Establishment Clause "requir[es] the government to maintain a course of neutrality among religions, and between religion and nonreligion").

The County argues (Br. 19), however, that allowing Faith Center to hold its religious meetings in the public meeting rooms "would cause a reasonable observer to perceive that the County was endorsing religion." Although the Establishment Clause may constitute a compelling state interest, it does not justify excluding Faith Center's use in this context, where a reasonable observer, "aware of the history and context of the community and forum," would not perceive an endorsement of religion. See *Good News Club*, 533 U.S. at 119 (quoting *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 779-780 (1995) (O'Connor, J., concurring)). As in *Widmar*, allowing religious groups to use the library facilities "does not confer any imprimatur of state approval on religious sects or practices." *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981). Indeed, such a policy would no more commit the County to religious goals in general, or Faith Center's goals in particular, than it has committed itself to the goals of the Sierra Club, Narcotics Anonymous, the East Contra Costa Democratic Club, or any other group eligible to use the meeting rooms. See *ibid*. To the contrary, the broad spectrum of groups allowed to use the County's library meeting rooms also "counteract[s] any possible message of official endorsement of or preference for religion or a particular religious belief." *Board of Educ.* v. *Mergens*, 496 U.S. 226, 252 (1990); see also *Prince* v. *Jacoby*, 303 F.3d 1074, 1092-1093 (9th Cir. 2002) (rejecting similar Establishment Clause arguments), cert. denied, 540 U.S. 813 (2003).

Under the reasonable observer analysis, the informed, reasonable observer here would be a library patron aware that the County, through both its policy and

practice, permits a variety of organizations to use the library meeting rooms. An informed library patron would be aware that other community groups have used the rooms for activities such as political meetings, letter-writing campaigns, and drug-abuse counseling. Such an informed library patron would be at no risk of perceiving state endorsement of religion if Faith Center is granted access to the library meeting rooms in the same manner as other community organizations and non-profit groups.

The fact that this case involves a public library does not alter the Establishment Clause analysis. If anything, a religious group's use of a public library is less suggestive of religious endorsement than its use of a public school. While *Good News Club* recognized that Establishment Clause precedents may assign some "significance * * * to the suggestion that elementary school children are more impressionable than adults," *Good News Club*, 533 U.S. at 115, this appeal does not involve young children in school, but at most adults at a public library. Rather than a captive audience of arguably impressionable children, library patrons are there of their own volition; thus, there is no coercive conduct compelling religion on library patrons, who can avoid the meeting if they wish.

The County complains that library patrons would be aware of the presence of Faith Center's worship in the meeting room because the meetings occur during normal library hours in a "non-soundproofed room," and that this would lead to a perceived endorsement of religion. Br. 20. The district court found no evidence

that noise from Faith Center's use bothered library patrons. See *Faith Ctr. Church Evangelistic Ministries* v. *Glover*, No. C04-03111 JSW, 2005 WL 1220947, at *2 n.5 (N.D. Cal. May 23, 2005). In any event, the County's argument proves too much. If people may overhear Faith Center's worship, then they also may overhear an East Contra Costa Democratic Club meeting. The County does not suggest that the reasonable observer would perceive that the County is endorsing such political speech or that the County has endorsed the Democratic party platform. The Establishment Clause does not protect people from being exposed to or aware of things with which they may disagree or dislike; that Clause protects against government endorsement of religion. As the Court has stressed, there is "a crucial difference between *government* speech endorsing religion * * * and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250. If anything, the fact that patrons are aware that the meeting rooms are used by diverse groups would tend to increase the knowledge level of the reasonable observer and reduce any mistaken belief that the County is endorsing religion. The County may make and enforce neutral rules to avoid disturbing other patrons, such as noise limitations, or limitations on how frequently one group may use the room, but may not discriminate on the basis of viewpoint.

Finally, allowing the County to attempt to discern which elements of a religious group's activities are "purely religious worship" and which are "religious speech" also would create an excessive entanglement of church and state. See

Widmar, 454 U.S. at 272 n.11. This is precisely this sort of entanglement and line-drawing in which courts are loathe to engage. See *Widmar*, 454 U.S. at 269 n.6, 272 n.11; *Bronx Household*, 331 F.3d at 355; *DeBoer* v. *Village of Oak Park*, 267 F.3d 558, 570 (7th Cir. 2001). Creating this sort of dichotomy between worship and speech from a religious viewpoint would violate the non-entanglement principles of the Establishment Clause. See *Widmar*, 454 U.S. at 269-270 n.6 (If distinction were made between "worship" and religious perspective, a public entity, and ultimately the courts, would be required to "inquire into the significance of words and practices to different religious faiths. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.").

CONCLUSION

For the foregoing reasons, the order of the district court granting a preliminary injunction should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for *amicus curiae* is not aware of any related cases.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation required by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains no more than 6,288 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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