May Religious Worship be Excluded from a Limited Public Forum? Commentary on the Ninth Circuit Court of Appeals Decision in *Faith Center Church Evangelistic Ministries v. Glover*

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I. INTRODUCTION

The Supreme Court has struck down every attempt to exclude private religious speakers from limited public forums. In every such case that has reached it, the Court held that the particular exclusion at issue violated the First Amendment Speech Clause, and that the inclusion of religious speakers did not violate the First Amendment Establishment Clause.[1] Nonetheless, governments keep trying to exclude them.[2] *Faith Center Church Evangelistic Ministries v. Glover*[3] is a recent example. In *Glover*, a divided three judge panel in the Ninth Circuit Court of Appeals held that religious worship could constitutionally be excluded from a limited public forum.[4] This commentary analyzes the issues in *Glover* and explains why the result violated the First Amendment rights of the religious speaker.

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[1] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981); *see also* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (similar result in the context of an open access forum); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (similar result in the context of a "limited open forum" under the Equal Access Act, 42 U.S.C. § 4071 (a)–(b) (2000)).

[2] *See* Bronx Household of Faith v. Bd. of Educ., 331 F.3d 342 (2d Cir. 2003) (public school building); DeBoer v. Vill. of Oak Park, 267 F.3d 558 (7th Cir. 2001) (Village Hall); Gentala v. City of Tucson, 325 F. Supp. 2d 1012 (D. Ariz. 2003) (Civic Events Fund); Campbell v. St. Tammany Parish Sch. Bd., No. Civ.A.98-2605, 2003 WL 21783317 (E.D. La. July 30, 2003) (public school buildings); Moore v. City of Van, 238 F. Supp. 2d 837 (E.D. Tex. 2003) (community center); Daily v. N.Y. City Hous. Auth., 221 F. Supp. 2d 390 (E.D.N.Y. 2002).

[3] 462 F.3d 1194 (9th Cir. 2006) (panel decision).

[4] *See id.* at 1207–14. Throughout the opinion the speech at issue was sometimes described as "pure religious worship," other times as "mere religious worship." *See id.* at 1200, 1201 & n.6, 1209, 1210, 1211–12 & n.14, 1214.

II. THE *GLOVER* DECISION

In *Glover*, the County made its public library meeting rooms available to "'[n]on–profit and civic organizations, for–profit organizations, schools and governmental organizations' . . . for 'meetings, programs, or activities of educational, cultural or community interest.'"[5] However, the County also had a "Religious Use" policy that at the time of suit, barred the rooms use for "religious services."[6] Faith Center Church Evangelistic Ministries applied and received approval to use a library meeting room on two occasions for "Prayer, Praise and Worship Open to the Public, Purpose to Teach and Encourage Salvation thru Jesus Christ and Build up Community."[7] Its advertising literature for the first meeting described it as a "Women of Excellence Conference" divided into morning and afternoon sessions.[8] The morning session was described as a "Wordshop" focusing on the topic "'The Making of an Intercessor,' an End-time call to Prayer for every Believer, and how to pray fervent, effectual Prayers that God hears and answers."[9] The afternoon session was described as a "'Praise and Worship' service with a sermon by Pastor Hopkins."[10] The first meeting occurred, but the County canceled the second one on the ground that Faith Center's meeting violated the religious use policy.[11]

Faith Center brought suit seeking injunctive relief arguing that the County's religious use policy violated the First Amendment on its face and as applied.[12] The County conceded at trial that Faith Center's morning "wordshop" could not be excluded.[13] It argued, however, that the afternoon session amounted to "mere religious worship" that "exceed[ed] the purpose for which the meeting room forum had been created."[14] Therefore its prohibition "was a permissible exclusion of a category of speech meant to preserve a limited public forum for its intended uses."[15]

The trial court rejected the County's argument. It held that Faith Center's exclusion violated the First Amendment Speech Clause because it was

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[5] *Id.* at 1198 (alteration in original) (quoting County's library meeting room policy).

[6] *Id.* at 1198–99. Two prior versions of the policy barred respectively the use of the meetings rooms "for religious purposes" and "for religious services or activities." *Id.* at 1198-99.

[7] *Id.* at 1199.

[8] *Id.*

[9] *Id.* (quoting Faith Center's advertising flyer).

[10] *Id.* (quoting Faith Center's advertising flyer).

[11] *Id.* at 1199–1200.

[12] *See id.* at 1200.

[13] *See id.*

[14] *Id.*

[15] *Id.*

viewpoint discriminatory, and that the First Amendment Establishment Clause did not provide a compelling reason for the exclusion.[16]

On appeal to the Ninth Circuit Court of Appeals, a divided three judge panel reversed.[17] Over Judge Tallman's vigorous dissent, Judge Paez, writing for himself and Judge Karlton, echoed the County's argument, and held that the exclusion of religious worship from the library meeting room was a reasonable viewpoint neutral constitutionally permissible exclusion of a category of speech from a limited public forum.[18] Because he concluded that the exclusion was permissible under the Speech Clause, Judge Paez did not address whether the Establishment Clause mandated the exclusion.[19]

A majority of the full Ninth Circuit denied a rehearing en banc.[20] However, Judge Bybee, writing for himself and six other judges, filed an opinion strongly dissenting from the denial.[21] He opined the that "[t]he panel majority's decision . . . 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."[22]

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[16] *Id.* at 1200–01.

[17] *Id.* at 1214.

[18] *See id.* at 1204–14.

[19] However, both Judge Karlton in a separate concurring opinion and Judge Tallman in his dissenting opinion did address the issue. Both seemed to agree that under Supreme Court precedents, permitting Faith Center to use the meeting rooms would not violate the Establishment Clause, but their approaches were quite different. Judge Tallman reasoned from the precedents. *See id.* at 1226–27 (Tallman, J., dissenting). Judge Karlton, however, severely criticized Supreme Court jurisprudence insofar as it treats religious speech as constitutionally protected under the First Amendment Free Speech Clause. *Id.* at 1215–16 (Karlton, J., concurring). He opined that "religious speech is categorically different than secular speech and is subject to analysis under the Establishment and Free Exercise Clause without regard to the jurisprudence of free speech." *Id.* at 1215. He apparently thought that the Establishment Clause, properly interpreted, prevented the County from providing Faith Center "a free place to worship." *Id.* Nonetheless, he concluded that "as a subordinate judge, it [was his] duty to adhere to the precedent of the Supreme Court 'no matter how misguided.'" *Id.* at 1216 (quoting Hutto v. Davis, 454 U.S. 370, 375 (1982)). The Establishment Clause issue is discussed *infra* at notes 170–212 and accompanying text.

[20] Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 895 (9th Cir. 2007) (denial of en banc rehearing).

[21] *Id.* at 895–902 (Bybee, J., dissenting).

[22] *Id.* at 895. Many of the same issues that divided the judges in *Glover* have also divided the judges on the Second Circuit Court of Appeals. *See* Bronx Household of Faith v. Bd. of Educ., 492 F.3d 89 (2d Cir. 2007); Bronx Household of Faith v. Bd. of Educ., 331 F.3d 342 (2d Cir. 2003); Bronx Household of Faith v. Cmty. Sch. Dist., 127 F.3d 207 (2d Cir. 1997), *overruled in part by* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001). For commentary on the *Bronx Household* litigation, see Kevin Fiet, Comment, *The Bronx Household of Faith: Looking at the Unanswered Questions*, 2007 BYU EDUC. & L.J. 153 (2007); Ralph D. Mawdsley, *Religious Worship in Public School Facilities: New York's Section 414*

III. FAITH CENTER'S RIGHTS UNDER THE FIRST AMENDMENT SPEECH CLAUSE

There is no question that religious speech, including religious worship, is constitutionally protected speech within the meaning of the First Amendment Speech Clause.[23] That fact alone, however, does not give religious or other speakers the right to use government property for speech purposes.[24] Instead, the right to exercise First Amendment protected speech rights on government property is governed by Supreme Court created categorical rules collectively known as the public forum doctrine.[25] Under this construct there is no right to use such property for speech purposes unless the property qualifies as a traditional public forum—streets, sidewalks, and parks that are generally open and available to the public—or unless the government intentionally opens its property for speech purposes.[26] If the government chooses, however, it may make its property an open access forum that is generally available for all speakers and topics.[27] In the alternative, the government may make its property a restricted access forum that is available only for certain speakers and topics.[28]

The County purported to create a type of restricted access forum known as a limited public forum.[29] The policy on its face did not make the library meeting rooms generally available for all speakers and topics; rather, it made them generally available only for "[n]on–profit and civic organizations, for–profit organizations, schools and governmental organizations . . . for meetings,

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and Closing the Gap Between Free Speech and the Establishment Clause, 178 W. EDUC. L. REP. 19 (2003). For commentary on both *Bronx Household* and *Glover*, see John Tyler, Comment, *Is Worship a Unique Subject or Way of Approaching Many Different Subjects?: Two Recent Decisions that Attempt to Answer This Question Set the Second and Ninth Circuits on a Course Toward State Entanglement with Religion*, 59 MERCER L. REV. 1319 (2008).

[23] Widmar v. Vincent, 454 U.S. 263, 269 (1981).

[24] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) ("The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.").

[25] For background on the public forum doctrine, see Norman T. Deutsch, *Does Anybody Really Need a Limited Public Forum?*, 82 ST. JOHN'S L. REV. 107 (2008).

[26] *See Perry*, 460 U.S. at 45–46.

[27] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) ("[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech . . . ."). Such a forum is "the functional equivalent of a traditional public forum." G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949, 958 (1991).

[28] *See Cornelius*, 473 U.S. at 802 ("[A] public forum may be created by government designation of a place or channel of communication for use by . . . certain speakers, or for the discussion of certain subjects.").

[29] *See Perry*, 460 U.S. at 46 n.7 ("A public forum may be created for a limited purpose such as use by certain groups or for the discussion of certain subjects.") (citations omitted).

programs or activities of educational cultural or community interest."[30] The language of inclusion was so broad, however, that it could be argued that the forum was generally available for all speakers and topics. Indeed, the Court has said that there is "considerable force" to the argument that such broad language creates an open access forum, but it has so far not found it necessary to decide the issue.[31] Nonetheless, Judge Paez held that the school's "policy and practice" as well as the nature of a library made it "clear" that the County intended to create a limited public forum, not an open access forum.[32]

Even if Judge Paez was correct that the County only created a restrictive access limited public forum, the exclusions must still meet First Amendment standards. This requires that viewpoint neutral exclusions be reasonable.[33] Exclusions that are impermissibly content or viewpoint discriminatory, however, are subject to strict scrutiny.[34] The essence of Judge Paez's holding was that the exclusion met these standards. He reasoned that the County's religious use policy was a constitutionally permissible content discriminatory "blanket exclusion" of subject matter that defined the parameters of the limited public forum.[35] Consequently, Faith Center's afternoon "praise and worship [service] . . . exceeded the boundaries of the library's limited forum."[36] The exclusion was therefore constitutional because it was viewpoint neutral and reasonable.[37]

Judge Paez's analysis is faulty in two fundamental respects. The first is his assumption that the content based exclusion in this case was constitutionally permissible. The second is his conclusion that the exclusion was not viewpoint discriminatory.

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[30] Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1198 (9th Cir. 2006) (panel decision) (alteration in original) (quoting County's library meeting room policy).

[31] *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 387, 391–92 (1993). The school district made its public school facilities broadly available to members of the public for "social, civic, and recreational use." *Id.* at 396.

[32] *See Glover*, 462 F.3d at 1204–06.

[33] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001) (stating the principle).

[34] *See Lamb's Chapel*, 508 U.S. at 391–95 (finding that the exclusion at issue was viewpoint discriminatory and that the Establishment Clause did not provide a compelling justification) (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)); Widmar v. Vincent, 454 U.S. 263, 269–78 (1981) (applying strict scrutiny to a content based exclusion).

[35] *See Glover*, 462 F.3d at 1211.

[36] *Id.* at 1210 (internal quotations omitted).

[37] *See id.* at 1206–14.

A. Prohibiting Faith Center's "Praise and Worship Service" Was a Content Based Exclusion That Should Have Been Subject to Strict Scrutiny

The principal issue that divided the Judges and the parties in *Glover* was whether Faith Center's exclusion was viewpoint neutral or viewpoint discriminatory.[38] Apart from that issue, however, it appears that the prohibition was an impermissible content based exclusion of subject matter that was otherwise within the scope of the forum; not, as Judge Paez asserted, a permissible content-based exclusion of subject matter that was outside of its scope. Consequently, the exclusion should have been subject to strict scrutiny even if it was viewpoint neutral.

1. Content based exclusions of subject matter otherwise within the boundaries of a limited public forum are subject to strict scrutiny

There should be no doubt that content-based exclusions of speakers and topics that are otherwise within the boundaries of a limited public forum are subject to strict scrutiny.[39] Indeed, the Court specifically reached that conclusion twenty–eight years ago in a case raising the very same point at issue in *Glover*—the exclusion of religious worship from a limited public forum.

In *Widmar v. Vincent*, a university created a limited public forum[40] when it made "its facilities generally available for the activities of registered student groups."[41] The University, however, denied access to such a group that wanted "to use the facilities for religious worship and religious discussion."[42] Justice Powell, writing for seven members of the Court, found that the exclusion was

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[38] The majority panel held that the exclusion was viewpoint neutral. *Id.* at 1207–14. However, the trial judge, Judge Tallman, in his dissent, and Judge Bybee in his dissent from the denial of a rehearing, found that the exclusion was viewpoint discriminatory. *See id.* at 1200–01; *see also id.* at 1222–26 (Tallman, J., dissenting); Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 895–902 (9th Cir. 2007) (Bybee, J., dissenting) (denial of en banc rehearing).

[39] *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677, 678–79 (1998) (using the limited public forum case Widmar v. Vincent, 454 U.S. 263 (1981), as an example of a designated public forum). The *Forbes* court noted that "[i]f the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny." *Id.* at 677; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983). In discussing limited public forums the court explained that "a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Id.* at 46.

[40] *Widmar*, 454 U.S. at 271–72 (referring to the property as a limited public forum).

[41] *Id.* at 264–65.

[42] *Id.* at 265. The exclusion was made pursuant to a regulation that "prohibit[ed] the use of University buildings or grounds 'for purposes of religious worship or religious teaching.'" *Id.* (quoting University's regulation).

based on the religious content of the group's speech.[43] Consequently, he held, without at all mentioning viewpoint, that to justify the exclusion, the University had to "show that its regulation [was] necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end."[44] The University failed to meet this standard because neither the Establishment Clause nor the state constitution provided a compelling reason for the exclusion.[45]

Judge Paez cited and discussed *Widmar*, but only for other propositions.[46] He ignored the main point of the case that a content based exclusion of religious worship that is otherwise within the scope of a limited public forum is subject to strict scrutiny.

Judge Paez did not deny that Faith Center's exclusion was content based. To the contrary, he went out of his way to emphasize that it was in fact a content based discrimination of subject matter, not viewpoint.[47] In partial support of this position, he cited *Boos v. Barry*[48] as example of a case that "exemplifies the difficulty of identifying whether a regulation excludes an entire category of speech or restricts a prohibited viewpoint."[49] *Boos* involved the constitutionality of a statute that made it "unlawful" to, among other things, "'display' . . . signs tending to bring a foreign government into public odium or public disrepute, such as signs critical of a foreign government or its policies" "within 500 feet of . . . any foreign . . . embassy."[50] According to Judge Paez, a plurality of the Court found that the statute was viewpoint neutral because it "excluded [the] entire category of speech [against foreign governments] without regard to any particular foreign government or criticism."[51]

However, just as he did with respect to *Widmar*, Judge Paez discussed *Boos* selectively. He failed to mention that although a plurality of the Court found the statute viewpoint neutral, a majority that included the plurality also held that statute was a content based restriction of political speech in a public forum that was therefore subject to strict scrutiny.[52]

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[43] *Id.* at 269–70.

[44] *Id.* at 270.

[45] *See id.* at 270–76.

[46] *See* Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1202, 1212–13 (9th Cir. 2006) (panel decision) (citing *Widmar* for the proposition that the First Amendment protects religious speech, and discussing the analysis therein on the issue of whether religious worship can be distinguished from other types of religious speech).

[47] *See id.* at 1207–11.

[48] 485 U.S. 312 (1988).

[49] *Glover*, 462 F.3d at 1208.

[50] *Boos*, 485 U.S. at 316 (quoting D.C. CODE ANN. § 22-1115 (LexisNexis 1981)) (internal citation marks omitted).

[51] *Glover*, 462 F.3d at 1208.

[52] *See Boos*, 485 U.S. at 321 (plurality opinion); *id.* at 334 (Brennan & Marshall, JJ., concurring).

The only authority that Judge Paez cited, that even arguably supports his position, that the prohibition of Faith Center's "'Praise and Worship' service" was a constitutionally permissible content based subject matter exclusion, is dictum in *Rosenberger v. Rector & Visitors of University of Virginia*.[53] In *Rosenberger*, a university created what the Court assumed was a limited public forum[54] when it made funds generally available to certain student groups to cover the cost of printing student-run publications.[55] Ultimately, a majority of the Court held that the denial of funds to a student-run publication that had a religious point of view was viewpoint discriminatory.[56] In the course of his majority opinion, however, Justice Kennedy said that:

> [I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purpose of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.[57]

This dictum does not support Judge Paez's holding to the effect that the exclusion of Faith Center's afternoon "'Praise and Worship' service with a sermon by Pastor Hopkins"[58] was a constitutionally permissible content based subject matter exclusion that defined the scope of the forum. Justice Kennedy did not say that content discrimination from a limited public forum *is* constitutionally permissible. To the contrary, in the previous paragraph he specifically stated the general rule that "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys" and that such "[d]iscrimination against speech because of its message is presumed to be unconstitutional."[59] What Justice Kennedy did say in his dictum, however, was that content discrimination *may be* permissible *if* it preserves the purpose of the limited public forum.

The facts of *City of Madison Joint School District v. Wisconsin Employment Relations Commission*[60] illustrate the distinction that Justice Kennedy was making between "content" discrimination that may be permissible and content discrimination that is impermissible. In *Madison*, a school board created a limited public forum when it made its school board meetings generally open to

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[53] 515 U.S. 819 (1995).

[54] *See id.* at 829.

[55] *See id.* at 824.

[56] *See id.* at 831.

[57] *Id.* at 829–30.

[58] Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1199 (9th Cir. 2006) (panel decision) (quoting Faith Centers' advertisement flyer).

[59] *Rosenberger*, 515 U.S. at 828.

[60] 429 U.S. 167 (1976).

the public for the discussion of school board business.[61] Accordingly, it could exclude speakers who wished to speak on other topics. Such exclusion, of course, would have the incidental effect of "discriminating" against the content of the excluded speaker's message. However, the whole point of limited public forums is that the government has the discretion to define the scope of speakers and topics that are permitted in such forums.[62] Consequently, the exclusion of subjects that went beyond the scope of school board business would be constitutionally permissible because such "content discrimination" would preserve the forum for its intended purpose.[63]

On the other hand, government may not engage in content discrimination against a subject matter, otherwise within the boundaries of a limited public, "because of [agreement or] disagreement"[64] or "hostility—or favoritism—towards the underlying message expressed."[65] For example, on the actual facts of *Madison*, the state's Employment Relations Board ordered the school board to prohibit teachers in the district from speaking at the meetings "on matters subject to collective bargaining," but that were otherwise within the scope of the forum.[66] Since the excluded teachers wanted to speak on includable subjects, the exclusion obviously was not designed to preserve the forum for its intended purpose. Instead, the exclusion was based on the theory that such speech amounted to "negotiation" that might "undermine the bargaining exclusivity guaranteed the majority union."[67] In other words, the exclusion was based on nothing more than hostility towards the content of the excluded teachers' speech on a subject that was otherwise within the scope of the forum. Consequently, the Court had no trouble finding that the exclusion was impermissibly content based.[68]

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[61] *Id.* at 174 n.6. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983) (describing *Madison* as a limited public forum "for the discussion of certain subjects").

[62] *See supra* notes 28-29 and accompanying text.

[63] *See Rosenberger*, 515 U.S. at 829 ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.").

[64] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)) (internal quotation marks omitted).

[65] R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

[66] *See Madison*, 429 U.S. at 173–75. The Court noted that "any citizen could have presented precisely the same points and provided the board with the same information as [the teachers]." *Id.* at 175.

[67] *Id.* at 173.

[68] *See id.* at 176 ("Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech.").

The exclusion in *Glover* was not a constitutionally permissible "content" based subject matter limitation that defined the scope of the forum. Instead, for the reasons discussed below, it was, as in *Madison*, a constitutionally impermissible content exclusion of speech otherwise within the scope of the forum that was based on disagreement with, and hostility towards, the underlying message expressed. Accordingly, the exclusion should have been subject to strict scrutiny.

2. Limited public forums are defined by their inclusions

Judge Paez held that Faith Center's afternoon service "exceeded the boundaries of the library's limited [public] forum."[69] He reached this result largely by defining the scope of the forum in terms of both its inclusions and exclusions. He viewed the forum as one that was generally available "for 'meetings, programs, or activities of educational, cultural or community interest,'" but not "religious services."[70] There is some support in Supreme Court dissenting opinions for this approach.[71] However, a majority of the Court has consistently defined the scope of limited public forums by their inclusions, without regard to their exclusions.[72]

For example, recall that in *Rosenberger v. Rector & Visitors of University of Virginia*,[73] the university created a limited public forum[74] when it made funds generally available to certain student groups to cover the cost of printing student run publications.[75] However, the funding guidelines prohibited funding for "'religious activit[ies]' . . . defined as any activity that 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.'"[76] Applying these guidelines, the university denied funding to a student run publication that "was established '[t]o publish a magazine of philosophical and religious expression,' '[t]o facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints,' and '[t]o provide a unifying focus for Christians of multicultural backgrounds.'"[77]

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[69] Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1210 (9th Cir. 2006) (panel decision).

[70] *Id.* at 1198–99, 1210–11 (quoting County's library meeting room policy) (internal quotation marks omitted).

[71] *See infra* notes 73–88 and accompanying text.

[72] *See infra* notes 73–106 and accompanying text.

[73] 515 U.S. 819 (1995).

[74] *Id.* at 829.

[75] *See id.* at 823–25.

[76] *Id.* at 825 (quoting Petition for Writ of Certiorari app. at 66a, *Rosenberger*, 515 U.S. 819 (No. 94-329)).

[77] *Id.* at 825–26 (quoting Petition for Writ of Certiorari, *supra* note 76, app. 67).

Justice Souter, writing for four members of the Court in dissent, viewed the exclusion as a subject matter limitation that defined the scope of the forum.[78] He noted that the funding guidelines "simply deny funding for hortatory speech that 'primarily promotes or manifests' any view on the merits of religion; they deny funding for the entire subject matter of religious apologetics."[79] The majority, however, did not consider the exclusion to be part of the definition of the forum's boundaries. To the contrary, they considered the exception for religious activities to be an unconstitutional exclusion of subjects that were "otherwise within" the scope of the forum.[80]

Similarly, in *Good News Club v. Milford Central School*[81] the Court assumed that a school district created a limited public forum[82] when it made its public school facilities generally available to members of the public "for 'instruction in any branch of education, learning or the arts'" and "for 'social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community.'"[83] The district "interpret[ed] its [use] policy to permit discussions of subjects such as child rearing, and of 'the development of character and morals from a religious perspective.'"[84] Nonetheless, the policy also provided that the facilities could not be used for "religious purposes."[85] Under this policy, the district denied a Christian children's club access to the forum "for the purpose of conducting religious instruction and Bible study."[86] In their dissents, both Justice Stevens and Justice Souter, joined by Justice Ginsburg, defined the scope of the forum by its exclusions. The former characterized the club's activities as religious proselytizing that was outside the boundaries of the forum under the exclusion for religious purposes.[87] The latter agreed with Justice Stevens' analysis, but he also thought that the club's activities were outside the scope of the forum, under the religious purposes exclusion, because they also involved religious worship.[88]

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[78] *See id.* at 892–99 (Souter, J., dissenting).

[79] *Id.* at 896.

[80] *Id.* at 831, 837 (majority opinion).

[81] 533 U.S. 98 (2001).

[82] *Id.* at 106.

[83] *Id.* at 102 (quoting Petition for Writ of Certiorari app. at D1, *Good News Club*, 533 U.S. 98 (No. 99-2036)).

[84] *Id.* at 108 (quoting Brief for Appellee at 6, *Good News Club*, 533 U.S. 98 (No. 98-9494) (CA2)).

[85] *Id.* at 103 (quoting Petition for Writ of Certiorari, *supra* note 83, app. at D2) (internal quotation marks omitted).

[86] *Id.* at 104 (quoting Brief for Appellee, *supra* note 84, app. at A56) (internal quotation marks omitted).

[87] *Id.* at 132–33 (Stevens, J., dissenting).

[88] *See id.* at 135–39 (Souter, J., dissenting).

The majority, however, did not define the forum's scope based on the religious purpose exclusion. Instead, they defined the scope of the forum based on its inclusions. Justice Thomas conceded that "Justice Souter's recitation of the Club's activities [was] accurate."[89] Nonetheless, he held that despite "any evangelical message it convey[ed],"[90] the Club fell within the scope of the forum's inclusions because it sought "to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint."[91]

The Court also defined the scope of the forum by its inclusions in *Lamb's Chapel v. Center Moriches Union Free School District.*[92] In *Lamb's Chapel*, which involved the same statutory scheme as in *Good News Club*, a school district made its facilities generally available to members of the public for "social, civic, or recreational uses."[93] The access policy, however, prohibited "use[] by any group for religious purposes."[94] Pursuant to the policy, the district prohibited a church from using the facilities to show a film on "family and child-rearing issues" from a religious perspective.[95] The Court did not define the scope of the forum by its "religious purposes" exclusion. Instead, it defined the scope of the forum by its inclusion "for social or civic purposes."[96] It held that even though the film had a religious point of view, it dealt with a subject that the access policy otherwise permitted.[97]

Additionally, in *City of Madison Joint School District v. Wisconsin Employment Relations Commission*[98] the school board created a limited public forum when it opened its meetings to the public for school board business.[99] The state's Employment Relations Board ordered the school board to prohibit teachers in the district from speaking at the meetings "on matters subject to collective bargaining between [the school board and the teachers]."[100] Again, however, the Court defined the parameters of the forum by its inclusions, generally available for school board business, not by its exclusion, generally

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[89] *Id.* at 112 n.4 (majority opinion).

[90] *Id.*

[91] *Id.* at 109.

[92] 508 U.S. 384 (1993).

[93] *Id.* at 387 (citing N.Y. EDUC. LAW § 414 (McKinney 1988 & Supp. 1993)).

[94] *Id.* (quoting N.Y. EDUC. LAW. § 414) (internal quotation marks omitted).

[95] *Id.* at 387; *see also id.* at 393–94.

[96] *Id.* at 393.

[97] *Id.* at 393–94.

[98] 429 U.S. 167 (1976).

[99] *Id.* at 174 & n.6. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983) (describing *Madison* as a limited public forum "for the discussion of certain subjects").

[100] *Madison*, 429 U.S. at 173 (quoting Wisconsin Employment Relations Commission Hearing) (internal quotation marks omitted).

available for school board business except matters subject to collective bargaining.[101]

Finally, in *Widmar v. Vincent*,[102] the university created a limited public forum[103] when it made "its facilities generally available for the activities of registered student groups."[104] The use policy, however, "prohibit[ed] the use of University buildings or grounds 'for purposes of religious worship or religious teaching.'"[105] Again, the Court defined the limited public forum by its inclusions, generally available to student groups, not by its exclusion, generally available to student groups except those who wish to engage in religious worship and teaching.[106]

The principle that the scope of a limited public forum is defined by its inclusions, not by its exclusions, is analogous to rules that apply with respect to procedural due process. The government has the discretion whether to create constitutionally protected property interests. Once a property interest is created, however, it is the Constitution, not the government regulations, that determines the procedures required for its deprivation.[107]

Similarly, the government has the discretion to decide what speakers and subjects are permitted in a limited public forum.[108] However, once the

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[101] *Id.* at 175 (noting that "the State [had] opened [the] forum for direct citizen involvement").

[102] 454 U.S. 263 (1981).

[103] *Id.* at 271–72 (referring to the property as a limited public forum).

[104] *Id.* at 264-65.

[105] *Id.* at 265 (quoting University Regulation No. 4.0314.0107).

[106] *Id.* at 267 (holding that "[t]hrough its policy of accommodating their meetings, the University has created a forum generally open for use by student groups").

[107] The principal case is *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). There, a state statute granted classified civil service employees a property interest in continued employment when it provided that they were "entitled to retain their positions 'during good behavior and efficient service,'" and "could not be dismissed 'except . . . for . . . misfeasance, malfeasance, or nonfeasance in office.'" *Id.* at 538–39 (quoting OHIO REV. CODE ANN. § 124.34 (LexisNexis 1984). The statute also provided procedures for removal. *Id.* at 539. Two dismissed employees brought suit arguing that the statute "was unconstitutional on its face because it provided no opportunity for a discharged employee to respond to charges against him prior to removal." *Id.* at 532. The government argued that employees' "property right [was] defined by, and conditioned on, the legislature's choice of procedures for its deprivation." *Id.* at 539. The Court rejected the government's argument. It held that "'[p]roperty' cannot be defined by the procedures provided for its deprivation." *Id.* at 541. Instead, "[t]he right to due process 'is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.'" *Id.* (quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell J., concurring in part and concurring in the result in part)). Those safeguards are found in the Constitution, not the state statute. *See id.*

[108] *See supra* note 28 and accompanying text.

inclusions are set, the Constitution, not government regulations, determines the propriety of exclusions.

3. Faith Center's "Praise and Worship service" fell within the scope of the forum's inclusions

The County included within the scope of its forum use by "'[n]on–profit and civic organizations, for–profit organizations, schools and governmental organizations' . . . for 'meetings, programs, or activities of educational, cultural or community interest.'"[109] As both Judge Tallman, in his dissent from the panel decision, and Judge Bybee, in his dissent from the denial of a rehearing en banc, pointed out, surely Faith Center's "'Praise and Worship' service" fell within this broad language of inclusion.[110] At the very least it was an "organization" that wanted to use the library meeting room for an "activity" (if not also a "program") of "community interest" (if not also of "educational and cultural interest").

Judge Paez did not deny that religious worship was an activity of community interest. Instead, he asserted that the relationship between religious worship and such activity was "tenuous[]" and that "[a]lthough religious worship is an important institution in any community, we disagree that anything remotely community–related must therefore be granted access to the Antioch Library meeting room."[111] However, quite the opposite is true. The County was not constitutionally required to open its library meeting rooms for community activities. Once it did, however, it was constitutionally bound to "respect the lawful boundaries it has itself set."[112] Thus, unless Judge Paez was prepared to say that religious worship was not a community activity, which he did not do, he was quite wrong when he held that Faith Center's "'Praise and Worship' service" did not fall within the scope of the forum.

4. Faith Center's exclusion was content based

Since Faith Center's "'Praise and Worship' service" fell within the forum's inclusions, its exclusion was not a constitutionally permissible "content" subject matter limitation that defined the scope of the forum. Instead, it was a constitutionally impermissible content based exclusion of subject matter that was otherwise within the boundaries of the forum. Consequently, the exclusion

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[109] Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1198 (9th Cir. 2006) (panel decision) (alteration in original) (quoting County's library meeting room policy).

[110] *See id.* at 1217 (Tallman, J., dissenting); Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 896 (9th Cir. 2007) (Bybee, J., dissenting) (denial of en banc rehearing).

[111] *Glover*, 462 F.3d at 1211 & n.14.

[112] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

fell within the general rule that "the government may not regulate speech based on its substantive content or the message it conveys," and that "[d]iscrimination against speech because of its message is presumed to be unconstitutional."[113] Indeed, in every case where the government excluded speech, including religious prayer, that otherwise fell within the scope of a limited public forum, the Court struck down the exclusion.[114] The same result should have obtained in this case.

There is no doubt that the exclusion of Faith Center's "'Praise and Worship' service" was impermissibly content based. Judge Paez gave two justifications for the exclusion, both of which he characterized as "reasonable."[115] First, it was designed to prevent the library meeting room from being "transformed into an occasional house of worship."[116] In this regard, he quoted Justice Souter's dissent in *Good News Club* for the proposition that to permit "religious worship services . . . [in] government buildings . . . would result in the 'remarkable proposition that any public [building] opened for civic meetings must be opened for use as a church, synagogue, or mosque.'"[117]

The problem with this reasoning is that it is directly attributable to the content of the speech. In so far as the First Amendment speech clause is concerned,[118] it evidences nothing more than the government's disagreement with, and outright hostility toward, the exercise of religious services in the limited forum.[119] Consequently, it demonstrates that the exclusion was constitutionally impermissible "[d]iscrimination against speech because of" "its substantive content [and] the message it conveys."[120]

The second justification Judge Paez gave for the exclusion was to prevent "controversy and distraction of religious worship within the Antioch Library meeting room [that might] alienate patrons and undermine the library's purpose of making itself available to the whole community," and "interfere with the library's primary function as a sanctuary for reading, writing, and quiet

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[113] *Id.* at 828.

[114] *See id.* (denying funds to student group with a religious point of view); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111 (2001) (denying access to public school buildings for "quintessentially religious" and "decidedly religious" speech); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (similar); Widmar v. Vincent, 454 U.S. 263 (1981) (denying access to university meeting facilities for religious worship and discussion); City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n, 429 U.S. 167 (1976) (prohibiting teachers from speaking at school board meeting).

[115] *See Glover*, 462 F.3d at 1206-07.

[116] *Id. at 1206.*

[117] *Id.* (quoting *Good News Club*, 533 U.S. at 139 (Souter, J., dissenting)).

[118] The constitutionality of the use of a limited public forum for religious services under the Establishment Clause is discussed *infra* at notes 170–212 and accompanying text.

[119] *See supra* notes 64–65 and accompanying text.

[120] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995).

contemplation."[121] These reasons, however, cannot support the exclusion. First of all, as a factual matter, it is doubtful that Faith Center's service would cause alienation, controversy, or distraction. The service was to be held behind closed doors,[122] and "[t]he County [did] not argue that excessive noise was a problem."[123] In any event, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[124]

More importantly, however, these reasons too are directly related to the content of the speech. Listeners' reaction to speech is not a content neutral basis of regulation; instead, it is a type of content based restriction that is subject to strict scrutiny.[125] Indeed one of the underlying purposes why a democratic society needs the First Amendment is to protect speech that causes alienation and controversy.[126]

Furthermore, the County had permitted a variety of groups to use the meeting rooms. These "include[ed] the Sierra Club for purposes of letter writing, Narcotics Anonymous for a recovery meeting, and the East Contra Costa Democratic Club to 'let people learn about Democratic candidates and issues.'"[127] The County was thus not at all concerned about any alienation, controversy, and distraction that might be engendered by the meeting room's use by "liberal" environmentalists, former drug users, and democrats. The fact that they were only concerned with alienation, controversy, and distraction with respect to Faith Center's "'Praise and Worship' service" illustrates again that the County discriminated against Faith Center's speech because of disagreement with and hostility towards its religious content.

In addition to disagreement with and hostility towards its religious content, there is yet another reason why the exclusion of Faith Center's "'Praise and Worship' service" should have been analyzed as the type of content based discrimination that is subject to strict scrutiny. The County and Judge Paez conceded that a large variety of religious speech, other than religious worship, would be permitted in the library meeting room. These include "workshop[s] . . . devoted to . . . how to communicate effectively with one's God," as well as other activities such as "discussing the Bible and other religious books[,] . . . teaching, praying, singing, sharing testimonies, sharing meals, and discussing

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[121] *Glover*, 462 F.3d at 1207.

[122] *Id.* at 1226 (Tallman, J., dissenting).

[123] *Id.* at 1200 n.1 (majority opinion).

[124] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

[125] *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321 (1988) (plurality opinion) (foreign diplomat's reaction to picketing); Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–12 (1975) (public's reaction to offensive speech).

[126] *See* Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (stating that "a function of free speech under our system of government is to invite dispute").

[127] *Glover*, 462 F.3d at 1204 (quoting County's use policy).

social and political issues."[128] However, in excluding religious worship from the list of permissible religious uses in the forum, the County took it upon itself to decide what "ideas and beliefs [are] deserving of expression."[129] This "contravenes th[e] essential right . . ." "[a]t the heart of the First Amendment . . . that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."[130] Consequently, such content based regulations are subject to "the most exacting scrutiny."[131]

B. The Religious Use Policy Was Also Viewpoint Discriminatory

The County not only impermissibly discriminated against Faith Center's "'Praise and Worship' service" based on its religious content, but it also impermissibly discriminated against it based on its viewpoint. As the Court has explained, viewpoint discrimination is "a subset or particular instance of" [132] and "an egregious form of content discrimination."[133] "When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[134] Consequently, "[t]he 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."[135]

Judge Paez asserted that the "test" of determining viewpoint discrimination "is whether the government has excluded perspectives on a subject matter otherwise permitted by the forum."[136] He concluded that the exclusion of Faith Center's afternoon "'Praise and Worship' service" was not viewpoint discriminatory under this test.[137] His basic reasoning was that the afternoon session amounted to "pure religious worship," and that pure religious worship is different from other types of religious speech because it "is not a *secular* activity that conveys a religious viewpoint on otherwise permissible subject matter."[138]

There are two fundamental problems with Judge Paez's reasoning. First of all, he did not even apply the rule he stated. There is no question that government engages in viewpoint discrimination when it excludes a perspective

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[128] *Id.* at 1210 (internal quotation marks omitted).

[129] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

[130] *Id.*

[131] *Id.* at 642.

[132] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831 (1995).

[133] *Id.* at 829. Although viewpoint discrimination is a subset of content discrimination, the latter can exist without the former. *See* Deutsch, *supra* note 25, at 134–35.

[134] *Rosenberger*, 515 U.S. at 829.

[135] *Id.*

[136] Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1208 (9th Cir. 2006) (panel decision).

[137] *Id.* at 1208–14.

[138] *Id.* at 1210 (emphasis added).

on a subject otherwise within the scope of a limited public forum.[139] In applying the rule, however, Judge Paez suggested that the government engages in viewpoint discrimination only when it excludes *secular* activities that convey a religious viewpoint. This is not the law. The fact is that the government also engages in such discrimination when it excludes religious activities that convey a religious viewpoint on an includable subject. For example, in *Good News Club*, where a majority found that the government had excluded a religious perspective on an includable subject,[140] all of the Justices agreed that the claimant was engaged in religious activities.[141]

The second problem is Judge Paez's assumption that "pure religious worship" can be separated from other religious activities because it does not express a viewpoint. Judge Paez based this supposition in large measure on language in Justice Thomas' majority opinion in *Good News Club*. Recall that in that case the school district, as in the instant case, made its property generally available to members of the public for a variety of activities including "instruction in any branch of education, learning or the arts," and "for 'social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community.'"[142] The school district "interpret[ed] its policy to permit discussions of subjects such as child rearing, and of 'the development of character and morals from a religious perspective.'"[143] However, it denied Good News Club access to the facilities on the ground that "the kinds of activities . . . engaged in by the . . . Club were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself."[144]

Justice Souter, in his dissent, "characterized" the Club's activities as "proselytizing" with "elements of worship."[145] As he saw it, the Club "intend[ed] to use the . . . premises . . . for an evangelical service of worship calling children to commit themselves in an act of Christian conversion."[146] In response, Justice Thomas, writing for the majority, conceded in a footnote that

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[139] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112 (2001) (holding "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").

[140] *Id.* at 109–12.

[141] *See id.* at 112 n.4; *id.* at 130–34 (Stevens, J., dissenting); *see also id.* at 134–39 (Souter, J., dissenting).

[142] *Id.* at 102 (majority opinion) (quoting Petition for Writ of Certiorari, *Good News Club*, *supra* note 83, app. at D1).

[143] *Id.* at 108 (quoting Brief for Appellee, *supra* note 84, at 6).

[144] *Id.* at 103–04 (quoting Brief for the Appellee, *supra* note 84, app. A25).

[145] *Id.* at 139 n.3 (Souter, J., dissenting).

[146] *Id.* at 138.

"Justice Souter's recitation of the Club's activities [was] accurate."[147] However, he also said:

> Despite [the district's] insistence that the Club's activities constitute religious worship, the Court of Appeals made no such determination. It did compare the Club's activities to religious worship, but ultimately it concluded merely that the Club's activities fall outside the bounds of pure moral and character development. In any event, we conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values.[148]

Judge Paez seems to have read this as "dr[awing] a line" between "religious worship" and all other religious activities, and indicating that the Justice Thomas did not consider the former has having a "viewpoint from which ideas are conveyed."[149] He also opined that the language indicates that Justice Thomas thought that "pure religious worship was too tenuously associated to the forum's purpose."[150]

A more likely interpretation of what Justice Thomas was saying, however, is that even if the Club was engaged in religious worship, it was using religious worship to teach moral values which was within the scope of the forum. This interpretation makes the most sense since, as explained below, religious worship is inherently about morals and ethics from a religious perspective.[151] It is also supported by Justice Thomas' further statement that "we see no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys."[152] Indeed, even Judge Paez conceded that "[i]t is difficult to imagine . . . that religious worship could ever truly be divorced from moral instruction or character development."[153]

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[147] *Id.* at 112 n.4 (majority opinion).

[148] *Id.* (citations and internal quotations omitted).

[149] Faith Center Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1209 (9th Cir. 2006) (panel decision) (quoting *Good News Club*, 533 U.S. at 112 n.4) (internal quotation marks omitted). For an article criticizing treating religious worship as a separate category of speech, see Tyler, *supra* note 22, at 1360-69 (arguing that such a distinction creates uncertainty and risks entanglement with religion, and opining that the focus should be not on whether the speech at issue is worship but whether it falls within the scope of the forum).

[150] *Glover*, 462 F.3d at 1211-12 n.14.

[151] *See infra* notes 163–69 and accompanying text.

[152] *Good News Club*, 533 U.S. at 112 n.4.

[153] *Glover*, 462 F.3d at 1211 n.14. For cases holding that the religious activities at issue did not constitute mere religious worship divorced from the teaching of moral values, see Bronx Household of Faith v. Bd. of Educ., 331 F.3d 342, 354 (2d Cir. 2003); Moore v. City of Van, 238 F. Supp. 2d 837, 847 (E.D. Tex. 2003); Campbell v. St. Tammany Parish Sch. Bd., No. Civ.A.98-2605, 2003 WL 21783317, at *9, (E.D. La. July 30, 2003). The issues involved in attempting to separate religious worship from the teaching of moral values were raised, but not answered in *Bronx Household*. *See Bronx Household*, 331 F.3d at 355.

There is some support for Judge Paez's position that religious worship can be separated from other religious speech in Supreme Court dissenting opinions. In his dissent in *Good News Club*, Justice Stevens, with whom Justice Souter in a separate dissent joined by Justice Ginsburg seemed to agree, opined that religious speech can be divided into three categories: (1) "speech about a particular topic from a religious point of view[;]" (2) "religious speech that amounts to worship, or its equivalent[;]" and (3) "proselytizing or inculcating belief in a particular religious faith."[154] In addition, in his dissent in *Widmar v. Vincent*, Justice White went so far as to argue that not only is religious worship distinguishable from speech about religion and religious beliefs, but also that the former is not even protected by the First Amendment Speech Clause.[155]

A majority of the Court, however, has rejected these arguments. In response to Justice White, Justice Powell, writing for the majority in *Widmar*, gave three reasons why religious worship cannot be distinguished constitutionally from other types of religious speech:

> First . . . the distinction has [no] intelligible content. 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."
>
> Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. 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.
>
> Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. The dissent apparently wishes to preserve the vitality of the Establishment Clause. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, than for religious worship by persons already converted. It is far from clear that the State gives greater support in the latter case than in the former.[156]

Justice Paez dismissed this language as "dicta that was not central to the Court's holding."[157] However, this rejection of Justice White's reasoning was essential to the holding. If Justice Powell had agreed with Justice White, he would have upheld the exclusion at issue instead of striking it down. Moreover, as Judge Bybee put it in his dissent from the denial of a rehearing,

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[154] *Good News Club*, 533 U.S. at 130 (Stevens, J., dissenting); *see also id.* at 138–39, 139 n.3 (Souter, J., dissenting) (agreeing with Justice Stevens).

[155] Widmar v. Vincent, 454 U.S. 263, 282–89 (1981) (White, J., dissenting).

[156] *Id.* at 269–70 n.6 (majority opinion) (citations omitted).

[157] *Glover*, 462 F.3d at 1212.

"[e]ven if *Widmar*'s express rejection of the panel majority's distinction [was] not dispositive, the distinction would still collapse under the weight of these three objections."[158]

In fact, Judge Paez all but conceded Justice Powell's second point involving unconstitutional entanglement with religion. He agreed that "[t]he distinction . . . between religious worship and virtually all other forms of religious speech . . . [is] one that the government and the courts are not competent to make."[159] Nevertheless, he insisted that distinction in this case was permissible because it was not made by either the County or the court. Instead, it was "made by Faith Center itself when it separated its afternoon religious worship service from its morning activities."[160] Thus, on Judge Paez's reasoning, whether religious worship is distinguishable from other religious activities turns not on the substance of the activities, but on the how they are described. Such a rule is devoid of meaning. As Judge Tallman pointed out in his dissent, the next religious group that wishes to use the forum is likely to choose its words more carefully.[161]

Furthermore, with respect to Justice Powell's other two points, Judge Paez's distinction between religious worship and other religious activities has no "intelligible content" or constitutional "relevance." Once again, Judge Paez conceded that it would be viewpoint discriminatory for the government to exclude a wide variety of religious speech, such as "discussing the Bible and other religious books . . . praying, singing, [and] sharing testimonies . . ." because "[t]hese activities convey a religious perspective on subjects that are or have been permitted in the Antioch Library meeting room."[162] But religious worship includes these exact same religious activities—praying and discussion of sacred texts, if not also singing and sharing testimonies. As Justice Powell said, there is simply no way from a constitutional perspective (whether by the courts, the government, or the claimant) to determine when such activities are protected and when they are not.

Moreover, Judge Paez's attempt to find a constitutional relevance for the distinction, on the theory that religious worship, unlike other religious activities, is a subject matter, not a viewpoint, is also flawed. One dictionary definition of religious worship is "[r]everence or veneration paid to a being or power regarded as supernatural or divine; the action or practice of displaying this by appropriate acts, rites, or ceremonies."[163] Such activities inherently

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[158] Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 899 (9th Cir. 2007) (Bybee, J., dissenting) (denial of en banc rehearing).

[159] *Glover*, 462 F.3d at 1214.

[160] *Id.*

[161] *Id.* at 1218 (Tallman, J., dissenting).

[162] *Id.* at 1210 (majority opinion) (internal quotation marks and citation omitted).

[163] Bronx Household of Faith v. Bd. of Educ., 331 F.3d 342, 366 n.7 (2d Cir. 2003) (Miner,

have a viewpoint on the nature of the universe and human existence. The point of view expressed is that a supernatural being exists and that to live a moral and ethical life one needs to seek divine revelation and guidance. In addition, the "mere acknowledgement of a higher being or a person's dependence on such could of itself be considered a moral lesson."[164] The fact that such expression may be more symbolic than verbal creates no constitutional infirmity. Just as one has a First Amendment protected right to express a point of view on the nature of America by burning the American flag without having to say "I hate America,"[165] one has a First Amendment protected right to express a point of view on the nature of existence through religious worship without having to say "I believe there is a deity."

Furthermore, much of religious worship in fact involves verbalized points of view. As Judge Tallman pointed out in his dissent, "[i]t 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."[166]

In any event, there seems no doubt that the exclusion of Faith Center's specific service was viewpoint discriminatory. Recall that the articulated purpose of the forum was use by "'[n]on–profit and civic organizations, for–profit organizations, schools and governmental organizations' . . . for 'meetings, programs, or activities of educational, cultural or community interest.'"[167] This would encompass discussions on everything from alcohol abuse to the Zephaniah, including such things as domestic relations and how to live life in a moral and ethical way.

Clearly, Faith Center's afternoon session sought to bring a religious viewpoint to these otherwise permissible subjects. It was described as a "'Praise and Worship' service with a sermon by Pastor Hopkins."[168] Again, as Judge Tallman cogently stated:

J., dissenting) (quoting OXFORD ENGLISH DICTIONARY 577 (2d ed. 1989)) (internal quotation marks omitted).

[164] Fiet, *supra* note 22, at 173.

[165] *See* Texas v. Johnson, 491 U.S. 397, 402–06 (1989). Of course, the government has a right to regulate conduct intended as speech, but any such regulation must be content neutral. *See id.* at 410–12 (holding that regulation at issue was "related to the suppression of free expression"). As previously explained, the exclusion in this case was impermissibly content discriminatory. *See supra* notes 113–31 and accompanying text.

[166] *Glover*, 462 F.3d. at 1224 (Tallman, J., dissenting) (alteration in original) (quoting Campbell v. St. Tammany Parish Sch. Bd., No. Civ.A.98-2605, 2003 WL 21783317, at *9 (E.D. La. July 30, 2003)) (internal quotation marks omitted).

[167] *Id.* at 1198 (majority opinion) (alteration in original) (quoting County's library meeting room policy).

[168] *Id.* at 1199 (quoting Faith Center's advertising flyer).

> Singing a religious song may very well be akin to singing about morality according to religious tenets. Praying is usually speech containing praise to a higher being, but may also contain personal characterizations of one's own life, wishes, hopes, or concerns. Pastor Hopkins's sermon is the clearest example of religious speech which expresses a viewpoint on otherwise permissible secular topics. One can imagine the variety of subject matter that could be included in a sermon money, family, love, or avoiding drugs and alcohol, to name a few. The list is endless.[169]

Thus, denying Faith Center access to the library meeting room for its "'Praise and Worship' service" prevented it from expressing a religious point of view on otherwise permissible subjects. Accordingly, the exclusion was impermissibly viewpoint as well as content discriminatory. It should, therefore, have been subject to strict scrutiny.

IV. THE ESTABLISHMENT CLAUSE

As just stated, because the exclusion of Faith Center's "'Praise and Worship' service with a sermon by Pastor Hopkins"[170] was both content and viewpoint discriminatory, it should have been subject to strict scrutiny. This would have required the County to "show that its regulation [was] necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end."[171] In similar cases, governments have argued that "not violating the Establishment Clause" provides such an "interest."[172] A majority of the Court, however, has consistently rejected this argument.[173] Instead, they have effectively held that the government does not violate the Establishment Clause when private religious speakers, including those engaged in "religious worship"[174] and other "quintessentially religious" or "decidedly religious"[175] activities, are granted no more than equal access to limited public forums along with other nonreligious speakers.[176]

Widmar is again the foundation case. Recall that there, a university created a limited public forum when it made its meeting facilities generally available to

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[169] *Id.* at 1225–26 (Tallman, J., dissenting).

[170] *Id.* at 1199 (majority opinion) (quoting Faith Center's advertising flyer).

[171] Widmar v. Vincent, 454 U.S. 263, 270 (1981).

[172] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112 (2001); *see also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394–95 (1993) (similar); *Widmar*, 454 U.S. at 270 (similar).

[173] Indeed in his majority opinion in *Good News Club*, Justice Thomas questioned, but did not decide, whether even "avoiding an Establishment Clause violation would justify viewpoint discrimination." *Good News Club*, 533 U.S. at 113.

[174] *Widmar*, 454 U.S. at 265.

[175] *Good News Club*, 533 U.S. at 111 (internal quotation marks omitted).

[176] *See infra* notes 177–201 and accompanying text.

registered student groups, but denied access to such a group that wished to use them for "religious worship and religious discussion."[177] Applying the so-called "three-pronged test" in *Lemon v. Kurtzman*,[178] Justice Powell, writing for seven members of the Court, held that permitting such use would not violate the Establishment Clause. The university's forum policy had "a secular legislative purpose; . . . its principle or primary effect . . . neither advance[d] nor inhibit[ed] religion . . . [and it did] not foster an excessive entanglement with religion."[179]

Justice Powell reasoned that the university's secular purpose was "to provide a forum in which students could exchange ideas."[180] Furthermore, "an open forum in a public university . . . [that] is available to a broad class of nonreligious as well as religious speakers" "does not confer any imprimatur of state approval on religious sects or practices,"[181] and any "incidental benefits" that the latter receive "from access to University facilities . . . does not violate the prohibition against the 'primary advancement' of religion."[182] Additionally, he agreed with the lower court "that the University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.'"[183]

The Court followed *Widmar* in *Lambs Chapel v. Center Moriches Union Free School District*.[184] Remember that there the school district made its facilities generally available to members of the public for "social, civic, or recreational uses," but denied access to a church that wanted to show "for assertedly religious purposes, a film series dealing with family and child–rearing issues."[185] Justice White, writing for six members of the Court, held such use would not violate the Establishment Clause. He reasoned that:

> The showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental. As

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[177] *Widmar*, 454 U.S at 264–65, 271–72.

[178] 403 U.S. 602, 612-15 (1971).

[179] *Widmar*, 454 U.S. at 271 (quoting *Lemon*, 403 U.S. at 612–13) (internal quotation marks omitted).

[180] *Id.* at 271-72 n.10.

[181] *Id.* at 274.

[182] *Id.* at 273.

[183] *Id.* at 272 n.11 (citing Chess v. Widmar, 635 F.2d 1310, 1318 (8th Cir. 1980)).

[184] 508 U.S. 384 (1993).

[185] *Id.* at 387.

> in *Widmar*, permitting District property to be used to exhibit the film series involved in this case would not have been an establishment of religion under the three–part test articulated in *Lemon v. Kurtzman*: The challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion.[186]

The Court reached the same result in *Good News Club v. Milford Central School*.[187] Recall there the school district made its public facilities generally available to members of the public "for instruction in any branch of education, learning or the arts" and "for social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community."[188] Nonetheless, it denied access to a Christian children's club whose activities were described as "quintessentially religious," "decidedly religious,"[189] and "the equivalent of religious instruction itself."[190] Justice Thomas, writing for the majority held that such activities did not violate the Establishment because they were "materially indistinguishable from those in *Lambs Chapel* and *Widmar*."[191]

Justice Thomas found the district's attempt to distinguish those cases "unpersuasive."[192] The district argued that the case was different because it "involve[d] elementary school children . . . [who] will perceive that the school is endorsing the Club and will feel coercive pressure to participate, because the Club's activities take place on school grounds, even though they occur during nonschool hours."[193] In rejecting this argument Justice Thomas emphasized "that 'a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion.'"[194] He noted that in cases such as this, "the 'guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints,

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[186] *Id.* at 395 (internal citations omitted). Three other Justices objected to the invocation of *Lemon*, but agreed that such use did not pose an Establishment Clause violation. *Id.* at 397 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 397–400 (Scalia, J., joined by Thomas, J., concurring in the judgment).

[187] 533 U.S. 98 (2001).

[188] *Id.* at 102 (quoting Petition for Writ of Certiorari, *Good News Club*, *supra* note 83, app. D2).

[189] *Id.* at 111.

[190] *Id.* at 108 (quoting Good News Club v. Milford Cent. Sch., 202 F.3d 502, 507 (2d Cir. 2000)).

[191] *Id.* at 113.

[192] *Id.* at 114.

[193] *Id.* at 113–14.

[194] *Id.* at 114 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 839 (1995)).

including religious ones, are broad and diverse.'"[195] Here, "Good News Club [was] seek[ing] nothing more than to be treated neutrally and given access to speak about the same topics as are other groups."[196]

Justice Thomas also reasoned that children would not be coerced into joining the club because they needed their parent's permission to attend.[197] Furthermore, even if "elementary school children are more impressionable than adults [the Court has] never extended . . . Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present."[198] Additionally, the "circumstances . . . [did] not support the theory that small children would perceive endorsement[;]"[199] and, in any event, the Court could not "operate . . . under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club's religious activity."[200] In the end he "decline[d] to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive."[201]

The application of these precedents makes it clear that permitting "Faith Center's 'Praise and Worship' service" in the library meeting room would not have violated the Establishment Clause. The County opened its library meeting rooms for the secular purpose of providing a space for a wide variety of organizations to hold "meetings, programs, or activities of educational, cultural or community interest."[202]

Permitting religious worship in the forum would not have the primary effect of advancing religion. A limited public forum that "is available to a broad class of nonreligious as well as religious speakers," "does not confer any imprimatur of state approval on religious sects or practices,"[203] and any "incidental

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[195] *Id.* (quoting *Rosenberger*, 515 U.S. at 839).

[196] *Id.*

[197] *Id.* at 115.

[198] *Id.*

[199] *Id.* at 118. Among other things, Justice Thomas noted that "[t]here [was] no evidence that young children [were] permitted to loiter outside classrooms after the school day [had] ended;" the club met in a combined "high school resource" and "middle school special education room" instead of "an elementary school classroom;" "[t]he instructors [were] not schoolteachers;" "[a]nd the children in the group [were] not all the same age as in the normal classroom setting; their ages range[d] from 6 to 12." *Id.* at 117–18.

[200] *Id.* at 119.

[201] *Id.*

[202] Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1198 (9th Cir. 2006) (panel decision) (quoting County's library meeting room policy) (internal quotation marks omitted).

[203] Widmar v. Vincent, 454 U.S 263, 274 (1981).

benefits" that the latter receive "from access . . . does not violate the prohibition against the 'primary advancement' of religion."[204] Any "reasonable observer,"[205] familiar with the forum, would understand that in allowing religious worship the County was simply acting neutrally towards religion by "following neutral criteria and even handed policies."[206]

Furthermore, the service itself would be held behind closed doors,[207] and Faith Center's advertising literature made it clear that it, not the County, sponsored the service and that it was open to the public on a voluntary basis.[208] Consequently, "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed,"[209] or that anyone would be coerced into participating. And, of course, even if some unaccompanied child in the library might be misled as to the County's endorsement of religion, "a group's religious activity [cannot] be proscribed on the basis of what the youngest members of the audience might misperceive."[210]

Finally the application of an evenhanded neutral policy of access would "not foster an excessive entanglement with religion."[211] To the contrary, the County "would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship.'"[212]

V. CONCLUSION

Nothing that has been said in this commentary prevents the government from excluding religious worship or any other speech from public property. That,

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[204] *Id.* at 273.

[205] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 848 (1995) (O'Connor, J., concurring) (quoting Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring)).

[206] *Good News Club*, 533 U.S. at 114 (quoting *Rosenberger*, 515 U.S. at 839) (internal quotation marks omitted).

[207] *Glover*, 462 F.3d at 1226 (Tallman, J., dissenting).

[208] *Id.* at 1199 (majority opinion). Judge Paez noted that:

> Faith Center advertised its May 29, 2004 meeting with a flyer describing a "Women of Excellence Conference" sponsored by Faith Center Evangelistic Ministries Outreach. The flyer stated: Coming to Antioch, California, on May 29th 2004, where the power of God would be moving to bring miracles into your life. "For this is the hour of the believer," thus saith the Lord, for divine impartation of spiritual gifts, and empowerment, for the body of Christ to move forward in total victory. Come and receive your blessing!

Id.

[209] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993).

[210] *Good News*, 533 U.S. at 119.

[211] Widmar v. Vincent, 454 U.S. 263, 271 (1981) (quoting Lemon v. Kurtzman, 403 U.S. 602, 613 (1971)) (internal quotation marks omitted).

[212] *Id.* at 272 n.11 (citing Chess v. Widmar, 635 F.2d 1310, 1318 (8th Cir. 1980).

however, depends on the nature of the forum. As Judge Bybee explained in his dissent from the denial of a rehearing:

> There are, of course, perfectly permissible means by which categories of speech—including worship activities—could be excluded from the library. For example, if the library had set aside its meeting rooms for book clubs, it could certainly exclude every other category of expressive activity that did not fall within the purposes of the forum. The library could exclude worship services that were not book clubs, just as it could exclude political debates and city council meetings. What it could not do is exclude book clubs discussing the Koran, the Torah, or the Tibetan Book of the Dead. Or the library might open its meeting rooms broadly, while prohibiting food or drink. That policy would exclude meetings at which communion might be served, or a Seder celebrated, or prashad distributed, just as it would exclude serving refreshments at a Boy Scout Court of Honor or tea at a meeting of the Garden Club. What the library cannot do is permit food and drink *except* when it is consumed in connection with religious services.[213]

In *Glover*, however, the County did not so restrict its forum. At the very least, it created a limited public forum that was generally available to "'[n]on–profit and civic organizations, for–profit organizations, schools and governmental organizations' . . . for 'meetings, programs, or activities of educational, cultural or community interest.'"[214] The boundaries of such forums are defined by their inclusions, not their exclusions. Faith Center's afternoon "'Praise and Worship' service with a sermon by Pastor Hopkins"[215] was undoubtedly a community activity that fell within scope of the forum.

Faith Center sought to bring a religious perspective to otherwise permissible subjects even if it did involve religious worship. The County excluded it from doing so because of disagreement with, and hostility towards, religious worship in the forum. The County also impermissibly took it upon itself to decide what religious speech is deserving of expression. Consequently, the exclusion should have been subject to strict scrutiny because it was impermissibly content and viewpoint discriminatory. Under the applicable precedents, the Establishment Clause would not have provided a compelling reason for the exclusion.

Regrettably, a majority of the judges on Ninth Circuit Court of Appeals failed in their duty to correct the error. Again, as Judge Bybee succinctly stated with respect to the majority panel decision, "[i]n so doing, the majority . . . disregarded equal–access cases stretching back nearly three decades, turned a blind eye to blatant viewpoint discrimination, and endorsed disparate treatment

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[213] Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 900 (9th Cir. 2007) (Bybee, J., dissenting) (denial of en banc rehearing).

[214] *Glover*, 462 U.S. at 1198 (alteration in original) (quoting County's library meeting room policy).

[215] *Id.* at 1199 (quoting Faith Center's advertising flyer).

of different religious groups."[216] One can only hope that in future cases, these judges will be more attuned to the Freedom of Speech granted to religious speakers under the First Amendment to the United States Constitution.

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[216] *Glover*, 480 F.3d at 895 (Bybee, J., dissenting).