Religious Liberties

"Equal Access"? *Faith Center Church Evangelistic Ministries v. Glover* And the Use of Public Facilities for Religious Worship

*By Douglas G. Smith**

The U.S. Court of Appeals for the Ninth Circuit has developed a unique jurisprudence in cases involving religious liberty. From holding recitation of the pledge of allegiance in public schools unconstitutional[1] to invalidating the display of a cross erected as part of a war memorial,[2] the court has issued a series of rulings that push the envelope in addressing the constitutionality of various government policies implicating religious liberties. *Faith Center Church Evangelistic Ministries v. Glover* represents the latest in that line of controversial decisions.[3]

In *Faith Center*, a divided Ninth Circuit panel held that the district court abused its discretion when it found that a county library must give equal access to a Christian group seeking to utilize one of its public meeting rooms. The library offered these public meeting rooms for "educational, cultural and community related meetings, programs and activities."[4] However, it specifically prohibited certain religious activities, stating that the library's meeting rooms "shall not be used for religious services."[5]

The court did not dispute that the Christian group "engaged in protected speech when its participants met in the Antioch library for prayer, praise, and worship."[6] Nonetheless, the court held that the group could not engage in religious worship because the library meeting room was a "limited public forum" and "the County's policy to exclude religious worship services from the meeting room is reasonable in light of the forum's purpose."[7] However, the county specifically defined that purpose as excluding religious worship. The court's reasoning thus allows public entities to define away religious organizations' equal access rights by merely defining the "limited" forum as one that excludes certain religious practices—a result that is inconsistent with well-settled Supreme Court precedent.

The Supreme Court has unequivocally held that "religious worship and discussion... are forms of speech and association protected by the First Amendment."[8] "The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place."[9] Accordingly, "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."[10]

The *Faith Center* court conceded that, in opening its facilities to the public, "the County's purpose was to invite the community at large to participate in use of the meeting room[s] for expressive activity."[11] Nonetheless, it asserted that the library did not open its meeting rooms "for indiscriminate use" because it required the submission of an application that "must be reviewed and approved in advance" and specifically excluded "religious services."[12] The panel majority claimed, without any citation to the record, that the library's exclusionary policy was designed to "preserve the character of the forum as a common meeting space, an alternative to the community lecture hall, the corporate board-room, or the local Starbucks."[13]

However, excluding religious "worship" has nothing to do with "preserving" such characteristics of the space. To the contrary, religious worship inherently involves utilizing the meeting rooms as a "common meeting space." Moreover, even if the library had such an objective, as the panel majority conceded, the library may not "discriminate against a speaker's viewpoint."[14] Accordingly, the library cannot discriminate against religious organizations by defining the "limitation" on the public forum to specifically exclude those with a religious viewpoint.

The Supreme Court has made clear that a public entity may not exclude "religious worship" any more than it may exclude the promotion of atheism or libertarian philosophy.[15] Nonetheless, the panel majority allowed the library to do just that, relying upon a *dissent* issued by two justices to conclude that such limitations were "reasonable" and thus constitutional, asserting that it would be "remarkable" if a "'public [building] opened for civic meetings must be opened for use as a church, synagogue, or mosque.'"[16]

Nor can the county's discriminatory behavior be justified by an "interest in screening applications and excluding meeting room activities that may interfere with the library's primary function as a sanctuary for reading, writing, and quiet contemplation." The panel merely assumed that religious worship was "controversial" and "alienating," and that the library must have reasonably wanted to exclude it.[17] Whether "offensive" or not, worship remains protected by the First Amendment, as are controversial views generally.[18] By allowing the library to define the "limited forum" to exclude religious worship, and then claiming that the Christian group seeking to use the library's facilities "exceeded the boundaries of the library's limited forum," the Ninth Circuit significantly eroded the plaintiffs' equal access rights.[19]

The Supreme Court has repeatedly held that access may not be restricted if the restriction is based on "the specific motivating ideology or the opinion or perspective of the speaker."[20] In *Widmar v. Vincent*, for example, the Court ruled unconstitutional a policy that barred the use of university buildings "for purposes of religious worship or religious teaching" on the grounds that "[t]hese are forms of speech and association protected by the First Amendment."[21] In *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court likewise held that the University of Virginia's policy of excluding religious publications from eligibility for student funds violated the Constitution because the University "select[ed] for disfavored treatment those student journalistic efforts with

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religious editorial viewpoints."[22] In *Lamb's Chapel v. Center Moriches Union Free School District*, the Court held that a school district acted unconstitutionally when it opened its property for "social, civic, or recreational uses," but specifically prohibited its use for "religious purposes."[23] Finally, in *Good News Club v. Milford Central School*, the Court held that a school district engaged in impermissible viewpoint discrimination when it refused to allow a Christian children's club to offer a religious perspective on moral and character development in a school forum that was open to the public. [24]

These cases involved facts legally indistinguishable from those at issue in *Faith Center*. Nonetheless, the panel majority attempted to reconcile these decisions with its holding on the ground that a footnote in *Good News Club* allegedly drew a distinction between religious speech and "'mere religious worship, divorced from any teaching of moral values.'"[25] This argument plainly misreads the Court's opinion, which made no such distinction and did not authorize the exclusion of any particular forms of religious speech. Moreover, this reading is inconsistent with the Supreme Court's decisions as a whole, which have made clear that there is no such purported distinction.

In *Widmar*, for example, the Court specifically held that such a distinction had 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'."[26] The Court further found that "even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer." "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."[27]

More fundamentally, the majority opinion lacks internal consistency. The court conceded, for example, that plaintiffs' "Wordshop" meeting, which included "fervent... [p]rayers," "teaching" and "singing", was permissible under the county's policy and that "*Good News Club* makes clear that such speech in furtherance of communicating an idea from a religious point of view cannot be grounds for exclusion."[28] Yet, at the same time, the panel asserted that the library properly excluded plaintiffs' "religious worship."[29] It is difficult to find a principled distinction between these activities. Indeed, standard definitions of "religious service" and "religious worship" make clear that such activities are merely a form of "prayer".[30]

In any event, the Supreme Court observed in *Widmar* that, if such a distinction could be made, discerning where it applied would impermissibly entangle the government with religion. Here the county would be faced with the "impossible task" of determining "which words and activities fall within 'religious worship and religious teaching.'" "There would also be a continuing need to monitor group meetings to ensure compliance with the rule."[31] Such entanglement is not merely undesirable—it is plainly prohibited under the Court's Establishment Clause jurisprudence. By contrast, "an open-forum policy, including nondiscrimination against religious speech… would in fact *avoid* entanglement with religion."[32]

As in *Rosenberger*, the religious exclusion the Ninth Circuit sanctioned in *Faith Center* is premised on a reading of the Establishment Clause that the Supreme Court has repeatedly rejected. Thus, for example, the panel majority asserted that religious worship is inherently "controversial" and "alienating" and that the government must exclude such conduct from public property because it is "not a secular activity."[33] Likewise, in a separate concurrence Judge Karlton criticized the Supreme Court's analysis in *Good News Club* and *Lamb's Chapel* on the ground that these decisions fail to recognize that the Establishment Clause creates a "wall of separation between church and state" that expressly prohibits any government role in religious life. Rather than guaranteeing religious liberty, he asserted that the First Amendment "serves the salutary purpose of insulating civil society from the excesses of the zealous" and lamented "[t]he *Good News Club* and *Lamb's Chapel* majorities' disdain of [this] Jefferson model."[34]

As a threshold matter, engaging in such analysis, the Ninth Circuit appears to have misunderstood the issue before it. As the Supreme Court observed in *Widmar*: "The question is not whether the creation of a religious forum would violate the Establishment Clause. The [library] has opened its facilities for use by [community] groups, and the question is whether it can now exclude groups because of the content of their speech." There is "no realistic danger" that the community would think the library "was endorsing religion or any particular creed" by allowing equal access to its facilities.[35] Any "benefit to religion or to the Church" would have been incidental. [36]

More fundamentally, the Constitution neither requires nor permits the government to expunge from public property all religious speech in order to ensure a purely "secular" forum. To the contrary, the Supreme Court has repeatedly held that the expression of religious viewpoints on public property does not offend the Constitution.[37] Indeed, the Constitution expressly *protects* the right to engage in such expression.[38] Accordingly, the Court has "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."[39] Thus, the *Faith Center* decision is inconsistent with not only the Court's free speech jurisprudence, but also its interpretation of the Establishment Clause.

The *Faith Center* decision has already prompted a strong reaction. In dissenting from the Ninth Circuit's denial of rehearing en banc, seven judges of that court maintained that the *Faith Center* majority "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."[40] Only time will tell whether the Ninth Circuit's decision represents a permanent erosion in religious organizations' equal access rights, or merely an aberration in an otherwise well-settled area of law.

Endnotes

1 *See* Newdow v. United States Congress, 328 F.3d 466 (9th Cir. 2003), *rev'd*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

2 *See* Buono v. Norton, 371 F.3d 543 (9th Cir. 2004).

3 462 F.3d 1194 (9th Cir. 2006), cert. denied, -- S. Ct. --, 2007 WL 1668585 (U.S. Oct. 1, 2007).

4 *Id.* at 1198.

5 *Id.* at 1198-99.

6 *Id.* at 1202.

7 *Id.* at 1204.

8 Widmar v. Vincent, 454 U.S. 263, 269 (1981).

9 *Id.* at 267-68.

10 Good News Club v. Milford Central School, 533 U.S. 98, 112 (2001); *see also* Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 828 (1995); Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 387, 393-94 (1993).

11 *Faith Center*, 462 F.3d at 1204.

12 *Id.* at 1205-06.

13 *Id.* at 1206.

14 *Id.*

15 *See Good News Club*, 533 U.S. at 112; *Rosenberger*, 515 U.S. at 828.

16 *Faith Center*, 462 F.3d at 1206 (quoting *Good News Club*, 533 U.S. at 139 (Souter and Ginsburg, JJ., dissenting)).

17 *Id.* at 1207.

18 *See* Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92, 96 (1972) ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

19 *Faith Center*, 462 F.3d at 1210.

20 *Rosenberger*, 515 U.S. at 829.

21 454 U.S. at 265 & n.3, 269.

22 515 U.S. at 831.

23 508 U.S. at 387, 393-94.

24 533 U.S. at 108.

25 *Faith Center*, 462 F.3d at 1209 (quoting *Good News Club*, 533 U.S. at 112 n.4). Instead of attempting to engage in the "laborious" effort to parse the Supreme Court's prior decisions to uphold the library's exclusionary policies, Judge Karlton simply disagreed with the Court's decisions in *Good News Club* and *Lamb's Chapel*, claiming that they misread the First Amendment because they do not recognize that "religious speech is categorically different than secular speech and is subject to analysis under the Establishment and Free Exercise Clause without regard to the jurisprudence of free speech." *Id.* at 1215 (Karlton, J., concurring).

26 454 U.S. at 270 n.6 (internal citation omitted).

27 *Id.*

28 *Faith Center*, 462 F.3d at 1210.

29 *Id.* at 1204.

30 *See, e.g.,* Merriam-Webster's Online Dictionary, *available at* http://www.m-w.com (defining "prayer" as "a religious service consisting chiefly of prayers"); Cambridge Online Dictionary, *available at* http://dictionary.cambridge.org (defining "pray" as "to speak to a god either privately or in a religious ceremony" and "worship" as "when you worship God or a god, often through praying or singing"); American Heritage Dictionary (4th ed. 2000) (defining "prayer" as "a reverent petition made to God, a god, or another object of worship").

31 454 U.S. at 272 n.11.

32 Board of Education of the Westside Community Schools v. Mergens By and Through Mergens, 496 U.S. 226, 248 (1990) (citing *Widmar*, 454 U.S. at 272 n.11) (emphasis in original).

33 *Faith Center*, 462 F.3d at 1210.

34 *Id.* at 1216 (Karlton, J., concurring); *see also id.* at 1215 (lamenting the "sorry state of the law" under the Supreme Court's decisions and "pray[ing] for the court's enlightenment").

35 *Lamb's Chapel*, 508 U.S. at 395.

36 *Id.*

37 *See, e.g., Good News Club*, 533 U.S. at 112-19; *Lamb's Chapel*, 508 U.S. at 394-96; *Widmar*, 454 U.S. at 271-75.

38 U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*….") (emphasis added).

39 *Rosenberger*, 515 U.S. at 839; *see also Lamb's Chapel,* 508 U.S. at 393-94; *Mergens,* 496 U.S. at 248, 252; *Widmar,* 454 U.S. at 274-75.

40 Faith Center Church Evangelistic Ministries v. Glover, 480 F.3d 891, 895 (9th Cir. 2007) (Bybee, J., dissenting from denial of rehearing en banc). Despite this strong reaction, the Supreme Court denied Faith Center's petition for certiorari on October 1, 2007.