No. 06-1633

IN THE
Supreme Court of the United States

FAITH CENTER CHURCH EVANGELISTIC MINISTRIES AND HATTIE HOPKINS,

Petitioners,

v.

FEDERAL D. GLOVER, MARK DESAULNIER, JOHN M. GIOIA, MILLIE GREENBERG, JOHN W. SWEETEN, ANNE CAIN, PATTY CHAN, LAURA O'DONAHUE, AND GAYLE UILKEMA,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

DANIEL W. NELSON
MATTHEW D. MCGILL
Counsel of Record
AARON D. LINDSTROM
JENNIFER J. SCHULP
S. JOY DOWDLE
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

QUESTION PRESENTED

Does a governmental policy that opens library rooms for "meetings, programs, or activities of educational, cultural or community interest" but excludes "religious services" violate the First Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

Rules

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

Amicus curiae Cato Institute respectfully submits that the petition for a writ of certiorari should be granted.[1]

INTEREST OF *AMICUS CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case is of central interest to Cato and the Center because the decision of the United States Court of Appeals for the Ninth Circuit weakens fundamental First Amendment protections for the freedom of speech.

STATEMENT

The Board of Supervisors of Contra Costa County, California ("the County"), adopted a policy

[1] Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the Cato Institute, its counsel, and its members made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief by all parties have been submitted to the Clerk.

that opened library meeting rooms to every manner of "educational, cultural and community related meetings, programs, and activities," but excluded "religious services." Pet. App. 3a, 108a–09a. After completing the requisite applications, Dr. Hattie Hopkins, the leader of Faith Center Church Evangelistic Ministries ("Faith Center"), received permission to hold meetings in the meeting room of the Antioch Branch Library on both May 29 and July 31, 2004. *Id.* 4a. These meetings were to include "discussing the Bible and other religious books," as well as "teaching, praying, singing, . . . and discussing social and political issues." *Id.* 4a; *see also id.* 5a (noting that the May 29 worship service included a sermon). Toward the end of the May 29 service, library officials revoked permission for Faith Center's July 31 meeting based solely on the County's policy prohibiting use of the meeting rooms for "religious purposes." *Id.* 5a & n.1; *see also id.* 71a–72a, 92a.[2]

Faith Center sought a preliminary injunction enjoining enforcement of the County's policy singling out "religious services" for exclusion. Pet. App. 66a–67a. The district court granted the injunction, concluding that Faith Center had demonstrated that the County's policy constituted "discrimination against [Faith Center's] speech based on its viewpoint," in violation of the First Amendment. *Id.* 76a.

---

[2] The actual language of the County's restriction has changed multiple times since Faith Center was denied access to the meeting room for its worship services. *Id.* 3a. Its initial prohibition on using the rooms for "religious purposes" was amended to bar "religious services or activities" and then revised again to its current form of prohibiting "religious services."

A divided panel of the Ninth Circuit reversed. The panel majority reasoned that the County's policy did not discriminate based on viewpoint because it excluded only "mere religious worship." Pet. App. 25a (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 n.4 (2001)), 26a. Although the County's "broad purpose" in opening the library meeting rooms to the public "was to invite the community at large to participate in use of the meeting room for expressive activity," the panel majority concluded that the exclusion of religious services "ma[d]e clear that the County did not intend for the Antioch Library meeting room to be open for indiscriminate use." *Id.* 15a–17a. Finding that the meeting room was a limited public forum, the majority concluded that the policy of excluding "religious services" was a reasonable measure to ensure that the meeting room was "not transformed into an occasional house of worship," *id.* 19a—this despite the panel's acknowledgment that "[r]eligious worship and discussion are forms of speech and association protected by the First Amendment." *Id.* 11a (citing, *inter alia*, *Widmar v. Vincent*, 454 U.S. 263, 269 (1981)). The majority also concluded that it was reasonable for the County to exclude religious services in order to prevent "controversy and distraction" that could "potentially interfere with the primary function of the library." *Id.* 20a.

In dissent, Judge Tallman, noting that "[b]oth parties agree that religious activities, including worship, are speech protected by the First Amendment," criticized the majority for failing even to "attempt to answer the insoluble riddle of how the County could parse religious speech which conveys a viewpoint on an otherwise permissible topic with *mere* religious

worship that is impermissible speech according to the court." Pet. App. 42a, 47a.

The Ninth Circuit denied rehearing. Pet. App. 87a. Dissenting from the denial of rehearing en banc, Judge Bybee, joined by six other judges, castigated the panel opinion for "permit[ting] the government to single out what it calls 'mere religious worship' for exclusion from a forum that it has opened broadly for use by community and cultural groups." *Id.* 88a. "[T]he [panel] majority," he continued, "has 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." *Id.* 88a–89a.

REASONS FOR GRANTING THE PETITION

This Court has made clear that the First Amendment limits the restrictions the government may impose on protected speech, regardless of the type of forum in which it is uttered. Any restriction of protected speech "must not discriminate against speech on the basis of viewpoint, and . . . must be reasonable in light of the purpose served by the forum." *Good News Club*, 533 U.S. at 106–07 (citations and internal quotation marks omitted).

Holding that the decision to exclude Faith Center's "worship services" was "not suppression of a prohibited perspective on an otherwise permissible topic," Pet. App. 22a, and was otherwise "reasonable, in light of the library policy," *id.* 19a, the Ninth Circuit's opinion stands in clear contravention of this Court's precedents on both viewpoint discrimination and reasonable restrictions on protected speech. The Ninth Circuit's casual disregard of this Court's decisions allows the government to silence religious

speech whenever the speaker engages in undefined "religious worship" on public property located anywhere in the largest circuit in the Nation. In addition to being squarely at odds with this Court's precedents, the decision below provides an opportunity for this Court to bring clarity to the diverging standards adopted by the Courts of Appeals to govern the protection of free speech occurring on government property. The petition for a writ of certiorari should be granted.

I. SINGLING OUT "RELIGIOUS WORSHIP" FOR EXCLUSION IS VIEWPOINT DISCRIMINATION

"When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is . . . blatant." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)). This Court has stated that "[v]iewpoint discrimination is thus an egregious form of content discrimination," which itself is "presumed to be unconstitutional." *Id.* at 828–29. The government therefore always must "abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id*. at 828. The County's proscription of "religious services" and "religious worship" is a paradigmatic example of viewpoint discrimination. The Ninth Circuit's contrary conclusion conflicts with three of this Court's decisions.

The governmental policy this Court considered and overturned in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), was materially identical to the County's policy prohibiting Faith Center's worship service. In that case, public school property was opened for "social, civic

and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," *id.* at 386, but the school board expressly prohibited using the premises "for religious purposes," *id.* at 387. Under the policy, the school district denied the applications of an evangelical church that sought access to the property to show films described as promoting a "return[] to traditional, Christian family values." *Id.* at 388. This Court held that disallowing a religious viewpoint on the subject of family issues and child rearing—subject matters which fit within the purposes of the forum created by the public school—violated the First Amendment. *Id.* at 393–94.

Here, the County encouraged use of the public library for community-related activities, Pet. App. 2a–3a, and Faith Center's applications to use the library space fell well within that stated purpose: Faith Center stated that its meetings were designed for "Worship Open to the Public" and to "Build up Community." *Id.* 4a. The Ninth Circuit recognized that "religious worship is an important institution in any community," but then made the conclusory statement that this "important [community] institution" was only "remotely community related." *Id.* 29a. Prohibiting Faith Center from engaging in speech that focused on community building solely because that speech took the form of a religious worship service conflicts with *Lamb's Chapel*.

This Court's subsequent jurisprudence has made clear that whatever type of forum exists, the government cannot exclude speech from a religious viewpoint that addresses a subject matter within the scope of the forum, regardless of whether the speech takes the form of "worship." In *Rosenberger*, for ex-

ample, this Court held that the exclusion of a religious-based publication from the University of Virginia's otherwise broadly open forum (a student activities fund) constituted impermissible viewpoint discrimination. 515 U.S. at 830, 832. The University's guidelines prohibited "religious activity," which it defined as "any activity that 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.'" *Id.* at 825. Although this religious speech included proselytization, a religious activity that the dissent thought lacked a secular equivalent, *id.* at 867–68 (Souter, J., dissenting), the Court concluded that the speech must be treated no differently from speech that offered a religious viewpoint on an otherwise permissible topic: because the University did not "exclude religion as a subject matter," it could not bar "those student journalistic efforts with religious editorial viewpoints." *Id.* at 831; *see also* Pet. App. 97a–98a.

Despite the similarities between the "religious activities" proscribed by the University in *Rosenberger* and the "religious services" prohibited by the County, the Ninth Circuit here took the opposite tack of that charted in *Rosenberger*: it concluded that because "[p]ure religious worship . . . is not a secular activity that conveys a religious viewpoint on otherwise permissible subject matter," this one type of religious speech falls outside the bounds of the Free Speech Clause. Pet. App. 28a–29a. As *Rosenberger* demonstrates, however, it is not the lack of a secular equivalent to worship that matters, but the fact that the County excludes religious speech in the context of a religious service simply because of its viewpoint. "Religion," this Court explained, is "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered."

Rosenberger, 515 U.S. at 831. Sermons, the Ninth Circuit acknowledges, are part of Faith Center's worship services, Pet. App. 4a, and those sermons express religious perspectives on topics, such as the discussion of religious texts and of social issues, that are "clearly permissible in the library" forum. *Id.* 28a. The Ninth Circuit's decision permitting the County to exclude "religious services" that express religious views on any number of issues, including religious activities (such as worship) and secular activities (such as discussing social issues), conflicts with this Court's teaching in *Rosenberger*.

This Court's opinion in *Good News Club* also mandates the same conclusion. The forum at issue in *Good News Club* was "available for 'social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community.'" 533 U.S. at 102. This policy had been specifically interpreted to include "teaching morals and character development to children." *Id.* at 108. Good News Club's activities consisted of, among other things, singing songs and hearing Bible lessons, and the Court found that "it [was] clear that the Club teaches morals and character development to children." *Id.* at 103, 108. Because "the Club [sought] to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious viewpoint," *id.* at 109, this Court held that "the exclusion of the Good News Club's activities . . . constitute[d] unconstitutional viewpoint discrimination," *id.* at 110.

Here, discussion of religion itself *is* a permissible subject matter: indeed, the Ninth Circuit expressly recognized that it is "permissible in the Antioch meeting room" to "discuss[] the Bible and other reli-

gious books" because such discussion "convey[s] a religious perspective" on a permissible topic. *Id.* 27a; *see also id.* 28a–29a. Atheists, for example, could meet to discuss their views on religion without running afoul of the policy prohibiting speakers from conducting a "religious service" or without contravening the Ninth Circuit's prohibition on engaging in "religious worship." It is, in other words, only a particular viewpoint—here, a religious one—that is excluded. To paraphrase *Good News Club*, the "exclusion of [Faith Center] based on its religious nature is indistinguishable from the exclusions in [*Lamb's Chapel* and *Rosenberger*]" and "constitutes viewpoint discrimination." *Id.* at 107.

In spite of these consistent precedents, the Ninth Circuit interpreted a footnote in *Good News Club* as "implicitly acknowledg[ing] that religious worship exceed[s] the boundaries of the limited public forum" and as distinguishing "'mere religious worship'" from the activities of the Good News Club to teach moral lessons. Pet. App. 29a; *see also id.* 25a–26a (citing *Good News Club*, 533 U.S. at 138 n.3 (Souter, J., dissenting)). But this Court contrasted the activities of the Good News Club (which explicitly sought to teach morals and character development to children) with "mere religious worship" (which did not aspire to such aims) simply to show that the Club's activities in fact related to a subject matter that fell within the forum's purposes. *See Good News Club*, 533 U.S. at 112 n.4 ("In any event, we conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values."). The Court had no occasion to address whether speech that did not relate to "teaching of morals and character development to children" fell within other permissible topics of discussion, such as those that

would be discussed at "social, civic, and entertainment meetings" or other topics "pertaining to the welfare of the community." *Id.* at 102, 108.

Because of its heavy reliance on (and misreading of) *Good News Club*'s passing footnote reference to "mere religious worship," the Ninth Circuit reached a strange conclusion: while recognizing that excluding religious speech is viewpoint discrimination, Pet. App. 27a, it concluded that prohibiting a subset of religious speech (*i.e.*, religious worship) is somehow not viewpoint discrimination. Because this decision conflicts with multiple precedents of this Court, review is warranted.

II. AS A SUBJECT-MATTER LIMITATION, THE EXCLUSION OF RELIGIOUS SERVICES IS NOT REASONABLY RELATED TO THE FORUM'S PURPOSES

Even if the County's proscription of religious worship were not viewpoint discrimination—that is, even if it were construed as a limitation on *subject matter*—it still would conflict intractably with this Court's decisions. Any restriction on the content of speech allowed in any type of forum "must be 'reasonable in light of the purpose served by the forum.'" *Good News Club*, 533 U.S. at 107 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)). In holding that the County's exclusion of religious worship services met this test, Pet. App. 15a, the Ninth Circuit offered two related justifications for the County's exclusion of religious services: first, because but for the exclusion of religious worship services, the Antioch library could be "transformed into an occasional house of worship," *id.* 19a; and second, because religious uses could "interfere with the primary function of the library" by creating

"controversy and distraction" that "may alienate patrons," *id.* 20a–21a. This Court, however, has squarely rejected each of these justifications.

With respect to the first justification, the Ninth Circuit reasoned that the County's decision to exclude religious services must be deemed reasonable because to conclude otherwise "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." Pet. App. 20a (quoting *Good News Club*, 533 U.S. at 139 (Souter, J., dissenting)). As an initial matter, this rationale seems only to restate the exclusion, failing to justify it. The goal of preventing the library from being used for religious worship while allowing its use for a wide range of other purposes cannot itself constitute the rationale for closing the library to religious worship.

Moreover, this justification is not reasonably related to the purpose served by the forum. As the Ninth Circuit acknowledged, "the County's purpose [in creating the forum] was to invite the community at large to participate in the use of the meeting room for expressive activity." Pet. App. 15a. Preventing occasional worship services from occurring in the meeting rooms is not related to and does not advance that purpose; to the contrary, such services are a type of community activity encouraged by the policy, and they include discussion topics well within the forum's scope.

More importantly, this Court rejected exactly this rationale in *Widmar*: "[T]he state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this

case by the Free Speech Clause as well." 454 U.S. at 276. When a public building is opened broadly for purposes that include religious subject matters, the First Amendment's Free Speech Clause requires that the building be available for religious worship. The government may impose reasonable time, place, and manner restrictions, applicable to all groups, to ensure that the space does not become a permanent house of worship. *See id.* Or the government may choose to close the forum. The government may not, however, exclude religious services from a forum simply because of the "religious" content of the speech. Such exclusion is not reasonably related to any *legitimate* government interest. *See, e.g.*, *Rosenberger*, 515 U.S. at 829–30.

The second justification relied on by the Ninth Circuit is equally without merit. Even assuming that the County's interest in protecting the character of the library is reasonable, permitting religious worship services is simply not inconsistent with maintaining the library's "primary function as a sanctuary for reading, writing, and quiet contemplation." Pet. App. 20a. There have been no assertions in this case that the worship service was disruptive—quite the contrary, the County admits that noise from the meeting was not an issue, *id.* 5a n.1—nor is there any assertion that Faith Center's meetings posed any greater risk of disruption to the patrons of the library than any other meeting conducted there. But even if such claims had been made, the proper restriction would be on the time, place, and manner of the speech, not the content of that speech.

Moreover, the Ninth Circuit's fear that "the controversy and distraction of" religious worship services "may alienate patrons and undermine the li-

brary's purpose of making itself available to the whole community," Pet. App. 20a–21a, is the same argument this Court rejected in *Lamb's Chapel*. In *Lamb's Chapel*, the school district contended that it "justifiably denied use of its property to a 'radical' church for the purpose of proselytizing, since to do so would lead to threats of public unrest and even violence." 508 U.S. at 395. Just as in *Lamb's Chapel*, "[t]here is nothing in the record to support such a justification[.]" *Id.* at 396. The County has already opened the room to controversial groups that have the potential to alienate patrons—the Sierra Club, Narcotics Anonymous, and the East Contra Costa County Democratic Club, Pet. App. 15a–16a—and there is no reasonable basis to believe that religious worship services would be any more controversial than these potentially divisive organizations. In any event, this Court has recognized that even if the religious services were found to be controversial, concerns about controversy "would be difficult to defend as a reason to deny the presentation of a religious point of view about a subject [that is] otherwise open[] to discussion on [government] property." *Lamb's Chapel*, 508 U.S. at 396; *cf. Reno v. ACLU*, 521 U.S. 844, 880 (1997) (striking down statute that would give "heckler's veto" to individuals opposed to controversial expression).

In short, prohibiting religious worship from a forum established "for educational, cultural and community related meetings, programs, and activities" lacks any reasonable basis. *Cf. Good News Club*, 53 U.S. at 122 (Scalia, J., concurring) ("Lacking *any* legitimate reason for excluding the Club's speech from its forum—'because it's religious' will not do—respondent would seem to fail First Amendment scrutiny regardless of how its action is character-

ized.") (citations omitted). Thus excluding religious services in light of the forum's purpose and the County's policy cannot be reconciled with this Court's precedents.

III. WIDESPREAD CONFUSION AMONG THE COURTS OF APPEALS CALLS FOR THIS COURT TO CLARIFY THE PUBLIC-FORUM DOCTRINE

This Court discussed the public-forum doctrine as an integral part of its analysis in each of the key precedents discussed above. *See, e.g.*, *Good News Club*, 533 U.S. at 106; *Rosenberger*, 515 U.S. at 829–30; *Lamb's Chapel*, 508 U.S. at 391–94; *see also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001) (describing *Lamb's Chapel* and *Rosenberger* as "limited forum cases"); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 n.12 (2000) (same). While it is true that the standards addressed above apply even in a nonpublic forum, *see Cornelius*, 473 U.S. at 819 (requiring that distinctions between speakers in nonpublic forums be "reasonable and viewpoint-neutral"); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 46 (1983) (same), the Court should take this opportunity to supply some badly needed guidance to the Courts of Appeals that are, by their own admission, quite confused as to how the doctrine applies to property that is neither a traditional public forum nor a nonpublic forum. *See, e.g.*, *Bowman v. White*, 444 F.3d 967, 975 (8th Cir. 2006) ("Substantial confusion exists regarding what distinction, if any, exists between a 'designated public forum' and a 'limited public forum.'").

Nearly a quarter century has passed since this Court introduced a three-tier public-forum doctrine to govern First Amendment analysis in cases involving government property. *See Perry Educ. Ass'n,* 460

U.S. at 45–46; *see also Cornelius*, 473 U.S. at 799–806. Despite frequent references to the doctrine by this Court, the Courts of Appeals continue to be at odds over even the most basic and essential components of the doctrine. Far from providing necessary guidance, this Court's more recent but seemingly inconsistent references to the doctrine have spurred on continued conflicts among the circuits over the terminology, categories, and standards of review governing speech in public forums. *See, e.g.*, *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 345 n.10 (5th Cir. 2001) (explaining that "[a]t times, the Supreme Court has referred to limited public forums as being a subcategory within a designated public forum," that "[i]n more recent cases, however, the Court has used the phrase 'limited public forum' to describe a type of nonpublic forum of limited access," and that even more recently "the Supreme Court once again used the phrase limited public forum to designate the intermediate forum category, as opposed to a nonpublic forum").

The circuit courts diverge, for example, as to whether the public-forum doctrine's middle tier consists of one category or two. *Compare, e.g.*, *Hosty v. Carter*, 412 F.3d 731, 737 (7th Cir. 2005) (en banc) (Easterbrook, J.) (one tier); *Rowe v. City of Cocoa, Fla.*, 358 F.3d 800, 802–03 (11th Cir. 2004) (one tier), *with*, *e.g.*, *Flint v. Dennison*, 488 F.3d 816 (9th Cir. 2007) (two tiers); *see also Gilles v. Blanchard*, 477 F.3d 466, 473–74 (7th Cir. 2007) (Posner, J.) (asserting that it is circuit courts that have "carved out a fourth category"). Of those circuits in the one-category camp, some conclude that the limited public forum and the designated public forum are interchangeable, while others conclude that it is the limited public forum and the nonpublic forum that are

synonymous. *Compare ACLU v. Mote*, 423 F.3d 438, 443 (4th Cir. 2005) (referring to "limited (or designated) public forums"); *Kincaid v. Gibson*, 236 F.3d 342, 348 (6th Cir. 2001) (en banc) (noting that the Supreme Court has "alternatively described" the middle category as a "limited public forum" and as a "designated public forum"); *PETA, Inc. v. Gittens*, 414 F.3d 23, 28–30 (D.C. Cir. 2005) (using "designated public forum" and "limited public forum" interchangeably), *with Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 76 & n.4 (1st Cir. 2004) (equating "limited public forum" with "non-public forum"). Of the circuits that employ two intermediate tiers, some have concluded that the limited public forum is a subset of the designated public forum, while others identify it as a subset of the nonpublic forum. *Compare Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 625–26 (2d Cir. 2005) ("[f]ollowing the lead of the Supreme Court" in "classify[ing] fora for expression in four categories" including the "'designated public forum,' and its subset, the 'limited public forum'"); *Justice For All v. Faulkner*, 410 F.3d 760, 765 (5th Cir. 2005) ("[T]he Supreme Court has made it clear that this middle category is further divided into two discrete types of forum: true 'designated' forums and 'limited' forums."); *Bowman*, 444 F.3d at 976 (8th Cir. 2006), *with Summum v. City of Ogden*, 297 F.3d 995, 1002 n.4 (10th Cir. 2002) ("A 'limited public forum' is a subset of the nonpublic forum classification.").

Indeed, the most definite and perhaps only area of broad agreement among the circuits as to the intermediate tier (or tiers) of the public-forum doctrine is that there is "[s]ubstantial confusion," "uncertainty," and "analytical ambiguity" as to its application. *See, e.g.*, *Bowman*, 444 F.3d at 975 (8th Cir.);

Whiteland Woods, L.P. v. Twp. of W. Whiteland, 193 F.3d 177, 182 n.2 (3d Cir. 1999); *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 750 (6th Cir. 2004); *see also Ridley*, 390 F.3d at 76 n.4 (1st Cir.); *Goulart v. Meadows*, 345 F.3d 239, 249 (4th Cir. 2003); *Chiu*, 260 F.3d at 345–46 (5th Cir.); *Christian Legal Society v. Walker*, 453 F.3d 853, 865 n.2 (7th Cir. 2006); *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001).

These differences are important—in fact, given this Court's instruction that the applicable standards "depend upon the nature of the forum," *Good News Club*, 533 U.S. at 106, they are often outcome determinative. *See also United States v. Kokinda*, 497 U.S. 720, 726 (1990) ("'[T]he extent to which the Government can control access depends on the nature of the relevant forum." (quoting *Cornelius*, 473 U.S. at 800)). As illustrated by the case at hand, the Courts of Appeals need guidance on this important analytic framework governing a wide swath of constitutionally protected speech.

* * *

Unless this Court reverses the panel decision, any speech classified as religious worship will now be placed outside the protection of the Free Speech Clause in the largest circuit in the Nation, except where such worship occurs in a traditional public forum. As parks, sidewalks, streets, and the curtilages of state capitols are, for obvious reasons, hardly conducive to typical types of worship activities, the practical effect of the Ninth Circuit decision will be to silence a significant amount of religious speech that this Court has recognized as constitutionally protected. This conflict with prominent decisions of this Court, however, is highly unlikely to be resolved in

the Ninth Circuit in the near future, as demonstrated by its failure to rehear the case en banc, despite the dissent of seven judges. Given the fact that this Court's precedents directly control the outcome, there is no need for further percolation in the circuit courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL W. NELSON
MATTHEW D. MCGILL
Counsel of Record
AARON D. LINDSTROM
JENNIFER J. SCHULP
S. JOY DOWDLE
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

August 8, 2007