02-7781

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRONX HOUSEHOLD OF FAITH, ROBERT HALL, and JACK ROBERTS

Plaintiffs-Appellees,

-against-

BOARD OF EDUCATION OF THE CITY OF NEW YORK and
COMMUNITY SCHOOL DISTRICT No. 10

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of New York

BRIEF AMICUS CURIAE OF
THE BECKET FUND FOR RELIGIOUS LIBERTY
IN SUPPORT OF THE PLAINTIFFS-APPELLEES AND
IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus The Becket Fund for Religious Liberty states that it does not have a parent corporation and does not issue any stock.

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INTEREST OF THE AMICUS

The Becket Fund for Religious Liberty respectfully submits this brief amicus curiae in support of Plaintiffs - Appellees and with the consent of all parties. Fed R. App. P. 29(a).

The Becket Fund is an interfaith, nonpartisan, public-interest law firm dedicated to protecting the free expression of all religious traditions, and the freedom of religious people and institutions to participate fully in public life. The Becket Fund has litigated in support of these principles in state and federal courts throughout the United States, both as primary counsel and as amicus curiae, on behalf of Buddhists, Christians, Jews, Muslims, Native Americans, Sikhs, Zoroastrians, and others.

For example, we recently filed an amicus brief before this Court on behalf of a broad coalition of religious and civil rights organizations in support of the Plaintiffs - Appellees in Fifth Avenue Presbyterian Church v. City of New York, 293 F.3d 570 (2d Cir. 2002). Of particular relevance to the present action, we have represented individuals and institutions whose religious speech has been silenced in a government forum. We filed an amicus brief before the U.S. Supreme Court in Good News Club v. Milford Central School, 533 U.S. 98 (2001), a case factually very similar to this one. See Amicus Brief of Carol Hood, 2000 WL 1784136 (Nov. 30, 2000). We represent the plaintiff in a student religious-speech case that is currently on remand in the District of New Jersey. See C.H. v. Oliva, 990 F.

Supp. 341 (D.N.J. 1997), aff'd, 166 F.3d 1204 (3d Cir. 1998), reh'g granted, opinion withdrawn, Apr. 16, 1999, on reh'g, 195 F.3d 167 (3d Cir. 1999), reh'g en banc granted, opinion vacated, 197 F.3d 63 (3d Cir. 1999), aff'd by an equally divided court in part, vacated and remanded in part, 226 F.3d 198 (3d Cir. 2000), cert. denied sub nom. Hood v. Medford Township Bd. of Educ., 121 S. Ct. 2519 (2001).

The Becket Fund respectfully submits this brief with the hope that our expertise in cases of this sort will prove helpful to the Court in resolving the present matter. Moreover, this brief is narrow in scope, focusing on the largely historical proposition that, from its earliest days to the present, the U.S. Constitution has been understood to allow the use of government buildings for religious speech and worship by private parties. Thus, the brief will supplement and not duplicate the briefs of the parties.

SUMMARY OF ARGUMENT

The Library of Congress has recently provided extensive historical documentation of the practice – dating back to the Jefferson administration – of allowing religious groups to use government buildings for religious services. To this day, decisions of the Supreme Court continually reaffirm and reinforce this time-honored, American tradition of equal access to government buildings without regard to religion. Thus, any suggestion that the City in this case violates the Establishment

Clause merely by allowing Plaintiffs – Appellees to worship in City buildings is misplaced.

ARGUMENT

I. THOMAS JEFFERSON AND OTHER FRAMERS OF THE CONSTITUTION BOTH PERMITTED AND PARTICIPATED IN RELIGIOUS WORSHIP SERVICES HELD BY PRIVATE GROUPS IN GOVERNMENT BUILDINGS.

Recent historical research has revealed that federal government buildings were regularly used on weekends for religious services from soon after the capitol was moved to Washington in 1800 until after the Civil War. Framers of the Constitution regularly attended these services, most notably Thomas Jefferson (who famously advocated a "wall of separation between church and state") and James Madison (who spearheaded the movement for the Bill of Rights, including the Establishment Clause of the First Amendment). Although this research is detailed and documented exhaustively in James H. Hutson, Religion and the Founding of the American Republic 84-93 (Library of Congress, 1998), amicus presents some highlights here for the convenience of the court.

During Jefferson's administration, Sunday church services were held every week in government buildings of all three branches of the federal government. Jefferson himself attended weekly services held in the hall of the U.S. House of Representatives – and brought along the U.S. Marine Band to provide music. Ministers of various faiths, including Presbyterians, Anglicans, Quakers, Baptists, and Swedenborgians,

led the services. At least one Roman Catholic bishop preached, as did a Unitarian. The first woman to speak officially in Congress was a traveling evangelist named Dorothy Ripley. She preached in the House to a congregation that included both President Jefferson and Aaron Burr on January 12, 1806.

The Jefferson administration also opened executive branch buildings to religious services. The May 15, 1801 National Intelligencer announced Episcopal services in the War Office. John Quincy Adams likewise tells of a Presbyterian communion service in the War Office on January 29, 1804. The Treasury Building was used by a variety of organizations, though a Presbyterian congregation led by the Reverend James Laurie seems to have used it with particular frequency. It, too, held communion services.

Weekly worship services were also held in judicial branch buildings. Adams describes in correspondence a service he attended on February 2, 1806 in the chambers of the Supreme Court itself. Congressman Manasseh Cutler described a similar service in the Supreme Court in 1804.

II. EVEN TODAY, THE UNITED STATES SUPREME COURT REPEATEDLY AND CONSISTENTLY ENFORCES THE RIGHT OF PRIVATE GROUPS TO ENJOY EQUAL ACCESS TO GOVERNMENT BUILDINGS FOR RELIGIOUS WORSHIP.

Opening government buildings to private religious services is not a mere vestige of the past. Instead, it is an enduring part of the broader American tradition of accommodation of religious exercise without regard to denomination. Not only is

this accommodation salutary -- "follow[ing] the best of our traditions," Zorach v. Clauson, 343 U.S. 306, 314 (1952) (Douglas, J.) -- it is mandatory in circumstances where the government opens its facilities to secular expressive uses.

The Supreme Court has repeatedly held that the government may not exclude speech from a government forum based on its viewpoint, except perhaps when necessary to serve a compelling governmental interest. See, e.g., Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112-13 (2001); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394-95 (1993) (discussing Widmar v. Vincent, 454 U.S. 263 (1981)). The Court has found with equal consistency that when the government excludes religious worship from a forum that remains open to secular expressive activity, the government engages in viewpoint discrimination. Good News Club, 533 U.S. at 109 & n.3 (discussing Lamb's Chapel); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995).

Most relevant, the Court has uniformly rejected the governmental interest most commonly asserted to justify this type of religious discrimination: avoiding the appearance of endorsing the private religious viewpoint expressed. See, e.g., Widmar, 454 U.S. at 276 (rejecting claim that "the state interest . . . in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution" is a compelling interest). Time and time again --

in keeping with the long tradition of making government buildings available for voluntary religious worship -- the Court has never found this kind of religious accommodation to violate the Establishment Clause. See, e.g., Good News Club, 533 U.S. at 112-119; Rosenberger, 515 U.S. at 837-45; Lamb's Chapel, 508 U.S. at 395; Widmar, 454 U.S. at 272-73 & n.13.

This case is no different; there is simply no reasonable basis to distinguish it from those that have gone before, especially Good News Club and Lamb's Chapel, both of which arose out of this Circuit and under the same New York law. In accordance with those decisions of the Supreme Court, this honorable Court should reject the unprecedented claim that allowing equal access to government buildings for religious worship offends the Establishment Clause.

CONCLUSION

For the foregoing reasons, the District Court's order should be affirmed.

Respectfully submitted,

October 22, 2002

THE BECKET FUND FOR RELIGIOUS LIBERTY

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is 1,258 words in length and complies with Federal Rule of Appellate Procedure 32(a)(7)(B) and (C).

_____
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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the above and foregoing Amicus Brief was sent this 22nd day of October, 2002 via facsimile and first-class mail to each of the following:

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