No. 10-10-731

IN THE

Supreme Court of the United States

DAVID G. WALSH, *et al.*,
Petitioners,

v.

BADGER CATHOLIC, INC.,
formerly known as Roman Catholic Foundation,
UW-MADISON, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JONATHAN W. GARLOUGH
FOLEY & LARDNER LLP
Suite 2800
312 N. Clark Street
Chicago, IL 60654-5313
(312) 832-4500

G. MICHAEL HALFENGER
FOLEY & LARDNER LLP
777 E. Wisconsin Ave.
Milwaukee, WI 53202-5306
(414) 271-2400

MICHAEL D. LEFFEL
Counsel of Record
FOLEY & LARDNER LLP
150 East Gilman Street
Madison, WI 53703-1481
(608) 257-5035
mleffel@foley.com

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

Whether, absent evidence of religious animus, a public institution of higher education that has created a limited public forum to promote its educational mission may refuse to fund a student organization's activities that the organization identifies as religious worship, proselytizing, or inculcation of a particular religious belief.

LIST OF PARTIES

Actual parties to the proceedings in the Court of Appeals, as Defendants—Appellants/Cross-Appellees, and Petitioners herein, are: current or former University of Wisconsin System Board of Regents members David G. Walsh, Mark J. Bradley, Jeffrey Bartell, Elizabeth Burmaster (former member), Eileen Connolly-Keesler (former member), Judith V. Crain, Mary Quinnette Cuene (former member), Danae Davis, Michael J. Falbo, Thomas Loftus, Milton McPike (former member), Charles Pruitt, Peggy Rosenzweig (former member), Jesus Salas (former member), Brent Smith, and Michael J. Spector, in their individual and official capacities; Kevin P. Reilly, individually and in his official capacity as President of the University of Wisconsin System; John D. Wiley, individually and in his official capacity as then-Chancellor of the University of Wisconsin-Madison; Lori M. Berquam, individually and in her official capacity as Dean of Students at the University of Wisconsin-Madison; Elton J. Crim, Jr., individually and in his official capacity as then-Associate Dean of Students at the University of Wisconsin-Madison; and Yvonne Fangmeyer, individually and in her official capacity as then-Director of the Student Organization Office at the University of Wisconsin-Madison.

Plaintiffs—Appellees/Cross-Appellants below, and Respondents herein, are: Badger Catholic, Incorporated, Elizabeth A. Planton, and Elizabeth A. Czarnecki.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, individual members of the Board of Regents of the University of Wisconsin System (the "Board") and various officials and employees of the University of Wisconsin-Madison, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Memorandum Opinion of the Seventh Circuit is reported at 620 F.3d 775 (7th Cir. 2010). Appendix ("App.") 1a-29a The District Court Order, dated January 17, 2008, granting the plaintiffs' motion for preliminary injunction is reported at 2008 WL 2766267 (W.D. Wis. Jan. 17, 2008). App. 71a-83a. The District Court Decision and Order, dated September 24, 2008, granting in part and denying in part the plaintiffs' motion for summary judgment, and granting in part and denying in part the Board's motion for summary judgment, is reported at 578 F. Supp. 2d 1121 (W.D. Wis. 2008). App. 30a-70a. The District Court Decision and Order, dated December 16, 2008, denying the plaintiffs' motion for reconsideration is reported at 590 F. Supp. 2d 1083 (W.D. Wis. 2008). App. 84a-103a.

JURISDICTION

The Opinion of the Court of Appeals was issued on September 1, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment of the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 18 of the Wisconsin Constitution provides that no person shall:

> be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent . . . nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

Article X, Section 6 of the Wisconsin Constitution provides:

> Provision shall be made by law for the establishment of a state university at or near the seat of state government . . . and no sectarian instruction shall be allowed in such university.

STATEMENT OF THE CASE

A. Background and Facts

This case concerns an issue that this Court has on several occasions noted was reserved for future consideration—whether a public institution operating a limited public forum is required to fund core religious activities such as religious worship.

This petition arises from the operation of the same student activity fee program at the University of Wisconsin that was at issue in *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000). Post-*Southworth*, the University of Wisconsin has continued to fund extracurricular activities in a viewpoint neutral manner to promote the University's educational mission. While the University has funded speech from a religious viewpoint, it has declined requests to fund programs that substantially involve religious worship, proselytizing, or the inculcation of a belief in a particular religious faith.[1] App. 37a.

a. Each semester, the University of Wisconsin-Madison ("University") collects student activity fees (called "segregated University fees" or "SUF") from its students on a mandatory basis, with no opt-out provision for objecting students. These fees provide a source of funds to ensure that students have the means to engage in dynamic discussions of philosophical, religious, scientific, social and political

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[1] As the District Court noted, "[a]s a result of the preliminary injunction [in this case], the University currently funds worship, proselytizing and sectarian instruction" for Badger Catholic. App. 36a-37a n.5.

subjects in their extracurricular campus life outside the lecture hall. Court of Appeals Separate Appendix of Defendants/Appellants ("C.A. Sep. App.") 302, ¶441. Segregated University fees may only be distributed to registered student organizations ("RSOs") and to University departments.

"SUF are state funds which are deposited and held in the State Treasury, and which are subject to the same limitations on use as other state funds." C.A. Sep. App. 375, ¶1; *see also* C.A. Sep. App. 301, ¶438. A small portion of some of the segregated University fees are deposited into the General Student Services Fund ("GSSF"), which funds the activities of qualified student organizations, including "expressive activities, concerts, some athletic activities, and recreational activities." App. 31a (citations and quotation marks omitted). Distribution of the GSSF is what is at issue in this case.[2]

The University student government ("Associated Students of Madison" or "ASM"), in consultation with the University Chancellor and subject to the final confirmation of the Board, decides how the GSSF will be allocated to support campus student activities. App. 32a; *see also* Wis. Stat. § 36.09(5). The funds are disbursed to student organizations that both (1) satisfy the University's registered student organization criteria, and (2) meet the ASM's eligibility criteria. C.A. Sep. App. 178.

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[2] During the 2007-08 academic year, the GSSF portion of the UW-Madison SUF budget was $2,460,300. C.A. Sep. App. 325, ¶ 493.

Student Organizations that receive funding from the GSSF do not receive lump-sum payments. C.A. Sep. App. 200, ¶118. Rather, ASM distributes funds to student organizations on a reimbursement or purchase-order basis. C.A. Sep. App. 200, ¶119. Student organizations submit budgets to ASM for preliminary approval but do not receive funds until they submit qualifying receipts and invoices to University staff who are responsible for overseeing GSSF expenditures. C.A. Sep. App. 200, ¶121. The University audits student organizations' reimbursement requests before issuing payment to ensure the expenditures comply with University policies and state and federal law. *Id.*

The Board has promulgated University policies regarding the use of segregated University fees. One of those policies, UW System Policy F50, limits the expenditure of segregated University fees to "items and activities that are related to the mission of the institution and the purpose of the organization" and provides that expenditures of SUF "must also conform with all applicable state and federal laws and policy requirements." C.A. Sep. App. 367.

Providing guidance on how to apply University policies, the University's Dean of Students directed that segregated University fees would be distributed to requesting registered student organizations to support "educational and expressive activities that are religious in nature." C.A. Sep. App. 389. However, they could not "be used to directly support the operating costs of a church or strictly church-related activity (e.g., worship service) if the funds being transferred could be characterized as a donation to the church or as being in lieu of other

contributions to the church normally used to cover similar costs." *Id.* The Dean's guidance specified further that educational activities "may include, but are not limited to, programs which increase students' awareness or understanding of the teachings of a particular faith or about the historical, social, economic, political, cultural or other impact of one or more religions or faiths. Expressive activities provide students the opportunity to communicate their political, religious, moral, or other beliefs, opinions and values." C.A. Sep. App. 394.

b. Respondent Badger Catholic, Inc., is a registered student organization and has received funds from the GSSF since the 2004-05 academic year. App. 33a.[3] For the 2006-07 and 2007-08 academic years, however, the University refused to fund certain specific activities.[4] For example, Badger Catholic sought funding in excess of $253,000 for the 2007-08 academic year. The University agreed to provide funding for more than $218,000 of the request. The University declined the request for the remaining $35,221 based on the nature of the six specific activities for which Badger Catholic sought those additional funds. C.A. Sep. App. 314.

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[3] At the time the lawsuit was filed, Respondent Badger Catholic was known as the Roman Catholic Foundation, UW-Madison, Inc., and "prior to May 1, 2007, was known as the University of Wisconsin Roman Catholic Foundation, Inc." and had other names before that. App. 33a & 33a n.3.

[4] The four Badger Catholic activities at issue for the 2006-07 academic year were also not funded in 2007-08. For ease of reference, only the 2007-08 activities are discussed in the text.

Badger Catholic described the nature of those activities as involving worship, proselytizing, or the inculcation of a particular religious belief. *See* App. at 35a-36a, 91a-94a (summarizing the activities at issue). "Mentoring for Busy Students," for example, was described as a program in which students met with a spiritual director (Catholic nuns and priests) for spiritual mentoring/counseling and to talk about anything the students wanted for a half-hour. If requested, the nuns and priests would offer guidance or prayer. An advertisement for the program described it this way: "Spend a half hour a day talking to a spiritual director and a half hour a day in prayer." Court of Appeals Supplemental Appendix of Defendants/Appellants ("C.A. Supp. App.") 135. Badger Catholic indicated that proselytizing was one of the intended consequences of the program. C.A. Sep. App. 311-12, ¶458. Another program denied funding, an Evangelical Catholic Institute, was a 48-hour program that included two masses, three praise and worship programs, and workshops providing instruction in effective techniques for Catholic proselytizing, creating large and small group Catholic ministries, and implementing evangelical Catholic ministries. C.A. Sep. App. 312-14, ¶460. Badger Catholic confirmed that the Institute was intended to foster worship and proselytizing. C.A. Sep. App. 314, ¶461. Badger Catholic also requested funding for Rosary booklets, for students to learn the Rosary prayer, to be used in small groups and by the students individually. C.A. Sep. App. 314, ¶462.[5]

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[5] Reviewing the parties' descriptions of the six challenged

When the University denied Badger Catholic's request for funds for the six activities, Badger Catholic and two of its student members, Elizabeth Planton and Elizabeth Czarnecki, filed suit in the United States District Court for the Western District of Wisconsin against the individual members of the Board and various University employees and officials. They alleged that the University's refusal to fund these six activities amounted to viewpoint discrimination in violation of the First Amendment to the United States Constitution and asserted claims under 42 U.S.C. § 1983.[6]

B. The District Court Decisions

Respondents sought a preliminary injunction, and on January 17, 2008, the District Court (Shabaz, J.) enjoined the University "from enforcing any policy that prohibits or prevents plaintiffs from applying for or obtaining reimbursement for activities listed in plaintiffs' 2007-08 approved budget because the activities are or involve religious speech considered prayer, worship and/or proselytizing." App. 82a-83a.

Respondents subsequently moved for summary judgment. The University opposed the motion and cross-moved for summary judgment. The University argued, in part, that funding for the requested

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activities at issue in this case, the District Court stated that "the undisputed facts are sufficient to demonstrate that [Badger Catholic's] activities included substantial prayer and worship components." App. 91a.

[6] They also alleged various state law claims, which were rejected by both the District Court, App. 67a-69a, and the Court of Appeals, App. 13a-14a, and are not the subject of this petition.

activities was not consistent with the purpose of the limited public forum and that the Establishment Clause of the First Amendment, as interpreted by this Court, prohibited access to the "metaphysical forum" created by limited funding of those activities that Badger Catholic identified as involving worship, proselytizing, or inculcation of a particular religious belief. On September 24, 2008, the District Court (Adelman, J.) entered its decision and order declaring unconstitutional the University's partial denial of funding for the 2006-07 and 2007-08 academic years.

Analogizing to this Court's decisions in *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995), and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), the District Court reasoned that the University's funding program constituted a "limited public forum" whose restrictions and limitations must be both viewpoint neutral and reasonable in light of the purpose for which the program was created. App. 39a-42a.

The District Court held that the University's denial of Badger Catholic's six challenged funding requests was *not* viewpoint discrimination. The court reasoned that the University had instead limited funding based on content because (1) Badger Catholic identified no topic on which the University excluded religious viewpoints but permitted secular viewpoints, and (2) Badger Catholic did not show that the University funded some worship, but not Badger Catholic's, or otherwise regulated Badger Catholic's speech due to its specific viewpoint, perspective, or opinion. App. 55a-57a.

The District Court concluded, however, that the University's denial of Badger Catholic's funding

requests was unreasonable, because (1) funding the activities would not violate the Establishment Clause, and (2) "the University's abstract characterization of the activities as something other than dialogue, discussion or debate simply because they could also be characterized as worship, proselytizing or sectarian religious instruction is an insufficient basis for excluding them from the forum." App. 54a-55a.[7]

C. The Seventh Circuit's Decision

A divided panel of the United States Court of Appeals for the Seventh Circuit affirmed. Chief Judge Easterbrook, writing the decision of the court, joined by Judge Evans, commented that "the Supreme Court is not always clear about the difference" between content discrimination and viewpoint discrimination in its First Amendment jurisprudence. App. 7a. The majority concluded that the University violated the First Amendment when it

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[7] In rejecting Badger Catholic's motion for reconsideration of its ruling that the individual members of the Board were entitled to qualified immunity, the District Court reiterated its holding that the "University's policy is better characterized as unreasonable content-based rather than viewpoint discrimination." App. 95a. It noted that "Plaintiffs do not identify any topic concerning which the University excluded a religious viewpoint" and that "[i]n fact, the University funds a considerable amount of [Badger Catholic]'s religious speech—including [Badger Catholic]'s small and large group discussions about religion, educational and service offerings, theater and choral activities, and new-student and freshman welcoming activities—indicating that the University is not attempting to exclude religious or Catholic viewpoints from its forum." App. 95a-96a.

declined to fund all of Badger Catholic's budget requests stating that "the label applied to that discrimination is unimportant." App. 8a.

The Seventh Circuit distinguished the present case from this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), noting that while this Court emphasized that the Washington state scholarship program at issue in *Locke* did not evidence hostility to religion, the University "by contrast, does not support programs that include prayer or religious instruction."[8] App. 9a. Finally, the Court of Appeals held that this Court's recent decision in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), left "no doubt" that "the University's activity fee fund must cover Badger Catholic's six contested programs, if similar programs that espouse a secular perspective are reimbursed." App. 12a.[9]

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[8] As Judge Williams reminded the majority in dissent, this conclusion overlooks that the University provided Badger Catholic substantial funding. Indeed, the $218,052.88 provided for the 2007-08 academic year represented 9% of the University's entire GSSF budget. App. 17a. In addition, the University did not refuse to fund all activities where, for example, a prayer was offered. C.A. Sep. App. 191, ¶ 94, 196 ¶¶ 107-108. Rather, as the District Court found, the University denied funding for programs that, based on "the undisputed facts . . . included *substantial* prayer and worship components." App. 91a (emphasis added).

[9] While the majority stated that the "University promised the Supreme Court in *Southworth* to distribute funds without regard to the content and viewpoint of the students' speech" (App. 3a), nothing in *Southworth* requires a university to fund all content without limitation.

Central to the majority's reasoning that the University engaged in inappropriate discrimination was its statement that "purely religious activities have 'little meaning on their own' and cannot be meaningfully distinguished from the categories of 'dialog, discussion or debate from a religious perspective' funded by the University." App. 19a (Williams, J., dissenting (quoting majority op. at App. 3a)).

Judge Williams dissented. She noted that the majority "is correct that the University offers funding for training workshops during the school year and summer breaks, but Badger Catholic is also free to access that funding and it has," App. 16a, receiving "the vast majority of the funding it sought in the relevant year," App. 17a. "For example, in the 2007-08 year, Badger Catholic was reimbursed for events titled 'Leadership Training Group' and 'Mary House Overnight.'" App. 16a.

Judge Williams disagreed with the majority's conclusion that "purely religious activities have 'little meaning on their own' and cannot be meaningfully distinguished from the categories of 'dialog, discussion or debate from a religious perspective,'" finding this conclusion to "degrade[ ] religion and the practice of religion." App. 19a. Judge Williams instead reasoned that worship and proselytizing are a separate category of speech rather than viewpoints of speech to which a secular counterpart exists. App. 19a-20a. She therefore concluded that the University was permitted—in a limited public forum like that resulting from allocation of activity funds—to prohibit the use of funds to pay for worship or proselytizing. App. 19a-21a.

As Judge Williams emphasized, the majority's approach inappropriately restricted public universities from drawing any restrictions on student activity funding to pay for purely religious activities:

> Under the panel's view, once a public university has created a forum, there is no way for it to constitutionally limit its forum to anything; it becomes a generally open forum. It must now fund the worship activities of every group, which opens the forum to funding requests for the day-to-day activities of those groups who believe day-to-day activities constitute worship. The panel has effectively commanded the University to enlarge its forum to include the worship and other purely religious activities of every student group.

App. 25a.

REASONS FOR GRANTING THE WRIT

This case presents an important question this Court has previously reserved for consideration,[10]

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[10] *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 n.4 (2001) (observing that the challenged "activities do not constitute mere religious worship, divorced from any teaching of moral values"); *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 842 (1995) (clarifying that "[w]e do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity"); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387-88 n.2 (1993) (noting that appellant church did not raise issue whether it could use public school facilities to conduct religious services).

and over which the circuits are split[11]—whether the First Amendment requires a public institution operating a limited public forum to fund a religious group's worship, proselytizing, or inculcation of a particular religious belief. Scholars and jurists alike have called for this Court's guidance to resolve this important issue.

Lacking clear guidance, public entities, like the University here, have likewise struggled with this question. In receiving and disbursing the funds at issue, the University operates a limited public forum with thousands of participants seeking access to a limited budget. The University must draw reasonable lines and make practical concessions to operate its forum in a way that is consistent with Wisconsin law and furthers its statutory mission while doing so in a viewpoint neutral manner. App. 29a. In administering the funding program consistent with its educational mission, the University has drawn the same type of line between supporting secular programming and supporting pure religious worship that Congress itself has drawn countless times in a myriad of appropriations to secondary education institutions and to religious organizations. *See infra* note 23 at 34-35.

The relevant facts of this case are undisputed, and the University has carefully avoided any excessive entanglement problems by relying on

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[11] *See* App. 1a-29a; *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891 (9th Cir. 2007) ("*Faith Center*"); *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89 (2d Cir. 2007) ("*Bronx Household III*").

Respondents' self-identification of the challenged activities as worship, proselytizing, or the inculcation of religious belief. Thus, this case presents an ideal vehicle in which to resolve the circuit split on whether a government entity can exclude on a viewpoint neutral basis pure religious worship from a limited public forum and to provide governmental entities much-needed guidance on this important constitutional issue.

I. THIS COURT'S REVIEW IS NECESSARY TO RESOLVE A CIRCUIT SPLIT CONCERNING AN ISSUE OF EXCEPTIONAL NATIONAL IMPORTANCE.

This Court, in *Southworth*, previously recognized that the funding program at issue here creates what is "tantamount to a limited public forum." 529 U.S. at 234; *see also id.* at 230 (applying the viewpoint neutrality standard from "the public forum cases"). As noted above, this Court has not addressed whether a governmental entity operating a limited public forum may prohibit use of the forum for religious worship. The Ninth Circuit permits state entities to restrict access to a limited public forum by closing the forum to worship services. The Second Circuit has issued a series of opinions culminating in a fractured, three-opinion order in which the court failed to reach a controlling rationale as to the State's obligation to provide access to limited public forums for the conduct of worship services. The Seventh Circuit below, on the other hand, rejected the University's attempt to draw the same line permitted by the Ninth Circuit, this time in the context of the University's "metaphysical" limited public forum. *Cf. Rosenberger*, 515 U.S. at 830.

A. This Court Has Long Distinguished Between Religious Worship And Speech From A Religious Viewpoint, And Has Left Unresolved The Question Whether The State May Decline To Fund Religious Worship In A Limited Public Forum.

Beginning with *Widmar v. Vincent*, 454 U.S. 263 (1981), through its opinion last term in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), this Court has considered the limitations and obligations of the state in providing access to religious organizations to a limited public forum. Yet the Court has not been confronted with, and has consistently and carefully reserved, answering whether the state must provide a religious organization access to a limited public forum for the purpose of conducting religious worship.

In *Widmar*, the university had a "generally open" policy that allowed non-religious student organizations access to the university's facilities. 454 U.S. at 267-68. University policy, however, prohibited access to school meeting rooms to registered student groups wishing to use the facilities for religious worship and discussion. *Id.* at 265. At that time, and treating the "generally open" policy as creating a traditional public forum, this Court applied strict scrutiny. *Id.* at 270. The Court held that religious speech is protected by the First Amendment and that the university's policy was a content-based restriction unsupported by a compelling state interest. *Id.* at 276. *Widmar* was therefore silent as to permissibility of prohibiting

access to a limited public forum for an organization seeking to conduct religious worship.[12]

Twelve years later, this Court held in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), that denying a religious group access to New York school facilities after hours to show a religious-oriented film series on family values and childbearing was impermissible viewpoint discrimination. *Id.* at 394. However, *Lamb's Chapel* expressly left open the question whether denying access to the facilities for the conduct of religious worship would be permissible. The Court noted that the issue was not presented because the plaintiff church declined to challenge the school board's denial of the church's request for access to conduct Sunday morning church services. *Id.* at 387-88 n.2.

Similarly, in *Rosenberger*, this Court held that a University of Virginia policy excluding a faith-based newspaper from student activity funding improperly discriminated based on religious viewpoint. 515 U.S. at 845. The Court differentiated between speech from a "religious perspective" and "a case where, even under a neutral program that includes nonsectarian

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[12] In *Christian Legal Society*, this Court recently explained its decision in *Widmar* by noting that while the Court had recognized that a "university's mission is education . . . and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities," the university policy at issue in *Widmar* was subject to strict scrutiny because the university had singled out religious organizations for discriminatory treatment. 130 S. Ct. at 2987 (internal quotations omitted).

recipients, the government is making *direct* money payments to an institution or group *that is engaged in religious activity*." *Id.* (emphasis added).

In *Good News Club*, this Court struck down a New York school board policy that prohibited the use of school facilities by a religious organization seeking to hold weekly meetings involving the teaching of morals and character to children through the use of songs, games, and the recitation of Bible stories. 533 U.S. at 109-10 (noting the "only apparent difference between the activity of Lamb's Chapel and the activities of the Good News Club is that the Club chooses to teach moral lessons from a Christian perspective through live storytelling and prayer, whereas Lamb's Chapel taught lessons through films"). Once again, this Court clarified that it was not confronted with the question now raised in this Petition. The *Good News Club* majority rejected Justice Souter's characterization of the activities at issue as an "evangelical service of worship," explaining that the activities were rather synonymous with those challenged in *Lamb's Chapel* and did "not constitute mere religious worship, divorced from any teaching of moral values." *Id.* at 112 n.4.

In *Christian Legal Society*, this Court reiterated that when the government creates a limited public forum, it may exclude speech where "its distinction is [ ] reasonable in light of the purpose served by the forum" and so long as the government does not "discriminate against speech on the basis of . . . viewpoint." *Christian Legal Society*, 130 S. Ct. at 2988 (quoting *Rosenberger*, 515 U.S. at 829) (second alteration in original); *see also id.* at 2984 ("Any

access barrier must be reasonable and viewpoint neutral."). The Court emphasized that a public university has the "ability to 'confin[e] a [speech] forum to the limited and legitimate purposes for which it was created.'" *Id.* at 2986 (quoting *Rosenberger*, 515 U.S. at 829). The Court distinguished the restrictions at issue in *Christian Legal Society*, which refused funding to any group not in compliance with the university's non-discrimination policy, from those at issue in *Widmar* and *Rosenberger*. In those cases, the Court held, "student groups had been unconstitutionally singled out because of their points of view." *Id.* at 2988.

B. The Courts Of Appeals Have Reached Conflicting Conclusions Regarding The Ability Of A Governmental Entity To Restrict Access To A Limited Public Forum For Religious Worship.

In the absence of definitive guidance from this Court, the Courts of Appeals have resolved inconsistently the issue of whether limited public forums must be opened to all manner of religious worship. The decision of the Court of Appeals below conflicts with the approach taken by other Courts of Appeals addressing limited public forums and restrictions on funding activities that are substantially worship, proselytizing, or the inculcation of a particular religious belief.

1. The Ninth Circuit Permits A Governmental Entity To Restrict Access To A Limited Public Forum For Religious Worship.

In *Faith Center Church Evangelistic Ministries v. Glover*, the Ninth Circuit held that a state could decline to subsidize religious worship without violating the Constitution. 480 F.3d at 915. The Court considered the constitutionality of a county library policy that opened library meeting rooms for public use, but prohibited the use of such rooms for, among other things, "religious services." *Id.* at 903. The plaintiff, a non-profit religious organization, sought to use the library's meeting rooms to hold meetings to "discuss educational, cultural, and community issues from a religious perspective" and to hold worship services during which its pastor offered a sermon and led participants in prayer. *Id.* The library's staff informed Faith Center that it could not use the library's meeting rooms to conduct religious services. *Id.* at 904.

Faith Center sued the county to enjoin it from excluding the use of the library's meeting rooms for the proposed religious services. The district court granted Faith Center's motion for a preliminary injunction. *Id.* at 904-05.

A divided panel of the Ninth Circuit reversed the grant of preliminary injunction, holding that Faith Center failed to show a likelihood of success on the merits. Consistent with this Court's prior holdings, the Ninth Circuit observed that "[r]estrictions governing access to a limited public forum [like the library rooms] are permitted so long as they are viewpoint neutral and reasonable in light of the

purpose served by the forum." *Id.* at 908 (citing *Rosenberger*, 515 U.S. at 829). The Ninth Circuit further noted that Faith Center's claim largely hinged on whether the county's library policy amounted to viewpoint discrimination, explaining that it "must identify whether the County's exclusion of Faith Center's religious worship services from the Library meeting room is 'content discrimination, which may be permissible if it preserves the purpose of that limited forum, [or] viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.'" *Id.* at 911 (quoting *Rosenberger*, 515 U.S. at 829-30).

The Ninth Circuit held that the worship service did not consist of religious viewpoint activities, as it was not "a secular activity that conveys a religious viewpoint on otherwise permissible subject matter." *Id.* at 915. As the Ninth Circuit explained, religious worship is a *category* of speech, rather than simply a *viewpoint* on a particular topic:

> For every other topic of discussion that Faith Center engages in—the Bible, communication, social and political issues, life experiences—religious and non-religious perspectives exist. The same can be said for moral and character development in *Good News Club*, child rearing in *Lamb's Chapel*, and the topic of religion itself in *Rosenberger*.
>
> Religious worship, on the other hand, is not a viewpoint but a category of discussion within which many different religious perspectives abound. If the County had, for example, excluded from its forum religious worship

> services by Mennonites, then we would conclude that the County engaged in unlawful viewpoint discrimination against the Mennonite religion. But a blanket exclusion of religious worship services from the forum is one based on the content of speech.

Id. at 915.[13]

The Ninth Circuit also recognized that although the distinction between religious worship and mere speech from a religious viewpoint is a difficult one that the court or the state may not be competent to make, the distinction was made by Faith Center itself, and that the court and the state appropriately relied on this representation in administering the county library policy. *Id.* at 918 ("The County may not be able to identify whether Faith Center has engaged in pure religious worship, but Faith Center can and did.").[14]

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[13] *Cf. Bronx Household of Faith v. Board. of Educ.*, 492 F.3d 89, 125 (2d Cir. 2007) ("Bronx Household III") (Walker, J., dissenting) ("I also agree that we must be careful not to articulate a standard that would simply require that 'any public school opened for civic meetings . . . be open for use as a church, synagogue, or mosque'") (quoting *Good News Club*, 533 U.S. at 139 (Souter, J., dissenting)).

[14] As explained above, the University here, similarly relied on Badger Catholic's self-identification of the challenged activities as involving worship, proselytizing, or the inculcation of a particular religious belief. App. 24a.

2. A Second Circuit Has Also Addressed Whether A Public Entity Operating A Limited Public Forum Must Subsidize Religious Worship.

The Second Circuit has also confronted whether the state is obligated to offer access to a limited public forum to groups seeking to conduct religious worship services when the forum has previously been made available to other civic groups.

In *Bronx Household of Faith v. Board of Education* ("Bronx Household III"), the Second Circuit considered an appeal from an injunction enjoining New York City school officials from enforcing a policy that prohibited the use of public school facilities for "holding religious worship services, or otherwise using a school as a house of worship" outside of school hours. 492 F.3d at 90-91, 94. A majority of the Second Circuit's panel voted to vacate the injunction. *Id.* at 91. The panel, however, was unable to reach a consensus opinion on the basis for doing so. Judge Leval voted to vacate the injunction as prematurely granted because the policy had not yet been invoked against Bronx Household. *Id.* at 107. Judges Calabresi and Walker, on the other hand, found the matter ripe for decision, but reached conflicting conclusions on the merits as to whether the city's policy was constitutionally sound.

Judge Calabresi's decision is in accord with the Ninth Circuit's approach in *Faith Center*. In his view, the city's policy was not viewpoint discrimination, but rather a valid content-based restriction because religious worship is a "unique category of protected expression" rather than the

"religious analogue of ceremonies, rituals, and instruction." *Id.* at 92 (Calabresi, J., concurring).

Judge Calabresi contrasted the disputed speech at issue before this Court in *Good News Club*—discussions of character and moral development—with the religious worship services sought to be performed in *Bronx Household III*. Judge Calabresi explained that "'worship' is not a viewpoint on a 'subject matter[,] morals and character,'" and to hold otherwise would "eviscerate the Supreme Court's distinction between *viewpoint* and the subject matter to which that viewpoint or approach is applied." *Id.* at 102 (Calabresi, J., concurring) (citations omitted). He emphasized the admission by the plaintiff's pastor that "significant differences separate the subject of worship services from moral instruction given from a religious viewpoint: 'The Bible study club would not administer the sacraments of baptism and the Lord's supper. That would be a big difference.'" *Id.*

Acknowledging the distinct nature of religious worship, Judge Calabresi explained that: "Prayer and worship services are not religious viewpoints on the subjects addressed in Boy Scouts rituals or in Elks Club ceremonies. Worship is adoration, not ritual; and any other characterization of it is both profoundly demeaning and false." *Id.* at 103. He therefore concluded that the school's exclusion of worship services was viewpoint neutral and a content-based restriction reasonable in light of the purposes of the school's limited public forum. *Id.* at 106.

Judge Walker concluded that the school's policy was viewpoint discriminatory. Notably, Judge Walker agreed with Judge Calabresi that religious

worship should not be deconstructed into component parts and that simply opening a public school for "civic meetings" did not mean that it must be "'open [ ] for use as a church, synagogue, or mosque.'" *Id.* at 108 (Walker, J. dissenting (quoting *Good News Club*, 533 U.S. at 139 (Souter, J., dissenting)). To Judge Walker, the religious organization's proposed activity fit easily within the purpose for which the school's limited public forum was created, namely to improve relations with the school's surrounding community. *Id.* at 126 (Walker, J., dissenting). In light of this, Judge Walker reasoned that a "more searching scrutiny" of the motives behind the forum limitation was required. *Id.* Based on the lengthy history of litigious animosity between the school board and Bronx Household,[15] Judge Walker concluded that the

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[15] *Bronx Household III* was preceded by two earlier Second Circuit opinions involving application of the school's policies in different circumstances. In *Bronx Household of Faith v. Community Sch. Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997) ("*Bronx Household I*"), the Second Circuit affirmed the dismissal of a suit challenging the application of a New York school board policy that barred outside organizations from conducting "religious services or religious instruction on school premises after school." 127 F.3d at 210. In *Bronx Household of Faith v. Board of Educ.*, 331 F.3d 342 (2d Cir. 2003) ("*Bronx Household II*"), the Second Circuit concluded that the challenged policy was substantially identical to that declared discriminatory by this Court in *Good News Club*, and therefore affirmed the district court's order enjoining the City from enforcing its policy. The *Bronx Household II* court pointed out that its ruling was "confined to the district court's finding that the activities plaintiffs have proposed for their Sunday meetings *are not simply religious worship, divorced from any teaching of moral values or other activities permitted in the forum.*" *Id.* at 354 (emphasis added). The City subsequently modified its policy to

school adopted the policy to exclude a particular viewpoint from its forum. *Id.* at 127 (Walker, J., dissenting).

Even Judge Walker, however, highlighted the need for further guidance on this issue. He stated in his dissent that the question raised by *Bronx Household III*—whether a public school may restrict access to a limited public forum by prohibiting religious worship services on its property—"would benefit from a more conclusive resolution by [the Supreme] Court." *Id.* at 132 (Walker, J., dissenting).

3. The Seventh Circuit Is The Only Court Of Appeals To Prohibit A Public Entity Operating A Limited Public Forum From Excluding Religious Worship.

The primary distinction between the approach of the Seventh Circuit's decision here and the approach adopted by the Ninth Circuit and Judge Calabresi in *Bronx Household III* centers around whether religious worship is simply speech from a religious viewpoint for which secular counterparts abound. *Compare Badger Catholic*, App. 4a (comparing religious worship to counseling programs, explaining "the University cannot exclude those that offer prayer as one means of relieving the anxiety that many students experience") *with Faith Center*, 480 F.3d at

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limit its prohibition only to requests "for the purpose of holding religious worship services, or otherwise using a school as a house of worship," addressed in *Bronx Household III*. 492 F.3d at 94. On remand, after *Bronx Household III*, the district court permanently enjoined the enforcement of the New York public school policy and an appeal is pending before the Second Circuit, *Bronx Household v. Board of Education*, Case No. 07-5291.

915 ("Religious worship . . . is not a viewpoint but a category of discussion within which many different religious perspectives abound"); *Bronx Household III*, 492 F.3d at 103 (Calabresi, J., concurring) ("Worship services, moreover, are not in any sense simply the religious analogue of ceremonies and rituals conducted by other associations that are allowed to use school facilities"); *see also id.* at 125 (Walker, J., dissenting) (agreeing court should not view religious worship as expressive activity comprised of several sub-parts, stating that "[b]y deconstructing religious worship into components, the district court denigrates it").[16]

Concluding there was no distinction between worship and the secular speech funded by the University, the majority held that the University could not refuse to fund pure religious worship. App. 10a. In the majority's view, if there is no distinction between religious worship and secular speech about current events, then the University cannot refuse to fund religious worship if it is funding speech by other RSOs. *Id.*

That view cannot be reconciled with the approach adopted by the Ninth Circuit or Judge Calebresi's clear statements that such a distinction does exist.

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[16] Judge Williams asked in her dissent, "[i]f religion, and the practice of one's religion, can be described as merely dialog or debate from a religious perspective, what work does the Free Exercise clause of the First Amendment do? The Free Speech clause, which provides constitutional protection of the right to discuss and debate views, would sufficiently protect the right of people to have 'dialog, discussion or debate from a religious perspective.'" App. 19a-20a (Williams, J., dissenting).

As noted below, the conclusion also is inconsistent with a host of statutes that have, similar to the University policy here, restricted funding for pure religious worship while funding counseling programs or other forms of speech. *See infra* note 23 at 35-36.

In short, the standard announced by the majority in the Seventh Circuit removes any practical discretion that the University has in limiting the scope of its limited public forum and avoiding directly subsidizing religious worship. Far from recognizing the unique role of public universities or providing the discretion this Court has previously called for to permit public universities to determine how best to use their resources to further their secular educational mission, the majority suggests that the University either pay for pure religious worship or decline to fund all summer retreats, training workshops, or counseling sessions. App. 4.

* * *

This split in the federal circuits on this issue, and the fractured opinions authored in each case, highlight the need for clarification from this Court. Indeed, scholars and judges alike have noted the need to address this important Constitutional issue. *See Bronx Household*, 492 F.3d at 132 (Walker, J., dissenting) ("[T]here is no doubt that this particular dispute . . . would benefit from a more conclusive resolution by [the Supreme] Court"); Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1269, 1314 (2008) (observing that "the closest question today [involving the Religion Clauses] is whether the government is required to allow worship itself to take place on public premises whenever it opens them to speech by civic organizations" and noting that

"influential circuit court judges have recently split on the issue," "which may draw the attention of the Supreme Court"); John Tyler, cmt., *Is Worship a Unique Subject or a 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, 1369 (2008) (observing that *Good News Club* left unanswered the question whether exclusion of worship services from a limited public forum constitutes viewpoint discrimination, and imploring that "the Supreme Court must act now to end this confusion").

II. THIS CASE PRESENTS A GOOD VEHICLE TO REVIEW AN IMPORTANT CONSTITUTIONAL QUESTION.

This Court's review is necessary not only to resolve the circuit split on this issue, but also to provide much-needed guidance to state governments, and in particular to school administrators, grappling with First Amendment questions while balancing the competing interests and demands of their student populations. Left undisturbed, the Seventh Circuit's decision severely limits a school's discretion to draw reasonable lines in light of the purposes of the school's limited public forum and its financial limitations.

A. This Case Raises Important Constitutional Issues Regarding The Ability Of Public Colleges And Universities To Promote Their Educational Missions.

On a number of occasions this Court recognized the need to address serious constitutional issues raised by government decisions relating to the support of religious expression in the context of higher education.[17] That need exists here as well.

This Court has acknowledged that there are "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." *Rosenberger,* 515 U.S. at 842. It has also held that, even absent evidence of an Establishment Clause violation, a governmental entity may refuse to fund certain types of religious expression. *Locke*, 540 U.S. at 721. That is because, as the Court stated in *Locke*, "there is room for play in the joints" between what the Establishment Clause permits and what the Free Exercise Clause demands. *Id.* at 718 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)).

a. In *Locke*, the Court upheld a Washington state college scholarship program that barred the use of scholarship monies to pursue a theology degree. 540 U.S. at 715. The State of Washington's "antiestablishment interests," *id.* at 722, reflected in the state's constitution and statutes, was a sufficient

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[17] *See, e.g.*, *Rosenberger*, 515 U.S. at 823; *Locke*, 540 U.S. at 715; *Christian Legal Society*, 130 S. Ct. at 2978; *cf. Southworth*, 529 U.S. at 220.

basis for refusing funding for "training for religious professions," *id.* at 720.[18]

Wisconsin has a similar antiestablishment provision in its constitution.[19] The Wisconsin constitution also calls for the creation of a public university, but requires that its educational mission be secular in nature. *See* Wis. Const. art. X, § 6 (providing that "no sectarian instruction shall be allowed in [the State's public] university"). As noted above, the University System Policy F50, issued post-*Southworth*, provides that the fees at issue "are state funds which are deposited and held in the State Treasury, and which are subject to the same limitations on use as other state funds." C.A. Sep. App. 375, ¶ 1; *see also* C.A. Sep. App. 301, ¶ 438.

Consistent with these requirements, the University permits the use of the fees in question for

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[18] The Court noted that states since their founding have safeguarded against the compelled subsidization of religious worship. *See, e.g.,* Pa Const. art. II (1776), reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 3082 (F. Thorpe ed. 1909) (reprinted 1993) ("[N]o man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent"); *see also Locke*, 540 U.S. at 723 (quoting same and state constitutions of New Jersey, Delaware, Kentucky, Vermont, Tennessee, and Ohio for same point).

[19] The State of Wisconsin's Constitution provides that no person shall "be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent . . . nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." Wis. Const. art. I, Sec. 18.

extracurricular on-campus activities that promote "the mission of the institution," C.A. Sep. App. 367, but prohibits the use of the funds for activities that are substantially religious worship, proselytizing, or the inculcation of a particular religious belief. App. 94a-95a.

The University's policy falls safely in the "joints" between the two Religion Clauses. As with the Washington statute in *Locke*, the University's policy "imposes neither criminal nor civil sanctions on any type of religious service or rite." *Locke*, 540 U.S. at 720. The University "does not deny" to any religious practitioner "the right to participate in the political affairs of the community," *id.* at 720, nor does the University "require students to choose between their religious beliefs and receiving a government benefit," *id.* at 720-21.[20] In fact, the University funds a significant amount of religious speech and activities.[21] It has simply chosen not to fund religious worship, proselytizing, and inculcation of religious belief, which is inconsistent with the University's mission.

b. The Seventh Circuit denies the University the discretion to determine how best to allocate its funding to support its secular educational mission.

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[20] As with the policy at issue in *Christian Legal Society*, the University "is dangling the carrot of subsidy, not wielding the stick of prohibition." 130 S. Ct. at 2986.

[21] As noted above, Badger Catholic itself receives significant funding, totaling almost $220,000 during the 2007-2008 academic year. During the 2007-08 academic year, the University's entire GSSF budget was $2,460,300. C.A. Sep. App. 325, ¶493.

This Court, however, has consistently emphasized that schools are accorded "a significant measure of authority over the type of officially recognized activities in which their students participate," and thus courts are to approach their consideration of school policies with "special caution" and to accord school officials "decent respect."[22]

In *Christian Legal Society*, the Court stated that its analysis must be viewed in the educational context from which the issue arose. 130 S. Ct. at 2988 ("'First Amendment rights . . . must be analyzed in light of the special characteristics of the school environment'") (quoting *Widmar*, 454 U.S. at 268 n.5). The context is important because deference is owed school authorities in the administration of their policies. *Id.* (cautioning courts to resist "'substituting their own notions of sound educational policy for those of the school authorities which they review'") (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982)). Undisturbed, the Seventh Circuit's decision inappropriately infringes on the University's discretion to determine how to expend funds to promote its secular educational mission.

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[22] *Christian Legal Society*, 130 S. Ct. at 2989 (quoting *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 240 (1990), and *Healy v. James*, 408 U.S. 169, 171 (1972)); *see also Rosenberger*, 515 U.S. at 832 (universities "must have substantial discretion in determining how to allocate scarce resources to accomplish its educational mission").

B. This Case Raises Important Constitutional Questions About The Special Status Of Religious Worship.

The Seventh Circuit's holding hinges on its conclusion that worship, proselytizing, and inculcation of a particular religious belief "cannot be meaningfully distinguished from the categories of 'dialog, discussion or debate from a religious perspective' funded by the University." App. 19a (Williams, J. dissenting, quoting Majority Op. at App. 3a).

Some have indicated that any distinction between worship and other forms of religious-based speech is false and unworkable. *See, e.g., Good News Club*, 533 U.S. at 126-27 (Scalia, J., concurring). However, this Court has consistently suggested that there is a constitutional distinction between pure religious worship and speech from a religious viewpoint. *Good News Club*, 533 U.S. at 112 n.4; *Rosenberger*, 515 U.S. at 842; *Lamb's Chapel*, 508 U.S. at 387-88 n.2.

In addition, numerous federal statutes draw a distinction between funding secular speech, including counseling and training programs, and funding religious worship. For example, both the federal executive, *see* Exec. Order No. 13279, 3 C.F.R. § 2(f), p.260 (2002), and legislative branches have included such distinctions in providing funding to religious-based recipients, *see* 42 U.S.C. § 604a(j) ("No funds provided directly to institutions or organizations to provide services and administer programs under subsection (a)(1)(A) of this section shall be expended for sectarian worship, instruction, or proselytizing"). There is in fact a long list of federal laws that appear to rely on the very distinction between pure religious

worship and speech from a religious viewpoint that the Seventh Circuit has rejected.[23] *See generally*

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[23] *See, e.g.*, 20 U.S.C. § 1011k(c) (no funds received as a grant to academic facilities "shall ever be used for religious worship or a sectarian activity or for a school or department of divinity"); 20 U.S.C. § 1062(c)(1) (limiting funds disbursed to colleges and universities by providing that "[n]o grant may be made under this chapter for any educational program, activity, or service related to sectarian instruction or religious worship, or provided by a school or department of divinity"); 20 U.S.C. § 1066c ("No loan may be made under this part for any educational program, activity or service related to sectarian instruction or religious worship"); 20 U.S.C. § 1068e(1) (prohibiting institutional aid disbursed to organizations of higher learning "for a school or department of divinity or any religious worship or sectarian activity"); 20 U.S.C. § 1103e(1) (prohibiting funds disbursed to institutions of higher education "for a school or department of divinity or any religious worship or sectarian activity"); 20 U.S.C. § 6316(e)(9) (funding to state elementary and secondary schools limited so that "[n]othing contained in this subsection shall permit the making of any payment for religious worship or instruction"); 22 U.S.C. § 8303(c)(3)(D) (prohibiting Office of Volunteers for Prosperity from funding any "religious or faith-based organization for the purpose of proselytization, worship, or any other explicitly religious activity"); 25 U.S.C. § 1803(b) (prohibiting disbursing grants to tribally controlled colleges and universities for use "in connection with religious worship or sectarian instruction"); 25 U.S.C. § 1813(e) (prohibiting use of funds for construction of facilities owned or operated by tribally controlled college or university for any construction "used for religious or a sectarian activity or for a school or department of divinity"); 25 U.S.C. § 2502(b)(2) ("Funds provided [to any tribally controlled school] may not be used in connection with religious worship or sectarian instruction"); 42 U.S.C. § 290kk-2 (limiting funds to religious organizations providing substance abuse counseling services and providing that "[n]o funds provided under a designated program shall be expended for sectarian worship, instruction, or proselyzation"); 42 U.S.C. §

Rosenberger, 515 U.S. at 885 & n.9 (Souter, J., dissenting) (citing federal statutes and stating that Congress "routinely excludes religious activities from general funding programs").

Whether these statutes deal with limited public forums is not significant. The central premise of the Seventh Circuit's decision is that for First Amendment purposes there is no distinction between secular speech and religious worship. Congress, however, has repeatedly recognized there is such a distinction in restricting the use of government funds. This Court has upheld the enforcement of these restrictions and has even construed statutes that lack

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300x-65(i) ("No funds provided through a grant or contract to a religious organization to provide services under any substance abuse program under this subchapter or subchapter III-A of this chapter shall be expended for sectarian worship, instruction, or proselyzation"); 42 U.S.C. § 9920(c) (prohibiting funds disbursed to religious organizations pursuant to Community Services Block Grant Program to be used for "sectarian worship, instruction, or proselyzation"); 42 U.S.C. § 12584(a)(4) (rendering ineligible applications for funding under National Service Trust Program where organization seeks funding for religious instruction, conduct worship services, or construct or operate facilities devoted to religious instruction or worship); 42 U.S.C. § 12584a(a)(7) (providing that national service positions under National Service Trust Program "may not be used for . . . [e]ngaging in religious instruction, conducting worship services . . . or engaging in any form of proselyzation"); 42 U.S.C. § 12634(a) ("[n]o assistance made available under a grant" pursuant to the National and Community Service State Grant Program "shall be used to provide religious instruction, conduct worship services, or engage in any form of proselyzation").

similar restrictions to be so limited in order to ensure compliance with the Establishment Clause.[24]

Given the interest of Wisconsin and many other states in promoting secular education at their state-funded universities, the ability to close limited public forums to religious worship is of national importance. If there is a distinction for First Amendment purposes between "dialog, discussion or debate from a religious perspective" (App. 2a-3a) and actual religious worship—as the Ninth Circuit, Judge Calabresi, the University, and countless others believe—then the Seventh Circuit's decision is unsound and should be reviewed by this Court given the importance of the issues.

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[24] *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 615 (1988) (reversing finding of facial unconstitutionality under Establishment Clause in challenge to federal funding of counseling and educational services relating to adolescent sexuality and pregnancy because there were safeguards to prevent "use by . . . grantees in such a way as to advance religion"); *Tilton v. Richardson*, 403 U.S. 672, 683 (1971) (addressing federal statute that restricted use of federal grants and loans for construction of "academic facilities" "to be used for sectarian instruction or as a place for religious worship").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN W. GARLOUGH
FOLEY & LARDNER LLP
Suite 2800
312 N. Clark Street
Chicago, IL 60654-5313
(312) 832-4500

MICHAEL D. LEFFEL
Counsel of Record
FOLEY & LARDNER LLP
150 East Gilman Street
Madison, WI 53703-1481
(608) 257-5035

G. MICHAEL HALFENGER
FOLEY & LARDNER LLP
777 E Wisconsin Ave.
Milwaukee, WI 53202-5306
Phone: 414-271-2400

Counsel for Petitioners

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