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10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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13 FAITH CENTER CHURCH EVANGELISTIC)
 14 MINISTRIES, a California nonprofit religious)
 corporation, and HATTIE HOPKINS, an individual,)

Civil Action No. C 04-3111 JSW

15)
 16 Plaintiffs,)

**DEFENDANTS SUPPLEMENTAL
 BRIEFING IN OPPOSITION TO
 PLAINTIFFS MOTION FOR
 PRELIMINARY INJUNCTION**

17 v.)

Hearing Date: May 13, 2005
 Hearing Time: 9:00 a.m.
 Courtroom 2

18 FEDERAL GLOVER, et al.)

19 Defendants.)
 20)
 21)

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1 Consistent with the Court s Notice of Tentative Ruling, the County defendants
2 (collectively, the County) submit the following in response to the issues raised in that
3 Notice.

4 I. INTRODUCTION AND SUMMARY

5 The American experiment has flourished largely free of the religious strife
6 that has stricken other societies because church and state have respected
7 each other s autonomy. Religion and government thrive because each,
8 conscious of the corrosive perils of intrusive entanglements, exercises
restraint in making claims on the other. The beneficiaries are a diverse
populace that enjoys religious liberty in a nation that honors the sanctity of
that freedom.

9 *Bronx Household of Faith v. Bd. of Ed. of City of New York*, 331 F.3d 342, 355 (2nd Cir.
10 2003).

11 Church and state cannot thrive autonomously when restraint gives way to intrusion.
12 Plaintiffs openly admit they seek to turn the Antioch public library meeting room into a
13 house of worship. Specifically, plaintiffs want to use the library meeting room as an
14 alternative to a traditional church building, into which some people who need to hear
15 about the gospel of Jesus Christ may never step. (Plaintiffs First Amended Complaint at
16 para. 22-24.) No court, including the Supreme Court, has ever held that a religious worship
17 service, even a religious worship service accompanied by other activities, should be
18 permitted to take place **free of charge** in a public library (or any other limited forum)
19 during the hours it is operating as a library and **open to the public** at the time the proposed
20 activities are to take place.

21 There is no simple apples to apples comparison between this case and the cases
22 which have come before it.¹ This case is factually distinct from *Good News Club* and
23 *Lamb s Chapel* in which the proposed activities did not include a worship service and were
24 to take place after school hours. *Good News Club v. Milford Central Sch.*, 533 U.S. 98,

25 ¹ This includes *Widmar v. Vincent*, 454 U.S. 263 (1981), upon which plaintiffs so
26 heavily rely in their moving papers. *Widmar* involved a college campus, which was an open
27 forum that placed virtually no limitations on student speech. That forum is distinguishable from
28 the forum at issue here. Additionally, plaintiffs contention that *Widmar* settled the issue that
religious worship cannot constitutionally be distinguished from other religious speech is not
well-taken. Had *Widmar*, in fact, settled that issue, later courts in cases such as *Good News
Club*, *Bronx Household of Faith* and *Campbell* would have had no reason to grapple with it.

1 102, 112 n.4 (2001); *Lamb s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S.
2 384, 386, 389 n.2 (1993). And, as noted by the Court, while the activities at issue in this
3 case appear to be factually similar to those permitted in *Bronx Household of Faith* and
4 *Campbell*, the nature of the forum is entirely different. (Notice of Tentative Ruling on
5 Plaintiffs Motion for a Preliminary Injunction and Setting of Hearing (Tentative Ruling),
6 at 2.) The proposed activities in those cases were to take place on a Sunday morning in
7 school buildings, which were completely empty except for those present to take part in the
8 religious worship services. *Bronx Household of Faith*, 331 F.3d at 345; *Campbell v. St.*
9 *Tammany Parish Sch. Bd.*, 2003 U.S. Dist. LEXIS 13559 at * 30-31 (E.D. La. July 30,
10 2003). That is quite different from a library which is in operation and open to the public
11 while a religious service is taking place.

12 The County strongly urges the Court to adopt a final ruling which finds that the
13 County s policy of prohibiting religious services does not constitute viewpoint
14 discrimination, as did the Ninth Circuit in *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d
15 1044, 1050 n.4 (9th Cir. 2003), where the court rejected the argument that excluding
16 religion as a subject or category from a limited public forum must constitute viewpoint
17 discrimination. If the Court nonetheless finds that prohibiting religious services constitutes
18 viewpoint discrimination, the Court should then conclude that such discrimination is
19 justified given the compelling governmental interest of avoiding an Establishment Clause
20 violation. The County s Establishment Clause concerns are much more significant here
21 where the proposed use is for a religious worship service, the proposed forum is a public
22 library during normal hours of operation and the space will be used for free not rented.
23 Such facts were not present in earlier Supreme Court and lower court cases in which
24 Establishment Clause arguments were rejected.

25 II. ARGUMENT

26 A. A Library Meeting Room Open For Use During Normal Operating Hours Is A 27 Limited Forum

28 While plaintiffs argue that the limited forum doctrine is suspect, the Ninth
Circuit disagrees and regularly distinguishes between designated forums and nonpublic

1 forums such as limited forums which legitimately restrict access to certain groups or
 2 topics. *Hills*, 329 F.3d at 1049.² The Ninth Circuit's forum analysis considers the nature
 3 of the property and its compatibility with expressive activity, whether the forum was
 4 designed and dedicated to expressive activity and the policy and practice of the
 5 government. *Id.* at 1049 (quoting *Children of the Rosary v. City of Phoenix*, 154 F.3d 972,
 6 976-77 (9th Cir. 1998)).

7 Here the nature of the forum is a meeting room, used **free of charge**, within a
 8 public library **during its normal hours of operation**. This is the critical distinction
 9 noted in the Court's tentative ruling between the fora at issue in *Bronx Household of Faith*
 10 and *Campbell* and the forum here. (Tentative Ruling at 2.) In *Bronx Household of Faith*,
 11 plaintiffs sought to **rent** public school space on a Sunday for singing, the teaching of
 12 adults and children . . . from the viewpoint of the Bible, and . . . a fellowship meal after the
 13 service. *Bronx Household of Faith*, 331 F.3d at 346-47 (internal quotes omitted). The
 14 court held that it did not find a valid Establishment Clause interest because the proposed
 15 meetings . . . occur on Sunday mornings, during nonschool hours . . . there is no evidence
 16 that any school children would be on the school premises on Sunday mornings or would
 17 attend the meetings . . . [and] the church apparently intended to pay rent for the use of the
 18 space. ³ *Id.* at 356. *Campbell* involved a forum identical to that in *Bronx Household of*

19
 20 ² The Ninth Circuit's approach to the forum doctrine is not the same as that of some
 21 courts in other federal circuits. Some courts use the terms limited and designated forum
 22 interchangeably. *See, e.g. Mainstream Loudoun v. Bd. of Trustees of the Loudoun County*
 23 *Library*, 24 F.Supp.2d 552, 562 (E.D. Va. 1998). The Ninth Circuit has indicated its disapproval
 24 of that practice. Some courts and commentators refer to a designated public forum as a
 limited public forum and use the terms interchangeably. **But they are not the same, at least
 not in this circuit.** *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (emphasis
 added).

25 ³ The significance of the distinction for Establishment Clause purposes between the
 26 use of a free library meeting room and the use of otherwise empty school buildings for a fee
 27 cannot be understated. The California Legislature has recognized the utility of permitting
 28 religious groups to conduct religious services in otherwise empty school buildings, but requires
 that religious groups pay for that use. Cal. Ed. Code § 38131(b)(3) (permitting the use of school
 facilities for [t]he conduct of religious services for temporary periods, on a one-time or
 renewable basis, by any church or religious organization . . . **provided the governing board**

(continued...)

1 *Faith*, namely, weekly use of a school on **Sunday mornings** for their regular worship
2 service. *Campbell*, 2003 U.S. Dist. LEXIS 13559 at *30-31 (emphasis added).

3 The Ninth Circuit recently upheld a school's right to restrict religious
4 proselytization at a graduation ceremony, distinguishing *Good News Club* on the grounds
5 that there was no valid Establishment Clause interest in *Good News Club* given that,
6 among other things, censored religious activities took place outside school hours.
7 *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 985 (9th Cir. 2003) (quoting *Good*
8 *News Club*, 533 U.S. at 113.) Here, the proposed religious worship service would take
9 place in the Antioch library on a busy Saturday morning when library patrons of all ages
10 and faiths would be present. Moreover, the library meeting room is provided free of
11 charge.⁴ These distinctions are critical. The danger of violating the Establishment Clause
12 is minimal when the public at-large is not present at the event in question and the
13 government property is rented as opposed to being subsidized by taxpayers. When the
14 space is provided free of charge during times when the general public is present, the danger
15 of a violation is substantially greater. The County has a compelling interest in avoiding an
16 Establishment Clause violation.

17 Moreover, the nature of libraries as traditional places for reading, writing and
18 quiet contemplation make them incompatible with indiscriminate expressive activity and
19 therefore limited forums. *Neinast v. Bd. of Trustees of the Columbus Metro. Library*, 346
20 F.3d 585, 591 (6th Cir. 2003) (quoting *Kreimer v. Bureau of Police for the Town of*
21 *Morrison*, 958 F.2d 1242, 1261 (3rd Cir. 1992)); see also, e.g., *Madrid v. Lopez*, 21
22

23 ³(...continued)

24 **charges the church or religious organization using the school facilities or grounds a**
25 **fee**)(emphasis added). Such fee must be at least equal to the district's direct costs. Cal. Ed.
26 Code § 38134(d).

27 ⁴ The California Constitution Article 16, Section 5 prohibits any government entity
28 to make an appropriation, or pay from any public fund whatever, or grant anything to in aid of
any religious sect, church, creed or sectarian purpose Cal. Const. art. XVI, § 5. Requiring
the County to provide free meeting space for religious worship services at least arguably violates
the California Constitution.

1 F.Supp.2d 1151 (N.D. Cal. 1997). In *Gay Guardian Newspaper v. Ohopee Regional*
2 *Library Systems*, the court held a library lobby was a limited forum given that library
3 officials were charged with harmoniously operating a *community* library. *Gay Guardian*
4 *Newspaper v. Ohopee Reg l Library Sys.*, 235 F.Supp.2d 1362, 1369 (S.D. Ga. 2002)
5 (emphasis in the original). The nature of a library, including its lobbies and meeting rooms,
6 is distinct from other fora and the County has a legitimate reason for preserving the primary
7 purpose of the forum by prohibiting certain types of inconsistent expressive activity.

8 Here too the Antioch public library, including its meeting room which is situated
9 inside the library itself, has a primary purpose of reading, writing and quiet
10 contemplation. *Neinast*, 346 F.3d at 591 (quoting *Kreimer*, 958 F.2d at 1261). That the
11 library permits community groups to use its meeting rooms for limited purposes does not
12 alter the primary purpose of the library especially given the location of the meeting room
13 inside the library itself and given that it is used during normal library hours. So while the
14 County is obligated to permit the public to exercise rights that are consistent with the
15 nature of the Library . . . other activities need not be tolerated. *Gay Guardian*
16 *Newspaper*, 235 F.Supp.2d at 1369 (quoting *Kreimer*, 958 F.2d at 1262). A religious
17 worship service during normal library hours is inconsistent with the primary purpose of the
18 library.

19 The County s policy delineating the speakers and uses appropriate for the forum and
20 its consistent screening process of the applications for use underscores that it has never
21 opened up the library or its meeting rooms for indiscriminate use.⁵ *See Campbell*, 2003
22 U.S. Dist. LEXIS 13559 at *19 n. 6 (restrictions were minimally sufficient to preserve the
23 limited forum identity.); *Hills*, 329 F.3d at 1049 (limited forum created given school
24 district screened submissions for suitability and frequently rejected flyers for various

25
26 ⁵ Here, the County restricts use of its library meeting rooms for educational,
27 cultural and community related meetings, programs and activities and its screening process
28 ensures that use complies with the policy as well as various state and local requirements
restricting use. For instance certain restrictions exist prohibiting the use of government property
for the purpose of electing or defeating a candidate for public office. *See Contra Costa County*
Administrative Bulletin 405.4; see also Cal. Gov t. Code. § 3207.

1 reasons); *Diloreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965-67 (9th
2 Cir. 1999) (limited forum given that school district screened and rejected advertisements).

3 **B. Prayer, Praise and Worship Is Mere Religious Worship, Which Is**
4 **Properly Excluded From The County s Limited Forum**

5 Plaintiffs application to use the library meeting room simply stated that they sought
6 to use it for prayer, praise and worship. Subsequently, the flyer provided to the County s
7 counsel during the course of initial disclosures clearly delineated all of plaintiffs proposed
8 activities wordshop and fellowship on the one hand and a religious worship service on
9 the other.

10 The Supreme Court has **not held** that a religious service or religious worship may
11 not be excluded from a limited forum. *Campbell*, 2003 U.S. Dist. LEXIS 13559 at *27
12 (emphasis added). Nonetheless, the *Bronx Household of Faith* and *Campbell* courts chose
13 to view requests to hold religious services plus some other clearly permissible activities as
14 all or nothing propositions if any arguably non-religious component was included, the
15 worship service component must be permitted as well. The County contends that, unlike
16 those courts, this Court should not read Supreme Court precedent to preclude distinctions
17 between the types of activities for which plaintiffs sought to use the library meeting room
18 or to require the County to allow religious services in an operating public library without
19 charge.

20 Notwithstanding plaintiffs anticipated arguments to the contrary, the decisions of
21 the Second Circuit (*Bronx Household of Faith*) and the Eastern District of Louisiana
22 (*Campbell*) do not compel any other conclusion, not only because those cases are entirely
23 distinguishable on their facts with respect to the forums at issue, but also for the obvious
24 reason that those decisions are not binding on this Court, and because those decisions were
25 based on an overly broad reading of *Good News Club* which was not necessary and which
26 does not comport with Ninth Circuit precedent.

27 Rather, *Good News Club* stands only for the proposition that religious instruction
28 (the teaching of morals and character, from a religious standpoint) must be allowed in a

1 forum which allows similar secular instruction.⁶ To read *Good News* any more broadly
 2 would, in the words of Justice Souter, read it to stand for the remarkable proposition that
 3 any public school opened for civic meetings must be opened for use as a church, synagogue
 4 or mosque. *Good News Club*, 533 U.S. at 139 (Souter, J., dissenting).⁷

5 Plaintiffs' workshop (the flyer's description of which is essentially that of a how
 6 to pray seminar) is precisely the type of secular equivalent activity that *Lamb's Chapel*
 7 and *Good News Club* address, and deference to those precedents mandates that this type of
 8 activity be permitted.⁸ The same deference, however, is not warranted with respect to the
 9 other activity for which plaintiffs sought to use the library's meeting room: a religious
 10 worship service—an activity **which has no secular equivalent**.⁹ The Ninth Circuit has
 11 rejected the argument that such exclusion (religion as a subject or category) from a
 12 limited forum necessarily constitutes viewpoint discrimination. *Hills*, 329 F.3d at 1050 n.4
 13 (*quoting DiLoreto*, 196 F.3d at 969). Absent viewpoint discrimination, the County can
 14 restrict its limited forum to uses which are consistent with the nature of the forum. As

15
 16 ⁶ The superintendent's stated reason for denying the applications was simply that
 17 the Club's activities were religious instruction. *Good News Club*, 533 U.S. at 114 n.5.
 18 Whether the club's activities were properly characterized as instruction—as opposed to
 19 worship—is subject to dispute (as the dissent points out), but in the present case, no such dispute
 need arise because the plaintiff's themselves described one activity in which they proposed to
 engage at the library as worship.

20 ⁷ It is, in fact, just that remarkable proposition that plaintiffs seek to have this Court
 21 adopt.

22 ⁸ It must be noted again, however, that the County was unaware of the nature of this
 23 part of plaintiffs' activities at the time that application was made for use of the library meeting
 24 room. A seminar of any type was not described by plaintiffs; rather, plaintiffs indicated only
 that they sought to use the meeting room for prayer, praise and worship.

25 ⁹ Again, although the courts in *Bronx Household of Faith* and *Campbell* chose not
 26 to do so, *Good News Club* is readily distinguishable. In *Good News Club*, the club sought
 27 nothing more than to be treated neutrally and given access to speak about the same topics as are
 28 other groups. *Good News Club*, 533 U.S. at 114. No non-religious group could or would seek
 access to the library to hold a religious service, because such a service is **exclusively** religious in
 nature. A religious worship service cannot be a religious viewpoint on an otherwise permissible
 subject, because without the religion in a religious worship service, there is no subject at all.
 Secular worship is an oxymoron.

1 discussed above, a religious service is not such a use.

2 **C. The Library s Prohibition On Religious Services Is Not too Vague To Be**
3 **Enforced**

4 The Court queries whether the County s policy which permits library meeting
5 rooms to be used for religious speech but prohibits use for religious services is too vague to
6 be enforced. (Tentative Ruling at 3.) The library here admittedly must permit religious-
7 based activities when it permits similar secular-based activities; its policy thus does not
8 prohibit such activities. The library need not, however, permit religious services, the
9 meaning of which is sufficiently clear that persons of ordinary intelligence can determine
10 what is prohibited. *Hills*, 329 F.3d at 1056; *see also*, *California Teachers Ass n v. State*
11 *Bd. of Educ.*, 271 F.3d 1141, 1152 (9th Cir. 2001). Plaintiffs can clearly distinguish the
12 different types of activities; they did so on their flyer.

13 [T]hat there may be some close cases or difficult decisions does not render a
14 policy unconstitutionally vague. *See Hills*, 329 F.3d at 1056 (9th Cir. 2003); *California*
15 *Teacher s Ass n*, 271 F.3d at 1152. The *Hills* court thus found that a school district s
16 policy, which prohibited distribution of [n]on-school originated material of a commercial,
17 political, or religious nature was not unconstitutionally vague, because [a]lthough not
18 perfectly clear, the term religious is a common term and does at least provide some degree
19 of constraint on the District. 329 F.3d 1047, 1056. Similarly, religious services, while
20 perhaps not perfect, is a commonly-used term and sufficiently descriptive so that
21 applicants such as plaintiffs are put on notice as to what is prohibited.

22 In the Ninth Circuit, therefore, the fact that a policy may require a government
23 entity to distinguish between different types of religious speech does not render that policy
24 unconstitutionally vague. Thus, the *Hills* court found that, despite the school district s
25 policy against distribution of materials of a religious nature, the school district could not
26 prohibit distribution of brochures for an off-campus summer program because it is taught
27 from a Christian perspective, if the school district allowed distribution of similar secular
28 brochures. *Id.* at 1053. However, under the same policy, the court held that the school
district could nonetheless exercise some control over the content of the brochure, to the

1 extent that some of the language in the proposed brochure exceeds the scope of the
 2 District s forum. *Id.* at 1052.¹⁰ The County s policy is similarly capable of enforcement.

3 **D. The Appropriate Scope Of An Injunction Permits Religious Activities And**
 4 **Allows The County To Maintain The Current Prohibition On Religious**
 5 **Services**

6 The County has no interest in monitoring the activities in the library meeting room,
 7 nor does it wish to repeatedly enter the constitutional minefield of determining what
 8 activities might arguably fall at the margins of permissible religious activities versus
 9 impermissible religious worship. The County is confident that the majority of the time the
 10 description of activities on a use application will be sufficient to determine whether or not
 11 the requested use is permissible. An injunction, therefore, that permits the County to
 12 exclude religious services, but requires that the library meeting room be available for
 13 religious activities that fall within the scope of the limited forum is a workable remedy.

14 If, however, there is some doubt that the library can distinguish between religious
 15 services and other religious activities, the County proposes that the meeting room use
 16 application be altered to include a certification by the applicant that the meeting room will
 17 not be used for religious services. As it does now with respect to applicants descriptions
 18 of the use to which they intend to put the meeting room, the County would rely on the
 19 honesty of an applicant in so certifying.

20 An injunction such as that described above satisfies both the free exercise clause of
 21 the first amendment (by permitting plaintiffs to express their religious viewpoints in the
 22 context of educational, cultural and community related events and activities) and the
 23 Establishment Clause (by not requiring the County to allow plaintiffs to hold religious
 24 services without charge in a limited forum during operating hours). A broader injunction,
 25 such as that sought by plaintiffs, which would require the County to allow plaintiffs to hold
 26 religious services for free in an open library, virtually invites an Establishment Clause
 27 challenge.

28 ¹⁰ As an example, the district could permissibly exclude language that contains
 direct exhortations to religious observance, such as a statement regarding the need to educate
 children younger than 12 of the importance of reading the Bible. *Id.* at 1052-53.

1 If an injunction issues that requires the County to permit religious services in its
2 library meeting rooms, the County contends that the appropriate level of a bond is an
3 amount sufficient to address the Establishment Clause violation action(s) that the County
4 believes will almost certainly follow. If an injunction issues that does not require that
5 worship services be held in County libraries, the necessity for a bond would be largely
6 eliminated.

7 **III. CONCLUSION**

8 The Ninth Circuit has rejected the idea that the exclusion of religion as a category
9 from a limited forum necessarily constitutes viewpoint discrimination. Religious services
10 are a unique religious activity for which there exists no secular equivalent. The exclusion
11 of the category of religious worship from the permissible activities allowed in County
12 library meeting rooms during operating hours without charge does not constitute viewpoint
13 discrimination. Rather, that exclusion is entirely reasonable given the nature of the forum
14 and the County's compelling interest in avoiding violation of the Establishment Clause.
15 The County therefore respectfully submits that the Court should not issue an injunction that
16 forces the County to provide free space in its libraries for religious services during
17 operating hours. Rather, if an injunction is to issue at all, that injunction should be limited
18 to one which requires that religious activities (i.e., discourse on otherwise permissible
19 subjects from a religious viewpoint) be allowed, but which does not force the County to
20 permit religious services.

21 Dated:

22 SILVANO B. MARCHESI
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24 /s/
25 By: KELLY M. FLANAGAN
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