

**95-7311**  
**95-7333**

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**United States Court of Appeals**  
*for the*  
**Second Circuit**

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EMILY HSU, by and through her next friend, Dr. Chin-Ching Hsu; and  
TIMOTHY HSU, by and through his next friend, Dr. Chin-Ching Hsu,

*Plaintiffs-Appellants-Cross-Appellees,*

– against –

*(For Continuation of Caption See Reverse Side of Cover)*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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**BRIEF FOR THE ANTI-DEFAMATION LEAGUE**  
***AMICUS CURIAE* IN SUPPORT OF APPELLEES**

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### INTEREST OF THE AMICUS CURIAE

The Anti-Defamation League (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion. In support of this principle, ADL has previously filed amicus briefs in numerous court cases at the federal level. ADL is able to bring to the issues raised in this case the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

### QUESTIONS PRESENTED

1. Whether the exemption Appellants seek from the Roslyn School District's generally applicable nondiscrimination policy violates the First Amendment's Establishment Clause?

2. Whether preventing a violation of the First Amendment's Establishment Clause constitutes a compelling state interest sufficient to justify a burden on Appellants' rights under the Free Exercise Clause of the First Amendment?

### STATEMENT OF THE CASE

1. At the time this action was commenced, Plaintiffs Emily Hsu and Timothy Hsu were students of Roslyn High School, a public high school for grades nine through twelve, located in Roslyn, New York. (Joint Appendix, p. A-207) (The statement of the case is based on the facts as set forth in the "Background" section of the Memorandum and Order of United States District Judge Leonard D. Wexler, dated February 21, 1995. All page references are to the page numbers of the Joint Appendix, hereinafter designated as "Jt. App.")

2. The school is controlled and operated under the authority of the School Board and receives federal financial assistance. (Jt. App. p. A-208)

3. Defendants permit a variety of student clubs, such as the Chess Club, Art Club, Mock Trial Club and Fashion Club, to meet on school premises during non-instructional time. Plaintiffs identify nearly three dozen such clubs. Each of these recognized clubs is granted certain rights and privileges, including access to meeting areas and the right to advertise. (Jt. App. p. A-208)

4. Sometime in or before September, 1993, Plaintiffs endeavored to form a new club, a Christian Bible Club, at Roslyn High School. (Id.) After several meetings between Plaintiffs and school officials in the fall of 1993

(Jt. App. p. A-208-09), Plaintiffs were informed in a January 6, 1994 meeting with Defendant Marilyn Silverman, Assistant Superintendent of the School District, and with Defendant Dr. Howard Rubin, the principal of Roslyn High School, that the School Board required a constitution for the proposed bible club before it could decide whether to permit the club to meet. (Jt. App. p. A-209-10).

5. On January 12, 1994, Emily Hsu submitted the bible club's constitution to Silverman. On January 21, 1994, Silverman informed Emily Hsu that the School Board "had a problem with the Christian Bible Club's constitution." (Jt. App. p. A-210-211). Specifically, the School Board's objection to the club's constitution concerned (a) the constitution's definition of "Christian fellowship" which stated that "Christian fellowship is when Christians gather to praise God . . ." and (b) the constitution's requirement that "officers must be professed Christians either through baptism or confirmation." (Jt. App. p. A-211).

6. Silverman explained to Emily Hsu that the School Board wanted the definition of Christian fellowship to be changed so that the word "Christian" would be substituted with the word "people" and that the requirement that officers be professed Christians also be changed so that "officers merely were to be members of the Christian Bible Club with the right to vote." (Jt. App. p. A-211)

7. Emily Hsu made the requested change regarding the definition of "Christian fellowship" and changed the requirement for officers to read: "All members eligible to vote will also be eligible to run for office. Accepting Jesus Christ as savior is a requirement for all officers." (Jt. App. p. A-212).

8. On approximately January 26, 1994, Emily Hsu and Jane Shin, another student interested in forming the student bible club, met with Silverman and Frank Tassone, Superintendent of the School District. The school officials again requested that Emily Hsu and Jane Shin remove from the club's constitution the requirement that officers must be Christians. Emily Hsu and Jane Shin refused to comply with this request "because this act would violate their sincerely-held religious beliefs that all club officers should be Christians." (Jt. App. p. A- 212). Silverman and Tassone stated that the School Board would not approve the constitution with this requirement and told Emily Hsu to submit a new constitution. (Id.)

9. On approximately January 31, 1994, Emily Hsu submitted the bible club's constitution, without further revision. Silverman refused to submit the constitution to the School Board for its approval. (Jt. App. p. A-212).

10. After Emily Hsu determined that "the Christian Bible Club would not be permitted to meet",

Plaintiffs commenced this action seeking a preliminary injunction. On March 10, 1994, before any hearing on the preliminary injunction motion, the School Board passed a resolution recognizing the formation of and granting access to the bible club. (Jt. App. p. A-213).

11. The March 10 Resolution provided that:

Membership in the Club shall be limited to Roslyn High School students, and no student shall be discriminated against or excluded from participating in or having access to the Club, including without limitation entitlement to be an officer of the Club, on the basis of creed or religion. (Jt. App. p. A-213)

12. Defendants maintained that the above paragraph of the March 10 Resolution, as well as the earlier requested changes to the bible club's constitution were required by the School District's nondiscrimination policy embodied in two policies previously enacted by the School Board. (Jt. App. p. A-213-14). The first policy, entitled "Equal Opportunity", provides:

The [School] Board, its officers and employees will not discriminate against any student . . . on the basis of race, color, national origin or religion, marital status, sex, age or handicapping condition.

This policy of nondiscrimination includes: access by students to . . . student activities . . . .

13. The second policy, entitled "Equal Educational Opportunity", provides:

The [School] [D]istrict shall provide every student with equal educational opportunities

regardless of race, color, creed, sex, national origin, religion, age, marital status, or disability.

No student will be excluded on such basis from participating in or having access to any . . . extracurricular activities or other school resources.

(Id.)

14. Plaintiffs vigorously objected to the School District's refusal to exempt the bible club from the nondiscrimination policy regarding the eligibility requirements to hold office. Plaintiffs contended that each officer of the club "carries a significant spiritual responsibility and import." (Jt. App. p. A-214-15.) Based on the roles of the bible club's officers, Plaintiffs argued that the condition prohibiting the club from requiring that officers be "professed Christians" "would influence the form and content of both the club itself, the day to day activities of its members and result in a violation of Plaintiffs' sincerely-held religious beliefs that all club officers should be Christians." (Jt. App. p. A-216-17).

15. Therefore, Plaintiffs claimed that the School District's conditioning of its permission for the formation of the Christian Bible Club upon the rule that non-Christians be allowed as officers in the Club violated the Equal Access Act, the First and Fourteenth Amendments and the Religious Freedom Restoration Act. (Jt. App. p. A-216-217).

16. On February 21, 1995, United States District Judge Leonard D. Wexler, Eastern District of New York, issued a Memorandum and Order in which he denied Plaintiffs' motion for a preliminary injunction and denied Defendants' cross-motion for judgment on the pleadings without prejudice to their right to move for summary judgment following discovery. (Jt. App. p. A-248).

17. On March 17, 1995, Plaintiffs filed their notice of appeal from the order denying their motion for a preliminary injunction. (Jt. App. p. A-253).

18. On March 31, 1995, Defendants filed their notice of appeal from the order denying their cross-motion for judgment on the pleadings. (Jt. App. p. A-255).

19. This appeal follows.

#### SUMMARY OF ARGUMENT

The ADL submits this amicus curiae brief in support of the Defendants-Appellees ("School District"). The exemption that the Plaintiffs-Appellants ("Appellants") seek from the School District's nondiscrimination policy would, if granted, effect an establishment of religion in violation of the First Amendment in at least three distinct ways: (1) the exemption would constitute a governmental preference in favor of the Appellants' religious beliefs;

(2) the exemption would constitute governmental endorsement of Appellants' religious beliefs; and (3) the exemption would create an impermissible symbolic union between the School District and the Appellants' proposed bible club.

The School District's interest in preventing an establishment of religion rises to the level of a compelling state interest that justifies the imposition of a burden on Appellants' rights under the Free Exercise Clause of the First Amendment as well as Appellants' rights of speech, association and equal protection under the First and Fourteenth Amendments to the United States Constitution. To date however, Appellants have not demonstrated the actual ways in which the School District's nondiscrimination policy presently burdens their constitutional rights.

Accordingly, the decision of the district court should be affirmed.

#### ARGUMENT

In the name of "Equal Access" Appellants seek to gain access that is fundamentally unequal in its power to discriminate on the basis of religion. Were the School District to grant such discriminatory access, the First Amendment's prohibition against the establishment of

religion would be violated at its core. Therefore, the decision of the district court should be affirmed.

**I. The Exemption Appellants Seek From The School District's Nondiscrimination Policy Constitutes a Preference In Favor of Appellant's Religious Belief.**

Appellants seek preferential treatment from the School District in the form of an exemption from a pre-existing, generally applicable policy of nondiscrimination. Appellants do not contest that the nondiscrimination policy pre-existed their application for access to school facilities nor do they contest that the nondiscrimination policy applies equally to all student clubs in the School District. Instead, Appellants claim the religious nature of their proposed bible club entitles the club to preferential treatment.

However, the preferential treatment of religion by government is precisely what the Establishment Clause forbids. "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which . . . prefer one religion over another." Everson v. Board of Education, 330 U.S. 1, 15 (1947). "It is part of our settled jurisprudence that 'the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion

as such, or to favor the adherents of any sect, or religious organization.'" Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 8-9 (1989) (tax exemption benefiting only religious periodicals held to violate the Establishment Clause) quoting Gillette v. United States, 401 U.S. 437, 450 (1971).

The First Amendment's prohibition against governmental sponsorship of religion

'preclude(s) government from conveying or attempting to convey a message that religion or a particular religious belief is avored or preferred.' Wallace v. Jaffree, 472 U.S., at 70, 105 S.Ct., at 2497 (O'CONNOR, J., concurring in judgment) (emphasis added). Accord, Texas Monthly, Inc. v. Bullock, 489 U.S. at \_\_\_\_\_, \_\_\_\_\_, 109 S.Ct., at 895, 896 (separate opinion concurring in the judgment) (reaffirming that 'government may not favor religious belief over disbelief' or adopt a 'preference for the dissemination of religious ideas'); Edwards v. Aguillard, 482 U.S., at 593, 107 S.Ct. at 2582 ('preference' for particular religious beliefs constitutes an endorsement of religion); Abington School District v. Schempp, 374 U.S. 203, 305, 83 S.Ct. 1560, 1615, 10 L. Ed.2d 844 (1963) (Goldberg, J., concurring) ('The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects or between religion and nonreligion.')

County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 593 (1989). (emphasis in original)

Here, Appellants' requested exemption would constitute favoritism by the School District in support of a particular student religious group, namely, the bible club. Moreover, such preferential treatment would undercut a critical prerequisite to the constitutionality of the

equal access afforded the Plaintiffs' bible club - - that it be afforded access that is the same as the access afforded other student clubs. Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 252 (1990) (No message of state approval or endorsement is conveyed where a school "permits a student-initiated and student-led club to meet after school, just as it permits any other student group to do . . .") (emphasis added); Widmar v. Vincent, 454 U.S. 263, 272 n. 10 (1981) ("Because this case involves a forum already made generally available to student groups it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but not by others. See, e.g., McCollum v. Board of Education, 333 U.S. 203 (1948). In those cases the school may appear to sponsor the views of the speaker.") (emphasis in original).

In this case, Appellants seek access to the School District's facilities in a manner presently unavailable to any other student club. Such preferential access violates the Establishment Clause.

In both Mergens and Widmar, the Court specifically predicated its holding that granting access to student religious groups did not violate the Establishment Clause on the equality of the access provided. Mergens, 496 U.S. at 252; Widmar, 454 U.S. at 273-74. Two factors

emphasized by the Court in Mergens and Widmar as indicators that the access granted to the student religious group was equal, and therefore not in violation of the Establishment Clause, were the "openness" and "breadth" of the forum. In Mergens, the Court explained that:

[T]he broad spectrum of officially recognized student clubs at Westside, and the fact that Westside students are free to initiate and organize additional student clubs, see App. 221-222, counteract any possible message of official endorsement of or preference for religion or a particular religious belief. See Widmar, 454 U.S., at 274, 102 S.Ct. at 277 ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect.").

Id. at 252.

The exemption Appellants seek would remove their proposed bible club from the "broad spectrum of officially recognized student clubs at [Roslyn High School]," thereby converting otherwise equal access into preferential access. Once distinguished from all other student groups by its officially sanctioned right to discriminate on the basis of religion, the bible club's access to public school facilities and various public school benefits would send an unmistakable message of governmental favoritism toward the bible club's sectarian beliefs. No longer "merely one of many different student-initiated voluntary clubs," Mergens, id., Plaintiffs' bible club would violate the Establishment Clause's prohibition against preferentialism. "A statutory preference for the dissemination of religious

ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable." Texas Monthly, Inc. v. Bullock, 489 U.S. at 28.

**II. The Exemption Appellants Seek From The School District's Nondiscrimination Policy Constitutes An Endorsement of Appellants' Religious Beliefs.**

The official right to discriminate on the basis of religion that Plaintiffs seek from the School District would squarely place the imprimatur of government on the sectarian beliefs of Plaintiffs' proposed bible club. All students would know that the leadership of the Roslyn High School Bible Club is officially limited by the School, not merely the club, to those students who "accept Jesus Christ as a Savior." (Jt. App, A-106). The official exemption would thereby have the "unconstitutional effect of conveying a government endorsement of Christianity." Allegheny, 109 S.Ct. at 3119. (O'CONNOR, J., concurring in part and concurring in judgment.)

In introducing the "endorsement" test, Justice O'Connor explained that:

[T]he Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they

are insiders, favored members of the political community.

Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'CONNOR, J., concurring) (internal quotations omitted).

For high school students, the operative political community is their public high school. Indeed, for many students, it is the opportunity to participate in extra-curricular clubs and, especially in the yearly campaigns and elections of club officers, that provides them with their first encounter with democratic processes. Therefore, to make adherence to a particular sectarian belief a precondition to full standing and participation in the Roslyn High School political community, of which the proposed student bible club would be a part, is to violate a basic principle of the Establishment Clause. In words directly applicable to the case at bar, Justice O'Connor elucidated the policy behind the endorsement test:

"We live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all. If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community."

County of Allegheny v. ACLU, 492 U.S. 573, 627 (1989) (O'CONNOR, J., concurring in part and concurring in the judgment.)

To ensure that those students at Roslyn High School who do not adhere to the Appellants' religious beliefs are not subjected to the message that they "are outsiders or less than full members of the political community," Appellants' requested exemption from the School District's nondiscrimination policy should be denied.

**A. The Risk Of An Unconstitutional Endorsement Of Religion Is Heightened In A Secondary School Environment.**

Nowhere is the concern with protecting against the subtle coercive pressure of governmental endorsement of religion greater than in the elementary and secondary public schools. Lee v. Weisman, 505 U.S. 577 (1992). Because "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." Lee v. Weisman, 112 S.Ct. at 2658.

Were the exemption at issue to be granted, the nonadhering student could hardly avoid the conclusion that the "machinery of the State" had been employed "to enforce [the] religious orthodoxy of [the Roslyn High School Bible Club]." For, unlike with any other student club at Roslyn High School, when a student would join the proposed Roslyn High School Bible Club she would learn that her public high

school officially conditioned her advancement to a position of leadership in the club on her spiritual allegiance to a particular religious creed. This is state-sanctioned coercion of religion. See, Engel v. Vitale, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.")

Moreover, if the nonadhering student joins the proposed bible club for the purpose of exploring another faith or sharing fellowship with a friend and finds herself among a majority of adherents to the club's religious belief, the state-sanctioned pressure to conform is compounded by peer pressure. See, Lee v. Weisman, 112 S.Ct. at 2659 ("Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. [citations omitted]. To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means.")

Appellants attempt to insulate their requested exemption from constitutional challenge by emphasizing that, here, the religious message is conveyed by a private bible club, not the School District. As a factual matter, however, the two cannot be so easily separated. For the bible club is, as the district court found, a "student club," (Jt. App. A-247) with the privileges of using a public high school room as its meeting place, a public high school's bulletin boards and public address system to advertise and announce its activities and the use of the public high school's hallways to distribute fliers and solicit other students to become members of the club. (Jt. App. A-223.)

Significantly, Appellants' proposed student bible club also benefits from the compulsory attendance of students at Roslyn Public High School. Moreover, as the facts of this case demonstrate, Appellants diligently and deliberately pursued official recognition as a student club, along with all of the benefits and privileges that accompany such recognition. For Appellants to seek protection from constitutional challenge under the shield of "private club" status after they have fought - - and continue to fight - - so vigorously for governmental recognition and access is at best inconsistent and at worst disingenuous.

As a matter of law, that the religious message is conveyed by the student bible club does not immunize the message or the club from a challenge based on an unconstitutional endorsement of religion.

"The Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations. See, e.g. Texas Monthly, supra (government support of the distribution of religious messages by religious organizations violates the Establishment Clause). Indeed, the very concept of 'endorsement' conveys the sense of promoting someone else's message. Thus, by prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what [could have] occurred here: the government's lending its support to the communication of a religious organization's religious message."

Allegheny, 492 U.S. at 600.

Because the Appellants' proposed exemption from the School District's nondiscrimination policy constitutes an unconstitutional endorsement of religion, it should be denied.

III. The Exemption Appellants Seek From The School District's Nondiscrimination Policy Creates An Impermissible Symbolic Union Between Church And State.

Given that the proposed exemption would grant to Appellants a form of special treatment and preferential access to Roslyn High School's facilities, the effect of the exemption would be to create a symbolic union between Appellants' bible club and the School District. Such a symbolic union, violates the Establishment Clause. Two cases are especially instructive to the case at bar.

1. Parents' Association of P.S. 16 v. Quinones

In Parents' Association of P.S. 16 v. Quinones, 803 F.2d 1235 (2d Cir. 1986), the City of New York implemented a federally funded remedial education program at Public School 16 in Brooklyn for parochial students from the Beth Rachel Satmar Hasidic School, a private girls' elementary school affiliated with the Satmar Hasidic Sect. In an effort to induce Beth Rachel administrators to send their students for remedial education, the City of New York adopted a special plan in which a group of nine classrooms in one wing of the school was segregated for the use of Beth Rachel students. The segregation was designed to accommodate the religiously based practice of the Hasidim to maintain a strict separation between themselves and the rest of society and to require the separation of males and

females for virtually every activity, including school.

The District Court denied the motion for a preliminary injunction brought by the Parents' Association of Public School 16, finding that the plans did not violate the Establishment Clause in that it was a permissible "accommodation" of religion rather than a "symbolic union" between church and state.

On appeal, the Second Circuit reversed the District Court and granted an injunction, holding that the plan violated the second prong of the now familiar three-prong test enunciated in Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). The Second Circuit explained:

[T]he City's Plan seems plainly to create a symbolic link between the state and the Hasidic sect that is likely to have a magnified negative impact on the minds of the youngsters attending P.S. 16. Thus, each day the public school students would observe some 390 Beth Rachel students arrive at P.S. 16. The Beth Rachel students would be taught in classrooms only they may use; no public school students would be taught either in those classes or in those rooms. Yiddish would be spoken in the Beth Rachel classes. Only Hasidic girls would be taught; those girls would be allowed no contact with boys. Only female teachers would teach Hasidic girls. And where once there was an open corridor allowing freedom to traverse the entire hall, there are now a wall and doors partitioning the Beth Rachel girls from the public school students . . . .

The lengths to which the City has gone to cater to these religious views, which are inherently divisive, are plainly likely to be perceived, by the Hasidim and others, as governmental support for the separatist tenets of the Hasidic faith."

Id. at 1241.

In the instant case, Appellants' requested exemption would "plainly create a symbolic link between the [School District] and the [proposed student bible club] that is likely to have a magnified negative impact on the minds of the youngsters attending [Roslyn High School]." Like the wall segregating the Hasidic girls from the rest of the students attending Public School 16 in Quinones, Appellants' requested exemption from the School District's generally applicable nondiscrimination policy is "inherently divisive" and, if granted, would "likely be perceived as governmental support for the separatist [rules of the student bible club]." Like the wall of segregation in Quinones, the wall of discrimination proposed in this case should be rejected.

2. Bollenbach v. Board of Education of Monroe Woodbury Central School District.

In Bollenbach v. Board of Education of Monroe Woodbury Central School District, 659 F.Supp. 1450 (S.D.N.Y. 1987); the School District, in an attempt to accommodate the religious needs of the Hasidim, which require the separation of the sexes, assigned male bus drivers with less seniority to select routes previously held by female bus drivers with greater seniority. The assignments at issue involved busing male students to the

United Talmudic Academy, ("UTA") a private religious school located within the Village of Kiryas Joel. Public transportation to and from parochial schools was required and generally provided pursuant to New York Education Law § 3635(1). The female bus drivers brought suit, alleging sex based discrimination and a violation of the Establishment Clause.

The Court framed the Establishment Clause issue in terms analogous to the case at bar: "Whether a school district can modify its bus transportation by assigning only male drivers without violating the Establishment Clause." Id. at 1460. In holding that the School District could not do so, the Court focused on the symbolic union between church and state that the religiously based modification of bus assignments would create:

In the instant case, the deployment of only male drivers on bus routes encompassing the Village would have the primary effect of advancing Hasidic religious beliefs. While the provision of bus transportation is neutral on its face, the District's use of male drivers would effectively transform this neutral service into a vehicle for promoting the Hasidic tenet that boys must not be in contact with women.

Similar to the programs in Grand Rapids School Dist. v. Ball, supra and Parent's Ass'n of P.S. 16 v. Quinones, supra, a plan requiring the District to provide male drivers for the UTA runs would be an impermissible symbolic union between church and state. Initially, it is likely that the Hasidic children would perceive the government's provision of male bus drivers as a symbolic endorsement by the Court and the District of their religious beliefs. In essence, riding the school bus would no longer be a

neutral activity but rather, would be akin to a government sponsored religious experience. As noted above, due to the impressionable nature of the young boys, this message of government endorsement is particularly dangerous. See Grand Rapids School Dist. v. Ball, *supra*, 473 U.S. at 390, 105 S.Ct. at 3226.

The bus drivers as well would view the specialized treatment for the UTA as an endorsement of the Hasidims' religious principles at the expense of the drivers' contract rights under the collective bargaining agreement. Moreover, while the Hasidic parents and children would perceive the District's action as promoting their religious tenets, other school children, their parents, and the community as a whole would view the provision of male drivers as a government alignment with the Hasidic religion as opposed to an alignment with their own religious views. Thus, giving the Hasidim the drivers of their choice would undoubtedly be seen as a symbolic union of church and state, conveying a message of state support for the Hasidic religion to students, drivers, and the general public.

Id. at 1464-65.

The case at bar is directly analogous to Bollenbach. In Bollenbach, a constitutionally permissible arrangement between government and religion -- public busing to parochial schools -- was rendered unconstitutional when a religious sect sought to tailor the generally available governmental benefit of public busing to its own particular religious preferences. Here, if Appellants were to prevail, a constitutionally permissible arrangement between government and religion -- equal access -- would be rendered unconstitutional by Appellants' tailoring of the generally available governmental benefit

of equal access to its own particular religious preference.

If Appellants were to prevail, all of the above-described consequences attending the symbolic union of the district and the Hasidim in Bollenbach would attend the symbolic union of the Appellants' religious beliefs and the Roslyn School District. Appellants would likely perceive the granting of their requested exemption as government's endorsement of their beliefs. "In essence, [the bible club's access to the Roslyn High School's facilities] would no longer be a neutral activity but rather would be akin to a government sponsored religious experience." "Moreover, while [Appellants] would perceive the [School] District's action as promoting their religious tenets, other school children, their parents, and the community as a whole would view the [exemption from the School District's nondiscrimination policy] as a government alignment with the [Appellants'] religion as opposed to an alignment with their own religious views."

Because such a result would violate the Establishment Clause, it should not be permitted. Accordingly, the decision of the district court should be affirmed.

**IV. Avoiding A Violation Of The Establishment Clause Constitutes A Compelling State Interest Sufficient To Justify A Burden On Appellants' First Amendment Free Exercise Rights.**

Appellants challenge the School District's nondiscrimination policy as an unconstitutional infringement on their First Amendment right to freely exercise their religion. First, Appellants have presented no evidence that their free exercise rights are actually burdened. Since the School District issued the March 10, 1994 Resolution approving the creation of a student bible club (Jt. App. p. A-123), the Appellants have been free to exercise their religious beliefs through the student bible club, including their right to select the officers of their choice. Appellants have presented nothing but speculation and hypothesis regarding how the School District's nondiscrimination policy "might" and "could" burden their free exercise rights. While Appellants raise the specter of an elective coup resulting in the takeover of the student bible club by students who do not adhere to their particular religious belief, they have failed to produce any real evidence that the nondiscrimination policy presently burdens their free exercise rights. Moreover, even in the unlikely event that Appellants' student bible club falls victim to the perils of the student democratic process, Appellants always remain free to start a new student bible club to ensure that their particular

religious beliefs are adequately expressed.

Second, even assuming that the Appellants could demonstrate that the nondiscrimination policy actually burdens their free exercise rights, the School District's interest in avoiding an Establishment Clause violation rises to the level of a "compelling state interest" sufficient to justify such a burden.

The Free Exercise Clause of the First Amendment . . . does not prohibit a government from forcing a choice between receipt of a public benefit and pursuit of a religious belief if it can show a compelling reason for doing so. See Bowen v. Roy, 106 S.Ct. 2147 (1986). Avoiding a violation of the Establishment Clause that would otherwise result from an apparent endorsement of the tenets of a particular faith is ample reason for compelling that choice.

Parents' Association of P.S. 16 v. Quinones, 803 F.2d at 1241-42.

In the case at bar, the School District's interest in enforcing its longstanding, generally applicable nondiscrimination policy in order to prevent a violation of the Establishment Clause is sufficiently compelling to justify a burden -- were one to actually exist -- on Appellants' free exercise rights.

Similarly, the School District's compelling interest in protecting against an establishment of religion justifies any alleged or anticipated burdens that may be placed on Appellants' rights of speech, association and equal protection. None of these rights are absolute and

all of them must be balanced against the School District's compelling interest in protecting all of its students against the discriminatory effects of an Establishment Clause violation.

To be sure, in a pluralistic society there may be some would-be theocrats, who wish that their religion were an established creed, and some of them perhaps may even be audacious enough to claim that the lack of established religion discriminates against their preferences. But this claim gets no relief, for it contradicts the fundamental premise of the Establishment Clause itself. The antidiscrimination principle inherent in the Establishment Clause necessarily means that would-be discriminators on the basis of religion cannot prevail. (emphasis added)

Allegheny, 109 S.Ct at 3111.

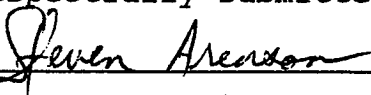
Here, Appellants' attempt to supersede the requirements of fairness and equality set forth in the School District's nondiscrimination policy with their own religious imperatives should be rejected. "A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some." Lee v. Weisman, 112 S.Ct. at 2665 (BLACKMUN, J., concurring).

CONCLUSION

It is therefore respectfully submitted that the decision of the district court denying Plaintiffs' motion for a preliminary injunction should be affirmed.

Dated: June 28, 1995.

Respectfully submitted,

  
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