NO. _____

In the Supreme Court of the United States

THE BRONX HOUSEHOLD OF FAITH, et al.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

JORDAN W. LORENCE
Counsel of Record
GARY S. MCCALEB
JOSEPH P. INFRANCO
JEFFREY A. SHAFER
ALLIANCE DEFENSE FUND
801 G Street NW, Suite 509
Washington, DC 20001
(202) 393-8690
jlorence@telladf.org

DAVID A. CORTMAN
ALLIANCE DEFENSE FUND
1000 Hurricane Shoals Rd.
Suite D-600
Lawrenceville, GA 30043
(770) 339-0774

DAVID J. HACKER
HEATHER GEBELIN HACKER
ALLIANCE DEFENSE FUND
101 Parkshore Drive
Suite 100
Folsom, CA 95630
(916) 932-2850

Counsel for Petitioners

QUESTIONS PRESENTED

The New York City Department of Education allows community groups to meet in public schools during non-school hours for any expression "pertaining to the welfare of the community," yet excludes "religious worship services." A sharply divided panel of the Second Circuit affirmed the application of the exclusion to the Bronx Household of Faith, notwithstanding this Court's decision in *Good News Club v. Milford Central School,* which found it "quite clear" that application of a previous version of the same policy to prohibit religious worship amounted to "viewpoint discrimination."

The following questions warrant review:

1. Whether the government engages in viewpoint discrimination when it excludes expression that is in all other respects permitted in the forum because it is labeled a "religious worship service."

2. Whether the government creates a designated public forum by opening its facilities broadly to any expression "pertaining to the welfare of the community," so that it must justify the content-based exclusion of religious expression by a compelling state interest.

3. Whether government *concern* about violating the Establishment Clause, and not an *actual* violation of that Clause, justifies the exclusion of private religious expression from a generally open forum.

4. Whether the government policy expressly excluding "religious worship services" from this forum violates the Free Exercise Clause.

PARTIES TO THE PROCEEDING

Petitioners are the Bronx Household of Faith and its two pastors, Robert Hall and Jack Roberts.

Respondents are the Board of Education of the City of New York and Community School District No. 10. During the litigation below, the Board of Education of the City of New York was renamed the New York City Department of Education.

CORPORATE DISCLOSURE STATEMENT

Petitioner Bronx Household of Faith is a private, nonprofit New York corporation, exempt from taxation under 26 U.S.C. §501(c)(3). It does not have parent companies and is not publicly held.

Petitioners Robert Hall and Jack Roberts are individual persons.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES viii

INTRODUCTION 1

DECISIONS BELOW 3

STATEMENT OF JURISDICTION 4

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES 4

STATEMENT OF THE CASE 4

I. Factual Background 5

A. The Board's Open Forum 5

B. Groups that Meet in the Board's School Facilities 7

C. The Church's Requested Use of the Board's Facilities 10

II. Procedural Background 11

A. *Bronx I* 12

B. *Bronx II* 13

C. *Bronx III* 13

D. *Bronx IV* 14

REASONS FOR GRANTING THE WRIT 16

I. The Second Circuit's Decision Conflicts with this Court's Decision in *Good News Club* and Magnifies a Conflict Among the Circuits Concerning the Exclusion of Religious Worship from a Generally Open Forum. 19

A. The Second Circuit's Decision Conflicts with this Court's Decision in *Good News Club* that the Exclusion of Religious Worship from a Generally Open Speech Forum is Viewpoint Discrimination. 20

B. The Circuits Are Divided on Whether the Government May Exclude Religious Worship from a Generally Open Forum. 25

II. The Second Circuit's Decision Conflicts with this Court's Decision in *Widmar* and Decisions from Other Circuits that the Exclusion of Religious Worship from a Generally Open Government Forum is Content-Based Discrimination. 29

III. The Second Circuit's Decision Conflicts with the Decisions of this Court By Authorizing Censorship of Private Religious Speakers Based Upon Mere Fear of an Unproven Establishment Clause Violation. 34

IV. The Second Circuit's Decision Upholds a Policy that Discriminates on the Basis of Religion in Violation of the Free Exercise Clause. 39

CONCLUSION 40

APPENDIX TABLE OF CONTENTS

Second Circuit Opinion (June 2, 2011) (reversing and vacating second permanent injunction) 1a

District Court Order (November 1, 2007) (granting second permanent injunction in favor of Bronx) 76a

Second Circuit Opinion (July 2, 2007) (reversing and vacating the first permanent injunction) 78a

District Court Opinion (November 16, 2005) (granting first permanent injunction in favor of Bronx) 176a

Second Circuit Opinion (June 6, 2003) (affirming preliminary injunction) 216a

District Court Opinion (June 26, 2002) (granting preliminary injunction in favor of Bronx) 276a

Second Circuit Order (July 27, 2011)
(denying petition to rehear third appeal).....337a

Second Circuit Order (September 8, 2003)
(denying petition to rehear preliminary injunction
ruling).....339a

District Court Judgment (November 5, 2007)
(entering second permanent injunction).....341a

Second Circuit Mandate (September 13, 2007)
(reversing and vacating first permanent
injunction).....343a

District Court Judgment (February 1, 2006)
(entering first permanent injunction).....345a

District Court Judgment (July 3, 2002)
(entering preliminary injunction).....347a

Standard Operating Procedures
Table of Contents.....349a

Standard Operating Procedures §§ 1.1-1.9
(dated May, 1989).....350a

Standard Operating Procedures §§ 2.1-2.11.2
(dated April, 1990).....352a

Standard Operating Procedures §§ 2.11.3-3.5.3
(dated August, 1989).....358a

Standard Operating Procedures §§ 4.1-4.7
(dated May, 1989).....364a

Standard Operating Procedures §§ 5.1-5.9
(dated October 2001, revised) 367a

Standard Operating Procedures §§ 5.10-5.14.3
(revised July 2007) 371a

Standard Operating Procedures §§ 5.14.4-5.27
(dated October 2001, revised) 373a

Standard Operating Procedures §§6.1-7.4
(dated May, 1989) 377a

CR D-180 (replaces the Standard Operating Procedures (SOP) chapter on "Extended Use of School Buildings", effective May 24, 2010) 382a

New York Education Law § 414, Use of Schoolhouse and Grounds (effective: June 30, 2009) 420a

U.S. Const. amend. I 426a

TABLE OF AUTHORITIES

Cases:

Badger Catholic v. Walsh,
620 F.3d 775 (7th Cir. 2010), ...27, 35

Board of Education of Westside Community Schools v. Mergens,
496 U.S. 226 (1990) 2, 35, 38

Bronx Household of Faith v. Board of Education of City of New York,
523 U.S. 1074 (1998) 13

Bronx Household of Faith v. Community School District Number 10,
1996 WL 700915 (S.D.N.Y. Dec. 5, 1996) 12

Bronx Household of Faith v. Community School District Number 10,
127 F.3d 207 (2d Cir. 1997).....12, 13, 20, 21

Capitol Square Review & Advisory Board v. Pinette,
515 U.S. 753 (1995) 2, 35

Chess v. Widmar,
635 F.2d 1310 (8th Cir. 1980) 29

Child Evangelism Fellowship of N.J. Inc. v. Stafford Township School District,
386 F.3d 514 (3d Cir. 2004).....35

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 39

Church on the Rock v. City of Albuquerque,
84 F.3d 1273 (10th Cir. 1996) 28, 35

Concerned Women for America v. Lafayette County,
83 F.2d 32 (5th Cir. 1989) 34

County of Allegheny v. ACLU,
492 U.S. 572 (1989) 37

Faith Center Church Evangelistic Ministries v. Glover,
480 F.3d 891 (9th Cir. 2007) 25, 26

Fairfax Covenant Church v. Fairfax County School Board,
17 F.3d 703 (4th Cir. 1994) .....*passim*

Good News Club v. Milford Central School,
202 F.3d 502 (2d Cir. 2000).....20, 21

Good News Club v. Milford Central School,
533 U.S. 98 (2001) .....*passim*

Good News/Good Sports Club v. School District of City of Ladue,
28 F.3d 1501 (8th Cir. 1994) 35

Grace Bible Fellowship v. Maine School Administrative District No. 5,
941 F.2d 45 (1st Cir. 1991).....33

Gregoire v. Centennial School District,
907 F.2d 1366 (3d Cir. 1990).....32, 33

Hays County Guardian v. Supple,
969 F.2d 111 (5th Cir. 1992) 32

Lamb's Chapel v. Center Moriches Union Free School District,
959 F.2d 381 (2d Cir. 1992).....20

Lamb's Chapel v. Center Moriches Union Free School District,
508 U.S. 384 (1993) .....*passim*

McCreary County v. ACLU,
545 U.S. 844 (2005) 37

Rosenberger v. Rector & Visitors of the University of Virginia,
515 U.S. 819 (1995) 2, 19, 35, 36, 38

Widmar v. Vincent,
454 U.S. 263 (1981) .....*passim*

Zelman v. Simmons-Harris,
536 U.S. 639 (2002).....35

***Statutes*:**

28 U.S.C. §1254 4

New York Education Law §414 ..... 4, 5, 12, 20, 40

INTRODUCTION

The Second Circuit's decision sets forth an unprecedented dichotomy of First Amendment law – the only difference between an allowable expressive use and a forbidden expressive use in this case is a theological one: does the expression constitute a "worship service"? This is not a constitutional criterion for excluding speech. Private speakers may gather for a meeting that contains singing, prayer, preaching and ceremony, but if the private group labels its meeting a "religious worship service," it is suddenly forbidden. The ruling below is but the latest in a line of Second Circuit decisions (the preceding three having been reversed by this Court) refusing to give religious expression the same protection as other speech under the First Amendment.

For the last nine years, the District Court's injunction in this case, which was based on this Court's decision in *Good News Club*, has allowed religious groups to meet in New York City public schools on the same terms and conditions as other community groups. After the Board of Education changed the wording of its policy from excluding "religious services" to excluding "religious worship services," however, the panel majority allowed the City of New York to exclude the Bronx Household of Faith from what is an expansively open public forum: available for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community."

In view of the accumulated force of this Court's decisions in *Widmar*, *Mergens*, *Lamb's Chapel*,

Rosenberger, *Pinette*, *Good News Club*,[1] and others, it should be clear that private religious speakers should not be excluded from a neutrally available speech forum. The panel majority evaded the foregoing line of this Court's cases, and puzzlingly found that the Board's "worship service" prohibition merely forbids an "event," not the speech that occurs during the event.

The panel further offered the startling innovation that the government may censor religious speech from a generally available forum when it claims a substantial *worry* about Establishment Clause compliance, even if the Establishment Clause does not in fact require the exclusion. The panel majority wrote that "the Board has a strong basis to believe that allowing the conduct of religious worship services in schools would give rise to a sufficient appearance of endorsement to constitute a violation of the Establishment Clause." App.21a. But in *Good News Club*, this Court held "that the school has no valid Establishment Clause interest" in preventing a private Christian club from engaging in worship. 533 U.S. at 113.

As a result, the Church now faces expulsion from the forum it has used for nine years on equal terms with other community groups.

---

[1] *Widmar v. Vincent*, 454 U.S. 263 (1981); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Capitol Square Review & Adv. Bd. v. Pinette*, 515 U.S. 753 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

DECISIONS BELOW

The first opinion of the United States District Court for the Southern District of New York, granting Petitioners' motion for preliminary injunction, is reported at 226 F. Supp. 2d 401 and reprinted in App.276a-336a. The first opinion of the United States Court of Appeals for the Second Circuit, affirming the preliminary injunction, is reported at 331 F.3d 342 and reprinted in App.216a-275a.

The second opinion of the District Court, granting Petitioners' motion for summary judgment, is reported in 400 F. Supp. 2d 581 and reprinted at App.176a-215a. The second opinion of the Court of Appeals, vacating the judgment of the District Court, is reported at 492 F.3d 89 and reprinted in App.78a-175a.

The third opinion of the District Court, granting Petitioners' motion for summary judgment, is unreported but is reprinted in App.76a-77a. The third opinion of the Court of Appeals, vacating the judgment of the District Court, is reported at -- F.3d ---, 2011 WL 2150974 and reprinted in App.1a-75a.

STATEMENT OF JURISDICTION

The Court of Appeals issued an opinion on June 2, 2011, and denied a timely petition for rehearing en banc on July 27, 2011. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The text of the First Amendment to the United States Constitution is set forth in App.426a. New York Education Law §414 (McKinney 2011), the statutory basis invoked for the government policy under review, is reprinted in App.420a-425a.

Respondents' Standard Operating Procedure §5.11 is the policy under review and is reprinted in App.371a.

STATEMENT OF THE CASE

For fifteen years, through two lawsuits, Bronx Household of Faith ("Church") has fought for equal access to a forum that the New York City Board of Education (now Department of Education) ("Board") has opened generally to any expression "pertaining to the welfare of the community." For fifteen years, the Board has attempted to exclude the Church. While the procedural history is lengthy, the material facts are simple and straightforward.

I. Factual Background

A. The Board's Open Forum

The Board owns and controls 1,197 individual school facilities. Ct. of Appeals App. ("A") 16-17 ¶3. Pursuant to N.Y. Educ. Law §414(1)(c), the Board created a policy entitled, "Extended Use of School Buildings," in the Board's Standard Operating Procedures Manual ("SOP"). Ct. of Appeals Supplemental App. ("SA") 91 ¶6. SOP §5.6.2 authorizes the use of school facilities for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community." App.368a. The "Board opened its schools to the public for purposes of 'maximiz[ing] educational, cultural, artistic and recreational opportunities for children and parents.'" App.52a.

The policy permits a broad range of community uses of its facilities after school hours. A354-371; *see also* App.294a-295a, 312a-313a, 330a-331a. In one school year alone, the Board approved nearly 10,000 community uses for its facilities. A925-1849; A1864 ¶c. The policy expressly permits the following users: tenant groups, taxpayer associations, drama clubs, merchant associations, senior citizen groups, tax-exempt organizations, youth groups, Scouts, Little League, teen clubs, labor unions, professional societies, and private social service agencies, such as the local "Y"s and settlement houses. SA113; *see also* App.379a-381a.

The Board has placed few limitations on expression in the forum. Those limitations are (1) a prohibition on "commercial purposes," except for

some flea markets,[2] App.371a §5.10; and (2) some limitations on forums for political candidates, App.368a §5.6.4.

The Board allows private groups meeting in the schools to engage in, *inter alia*, secular speech parallel to the components of worship services, including:

- teaching of morals and character development;
- eating meals;
- singing songs; and
- conducting ceremonies and rituals.

SA10 ¶¶5-6, SA19 ¶6, SA21 ¶7, SA44; A1866-68 ¶¶14, 16; App.226a.

But the Board has consistently sought to exclude religious worship from its broad forum. When the litigation began in 2001, Board policy SOP §5.11 stated:

> No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a

[2] Despite this claimed limitation, the Board routinely approves many commercial uses, such as those by Blockbuster, *Law and Order*, Spelling TV, Show Bliss Entertainment, J & R Pizza, Nickelodeon, Morgan Stanley, Amalgamated Life, Bank of New York, and Sex & the City Inc. A1505-1536.

> religious viewpoint or for distributing such material is permissible.

SA109 §5.11; App.6a n.2, 295a.

In July 2007, the Board revised SOP §5.11. A3594-95 ¶¶3-9. The policy now states:

> No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship. Permits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this chapter on the same basis that they are granted to other clubs for students that are sponsored by outside organizations.

App.9a n.4, 371a.

B. Groups that Meet in the Board's School Facilities

Thousands of different groups and individuals have met in the Board's school facilities for meetings, lectures, concerts, and other expressive activities. In 2000-2001, for instance, the following representatively diverse activities occurred:

- A Bangladeshi cultural function;
- Adult and continuing education;
- College Gardens general shareholder meeting;
- Donegal Ladies and Men Football Club meeting;

- Movie filming by Empire Films;
- Falkons tutorials and mentoring classes;
- Giodano Memorial Fund scholarship committee meeting;
- Hebrew Institute of Riverdale youth basketball program;
- University Heights holiday show and Black History Month observation.

App.226a; A914-15; SA74-75, 83-87. During the 2003-2004 school year, the Board issued 9,804 community organization permits. A925-1849; A1864 ¶c. Many of the permits issued were for multiple uses (i.e., more frequent than one day). A1865 ¶¶11, 13.

In particular, many of the permitted uses entailed, in secular terms, identical expressive uses to those subsumed in the stereotypical "worship service," namely, rituals, recitations, moral instruction, songs, collections, meals, etc. App.16a, 58a-59a.

At least one Girl Scout troop meets regularly in Public School ("P.S.") 15, the same building in which the Church meets. SA32; A1868 ¶17. The Girl Scouts teach character qualities to the girls, such as self esteem, honesty, and how to get along with one another. SA31-32; A1868 ¶18. Girl Scout meetings include singing songs, eating refreshments, paying dues, and rituals of graduation and rededication. SA51-53, 59; A1870-71 ¶¶23-25. Their meetings also include ceremonies of reciting the Pledge of Allegiance, the Girl Scout Promise (which refers to

serving God), and the Girl Scout Law. SA37-38, 40; A1869-70 ¶¶20-22, A1869-70 ¶22.

Boy Scout troops and Cub Scout packs also meet regularly in the Board's schools. SA14 ¶4; A1871 ¶27. The mission of the Boy Scouts is "to prepare young people to make ethical choices over their lifetimes by instilling in them the values of the Scout Oath and the Scout Law." SA13 ¶3; A1872 ¶28. Their meetings include a flag ceremony, recitation of the Pledge of Allegiance, and the Scout Oath or Law (which pledges one's duty to God). SA14 ¶¶3, 6; A1872-73 ¶¶29-30. Their meetings also include a motivational teaching message based on Scouting's values, songs, and induction and promotion ceremonies. SA15 ¶¶8-9; A1873-74 ¶¶31, 34.

The Legionnaire Grey Cadets have met in Middle School 206B in the Bronx. SA9 ¶1. The weekly program is set in a military style environment with uniforms, ranks, formation, and marching. SA9-10 ¶¶3-4, 6. The program teaches character, honesty, integrity, teamwork, American history, and reading. *Id.* The students sing cadences while they march. *Id.* The leader collects food money from the students, who eat a snack on Fridays and a meal on Saturdays. *Id.* ¶5; A1874-75 ¶35. The Legionnaire program includes ceremonies including singing of the National Anthem and honoring the flag and members' personal achievements. SA10 ¶¶4, 6; A1875 ¶¶36-37.

The Mosholu Community Center conducts an after school program every day at P.S. 51 in the Bronx. SA20 ¶1. The program uses counselors to help students with their homework and instruct

them how to interact with each other; includes a ceremony to give awards to children who demonstrate achievement during the week; and uses specific programs to teach the character qualities of generosity, gratefulness, and tolerance of other cultures and traditions. SA20-21 ¶¶4, 6-8; A1876 ¶38.

C. The Church's Requested Use of the Board's Facilities

The Bronx Household of Faith is an evangelical Christian church that was formed in 1971 and has been meeting in the Bronx for 40 years. SA2 ¶2. Pursuant to the District Court's preliminary and permanent injunctions, the Church has paid a fee to use the Board's facilities since August 2002 similar to other community organizations. App.379a-381a; A24-25 ¶33, 454, 463. The parties agree that the Church's intended use of P.S. 15 for its Sunday meetings falls within the purposes of the forum. App.52a.

The Church meets weekly on Sunday mornings and its meetings are open to the public. A417; App.68a, 225a. Approximately 85-100 people attend on any given Sunday morning. A409. The Sunday meetings are an important part of the Bronx Household of Faith spiritual community. They provide an indispensable integration point and meeting place for the church members and others from the neighborhood to provide for each others' needs and to encourage one another. SA7-8 ¶¶6-9. Church members have provided food, clothing, toys, and money to those in need. *Id.*, A424. They have

provided emotional and social support to help people escape welfare dependence, to lead productive lives, to escape addiction, and to leave a life of crime. *Id.*

The Church's Sunday meetings consist of singing songs and hymns of praise, teaching and preaching from the Bible, sharing testimonies, fellowship, and celebrating the Lord's Supper (communion). SA7-8 ¶¶3-4. Those attending are taught many lessons from the Bible, such as how to live, to love their neighbors as themselves, to defend the weak, to help the poor, and to share their needs and problems. SA7. The pastors summarize these activities at the Sunday morning meeting by the label "worship service." A420; App.223a.

The Church desires to meet in a public school to offer its members an enclosed meeting space large enough to accommodate all who attend its services. A427-28. While the Church hopes to meet in its own facility when the construction is completed, as of now the Board's facilities are its only viable option in the local community. Construction of the new church building is not yet completed due to lack of funds and bureaucratic delays. A427, 429, 432, 457.

II. Procedural Background

In June 2001, this Court decided *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), which held that the exclusion of religious expression (including worship, prayer, and religious advocacy) from a speech forum violated the First Amendment's prohibition against viewpoint discrimination. The decision identified the Second Circuit's earlier decision on the Board's forum policy in previous

litigation between these same parties as being on the wrong side of the implicated circuit conflict and thus implicitly overruled it. *Id*. at 105-06 (citing *Bronx Houshold of Faith v. Cmty. Sch. Dist. No. 10* ("*Bronx I*"), 127 F.3d 207 (2d Cir. 1997). The *Good News Club* decision prompted the Church to apply again for access to Respondents' speech forum. Respondents denied the request and the Church filed a new lawsuit requesting access to the schools.

A. *Bronx I*

The Church's litigation with the Board over equal access began more than fifteen years ago. In 1994, the Church sought permission from Community School District No. 10 ("School District") to use one of its school facilities for its Sunday worship services. The School District, pursuant to N.Y. Educ. Law §414, opened its facilities to "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community." The School District denied the Church's request under the version of its facilities use policy that prohibited "religious services or religious instruction." The Church sued, but the District Court held that the policy's provision were "reasonable regulations of expression related to the legitimate government concern of preserving and prioritizing access to the middle school primarily for educational purposes and, secondarily, for nonexclusive public and community activities." *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 1996 WL 700915, *6 (S.D.N.Y. Dec. 5, 1996). The Court of Appeals affirmed and held that the policy was reasonable and viewpoint neutral. *Bronx I*, 127

F.3d 207, *overruled by Good News Club*, 533 U.S. 98. This Court denied certiorari. *Bronx I*, 523 U.S. 1074 (1998).

B. *Bronx II*

Three years later, when the *Good News Club* decision expressly identified the Second Circuit's *Bronx I* decision as being on the wrong side of the implicated circuit conflict and overruled it, *Good News Club*, 533 U.S. at 105-06, the Church reapplied for permission to use Respondents' facilities. App.293a-294a. The Board again rejected the request based on its policy. Petitioners filed a new lawsuit in the District Court on September 24, 2001. A3. They alleged that Respondents' policy of excluding "religious services or religious instruction" from their broadly open forum violated *Good News Club*. App.298a. Petitioners moved for a preliminary injunction, which the District Court granted on June 26, 2002. App.336a.

The Court of Appeals affirmed on June 6, 2003, acknowledging that the activities described in *Good News Club* were materially indistinguishable from the Church's activities in the present litigation. App.239a.

C. *Bronx III*

After the preliminary injunction was issued, the Board revised SOP §5.11 to forbid "religious worship services" instead of "religious services." The parties then filed cross-motions for summary judgment, addressing the terms of the revised SOP §5.11.

On November 16, 2005, the District Court ruled in favor of Petitioners, issued a permanent injunction against enforcement of the revised SOP §5.11, and held that it violated the First Amendment because it discriminated against speech based on viewpoint, excessively entangled the government with religion, and is otherwise not justified by the Establishment Clause. App.192a-210a.

Respondents appealed. The Court of Appeals issued a *per curiam* opinion vacating the permanent injunction and remanding for further proceedings, but without a controlling rationale for so doing. App.80a-83a. Judge Leval believed the merits of the revised policy were not ripe for adjudication, as it was unclear that the Board had adopted the new policy. App.155a. Judge Calabresi thought the case ripe and voted to reverse because he thought the school's exclusionary policy was constitutional. App.117a. Judge Walker dissented, opining that the case was ripe and that §5.11 was unconstitutionally viewpoint-discriminatory. App.156a-157a.

D. *Bronx IV*

After remand, the Board officially adopted the new policy, and the Church reapplied to meet in P.S. 15. App.10a-11a. The Board denied the request. *Id.* Both parties again moved for summary judgment. *Id.* The District Court issued a permanent injunction against SOP §5.11 on November 1, 2007. App.76a-77a. Respondents appealed.

In a 2-1 decision, the Second Circuit reversed the judgment of the District Court and vacated the permanent injunction. App.2a. Judges Leval and

Calabresi held that Respondents' exclusion of "religious worship services" was not viewpoint discrimination, but was a permissible content-based exclusion from a limited public forum. App.20a.

To distinguish this Court's decision in *Good News Club*, the panel majority professed to find a meaningful distinction between "religious worship" and a "religious worship service," writing:

> Prayer, religious instruction, expression of devotion to God, and the singing of hymns, whether done by a person or a group, do not constitute the conduct of worship services. Those activities are not excluded .... The branch of the rule excluding religious worship services, as we understand it, is designed by the Board to permit use of the school facilities for all of the types of activities considered by the Supreme Court in [*Good News Club*, *Lamb's Chapel* and *Rosenberger*]. The "religious worship services" clause does not purport to prohibit use of the facility by a person or group of persons for "worship." What is prohibited by this clause is solely the conduct of a particular type of event: a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion.

App.13a-14a.

Judge Walker dissented. App.49a-75a. The majority, he stated, "turns its back on the Supreme

Court's holding in *Good News Club,*" App.57a, the terms of which, along with several other cases, make clear that the Board's exclusion of worship from its forum is unconstitutional viewpoint discrimination, App.53a-57a, 61a-63a. He also denied the reasonableness of the Board's Establishment Clause concerns in view of the series of materially indistinguishable cases clearly addressing the matter in dispute, App.63a-73a, and thus, he said, the battle the majority fights "has already been lost," App.65a.

In response, the panel majority offered that "the Supreme Court has neither ruled on the question [of the constitutionality of a policy like the Board's], nor even given any reliable indication of how it would rule." App.44a. The majority lamented that the "Supreme Court's precedents provide no secure guidelines as to how [this case] should be decided. The main lesson that can be derived from them is that they do not supply an answer to the case before us." App.32a.

REASONS FOR GRANTING THE WRIT

This Court's review is needed to resolve an issue of exceptional and recurring importance, namely whether the government may exclude religious worship services from a broadly open speech forum.[3] After litigation stretching over fifteen years and four separate decisions from the Court of Appeals, the

[3] While the lower court did not find it necessary to address the constitutionality of the "house of worship" prohibition, it is Petitioners' position that it suffers from the same constitutional defects as the ban on "religious worship services."

Second Circuit has ruled that the policy's exclusion of worship services is viewpoint neutral and a reasonable content-based exclusion from a limited public forum. That ruling not only inequitably denies religious speakers access to a speech forum widely open to speech pertaining to the welfare of the community, it conflicts with the decisions of this Court and other circuits in multiple ways.

First, the Second Circuit's decision conflicts directly with this Court's decision in *Good News Club*, which held that the prior version of the same Board policy excluding "quintessentially religious" expression from a limited public forum was unconstitutional viewpoint discrimination. Despite the direct application of *Good News Club* to this case, the panel majority declared that "the Supreme Court has neither ruled on the question [of the constitutionality of a policy like the Board's], nor even given any reliable indication of how it would rule." App.44a. This Court should grant review to provide the apparently necessary clarity. Furthermore, in rejecting *Good News Club*, the Second Circuit aligns itself with the Ninth Circuit, intensifying a circuit conflict with the Fourth, Seventh, and Tenth Circuits over the exclusion of religious worship from an expressive forum.

Second, this court should grant review to answer a question expressly left open in *Good News Club*: whether the Board's policy creates a designated public forum, triggering strict scrutiny of its content-based exclusion of religious worship. *See* 533 U.S. at 106 ("we need not resolve the issue here"). The Second Circuit's ruling on this issue conflicts with this Court's decision in *Widmar*, 454 U.S. 263,

holding that the exclusion of religious worship from a generally open speech forum is an unconstitutional content-based regulation of speech.

Third, the Second Circuit ruled that the Board's mere *concern* about violating the Establishment Clause by permitting the Church to use its facilities – not an *actual* violation of the Establishment Clause – justifies the Board's exclusionary policy. That ruling conflicts with a long line of decisions from this Court holding that the government does not violate the Establishment Clause by allowing religious speakers equal access to a neutrally available speech forum. These cases also refute the panel's novel proposal that subjective worries about a nonexistent legal violation justify censoring speakers who hold (and wish to exercise) real First Amendment rights.

Finally, the Board's policy explicitly cites religion as the reason they are excluding speakers from the forum, which violates the Free Exercise Clause. The Second Circuit completely ignored this important First Amendment restraint that limits the Board's authority to exclude speakers from the forum.

In view of these departures from this Court's precedents and from the decisions of other circuits, this Court should grant review and call an end to the determined attempts to classify religious speech in a way that leaves it uniquely devoid of the First Amendment protections available to speech of other viewpoints.

I. The Second Circuit's Decision Conflicts with this Court's Decision in *Good News Club* and Magnifies a Conflict Among the Circuits Concerning the Exclusion of Religious Worship from a Generally Open Forum.

This Court held in *Good News Club,* 533 U.S. at 109-10, that the exclusion of religious worship from what was assumed to be a limited public forum was unconstitutional viewpoint discrimination – a ruling required by this Court's "dispositive" decisions in *Lamb's Chapel*, 508 U.S. 384, and *Rosenberger*, 515 U.S. 819. In reaching that conclusion, this Court not only reversed the Second Circuit's decision in *Good News Club,* but also mentioned and implicitly overruled the Second Circuit's decision against this Church in *Bronx I*, which, like the decision at bar, found that the government may exclude religious worship from a limited public forum open to a broad range of speakers. *Good News Club*, 533 U.S. at 105-06.

Despite this, the Second Circuit's most recent decision again rejects this Court's case law to hold that a bar on religious worship is a permissible content-based exclusion from a forum broadly open to private expression. That holding joins the Ninth Circuit's side of a circuit conflict with the Fourth, Seventh, and Tenth Circuits.

A. The Second Circuit's Decision Conflicts with this Court's Decision in *Good News Club* that the Exclusion of Religious Worship from a Generally Open Speech Forum is Viewpoint Discrimination.

The Second Circuit's conclusion that "religious worship services" may be excluded from a generally open speech forum "turns its back on the Supreme Court's holding in *Good News Club*," App.57a, and is the latest in a line of Second Circuit decisions upholding exclusions of religious expression from public forums – a line of decisions that this Court has uniformly reversed. *See Lamb's Chapel*, 959 F.2d 381 (2d Cir. 1992), *rev'd,* 508 U.S. 384 (1993); *Bronx I*, 127 F.3d 207, *overruled by Good News Club*, 533 U.S. 98; *Good News Club*, 202 F.3d 502 (2d Cir. 2000), *rev'd,* 533 U.S. 98.

This Court's decision in *Good News Club* is important for two reasons: First, it reaffirmed that there is no difference between "quintessentially religious" speech, including worship, and other forms of religious expression; second, it reaffirmed that the exclusion of religious expression, including worship, from the very same forum at issue in this case constitutes impermissible viewpoint discrimination.

Good News Club addressed essentially the same policy as the one at issue here, one that opened school facilities to "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community." 533 U.S. at 103. The policy was promulgated under N.Y. Educ. Law §414, the same law authorizing the

Board's generally open forum in this case. The school prohibited the use of its facilities for "religious purposes." *Id.* A Bible club for children requested permission to meet in the school district's facilities to sing songs, hear a Bible lesson, pray, and memorize scripture. The school denied the request because it determined such activities had "religious purposes." *Id.*

In *Good News Club*, the Second Circuit upheld the school's exclusion of religious expression by relying on its previous decision in *Bronx I*. *See Good News Club*, 202 F.3d at 509-10 (citing *Bronx I*, 127 F.3d at 214). The court held that the "characterization of the Club's activities as religious in nature warranted treating the Club's activities as different in kind from other activities permitted by the school." *Id.*

This Court granted certiorari based on the circuit conflict created, in part, by the Second Circuit's decision involving this Church in *Bronx I*. *See Good News Club*, 533 U.S. at 105-06 ("There is a conflict among the Courts of Appeals on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech. Compare ... [*Bronx I*], 127 F.3d 207 (2d Cir. 1997) (concluding that a ban on religious services and instruction in the limited public forum was constitutional) ... We granted certiorari to resolve this conflict.").

This Court rejected the Second Circuit's reasoning in *Bronx I* and held that the exclusion of the Bible club's activities constituted impermissible viewpoint discrimination in a speech forum. *Id.* at

110. This Court "disagree[d] that something that is 'quintessentially religious' or 'decidedly religious in nature' cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint." *Id.* at 111. In fact, there was "no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons." *Id.* The Court emphasized that the labels used to describe speech are unimportant; what matters is the "substance" of the speech activity. *Id.* at 112 n.4.

Good News Club follows *Widmar*, which long ago rejected a distinction between religious worship and religious expression, stating, "[w]e think that the distinction advanced by the dissent [between religious speech and religious worship] lacks a foundation in either the Constitution or in our cases, and that it is judicially unmanageable." 454 U.S. at 271 n.9. This Court even devoted an extensive footnote to explaining three reasons why religious worship and religious speech are both equally protected under the Free Speech Clause. *Id.* at 269 n.6. First, there is no intelligible way, for First Amendment purposes, to distinguish between "religious speech" and "religious worship":

> There is no indication when "singing hymns, reading scripture, and teaching biblical principles," cease to be "singing, teaching and reading" – all apparently forms of "speech," despite their religious subject matter – and become unprotected "worship."

Id. (internal citation omitted). Second, to distinguish between "protected" religious speech and "less protected" religious worship would require the government and the courts to entangle themselves in religious groups' affairs in violation of the Establishment Clause. *Id.* Third, there is no good reason to protect "religious speech" and not to protect "religious worship" under the Constitution. *Id.*

The Second Circuit's decision below runs afoul of *Good News Club* by admitting the factual similarities between the cases, App.18a-20a, but then mechanically focusing on the *label,* "worship service," rather than evaluating the substantive component parts of Petitioners' expression – even though this Court explained in *Good News Club*, like it had in *Widmar*, that it is "the substance of the ... activities," not a "label," that is the defining consideration, 533 U.S. at 112 n.4.

The panel majority used the Church's seven word summary jotted on the permit application – "worship services as we have done in the past" – as the justification for excluding the Church from the forum. App.48a n.1. Thus, even though other permitted users of the Board's facilities conducted ceremonies, rituals, meals, ethical teaching, and admonitions of political and religious duties – all expressive activities that are component parts of the Church's Sunday meetings – the panel held that excluding these same activities presented from and with a religious viewpoint was permissible when conducted during a "worship service." App.13a-18a. This makes the case turn on a nominal – rather than substantive – distinction rejected in *Good News Club*

and *Widmar*. The government may not rely on labels – either of its own devising or those that private groups apply to their meetings – to deny otherwise meritorious First Amendment claims.

In both this case and in *Good News Club* the forum was open for the general "welfare of the community," *compare Good News Club*, 533 U.S. at 102 *with* App.5a. (Judge Walker observes that the respective speech forums are "in every material respect identical," App.57a); in both cases the speakers intended to sing, pray, teach about religion, and socialize, *compare* 533 U.S. at 103 *with* App.223a-225a; and in both cases the school disallowed the use of the facilities for religious "worship," *compare* 533 U.S. at 103 *with* App.9a.

According to a previous Second Circuit panel in this case, the speech at issue in *Good News Club* and presented in the Church's Sunday services are indistinguishable for First Amendment purposes. App.239a. But the current panel majority concluded that *Good News Club* does not apply because the Church desires to use the forum for a "worship service," something the panel defines as "the conduct of a particular type of event: a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion." App.14a. That such expression is "quintessentially religious," *Good News Club*, 533 U.S. at 111, however, or "done according to an order prescribed by and under the auspices of an organized religion," App.14a, is irrelevant. There is "no logical difference in kind between the invocation of Christianity by [the

Church in its 'worship services'] and the invocation of teamwork, loyalty, or patriotism by other associations [like the Boy Scouts in its 'Scout meetings'] to provide a foundation for their lessons," *Good News Club*, 533 U.S. at 111.

The Second Circuit draws an unintelligible and unconstitutional distinction between religious worship services and religious expression to justify excluding the former from a forum open to a broad range of uses.

B. The Circuits Are Divided on Whether the Government May Exclude Religious Worship from a Generally Open Forum.

The Second Circuit's decision aggravates a circuit conflict on the issue of whether the exclusion of religious worship services from a limited public forum constitutes impermissible content and viewpoint discrimination. The Second and Ninth Circuits have upheld such exclusions, while the Fourth, Seventh, and Tenth Circuits have properly struck down such exclusions as either viewpoint discrimination or an unconstitutional content-based exclusion.

The Second Circuit's decision below aligns with the Ninth Circuit's decision in *Faith Center Church Evangelistic Ministries v. Glover*, which held that a public library's policy of opening its facilities to "educational, cultural and community related meetings, programs and activities," but excluding "religious services," was reasonable and viewpoint neutral. 480 F.3d 891, 902-03, 918 (9th Cir. 2007).

As a result, a church was prohibited from using the library's facilities for a "praise and worship" meeting. *Id.* at 903-04. The Ninth Circuit determined the policy was a permissible content-based regulation of speech because "pure religious worship" is not a secular activity that conveys a religious viewpoint on otherwise permissible subject matter. In that court's view, religious worship is not a viewpoint, but a "category of discussion." *Id.* at 915.

In addition, both the Second and Ninth Circuits have found after *Good News Club* that while the component parts of a worship activity must be permitted in the forum, the government can exclude the collective conglomerate of that expression labeled as "worship" (Ninth Circuit) or "worship service" (Second Circuit). *Id.* at 914; App.16a. In both cases, the courts relied on a theological label for the religious expression to justify its exclusion. Such a method leads to anomalous results, as case outcomes then turn on the naming convention employed to designate the speech content, rather than on the substance of the expression itself. Worse, it can turn on how canny one applicant is, compared to another, in labeling *exactly* the same expressive acts and content differently. Also, theological distinctions can lead groups to use different labels for their activities.

In direct conflict with the Second and Ninth Circuits, the Fourth, Seventh, and Tenth Circuits have held that excluding religious worship from either a designated or limited public forum violates the First Amendment.

In *Badger Catholic v. Walsh*, the Seventh Circuit recently held that a public university's exclusion of student-led worship, proselytizing, or religious instruction from a speech forum violated the First Amendment. 620 F.3d 775, 776-77, 781 (7th Cir. 2010), *cert. denied* 131 S.Ct. 1604 (2011). In stark contrast to the Second Circuit's reliance on the label "religious worship service," the Seventh Circuit looked beyond the labels "worship, proselytizing, and religious instruction" used by the students and the university. It instead focused on the substance of the students activities, which were no different than their secular counterparts. *Id*. at 777-79. Like Judge Walker's dissent in this case, App.56a, the Seventh Circuit rejected a distinction between religious worship services and other forms of religious speech:

> Quakers view communal silence as religious devotion, and a discussion leading to consensus as a religious exercise. Adherents to Islam and Buddhism deny that there is any divide between religion and daily life; they see elements of worship in everything a person does.... [A] constitutional rule must be general enough to handle all sorts of religion ....

Id. at 781.

In *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703, 704-05 (4th Cir. 1994), the Fourth Circuit declared unconstitutional a school district's policy that required churches conducting worship services to pay more than nonreligious groups renting school buildings for their expression. The school opened its facilities to a "wide array of

private, community, religious, and cultural organizations, both commercial and nonprofit." *Id.* The Fourth Circuit held that the policy was an unconstitutional content-based restriction on speech unjustified by a compelling state interest. *Id.* at 707.

In *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996), the Tenth Circuit ruled that the City of Albuquerque violated the First Amendment by enforcing a policy that excluded "religious worship" and "sectarian instruction" from a designated public forum. The city denied a local church access to a senior center to show a film that encouraged people to convert to the Christian faith. *Id.* at 1277, 1279. The Tenth Circuit ruled that the exclusion of religious advocacy was viewpoint discriminatory. *Id.* at 1279.

Despite this Court's holdings in *Widmar* and *Good News Club* clearly indicating that religious worship services are no different in constitutionally material respects than other forms of expression, the lower courts are divided on whether the exclusion of worship violates the First Amendment. The Court should grant review to unify the circuits and clarify that worship may not be excluded from either a designated or limited public forum otherwise open to speech of that character.

II. The Second Circuit's Decision Conflicts with this Court's Decision in *Widmar* and Decisions from Other Circuits that the Exclusion of Religious Worship from a Generally Open Government Forum is Content-Based Discrimination.

If the Court does not resolve this case on the basis of viewpoint discrimination, the case presents an ideal vehicle for addressing the issue expressly left open in *Good News Club*: whether opening a forum to all speech pertaining to the welfare of the community creates a designated public forum, triggering strict scrutiny of its exclusion of religious worship services, even if that exclusion is deemed content-based rather than viewpoint-discriminatory. *See* 533 U.S. at 106 ("we need not resolve the issue here").

On this issue, the decision below conflicts with this Court's 8-1 decision in *Widmar*, which held exclusion of religious worship from a generally open forum is impermissible content-based discrimination. The First, Third, Fourth, and Fifth Circuits have followed *Widmar* and held that forums similar to the one at issue in this case are designated public fora in which content-based discrimination is prohibited. The Second Circuit's decision conflicts with *Widmar* and creates a circuit conflict with these other decisions.

In *Widmar*, a public university opened its facilities to students for "political, cultural, educational, social and recreational events," *Chess v. Widmar*, 635 F.2d 1310, 1312 (8th Cir. 1980), but not "for purposes of religious worship or religious

teaching," 454 U.S. at 265. A religious student group desired to use the university's facilities for its meetings, which typically included "prayer, hymns, Bible commentary, and discussion of religious views and experiences." *Id.* at 265 n.2. The university rejected the group's request because these activities were "religious worship." *Id.* at 265. This Court held that the university created a public forum and the exclusion of religious worship from that forum was a content-based exclusion that was not justified by a compelling state interest. *Id.* at 269 n.6 & 277.

In conflict with *Widmar*, the Second Circuit ruled that a forum opened generally for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community" is merely a limited public forum when it excludes one form of speech – religious worship services – and thus that all exclusions (even of speakers whose expression lies within the parameters of the forum) are subject to lesser constitutional scrutiny. App.12a-13a. The Second Circuit conducted no analysis of the forum's broad parameters and the vast variety of speakers permitted in the forum – 10,000 separate uses in one school year alone, including Scouts, board meetings, athletic events, and religious and cultural events.

Contrast that lack of contextual analysis with *Lamb's Chapel*, where this Court strongly suggested that the Second Circuit erred by ruling that N.Y. Educ. Law §414 (and the policy based on that law) created only a limited forum and not a designated public forum. There, as in this case, the school permitted the use of school facilities for "social, civic, and recreational" purposes. 508 U.S. at 391. The

plaintiff church argued that the school's policy created a designated public forum. *Id.* This Court stated that "argument has considerable force" because the facilities are "heavily used by a wide variety of private organizations." *Id.* However, this Court left the forum designation issue for a later day, resolving the case instead on the basis of viewpoint discrimination. *Id.* at 391-92. *Good News Club*, 533 U.S. at 106, also left open the issue of whether the forum was indeed designated, but decided the case assuming the forum was limited based on the parties' agreement. There was no analysis or determination whether the forum was objectively "limited" in terms of First Amendment parameters.

The Church here presents the same forum classification argument that this Court in *Lamb's Chapel* said has "considerable force." Respondents' policy, like the ones in *Lamb's Chapel* and *Good News Club,* permits community groups to meet for "social, civic and recreational" purposes and "other uses pertaining to the welfare of the community." App. 368a. The policy expressly permits a wide variety of uses.[4] App.368a-369a, 379a-381a. By creating such a broad forum, the categories of which clearly encompass the religious speech invidiously excluded from it, Respondents have created a designated public forum.

---

[4] While Respondents' policy purports to exclude commercial uses, Respondents routinely permit many such uses. App.371a; A1505-1536. Even political uses are permitted if all candidates are invited. App.368a. "Religious worship services" are the only categorical exclusion. A3594 ¶3, 3505 ¶5.

The Second Circuit's position, however, is that if there is any exclusion of entrants at all, the forum is limited, and the exclusions are judged by a reasonableness standard. Such circular reasoning guts this Court's forum doctrine. As the Third Circuit has recognized:

> We cannot conclude that, because there is ... exclusionary language in the wording of the revised policy, we are precluded from finding that the school district has created a designated open forum. If this is, indeed, what *Cornelius* requires, there is no longer a place in the law for the concept of the designated open forum; the government may, upon the most tenuous and internally inconsistent grounds, pick and choose those to whom it grants access for purposes of expressive activity simply by framing its access policy to carve out even minute slices of speech which, for one reason or another, it finds objectionable. We do not read either *Perry* or *Cornelius* as sounding the death knell for the designated open forum.

Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1378 (3d Cir. 1990); s*ee also Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 117-18 (5th Cir. 1992) ("a general policy of open access does not vanish when the government adopts a specific restriction on speech, because the government's policy is indicated by its consistent practice, not each exceptional regulation that departs from the consistent practice"). Excluding a small sliver of private expression from the forum, while broadly allowing

the category of speech to which it belongs, does not create a "limited forum."

The Second Circuit's decision conflicts with the decisions of four other circuits on whether generally open access policies create designated public fora and whether religious exclusions from them are constitutional.

In *Grace Bible Fellowship v. Maine School Administrative District No. 5*, 941 F.2d 45, 48 (1st Cir. 1991) (panel including Breyer, C.J.), the First Circuit held that a school district created a designated public forum when it opened its buildings for meetings by youth groups, community, civic, and service organizations, government agencies, educational programs, and cultural events. The court struck down the district's content-based exclusion of a church that applied to use the facilities to serve a free Christmas meal and to present prayer and religious preaching.

In *Gregoire,* 907 F.2d at 1369, 1372-78, the Third Circuit held that a school district created a designated public forum when it permitted meetings by civic groups, cultural activities, resident service organizations, adult education classes and labor unions, but prohibited "religious services, instruction and/or religious activities." The court found that the district had discriminated based on content when it refused to rent its high school auditorium for a Saturday night evangelistic presentation.

As noted earlier, in *Fairfax Covenant Church*, 17 F.3d 703, the Fourth Circuit held that a school district created a designated public forum by its policy permitting meetings by cultural, civic,

educational, and political groups, and that a requirement that churches pay more rent than nonreligious groups was unconstitutional.

In *Concerned Women for America v. Lafayette County*, 883 F.2d 32, 33-34 (5th Cir. 1989), the Fifth Circuit held that a public library established a designated public forum with its policy permitting meetings of a "civic, cultural or educational character," even though it expressly excluded religious expression. The court found that the policy was an unconstitutional content-based regulation of speech.

This Court should grant review to resolve the conflict in the circuits over whether a generally open speech forum is a designated public forum, and affirm that content-based exclusions are not permitted in such fora absent a compelling state interest. What is open and public in one Circuit should not be crimped and cramped into a crabbed closed forum in another.

III. The Second Circuit's Decision Conflicts with the Decisions of this Court By Authorizing Censorship of Private Religious Speakers Based Upon Mere Fear of an Unproven Establishment Clause Violation.

The Second Circuit allows the Board's mere concern over the Establishment Clause to justify its actual exclusion of private worship services from its broadly available speech forum. App.21a. The ruling conflicts with myriad decisions of this Court which rejected the notion that the Establishment

Clause authorizes or requires the government to censor private religious expression in a neutral speech forum. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (2002); *Good News Club*, 533 U.S. at 119; *Pinette*, 515 U.S. at 762-770; *Rosenberger*, 515 U.S. at 842; *Lamb's Chapel*, 508 U.S. at 395; *Mergens*, 496 U.S. at 253; *Widmar*, 454 U.S. at 276.[5]

Yet the panel justifies the Board's exclusion of the Church's speech from the forum because of the Board's unsubstantiated *concern* about an Establishment Clause violation – not because an *actual* violation of the Establishment Clause would obtain if the Church were granted forum access. The panel stated:

> In order to determine whether the content restriction for this purpose is reasonable and thus permissible, *we need not decide* whether use of the school for worship services would in fact violate the Establishment Clause, a question as to which reasonable arguments could be made either way, and on which no determinative ruling exists. It is sufficient if the Board has a strong basis for concern that permitting use of a public school for the conduct of religious worship services would violate the Establishment Clause.

App.21a (emphasis added).

---

[5] The Second Circuit's decision also conflicts with the holdings and analysis of its sister circuits, *see*, *e.g.*, *Badger Catholic*, 620 F.3d at 778-79; *Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 530-34 (3d Cir. 2004); *Church on the Rock*, 84 F.3d at 1280; *Good News/Good Sports Club v. Sch. Dist. of City of Ladue*, 28 F.3d 1501, 1510 (8th Cir. 1994); *Fairfax Covenant Church*, 17 F.3d at 707.

Mere government concern over what would not *in fact* be an Establishment Clause violation has never justified censorship of private speech due to its religious viewpoint. To the contrary, this Court has ruled repeatedly that a wrong (even if sincere) view of the operation of the Establishment Clause is evidence of unconstitutional viewpoint discrimination, not a justification for censoring private speech. *See Good News Club*, 533 U.S. at 120; *Rosenberger*, 515 U.S. at 832. Absent an *actual* Establishment Clause violation, the government's exclusion of private speech *because of its religious viewpoint* (which is what Respondents concede by the very assertion of an Establishment Clause defense) is without legal justification, and thus violates the Free Speech Clause's prohibition on viewpoint discrimination. *See supra* Part I.

As this Court explained in *Widmar*, when the government operates an open speech forum it may not exclude otherwise qualifying private religious speech beyond what the Establishment Clause *actually* forbids, for it is at that line that the speaker's First Amendment rights engage.

> [T]he state interest asserted here – in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution – is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well.

454 U.S. at 276. To exalt unsubstantiated Establishment Clause fears above Free Speech substance would yield a jurisprudence of First

Amendment timidity wholly inconsistent with this Court's many cases vindicating the Free Speech rights of religious speakers. The pertinent issue remains only what the Establishment Clause in fact commands, not what speculating officials might fear.

In this case, moreover, any Establishment fear is meritless. This case concerns *private* religious speech in a forum broadly opened to a wide spectrum of users and uses. The Second Circuit failed to grasp the significance of this important factual distinction and instead relied on irrelevant cases such as *McCreary County v. ACLU*, 545 U.S. 844 (2005), and *County of Allegheny v. ACLU*, 492 U.S. 572 (1989), which involved *government* speech that was religious in nature. This Court has held repeatedly that when a private speaker chooses to espouse a religious viewpoint in a forum of such breadth, the government does not violate the Establishment Clause by permitting him to speak. *Good News Club*, 533 U.S. at 113-14; *Widmar*, 454 U.S. at 273-75.

The Second Circuit also ran afoul of settled precedent in viewing sympathetically the Board's alleged concerns about "subsidizing churches." App.23a-24a. The Second Circuit replicates the very error that the Fourth Circuit made in *Rosenberger*:

> The error made by the Court of Appeals, as well as by the dissent, lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient. If the expenditure of governmental funds is prohibited whenever those funds pay for a

> service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, than *Widmar*, *Mergens* and *Lamb's Chapel* would have to be overruled.

Rosenberger, 515 U.S. at 843; *see Fairfax Covenant Church*, 17 F.3d at 708 (rejecting "subsidy" concern if government rents space to churches for same price as other community groups). In-kind benefits neutrally extended to all, including to religious groups using a forum, do not violate, and thus do not justify a concern about violating, the Establishment Clause.

> It does not violate the Establishment Clause for [the government] to grant access to its facilities on a religion-neutral basis to a wide spectrum of [community] groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises.

Rosenberger, 515 U.S. at 842 (citing *Widmar*, 454 U.S. at 269; *Mergens*, 496 U.S. at 252).

The Second Circuit also proposed that church usage of the Board's facilities may lead students to conclude that New York has endorsed religion. App.24a-26a. *Good News Club*, however, flatly rejected that notion: "[W]e have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present." 533 U.S. at 115. The Church's use of the Board's facilities on Sunday leads to no more of a perception of state endorsement of religion than the use of the

same facilities by a Bible club after school during the week, *id*. at 119, or by the thousands of other users.

An ill-conceived government concern over violating the Establishment Clause does not justify the exclusion of religious speakers from a generally open forum.

IV. The Second Circuit's Decision Upholds a Policy that Discriminates on the Basis of Religion in Violation of the Free Exercise Clause.

The Board's policy expressly uses religion as the factor for denying private speakers access to the forum. Yet the Second Circuit ignored this rank religious discrimination. The Board cannot set the parameters of its forum in a way that violates the Free Exercise Clause. When a law "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons" it violates the Free Exercise Clause. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). Thus, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id*. at 533 (citing *Emp't Div. v. Smith*, 494 U.S. 872, 878-79 (1990)); *see Fairfax Covenant Church*, 17 F.3d at 707 (holding school's policy of charging churches more rent than other groups burdened the churches' free exercise of religion).

SOP §5.11 expressly prohibits conduct undertaken for religious reasons: "No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship." App.371a. Moreover, Respondents purposely aimed §5.11 at the practice of religion and have persistently excluded groups intending to use school facilities for religious purposes. Yet Respondents fail to articulate a compelling interest for discriminating against religion in their forum. As discussed previously, their reliance on Establishment Clause arguments is mistaken. Whatever Respondents' authority may be to exclude speakers from a forum, they may not do so in a way that violates the Free Exercise Clause, as they have done here.

CONCLUSION

This Court should grant review.

Respectfully submitted,

JORDAN W. LORENCE
Counsel of Record
GARY S. MCCALEB
JOSEPH P. INFRANCO
JEFFREY A. SHAFER
ALLIANCE DEFENSE FUND
801 G Street NW, Suite 509
Washington, DC 20001
(202) 393-8690
jlorence@telladf.org

DAVID A. CORTMAN
ALLIANCE DEFENSE FUND
1000 Hurricane Shoals Rd.,
Suite D-600
Lawrenceville, Georgia
30043
(770) 339-0774

DAVID J. HACKER
HEATHER GEBELIN HACKER
ALLIANCE DEFENSE FUND
101 Parkshore Drive,
Suite 100
Folsom, California 95630
(916) 932-2850

September 27, 2011

APPENDIX

APPENDIX TABLE OF CONTENTS

Second Circuit Opinion (June 2, 2011)
(reversing and vacating second permanent
injunction) 1a

District Court Order (November 1, 2007)
(granting second permanent injunction in favor of
Bronx) 76a

Second Circuit Opinion (July 2, 2007)
(reversing and vacating the first permanent
injunction) 78a

District Court Opinion (November 16, 2005)
(granting first permanent injunction in favor of
Bronx) 176a

Second Circuit Opinion (June 6, 2003)
(affirming preliminary injunction) 216a

District Court Opinion (June 26, 2002)
(granting preliminary injunction in favor of
Bronx) 276a

Second Circuit Order (July 27, 2011)
(denying petition to rehear third appeal)..... 337a

Second Circuit Order (September 8, 2003)
(denying petition to rehear preliminary injunction
ruling) 339a

District Court Judgment (November 5, 2007)
(entering second permanent injunction) 341a

Second Circuit Mandate (September 13, 2007)
(reversing and vacating first permanent
injunction) 343a

District Court Judgment (February 1, 2006)
(entering first permanent injunction) 345a

District Court Judgment (July 3, 2002)
(entering preliminary injunction)..... 347a

Standard Operating Procedures
Table of Contents 349a

Standard Operating Procedures §§ 1.1-1.9
(dated May, 1989)..... 350a

Standard Operating Procedures §§ 2.1-2.11.2
(dated April, 1990) 352a

Standard Operating Procedures §§ 2.11.3-3.5.3
(dated August, 1989)..... 358a

Standard Operating Procedures §§ 4.1-4.7
(dated May, 1989)..... 364a

Standard Operating Procedures §§ 5.1-5.9
(dated October 2001, revised) 367a

Standard Operating Procedures §§ 5.10-5.14.3
(revised July 2007) 371a

Standard Operating Procedures §§ 5.14.4-5.27
(dated October 2001, revised) 373a

Standard Operating Procedures §§6.1-7.4
(dated May, 1989).....377a

CR D-180 (replaces the Standard Operating
Procedures (SOP) chapter on "Extended Use of
School Buildings", effective May 24, 2010) 382a

New York Education Law § 414, Use of Schoolhouse
and Grounds (effective: June 30, 2009).....420a

U.S. Const. amend. I.....426a

07-5291-cv
Bronx Household v. Board of Education

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2010

(Argued: October 6, 2009 Decided: June 2, 2011)

Docket No. 07-5291-cv

- X

THE BRONX HOUSEHOLD OF FAITH, ROBERT HALL, and JACK ROBERTS,

Plaintiff-Appellees,

v.

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

Defendant-Appellants.

- X

Before: WALKER, LEVAL, and CALABRESI,
Circuit Judges.

Defendants appeal from an order of the United States District Court for the Southern District of New York (Preska, *C.J.*) granting summary judgment to Plaintiffs and entering a permanent injunction barring the Board of Education of the City of New York from enforcing a rule that prohibits outside groups from using school facilities after hours for "religious worship services." The Court of Appeals (Leval, *J.*) concludes that (1) because the rule does not exclude expressions of religious points of view or of religious devotion, but excludes for valid non-discriminatory reasons only a type of activity – the conduct of worship services, the rule does not constitute viewpoint discrimination; and (2) because Defendants reasonably seek by this rule to avoid violating the Establishment Clause, the exclusion of religious worship services is a reasonable content-based restriction, which does not violate the Free Speech Clause. Accordingly, the judgment of the district court is reversed and the injunction barring enforcement of the rule against Plaintiffs is vacated.

Judge Calabresi concurs in the opinion and has filed an additional concurring opinion.

Judge Walker dissents by separate opinion.

JANE L. GORDAN, Senior Counsel (Edward F.X. Hart, Lisa Grumet, Janice Casey Silverberg, *on the brief*), *for* Michael A. Cardozo, Corporation Counsel of the City of New York, New York, New York, *for Appellants*.

JORDAN W. LORENCE, Alliance Defense Fund, Washington, D.C. (Joseph P. Infranco, Jeffrey A. Shafer, David A. Cortman, Benjamin W. Bull, *on the brief*), *for Appellees*.

Michael J. Garcia, United States Attorney for the Southern District of New York, New York, New York (David J. Kennedy, Assistant United States Attorney, Southern District of New York, Grace Chung Becker, Acting Assistant Attorney General, Dennis J. Dimsey, Eric W. Treene, Karl N. Gellert, Attorneys, Appellate Section, Civil Rights Division, U.S. Department of Justice, *on the brief*), *for Amicus Curiae* United States of America.

Mitchell A. Karlan, Gibson, Dunn & Crutcher LLP, New York, New York (Aric H. Wu, Farrah L. Pepper, Gibson, Dunn & Crutcher LLP, Carol Nelkin, Jeffrey P. Sinensky, Kara H. Stein, The American Jewish Committee, *on the brief*), *for Amicus Curiae* The American Jewish Committee.

Isaac Fong, Center for Law and Religious Freedom, Springfield, Virginia (Kimberlee Wood Colby, Gregory S. Baylor, *on the brief*), *for Amicus Curiae* The Christian Legal Society.

Eloise Pasachoff, Committee on Education and the Law, Association of the Bar of the City of New York, New York, New York (Jonathan R. Bell, Rosemary Halligan, Laura L. Himelstein, *on the brief*), *for Amicus Curiae* Association of the Bar of the City of New York.

LEVAL, *Circuit Judge*:

Defendants, the Board of Education of the New York City Public Schools and Community School District No. 10 (collectively, "the Department of Education" or "the Board"),[1] appeal from an order of the United States District Court for the Southern District of New York (Preska, *C.J.*), which granted summary judgment to Plaintiffs the Bronx Household of Faith ("Bronx Household"), a Christian church, and its pastors Robert Hall and Jack Roberts, and permanently enjoined the Board from enforcing against Bronx Household a Standard

[1] The Board of Education of the City of New York has been reorganized and renamed the New York City Department of Education. *See, e.g.*, *D.D. ex rel V.D. v. New York City Bd. of Educ.*, 465 F.3d 503, 506 n.1 (2d Cir. 2006).

Operating Procedure ("SOP") that prohibits the use of school facilities by outside groups outside of school hours for "religious worship services." We conclude that the challenged rule does not constitute viewpoint discrimination because it does not seek to exclude expressions of religious points of view or of religious devotion, but rather excludes for valid non-discriminatory reasons only a type of activity – the conduct of worship services. We also conclude that because Defendants reasonably seek by the rule to avoid violating the Establishment Clause, the exclusion of religious worship services is a reasonable content-based restriction, which does not violate the Free Speech Clause. Accordingly, we reverse the judgment of the district court and vacate the injunction.

BACKGROUND

The relevant facts are familiar, and are not in dispute. *See Bronx Household of Faith v. Bd. of Educ. of the City of New York (Bronx Household III)*, 492 F.3d 89 (2d Cir. 2007). Under New York State law, a local public school district may permit its facilities to be used outside of school hours for purposes such as "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," as long as the uses are "nonexclusive and . . . open to the general public." N.Y. Educ. Code § 414(1)(c). Pursuant to this provision, New York City's Department of Education developed a written policy governing use of school facilities during after-school hours as part of its Standard Operating Procedures Manual. The policy, or SOP, permits outside groups

to use school premises for the purposes described in the state law, when the premises are not being used for school programs and activities, but subject to limitations. In earlier stages of this litigation, SOP § 5.9 prohibited the use of school property for "religious services or religious instruction."[2] *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10 (Bronx Household I)*, 127 F.3d 207, 210 (2d Cir. 1997).

In 1994, Bronx Household applied to use space in the Anne Cross Mersereau Middle School ("M.S. 206B") in the Bronx, New York, for its Sunday morning "church service[s]." *Bronx Household of Faith v. Bd. of Educ. of the City of New York*, 226 F. Supp. 2d 401, 410 (S.D.N.Y. 2002) (quoting First Affidavit of Robert Hall). According to Bronx Household's application, its services would include "singing of Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion, [and] sharing of testimonies," followed by a "fellowship meal," during which attendees "talk to one another, [and] share one another's joys and sorrows so as to be a mutual help and comfort to each other." *Id.* The

---

[2] SOP § 5.9 provided:

> No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purposes of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

Bronx Household I, 127 F.3d at 210.

Board denied Bronx Household's application under SOP § 5.9. *Bronx Household I*, 127 F.3d at 211.

Plaintiffs brought suit, contending that the Board's denial of Bronx Household's application constituted viewpoint discrimination in violation of the Free Speech Clause of the First Amendment. The district court granted the Board's motion for summary judgment, and dismissed the suit. *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, No. 95 Civ. 5501, 1996 WL 700915 (S.D.N.Y. Dec. 5, 1996) (Preska, *J.*). We affirmed, concluding that the Department of Education had created a limited public forum by opening school facilities only to certain activities, and that the exclusion of religious services and religious instruction was viewpoint neutral and reasonable in light of the forum's purposes. *Bronx Household I*, 127 F.3d at 211-15, 217.

In 2001, however, the Supreme Court ruled in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), that it was unconstitutional for a public school district in Milford, New York, to exclude from its facilities "a private Christian organization for children," which had requested permission to use space in a school building after school hours to sing songs, read Bible lessons, memorize scripture, and pray. *Id.* at 103. The Milford district's policy, in accordance with New York state law, permitted school facilities to be used for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community." *Id.* at 102 (quoting N.Y. Educ. Code § 414(1)(c)). However, it prohibited use "by any

individual or organization for religious purposes," which school district officials interpreted as prohibiting "religious worship" or "religious instruction." *Id.* at 103-04. The Supreme Court concluded that the Good News Club was seeking to "address a subject otherwise permitted [in the school], the teaching of morals and character, from a religious standpoint," and, therefore, the school district's denial of the club's application constituted impermissible viewpoint discrimination in the context of a limited public forum. *Id.* at 109.

After the Supreme Court's decision in *Good News Club*, Bronx Household applied again, and its application was again denied. *Bronx Household of Faith v. Bd. of Educ. of the City of New York (Bronx Household II)*, 331 F.3d 342, 346-48 (2d Cir. 2003). Plaintiffs brought a new action, and this time the district court, citing *Good News Club*, preliminarily enjoined the Board from denying the permit. *Bronx Household*, 226 F. Supp. 2d at 427. We affirmed the preliminary injunction, finding that the district court did not abuse its discretion, and acknowledging the "factual parallels between the activities described in *Good News Club* and the activities at issue in the present litigation." *Bronx Household II*, 331 F.3d at 354. After the issuance of the preliminary injunction, Bronx Household applied for, and was granted, permission to use P.S. 15 in the Bronx for its Sunday "Christian worship service[s]." *Bronx Household III*, 492 F.3d at 94, 101 (Calabresi, J., concurring).

Bronx Household thereafter moved for summary judgment to convert the preliminary injunction into

a permanent injunction, and the Board cross-moved for summary judgment. During the pendency of the motions for summary judgment, the Board wrote to the district court asking the court to adjudicate the issue under a revised SOP, numbered SOP § 5.11,[3] which was intended to replace the old standard. The Board advised that the new SOP § 5.11 had been "approved at the highest levels of the Department of Education" and that if Bronx Household were to reapply, its application would be rejected under the new SOP § 5.11. *Id.* at 95 n.2. The text of the new SOP § 5.11 prohibited use of school property for "religious worship services, or otherwise using a school as a house of worship."[4] The district court, after initially expressing doubt about its jurisdiction to rule on the constitutionality of a rule whose status was unclear and which had not been applied against Plaintiffs, nevertheless concluded that the question was justiciable and granted summary judgment in favor of Bronx Household, permanently enjoining the

---

[3] Before the revision of the standard was proposed, the old SOP § 5.9 was renumbered (without change in text) to § 5.11. To avoid confusion, in this opinion we use "SOP § 5.9" to refer to the standard utilized by the Board before revision of the text, and we use "SOP § 5.11" to refer to the new text quoted in footnote 4.

[4] SOP § 5.11 states:

> No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship. Permits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this chapter on the same basis that they are granted to other clubs for students that are sponsored by outside organizations.

Board from enforcing the proposed SOP § 5.11. *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 400 F. Supp. 2d 581, 588, 601 (S.D.N.Y. 2005). The district court concluded that its decision was compelled by the Supreme Court's decision in *Good News Club*.

On appeal, a majority consisting of Judge Calabresi and me, over dissent by Judge Walker, vacated the permanent injunction, although we were divided as to the rationale for doing so. *Bronx Household III*, 492 F.3d at 91 (per curiam). Judge Calabresi would have reached the merits and would have ruled that the proposed SOP § 5.11 was a reasonable, viewpoint-neutral, content-based restriction. *Id.* at 100-06 (Calabresi, J., concurring). I concluded that litigation over the constitutionality of the proposed SOP § 5.11 was unripe for adjudication. *Id.* at 122-23 (Leval, J., concurring). This was because the proposed rule, although "approved at the highest levels," had not been promulgated by the Board, and Bronx Household had neither applied, nor been refused, under the new standard. *Id.* at 115, 122 n.8. Judge Walker wrote in dissent that he would have reached the merits and would have ruled that enforcement of the new SOP was barred by *Good News Club*, because in his view it constituted impermissible viewpoint discrimination. *Id.* at 123-24 (Walker, J., dissenting). We remanded the case to the district court for all purposes. *Id.* at 91 (per curiam).

In July 2007, shortly after our decision remanding the case, the Board adopted the proposed SOP and published it for the first time. Bronx

Household applied to use P.S. 15 under the new rule, stating in its application that it planned to use the facilities for "Christian worship services," and the Board denied the application.[5] Both parties then moved for summary judgment. The district court again granted summary judgment in favor of Bronx Household and permanently enjoined the Board from enforcing SOP § 5.11 against Bronx Household, adopting the reasoning of its previous opinion. *Bronx Household of Faith v. Bd. of Educ. City of New York*, No. 01 Civ. 8598 (S.D.N.Y. Nov. 1, 2007) (Preska, *J.*).

The case is now before us for the fourth time.

DISCUSSION

P.S. 15 is a limited public forum. *See Bronx Household III*, 492 F.3d at 97-98 (Calabresi, J., concurring); *id.* at 125 (Walker, J., dissenting);

---

[5] Previously, the Board's rules, which it published on its website, included no reference to the new SOP § 5.11; a person telephoning the Board to inquire whether there was a rule that governed use of school facilities after hours by religious groups was told no rule was in effect. In short, at the time we last heard this case, the new rule had not been promulgated, applied, or even disclosed to the public, and was not applied to Bronx Household. This led me to conclude, for reasons I explained in my concurring opinion, *see* 492 F.3d at 110-23, that there was no ripe controversy before the court as to the constitutionality of SOP § 5.11.

Judges Walker and Calabresi have authorized me to say that upon reconsideration of the circumstances that obtained when the case was last before us, they are now far less confident that the case was in fact ripe for adjudication at that time. Now that the new SOP has been adopted, published, and applied against Bronx Household, the controversy is unquestionably ripe for adjudication.

Bronx Household I, 127 F.3d at 211-14. As explained in Judge Calabresi's opinion in *Bronx Household III*, a category of speakers or expressive activities may be excluded from a limited public forum only on the basis of "reasonable, viewpoint-neutral rules." *Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 626 (2d Cir. 2005). Thus, the operator of a limited public forum may engage in "content discrimination, which may be permissible if it preserves the purposes of that limited forum," but may not engage in "viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995); *see also Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2984 (2010); *Good News Club*, 533 U.S. at 106-07.

SOP § 5.11, on its face, prohibits use of school facilities for two types of activities. The rule prohibits use of schools for "religious worship services," and prohibits also "otherwise using a school as a house of worship." Bronx Household stated in its application that it sought a permit to use P.S. 15 for "Christian worship services." While the Board did not explain its rejection of the application, it is clear that an application to use the school for "Christian worship services" falls under the words of SOP § 5.11 prohibiting use for "religious worship services." We therefore assume the Board relied, at least in part, on this clause of its rule in rejecting the application. (Accordingly, we need not, and this opinion does not, consider whether the Board could lawfully exclude Bronx Household

under the second, less precise, branch of the rule proscribing use of a school "as a house of worship.")[6]

A.

The prohibition against using school facilities for the conduct of religious worship services bars a type of activity. It does not discriminate against any point of view. The conduct of religious worship services, which the rule excludes, is something quite different from free expression of a religious point of view, which the Board does not prohibit. The conduct of services is the performance of an event or activity. While the conduct of religious services undoubtedly *includes* expressions of a religious point of view, it is not the expression of that point of view that is prohibited by the rule. Prayer, religious instruction, expression of devotion to God, and the singing of hymns, whether done by a person or a group, do not constitute the conduct of worship services. Those activities are not excluded. Indeed SOP § 5.11 expressly specifies that permits will be granted to student religious clubs "on the same basis that they are granted to other clubs for students." The branch of the rule excluding religious worship services, as

[6] Nor does this opinion express any views as to whether "worship" may be lawfully excluded. Judge Walker criticizes this opinion for "declining even to consider" the constitutionality of the second branch of SOP § 5.11, which prohibits "using a school as a house of a worship." Dissenting Op. 3. Because this opinion concludes that the Board's rejection of Bronx Household's application was lawful under the "religious worship services" branch of the rule, further inquiry into the whether the Board could also lawfully exclude Bronx Household under the "house of worship" branch of the rule is unnecessary to this ruling.

we understand it, is designed by the Board to permit use of the school facilities for all of the types of activities considered by the Supreme Court in *Good News Club*, *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 830 (1995). The "religious worship services" clause does not purport to prohibit use of the facility by a person or group of persons for "worship." What is prohibited by this clause is solely the conduct of a particular type of event: a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion. The conduct of a "religious worship service" has the effect of placing centrally, and perhaps even of establishing, the religion in the school.[7]

---

[7] Judge Walker complains that our understanding of the meaning of the term "religious worship services" is "self-styled." Dissenting Op. 8. We have not found in any dictionary a definition of the compound term "religious worship services." Dictionaries define the verb to worship as "to honor or reverence as a divine being or supernatural power: VENERATE." *Webster's Third New International Dictionary* 2637 (1976); *see also Oxford English Dictionary* (Nov. 2010 online ed.), http://www.oed.com. (same). Worship, the noun, is defined as "an act, process, or instance of expressing such veneration by performing or taking part in religious exercises or ritual," and "a form or type of worship or religious practice with its creed or ritual." *Webster's Third New International Dictionary* 2637. The word service is defined as "[w]orship; esp. public worship according to form and order," "[a] ritual or series of words and ceremonies prescribed for public worship," *Oxford English Dictionary* (Nov. 2010 online ed.), and "the performance of religious worship esp. according to settled

There is an important difference between excluding the *conduct of an event or activity* that includes expression of a point of view, and excluding the *expression* of that point of view. Under rules consistent with the purposes of the forum, schools may exclude from their facilities all sorts of activities, such as martial arts matches, livestock shows, and horseback riding, even though, by participating in and viewing such events, participants and spectators may express their love of them. The basis for the lawful exclusion of such activities is not viewpoint discrimination, but rather the objective of avoiding either harm to persons or property, or liability, or a mess, which those activities may produce. We think it beyond dispute that a school's decision to exclude martial arts matches would be lawful notwithstanding the honest claim of would-be participants that, through participating in the matches, they express their love of the sport and their character. The exclusion would

---

public forms or conventions," *Webster's Third New International Dictionary* 2075.

We believe the understanding we have put forth comports with common understanding and find nothing in dictionary definitions of the term's three component words that is inconsistent with our understanding. Nor does Judge Walker offer a better definition, whether derived from a dictionary or another source.

Furthermore, we do not understand why Judge Walker should concern himself with what we take SOP § 5.11 to mean by "religious worship services." According to his argument, no matter what SOP § 5.11 means by "religious worship services," it necessarily constitutes unlawful viewpoint discrimination because it excludes activity on the basis of the activity's religious nature. If Judge Walker is right as to the applicable test, SOP § 5.11 is void no matter what it means by "religious worship services."

nonetheless not represent viewpoint discrimination. While a school may prohibit the use of its facilities for such activities for valid reasons, it may not selectively exclude meetings that would celebrate martial arts, cow breeding, or horseback riding, because that would be viewpoint discrimination. When there exists a reasonable basis for excluding a type of activity or event in order to preserve the purposes of the forum, such content-based exclusion survives First Amendment challenge notwithstanding that participants might use the event to express their celebration of the activity. *See Rosenberger*, 515 U.S. at 829-30.

Similarly, SOP § 5.11 prohibits use of school facilities to conduct worship services, but does not exclude religious groups from using schools for prayer, singing hymns, religious instruction, expression of religious devotion, or the discussion of issues from a religious point of view. While it is true without question that religious worship services *include* such expressions of points of view, the fact that a reasonably excluded activity includes expressions of viewpoints does not render the exclusion of the activity unconstitutional if adherents are free to use the school facilities for expression of those viewpoints in all ways except through the reasonably excluded activity. Under at least this branch of SOP § 5.11, the schools are freely available for use by groups to express religious devotion through prayer, singing of hymns, preaching, and teaching of scripture or doctrine. It is only the performance of a worship service that is excluded.

Nor is this rule of exclusion vulnerable on the ground that the activity excluded has some similarities to another activity that is allowed. To begin with, we reject the suggestion that because a religious worship service shares some features with activities such as a Boy Scout meeting, no meaningful distinction can be drawn between the two types of activities. *See* Dissenting Op. 11-12. Boy Scout meetings are not religious worship services. The fact that religion often encompasses concern for standards of conduct in human relations does not mean that all activity which expresses concern for standards of conduct in human relations must be deemed religion.

The argument might be made that, because the rule prohibits use of facilities for "*religious* worship services," it excludes religious worship services while permitting non-religious worship services. This argument is a canard. The presence of the word "religious" in the phrase is superfluous and does not change the meaning. There is no difference in usage between a "worship service" and a "religious worship service;" both refer to a service of religious worship. *See Bronx Household I*, 127 F.3d at 221 (Cabranes, J., concurring in part and dissenting in part) ("Unlike religious 'instruction,' there is no real secular analogue to religious 'services,' such that a ban on religious services might pose a substantial threat of viewpoint discrimination between religion and secularism."). We think, with confidence, that if 100 randomly selected people were polled as to whether they attend "worship services," all of them would understand the questioner to be inquiring whether they attended services of *religious* worship.

While it is true that the word "worship" is occasionally used in nonreligious contexts, such as to describe a miser, who is said to "worship" money, or a fan who "worships" a movie star,[8] the term "worship services" has no similar use; meetings of a celebrity's fan club are not described as "worship services." Worship services are religious; the rule describes the entire category of activity excluded. The meaning of the rule's exclusion of "religious worship services" would be no different if it identified the excluded activity as "worship services."

The application of SOP § 5.11 to deny Bronx Household's request to use school facilities for worship services is thus in no way incompatible with the Supreme Court's decisions in *Good News Club*, *Lamb's Chapel*, and *Rosenberger*. In *Good News Club*, a school district had invoked a policy prohibiting after-hours use of a school for "religious purposes" to deny a Christian organization permission to use space in a school building for "religious instruction" of children aged 6 to 12. 533 U.S. at 103-04. The Supreme Court ruled that this exclusion violated the Free Speech Clause. *Id.* at 120. The denial constituted viewpoint discrimination, rather than content-based restriction, because the school district refused to

[8]In the view of the author, such uses of the word are metaphorical. A statement that someone worships money or worships a movie star is intended to be understood as an assertion that the subject treats money or the movie star with the same devotion or reverence that a religious believer accords to God. (Judge Calabresi leaves open the question whether such statements are purely metaphorical or whether they too describe a form of worship. *See* Concurring Op. 1.)

allow the teaching of moral lessons from a religious perspective, while permitting the teaching of moral lessons from a secular perspective. *Id.* at 107-08.

Similarly, in *Lamb's Chapel*, the Court found unconstitutional a school district's rejection of a church's request to show a Christian film series about child rearing and family values, again on the basis of a policy prohibiting after-hours use of school property "for religious purposes." *Lamb's Chapel*, 508 U.S. at 387-89, 393. Like the moral lessons taught in the Good News Club, the film series "dealt with a subject otherwise permissible . . . [but] its exhibition was denied solely because the series dealt with the subject from a religious standpoint." *Id.* at 394. And in *Rosenberger*, the Court concluded that the University of Virginia discriminated on the basis of viewpoint, when, in accordance with its policy, it refused to reimburse the printing expenses of a student newspaper with a Christian editorial perspective because the publication "promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." *Rosenberger*, 515 U.S. at 827, 831-32. Because the University's refusal resulted from the newspaper's "prohibited perspective, not the general subject matter," it violated the Free Speech Clause. *Id.* at 831.

In each of those cases, the policy being enforced categorically excluded expressions of religious content. Here, by contrast, there is no restraint on the free expression of any point of view. Expression of all points of view is permitted. The exclusion applies only to the conduct of a certain type of activity – the conduct of worship services – and not

to the free expression of religious views associated with it. It is clear that the Board changed its rule in order to conform to the dictates of *Good News Club*, abandoning the prohibition of "religious instruction" (which involved viewpoint discrimination). Indeed, SOP § 5.11 expressly permits use of school facilities by "religious clubs for students that are sponsored by outside organizations" on the same basis as other clubs for students sponsored by outside organizations.

Accordingly, as SOP § 5.11's prohibition of "religious worship services" does not constitute viewpoint discrimination, it is a content-based exclusion, which passes constitutional muster so long as the exclusion is reasonable in light of the purposes of the forum.

B.

We therefore go on to consider whether this exclusion is "reasonable in light of the purpose served by the forum." *Rosenberger*, 515 U.S. at 829 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)). Precedent, furthermore, calls for giving "appropriate regard" to the Board's judgment as to which activities are compatible with its reasons for opening schools to public use. *Christian Legal Soc'y*, 130 S. Ct. at 2989. By excluding religious worship services, the Board seeks to steer clear of violating the Establishment Clause. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995) ("There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to

justify content-based restrictions on speech."); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (noting that an interest in avoiding a violation of the Establishment Clause "may be characterized as compelling"). In order to determine whether the content restriction for this purpose is reasonable and thus permissible, we need not decide whether use of the school for worship services would in fact violate the Establishment Clause, a question as to which reasonable arguments could be made either way, and on which no determinative ruling exists. It is sufficient if the Board has a strong basis for concern that permitting use of a public school for the conduct of religious worship services would violate the Establishment Clause. *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 476 (2d Cir. 1999) ("[W]hen government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause . . . ."); *cf. Ricci v. DeStefano*, 129 S. Ct. 2658, 2677 (2009) (race-based employment action violates Title VII unless the employer has a strong basis to believe it otherwise will be subject to disparate impact liability). We conclude that the Board has a strong basis to believe that allowing the conduct of religious worship services in schools would give rise to a sufficient appearance of endorsement to constitute a violation of the Establishment Clause.

The Supreme Court's decision in *Lemon v. Kurtzmann*, 403 U.S. 602 (1971), provides the framework for evaluating challenges under the

Establishment Clause.[9] The Court instructed in *Lemon* that government action which interacts with religion (1) "must have a secular . . . purpose," (2) must have a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) "must not foster an excessive government entanglement with religion." *Id.* at 612-13 (internal quotation marks omitted). In discussing the second prong of the *Lemon* test, the Supreme Court has warned that violation of the Establishment Clause can result from *perception* of endorsement. "The Establishment Clause, at the very least, prohibits government from *appearing* to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *Cnty. of Allegheny*, 492 U.S 573, 593-94 (1989) (emphasis added) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (O'Connor, J., concurring)); *see also Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (observing that the second prong of the *Lemon* test "asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval"); *Skoros*, 437 F.3d at 17-18. It was certainly not unreasonable for the Board to conclude that permitting the conduct of religious worship

---

[9]Although the *Lemon* test has been much criticized, the Supreme Court has declined to disavow it and it continues to govern the analysis of Establishment Clause claims in this Circuit. *Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 634 (2d Cir. 2005); *see Skoros v. City of New York*, 437 F.3d 1, 17 n.13 (2d Cir. 2006) (noting that this Court is required to respect precedent applying the *Lemon* test "until it is reconsidered by this court sitting *en banc* or is rejected by a later Supreme Court decision").

services in the schools might fail the second and third prongs of the *Lemon* test, and that the adoption of the "worship services" branch of SOP § 5.11 was a reasonable means of avoiding a violation of the Establishment Clause.

The performance of worship services is a core event in organized religion. *See Bronx Household*, 226 F. Supp. 2d at 410 (quoting Pastor Hall describing Bronx Household's Sunday worship service as "the indispensable integration point for our church"); Mark Chaves, *Congregations in America* 227 (2004) (reporting results of survey finding that 99.3% of religious congregations hold services at least once per week). Religious worship services are conducted according to the rules dictated by the particular religious establishment and are generally performed by an officiant of the church or religion. When worship services are performed in a place, the nature of the site changes. The site is no longer simply a room in a school being used temporarily for some activity. The church has made the school the place for the performance of its rites, and might well appear to have *established* itself there. The place has, at least for a time, become the church.

Moreover, the Board's concern that it would be substantially subsidizing churches if it opened schools for religious worship services is reasonable. The Board neither charges rent for use of its space, nor exacts a fee to cover utilities such as electricity,

gas, and air conditioning.[10] The City thus foots a major portion of the costs of the operation of a church. It is reasonable for the Board to fear that allowing schools to be converted into churches, at public expense and in public buildings, might "foster an excessive government entanglement with religion" that advances religion. *See DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 419 (2d Cir. 2001) (concluding that a publicly funded private hospital whose employees coerced patients to participate in a religious support group would violate the Establishment Clause, noting that the Supreme Court's "'decisions provide no precedent for the use of public funds to finance religious activities,'" and that "neutral administration of the state aid program . . . is an insufficient constitutional counterweight to the direct public funding of religious activities" (quoting *Mitchell v. Helms*, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring in the judgment))).

The Board could also reasonably worry that the regular, long-term conversion of schools into state-subsidized churches on Sundays would violate the Establishment Clause by reason of public perception of endorsement. *Cf. Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009) (ruling that monument in public park was properly viewed as government speech because, among other reasons, the monument was permanent). Such a concern has been vindicated by the experience in the schools in the seven years since the district court granted the preliminary

[10] The only fee charged is for the partial cost of custodial work, and for security services when provided by the Board.

injunction. For example, Bronx Household has held its worship services at P.S. 15, and nowhere else, every Sunday since 2002. Under the injunction, at least twenty-one other congregations have used a school building on Sundays as their regular place for worship services.[11] During these Sunday services, the schools are dominated by church use. *See Capitol Square*, 515 U.S. at 777 (O'Connor, J., concurring in part and concurring in the judgment) ("At some point . . . a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval."). Because of their large congregations, churches generally use the largest room in the building, or multiple rooms, sometimes for the entire day. *See Cnty. of Allegheny*, 492 U.S. at 579, 599-600 (finding unconstitutional endorsement of religion where crèche was placed on the "Grand Staircase" of courthouse, the "main" and "most public" part of the building, which was not available to other displays simultaneously). Church members post signs, distribute flyers, and proselytize outside the school buildings. In some schools, no other outside organizations use the space. Accordingly, on Sundays, some schools effectively become churches. As a result of this church domination of the space, both church congregants and members of the public identify the churches with the schools. The possibility of perceived endorsement is made particularly acute by the fact that P.S. 15 and other

[11] The record in this regard has not been updated since 2005. At oral argument, counsel for the Board told us that the number of churches using schools for worship services has increased substantially since that time.

schools used by churches are attended by young and impressionable students, who might easily mistake the consequences of a neutral policy for endorsement. *Cf. Van Orden v. Perry*, 545 U.S. 677, 703 (2005) (Breyer, J., concurring) (distinguishing lawful display of Ten Commandments from cases in which display was "on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state"); *Skoros*, 437 F.3d at 24-25 ("A mature reasonable objective observer . . . would take into consideration that schoolchildren are the intended audience for the displays, that these children are being reared in a variety of faiths (as well as none), and that, by virtue of their ages, they may be especially susceptible to any religious messages conveyed by such displays.").[12]

Furthermore, the fact that school facilities are principally available for public use on Sundays results in an unintended bias in favor of Christian religions, which prescribe Sunday as the principal

---

[12] The dissent maintains that *Good News Club* precludes the Board from relying on this concern, because the facts of this case present less reason to fear the appearance of endorsement than those of *Good News Club*. Dissenting Op. 22-23. We disagree with this assessment of the facts. In our view, Bronx Household's long-term weekly use of P.S. 15 for Christian worship services at the Board's expense, and the effective exclusion of competing religious groups who would wish to hold services in schools on days other than Sunday but are effectively precluded by school-related activities from doing so, provides a substantially stronger basis for fearing an Establishment Clause violation than the after-school use of a single classroom by a religious group at issue in *Good News Club*.

day for worship services. Jews and Muslims generally cannot use school facilities for their services because the facilities are often unavailable on the days that their religions principally prescribe for services. At least one request to hold Jewish services (in a school building used for Christian services on Sundays) was denied because the building was unavailable on Saturdays. This contributes to a perception of public schools as Christian churches, but not synagogues or mosques.

Finally, the religious services Bronx Household conducts in the school are not open on uniform terms to the general public. Bronx Household acknowledges that it excludes persons not baptized, as well as persons who have been excommunicated or who advocate the Islamic religion, from full participation in its services. *See Bronx Household III*, 492 F.3d at 120 (Leval, J., concurring); *cf. Christian Legal Soc'y*, 130 S. Ct. at 2995 (upholding university's denial of Registered Student Organization status to student group that refused to comply with non-discrimination policy for ideological reasons). The *de facto* favoritism of the Christian (Sunday service) religions over others, as well as the deliberate exclusion practiced by Bronx Household, aggravates the potential Establishment Clause problems the Board seeks to avoid.

In the end, we think the Board could have reasonably concluded that what the public would see, were the Board not to exclude religious worship services, is public schools, which serve on Sundays as state-sponsored Christian churches. For these reasons, the Board had a strong basis to be wary

that permitting religious worship services in schools, and thus effectively allowing schools to be converted into churches on Sunday, would be found to violate the Establishment Clause. To reiterate, we do not say that a violation has occurred, or would occur but for the policy. We do find, however, that it was objectively reasonable for the Board to worry that use of the City's schools for religious worship services, conducted primarily on Sunday when the schools are most available to outside groups, exposes the City to a substantial risk of being found to have violated the Establishment Clause.

This conclusion is not, as the dissent maintains, foreclosed by the Supreme Court's precedents. We recognize that in *Good News Club*, *Widmar*, *Lamb's Chapel*, and *Rosenberger*, the Supreme Court rejected arguments that the rules in question, and their application to bar or disfavor particular activities, were justified by concern to avoid violating the Establishment Clause. But those rulings were based on their particular facts, which are significantly different from those here. In none of those cases did the Supreme Court suggest that a reasonable concern to avoid violation of the Establishment Clause can *never* justify a governmental exclusion of a religious practice. In arguing that the Supreme Court's precedents forbid our ruling, the dissent relies on broad statements of principle, often from opinions that did not command a majority of the Court, and contends that, taken together, they show the invalidity of the reasons the Board proffers for fearing an Establishment Clause violation. However, neither the Supreme Court nor this court has considered the constitutionality of a

policy that allows the regular use of public schools for religious worship services. Indeed, the Court in *Good News Club* expressly declined to address the lawfulness of a policy that excludes "mere" religious worship, a category of activity which is substantially broader than the "religious worship services" covered by the first branch of SOP § 5.11. *Good News Club*, 533 U.S. at 112 n.4.

In any event, the reasonableness of the Board's concern to avoid creating a perception of endorsement resulting from regular Sunday conversion of schools into Christian churches, together with the absence of viewpoint-based discrimination, distinguishes this case from the Supreme Court's precedents striking down prohibitions of the use of educational facilities or funds by religious groups. All of those cases involved rules or policies which broadly suppressed religious viewpoints and which, in their particular applications, disfavored activities which had far less potential to convey the appearance of official endorsement of religion. In *Widmar*, the challenged policy prohibited the use of university facilities for religious worship or even discussion. In *Rosenberger*, the challenged policy prohibited the reimbursement of expenses incurred by university student groups for activities that "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." 515 U.S. at 825. And in *Lamb's Chapel* and *Good News Club*, the challenged policies prohibited the use of school district property for any and all "religious purposes." *See Good News Club*, 533 U.S. at 103; *Lamb's Chapel*, 508 U.S. 387. In each case, the policy being enforced, unlike SOP §

5.11, was broadly categorical in its exclusion of religious content. In addition, the activities disallowed or disfavored under those policies – meetings of Christian clubs for students (in *Widmar* and *Good News Club*), the publication of a newspaper with a Christian editorial viewpoint (in *Rosenberger*), and the showing of a Christian film series (in *Lamb's Chapel*) – were much less likely than the conduct of Sunday worship services to evoke an appearance of endorsement of religion by public school authorities. In determining that there was no danger of an Establishment Clause violation in these cases, the Supreme Court relied on the fact that facilities and funds were available to and used by numerous and diverse private groups. *See Lamb's Chapel*, 508 U.S. at 395 (observing that school district's property "had repeatedly been used by a wide variety of private organizations"); *Rosenberger*, 515 U.S. at 842 (student activity funds were distributed to "a wide spectrum of student groups"); *Widmar*, 454 U.S. at 277 (university provided benefits to "over 100 student groups of all types"); *Good News Club*, 533 U.S. at 113 (district "made its forum available to other organizations"). In finding insufficient risk of the perception of endorsement, the Court observed in *Widmar* that university students are "young adults," who are "less impressionable than younger students" and can therefore appreciate that a policy permitting religious student groups to use meeting space on the same basis as other types of student groups was neutral toward religion. 454 U.S. at 275-75 & n.14. And in *Lamb's Chapel* and *Good News Club*, the Court found it significant that the proposed film exhibition and club meetings would be open to the

public, not just to the members of the Christian groups sponsoring the events. *See Good News Club*, 533 U.S. at 113; *Lamb's Chapel*, 508 U.S. at 395.

The use of P.S. 15 and other schools for Sunday worship services is more likely to promote a perception of endorsement than the uses in those cases. A worship service is an act of organized religion that consecrates the place in which it is performed, making it a church. Unlike the groups seeking access in those cases, Bronx Household and the other churches that have been allowed access under the injunction tend to dominate the schools on the day they use them. They do not use a single, small classroom, and are not merely one of various types of groups using the schools; they use the largest rooms and are typically the only outside group using a school on Sunday. They identify the schools as their churches, as do many residents of the community. The students of P.S. 15 are not the "young adults" of *Rosenberger* and *Widmar*, but young children who are less likely to understand that the church in their school is not endorsed by their school. The fact that New York City's school facilities are more available on Sundays than any other day of the week means that there is a *de facto* bias in favor of Christian groups who want to use the schools for worship services, compounded by the exclusionary practices of churches like Bronx Household.

Furthermore, the Board's prohibition on the use of school facilities for "religious worship services" is far less broad than the exclusions of use for "religious purposes" or "religious discussion" in the

earlier cases, which included in their sweep activities that are similar to secular activities. The broad scope of the exclusions considered in the other cases resulted in viewpoint discrimination, rather than mere content restriction. The exclusions also disfavored more religious activity than necessary to avoid an actual Establishment Clause violation. In contrast, the "religious worship services" clause of SOP § 5.11 is narrowly drawn to exclude a core activity in the establishment of religion – worship services – and thereby avoid the perceived transformation of school buildings into churches.

It is not our contention that the Supreme Court's precedents compel our conclusion. On the other hand, we cannot accept Judge Walker's contention that the Court has effectively decided this case. This case is terra incognita. The Supreme Court's precedents provide no secure guidelines as to how it should be decided. The main lesson that can be derived from them is that they do not supply an answer to the case before us. Precedent provides no way of guessing how the Supreme Court will rule when it comes to consider facts comparable to these. By hunting and pecking through the dicta of various opinions, one can find snippets that arguably support a prediction either way. Judge Calabresi and I believe that the Board's exclusion of Bronx Household's conduct of worship services is viewpoint-neutral and justified by the Board's reasonable concern that permitting use of school facilities for worship services would violate the Establishment Clause.

* * *

Bronx Household contends that SOP § 5.11 is not a measure reasonably designed to avoid an Establishment Clause violation but is instead itself a violation of that clause. Bronx Household argues that SOP § 5.11 fails the *Lemon* test because it sends a message of official hostility to religion and because its enforcement fosters excessive government entanglement with religion. We are not persuaded.

As emphasized above, SOP § 5.11 prohibits worship services in schools, but permits the expression of religious points of view through activities such as prayer, singing of hymns, preaching, and teaching or discussion of doctrine or scripture. Given the broad range of expressive religious activity that the policy does allow, we do not think a reasonable observer would perceive hostility to religion in the enforcement of SOP § 5.11.

Bronx Household also argues that SOP § 5.11 not only conveys the appearance of official hostility, but is in fact motivated by such hostility. We find no basis for this contention. Of course, "government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. However, we do not understand why Bronx Household attributes the Board's position to hostility rather than a good faith desire to navigate successfully through the poorly marked, and rapidly changing, channel between the Scylla of viewpoint discrimination and the Charybdis of violation of the Establishment Clause.

The Board has by no means been alone in the belief that the Establishment Clause requires governmental educational institutions to be cautious of harboring or sponsoring religious activities. The Supreme Court's rulings in *Rosenberger*, *Lamb's Chapel*, and *Good News Club* deviated from a previously widespread governmental and judicial perception of the scope of the Establishment Clause's prohibitions. In each of those three cases, the school administrators and the lower court judges believed that the challenged policies, which were intended to keep religion at a distance from public institutions, were mandated by the Establishment Clause, or at least consistent with the Constitution. And in two of the cases, a number of Supreme Court justices did as well.

There is no better reason to believe, as Bronx Household suggests, that the Board was motivated by hostility toward religion than there is to believe that such hostility has motivated other school authorities throughout the country, the lower court judges and dissenting Supreme Court justices in *Lamb's Chapel*, *Rosenberger*, and *Good News Club*, or Judge Calabresi and me. We see no sound basis for concluding that the Board's actions have been motivated by anything other than a desire to find the proper balance between two clauses of the First Amendment, the interpretation of which by the Supreme Court has been in flux and uncertain.[13]

---

[13] Judge Walker similarly asserted in his dissent in *Bronx Household III* that the Board's adoption of SOP § 5.11 was motivated by "long-standing hostility to religious groups." *See Bronx Household III*, 492 F.3d at 127 ("The Board's avowed purposed in enforcing the regulation in this case . . . and its

Bronx Household also argues that SOP § 5.11 cannot be applied without unconstitutionally entangling the Board in matters of religious doctrine. *See Agostini v. Felton*, 521 U.S. 203, 232-33 (1997). According to Bronx Household, any attempt by the Board to distinguish between religious activity that falls under the exclusion of "worship services," and religious activity that does not, necessarily places the Board in violation of the duty imposed by *Lemon* to avoid "excessive government entanglement with religion." 403 U.S. at 613.[14]

To begin with, whatever merit this argument may have in other types of cases, we do not see what application it has here. Bronx Household does not contest that it conducts religious worship services. To the contrary, it applied for a permit to conduct "Christian worship services," and the evidence suggests no reason to question its own characterization of its activities. *Cf. Christian Legal Soc'y*, 130 S. Ct. at 2982-84; *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 918 & n.18 (9th Cir. 2007), *abrogated on other grounds*

---

long-standing hostility to religious groups, leads ineluctably to the conclusion that the Board, in fact, has undertaken to exclude a particular viewpoint from its property."). Judge Walker has not repeated that assertion in his present opinion, but neither has he retracted it.

[14] Judge Walker has also made this argument. *See Bronx Household III*, 492 F.3d at 131 (Walker, J., dissenting) (arguing that the Board would "flout[] the Establishment Clause" by trying to distinguish worship because it would "no doubt have to interpret religious doctrine or defer to the interpretations of religious officials in order to keep worship, and worship alone, out of its schools" (internal quotation marks omitted)).

by Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365 (2008).

This argument, furthermore, overlooks the nature of the duties placed on government officials by the Establishment Clause (as well as the Free Exercise of Religion Clause). As we outlined above, while other clauses of the First Amendment prohibit government officials from discriminating on the basis of religious viewpoint, the Establishment Clause prohibits them from taking action that would constitute establishment of religion. In various circumstances, especially when dealing with initiatives for the conduct of undoubtedly religious exercises on public property, government officials cannot discharge their constitutional obligations without close examination of the particular conduct to determine if it is properly deemed to be religious and if so whether allowing it would constitute a prohibited establishment of religion. Bronx Household's argument, if valid, would effectively nullify the Establishment Clause.[15]

Without doubt there are circumstances where a government official's involvement in matters of religious doctrine constitutes excessive government entanglement. *See, e.g.*, *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 427 (2d Cir. 2002). But it does not follow, as Bronx

[15] The Free Exercise of Religion Clause also at times compels government officials to examine conduct of an undoubtedly religious nature to determine whether it constitutes exercise of religion, and is thus entitled to the clause's protection, or does not, and is thus subject to regulation.

Household seems to argue, that the mere act of inspection of religious conduct is an excessive entanglement. The Constitution, far from forbidding government examination of assertedly religious conduct, at times *compels* government officials to undertake such inquiry in order to draw necessary distinctions.[16] *See Lee v. Weisman*, 505 U.S. 577, 598 (1992) ("Our jurisprudence in this area is of necessity one of line-drawing, of determining at what point a dissenter's rights of religious freedom are infringed by the State."); *Cnty. of Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring in part and concurring in the judgment) ("We cannot avoid the obligation to draw lines, often close and difficult lines, in deciding Establishment Clause cases . . . ."). It was just such inspection which permitted the Supreme Court to allow the display of arguably religious symbols in certain public contexts while prohibiting it in others. *Compare Van Orden*, 545 U.S. at 703 (Breyer, J., concurring), *and Cnty. of Allegheny*, 492 U.S. at 620, *with McCreary*, 545 U.S. at 881, *and Cnty. of Allegheny*, 492 U.S. at 601-02.

C.

Judge Walker's dissenting opinion criticizes our ruling on a number of grounds. We believe his criticisms are not well founded.

---

[16] Applying such a rule would, for example, mean that every claim of entitlement under the Religious Land Use and Institutionalized Persons Act (RLIUPA), 42 U.S.C. § 2000cc *et seq.*, would be immune from court inquiry into whether the use is in fact a religious use.

1) Judge Walker's primary argument is that, because SOP § 5.11's exclusion of religious worship services depends on their religious nature, which we do not dispute, it necessarily discriminates illegally on the basis of viewpoint. *See* Dissenting Op. 10 ("The Board cannot lawfully exclude the conduct of an event based solely on the religious viewpoints expressed during the event."). He concludes that there is "no doubt that it is 'religious services' and 'worship' that the Board is targeting for exclusion" because "[t]he Board is otherwise unconcerned with comparable ceremonial speech occurring on school premises." Dissenting Op. 9. According to his analysis, the governing test should be "whether Bronx Household is engaging in speech that fulfills the purposes of the forum and is consistent with non-religious speech occurring on school premises." Dissenting Op. 9. If Bronx Household is engaging in such speech and is excluded because of the religious nature of its activity, the exclusion is necessarily illegal viewpoint discrimination.

The problem we find with Judge Walker's analysis is that it either ignores the crucial role of the Establishment Clause in motivating the Board's decision or it simply reads that clause out of the Constitution. The general effect of the Establishment Clause is to prohibit government from taking actions which have the effect of establishing *religion*. Assuming that the Establishment Clause has some meaning – that is to say, assuming there are some forms of activity which government may not conduct (or may not permit) by reason of the Establishment Clause – any such prohibitions necessarily depend on the *religious*

nature of the particular activity. If the activity is not of religious nature, it does not fall within the purview of the Establishment Clause.

This feature is evident throughout the Supreme Court's Establishment Clause jurisprudence. In *Lee v. Weisman*, 505 U.S. 577 (1992), for example, the Supreme Court held that the Establishment Clause prohibited a public high school from including the recitation of a prayer in its graduation ceremony. The prayer was unquestionably an expressive act, and the prohibition by the Court under the Establishment Clause unquestionably depended on the religious nature of prayer. Had the school administration sought to include instead of a prayer a non-religious affirmation of patriotism, or of love of learning, that would not have been prohibited by the Establishment Clause.

In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Court held that the Establishment Clause prohibited the display of a crèche in the Grand Staircase of the Allegheny County Courthouse, but upheld against Establishment Clause challenge another display which included an 18-foot menorah, a 45-foot Christmas tree, and a sign declaring devotion to liberty. Both displays conveyed an expressive message. What distinguished them was the fact that the crèche "sent an unmistakable message that [the county] supports and promotes the Christian praise to God," *id.* at 600, while the menorah, tree, and sign celebrated the holiday season on a non-sectarian basis, *id.* at 617-18.

In the companion cases of *McCreary County v. ACLU*, 545 U.S. 844 (2005), and *Van Orden v. Perry*, 545 U.S. 677 (2005), the Court distinguished between two public displays of the Ten Commandments based on whether they conveyed a message of governmental support or endorsement of religion. In *McCreary*, the Court upheld an injunction prohibiting a display of the Ten Commandments in two courthouses, because the displays had a "predominantly religious purpose." *McCreary*, 545 U.S. at 881. By contrast, Justice Breyer's controlling opinion in *Van Orden* found that the display of the Ten Commandments in the Texas State Capitol did not violate the Establishment Clause because, when viewed in context, it conveyed a predominantly secular message of the importance of law. *Van Orden*, 545 U.S. at 701-02 (Breyer, J., concurring). The religious (or non-religious) nature of the two displays again determined whether their presence on public property was lawful.

In light of such decisions, Judge Walker's view of the question seems to us not compatible with the Establishment Clause. Inevitably, whatever expressive conduct is prohibited by the Establishment Clause is prohibited by reason of its religious nature and would not be prohibited if what it expressed were not related to religion.

We do not suggest for a moment that any and all expressive activity with religious content must be excluded from government property or from government-controlled enterprise, such as the administration of a school system. The Supreme Court has unquestionably ruled otherwise in

Rosenberger, *Good News Club*, and other cases. Our point is only that the test cannot be as Judge Walker views it. The mere fact that government does not permit an expressive activity, which it would permit if the activity were not religious, does not compel the conclusion that it is engaging in unconstitutional viewpoint discrimination. Whatever forms of governmental action are prohibited by the Establishment Clause are prohibited in part because of their religious nature and would not be prohibited if they were not religious.

Where government excludes a category of activity involving religious expression out of concern for the limitations imposed on government by the Establishment Clause, the lawfulness of the exclusion (notwithstanding that the religious content motivates the exclusion) will turn on whether allowing the activity would either violate the Establishment Clause or place the government entity at a reasonably perceived risk of violating the Establishment Clause. The Supreme Court has never ruled on whether permitting the regular conduct of religious worship services in public schools constitutes a violation of the Establishment Clause, and we reach no conclusion on that question. As discussed above, considering all the circumstances, we think the risk that permitting the regular conduct of worship services in public schools would violate the Establishment Clause is sufficiently high to justify the Board's adoption of a content restriction that prohibits the performance of such services but does not otherwise limit the expression of religious viewpoints.

2) Judge Walker maintains that our ruling approves the exclusion of the very sort of conduct that the Supreme Court ruled in *Good News Club* could not be excluded. Dissenting Op. 10. We respectfully disagree. The application of the Good News Club, which the school district denied, was for a Christian group to hold after-school meetings for children between the ages of six and twelve, where they would have "a fun time of singing songs, hearing a Bible lesson and memorizing scripture." *Good News Club*, 533 U.S. at 103. The club later gave an expanded description by letter to the effect that

> Ms. Fournier tak[es] attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next Club members engage in games that involve, *inter alia*, learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization.

Id.

Without doubt there is some overlap between Bronx Household's conduct of Christian worship services and the children's club meetings that were the subject of *Good News Club*, in that worship services generally include song, prayer, and scripture. Nonetheless, we doubt that objective observers employing ordinary understandings of the

English language would describe Ms. Fournier's club meetings as worship services. Judge Walker seeks to discern the meaning of the Supreme Court's majority opinion from the emphatic objections to it expressed in Justice Souter's dissenting opinion. He bases his assertion that the activities of the Good News Club were "religious worship services" on Justice Souter's dissenting statement that what the majority allowed into a public school was in effect "an evangelical service of worship." 533 U.S. at 138. It is axiomatic that a dissenting opinion is generally the least reliable place to look to discern the meaning of a majority opinion. Dissenters commonly exaggerate what they see as inevitable, appalling consequences of the majority's ruling, a phenomenon which led Judge Friendly to observe that dissenting opinions are "rarely a safe guide to the holding of the majority." *United States v. Gorman*, 355 F.2d 151, 155 (2d Cir. 1965). Regardless of whether the dissenting justices believed the activities of the Good News Club were equivalent to "an evangelical service of worship," there is no indication that the majority shared that view. Indeed, rejecting the argument advanced by the school district in *Good News Club* "that the Club's activities constitute 'religious worship,'" the majority expressly noted that the court below had "made no such determination," emphasizing that it was not addressing what ruling it would make if the excluded activity were religious worship. *Id.* at 112 n.4.

We do not mean to imply that we think the Supreme Court somehow indicated in *Good News Club* that it would rule as we do on the exclusion of

worship services. Our point is only that the Supreme Court has neither ruled on the question, nor even given any reliable indication of how it would rule.

3) Judge Walker argues that we err to the extent that we rely on the heavy predominance of the use of schools for *Christian* worship services (as opposed to services of other religions) because of the greater availability of the schools on the Christian day of worship. He argues that the greater availability of schools for use by Christian organizations is of no constitutional concern, because "[a]n Establishment Clause violation does not result from either private choice or happenstance." Dissenting Op. 24.

The greater availability of schools for use on the Christian day of worship is certainly not "happenstance." From the first, schools throughout the United States were closed on Sundays precisely because Sunday is the Christian day of worship – the day when schoolchildren were expected to attend church services with their parents. The tradition of closing schools, post offices, courts, and other government buildings on Sunday is no more happenstance than the fact that, until recently, many state laws required businesses to close on Sundays. *See* Alan Raucher, *Sunday Business and the Decline of Sunday Closing Laws: A Historical Overview*, 36 J. Church and State 13 (1994). That choice has origins in the government's solicitude for Christianity, in what was once widely viewed as "a Christian nation." *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892).

* * *

In rejecting a multitude of Judge Walker's arguments, we do not imply that his conclusion (as to the constitutional invalidity of the religious worship services branch of SOP § 5.11) is frivolous or even necessarily wrong. The Supreme Court's rulings have laid down no principles that compel a decision one way or the other on these facts. Nor has the Supreme Court given any reliable indication of how it will rule if and when it confronts these facts. As Judge Calabresi and I view the facts, the use of New York City public schools for religious worship services – with a heavy predominance of Christian worship services because school buildings are most available for non-school use on Sundays – would create a very substantial appearance of governmental endorsement of religion and give the Board a strong basis to fear that permitting such use would violate the Establishment Clause. Because the "religious worship services" clause of SOP § 5.11 is a content restriction that excludes only a type of activity, does so for a reason that is either constitutionally mandated or at least constitutionally reasonable, and does not otherwise curtail free expression of religious viewpoints, we conclude that the restriction does not violate the Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the district court is REVERSED, and the injunction barring enforcement of SOP § 5.11 against Bronx Household is VACATED.

CALABRESI, Circuit Judge, concurring:

I join Judge Leval's opinion in full because it states a correct alternative ground upon which to decide this case. But I write separately to emphasize that I continue to adhere to the position I took in my earlier opinion in this case, that worship is *sui generis*. *See Bronx Household III*, 492 F.3d at 100 (Calabresi, J., concurring). And I especially wish to reaffirm my view there stated:

> A holding that *worship* is only an agglomeration of rites would be a judicial finding on the nature of worship that would not only be grievously wrong, but also deeply insulting to persons of faith.

Id. at 103. Worship is something entirely different. *See id.*; *see also Bronx Household I*, 127 F.3d at 221 (Cabranes, J., concurring in part and dissenting in part) ("Unlike religious 'instruction,' there is no real secular analogue to religious 'services,' such that a ban on religious services might pose a substantial threat of viewpoint discrimination between religion and secularism."). State rules excluding all "worship" from a limited public forum, therefore, are based on content, not viewpoint.

In the context of the rule before us, there is one particular problem: the rule seems to prohibit *religious* worship. *See* SOP § 5.11 ("No permit shall be granted for the purpose of holding religious worship services . . . ."). And if it be the case that *non-religious* worship also exists, then the prohibition of *religious* worship would be viewpoint

discrimination, and most likely unconstitutional. The question of whether there is a category of nonreligious worship, or whether worship is inherently religious and thus "religious worship" is redundant, is interesting and difficult, but we do not need to decide it in this case. The majority opinion does not need to decide the issue because it concludes that there is no such thing as a non-religious worship *service*. Maj. Op. at **[15-16]**. I also need not decide the issue because the rule before us prohibits "using a school as a house of worship," as well as the holding of "religious worship services." SOP § 5.11. No one questions that what Appellees seek to do in the instant case is to use the school as a house of worship. And since both religious worship and nonreligious worship (if there be any) are subject to the clause barring use of a school as "a house of worship," the prohibition here is content- and not viewpoint-based.

We also do not need to be concerned with whether in some other case it might be hard to say whether what the Appellees wish to do is to use the school as "a house of worship." Nor need we worry that, in attempting to answer that question, we (or the Appellants) might become unconstitutionally "entangle[d] with religion," *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). For Appellees admitted in their permit request, *see* J.A. at 3586, and in their briefs before this court, *see* Appellees' Br. at 1, that they seek to use school facilities for "worship." When a group tells the government that what it wishes to do is "worship," the government is entitled to take the group at its word. *See Bronx Household I*, 127 F.3d at 221-22 (Cabranes, J., concurring in part and

dissenting in part) ("There may be cases in which the parties dispute whether or not a proposed activity for which permission to use school premises is denied actually constitutes religious instruction or worship . . . . However, this issue does not arise in the instant case, as the parties have stipulated that plaintiff seeks to use a school gymnasium for 'religious worship services.'"). That is all the Appellants did when they enforced SOP § 5.11,[1] and it is all a court needs to do here. This case does not, therefore, present an appropriate occasion for deciding how to resolve a dispute over whether something actually is "worship."

[1] Whatever the Appellants may have done in deciding whether to grant previous permit applications not governed by the revised SOP § 5.11 is not before us. Under SOP § 5.11, the Appellants denied the Appellees' permit application four days after it was submitted, because it described the activities to be conducted on school premises as "Christian worship services." *See* J.A. at 3586, 3588. It also does not matter that the permit application included the words "as we have done in the past," J.A. at 3586, or that it might have been worded explicitly to include, in addition to worship, other activities that, if conducted separately from worship, could not constitutionally be excluded from the limited public forum. Once an applicant says that what it wishes to do is "worship," no inquiry into whether the underlying or accompanying activities actually constitute worship is required.

JOHN M. WALKER, JR., Circuit Judge, dissenting:

The Board's Standard Operating Procedure ("SOP") § 5.11 withholds otherwise broadly available school-use permits from religious groups seeking to use school facilities during non-school hours "for the purpose of holding religious worship services, or otherwise using a school as a house of worship." Without addressing the "house of worship" ban, the majority concludes that the ban on "religious worship services" does not offend the First Amendment's Free Speech Clause because it is a neutral, content-based restriction that is reasonably implemented to avoid an Establishment Clause violation. I disagree: SOP § 5.11 is impermissible viewpoint discrimination against protected speech and is unsupported by a compelling state interest. In this case, Bronx Household's worship services fit easily within the purposes of the Board's broadly available forum and may not be the object of discrimination based upon the religious viewpoint expressed by the services' participants. The Board's purported Establishment Clause concerns are insubstantial: they are not reasonable, much less a compelling reason for the Board to shut the door on Bronx Household's protected speech.

* * * * * *

When this panel split in 2007, Judge Calabresi indicated that he would uphold SOP § 5.11 as a reasonable content-based restriction on the unique subject of "worship," Judge Leval expressed no opinion on the merits of the case due to ripeness concerns, and I indicated that I would strike down

the application of SOP § 5.11 as unconstitutional viewpoint discrimination. See generally Bronx Household of Faith v. Bd. of Educ., 492 F.3d 89, 100-106 (Calabresi, J.), 110-123 (Leval, J.), and 123-32 (Walker, J.) (2d Cir. 2007). At that time, I compared the purpose of Bronx Household's proposed use of school property with the purposes for which the Board opened its limited forum to the public under SOP § 5.6.2, and, after inquiring searchingly of the government's motives, concluded that the Board had engaged in impermissible viewpoint discrimination by rejecting permit applicants under SOP § 5.11. Id. at 123-25. In response to Judge Calabresi's willingness to uphold the Board's prohibition on religious worship, I countered that Judge Calabresi had not engaged in any real analysis of the purpose of Bronx Household's proposed expressive activity in light of the purposes of the forum and in comparison to the purposes of the activities the Board had allowed, pointing out that he had erred by simply comparing the speech already permitted on school premises with "worship," which he declared to be sui generis and thus readily excludable from the forum. See id. at 127-130; cf. Op. of J. Calabresi at 1.

Now, in this latest iteration of what is effectively the same facial challenge to the Board's exclusions under SOP § 5.11, the majority opinion breaks with Judge Calabresi's earlier analysis that "worship" is a separate category of speech that is readily excludable from the Board's expansive community use policy, declining even to consider either the second part of SOP § 5.11 (which prohibits "using a school as a house of worship") or whether "worship" may be lawfully excluded from the forum. Compare

Maj. Op. at 11 & 11 n.6 (expressly avoiding a decision on "worship"), with Op. of J. Calabresi at 1-3 (readily excluding "worship").[1] Rather, the majority adopts a position not argued below or advanced by the Board by focusing solely on the Board's restriction against "religious worship services," characterizing SOP § 5.11 as merely the exclusion of "the conduct of an event or activity that includes expression of a point of view," Maj. Op. at 13. The majority does not disagree that Bronx Household's services fall squarely within the purposes of the limited public forum; it holds, however, that SOP § 5.11's exclusion of services is both viewpoint-neutral and justified by Establishment Clause concerns. Because I believe that neither conclusion is correct, I would affirm the district court's injunction.

I. SOP § 5.11's Ban on Religious Worship Services Constitutes Viewpoint Discrimination

As the majority recognizes, the Board has created a limited public forum by opening its schools for "uses pertaining to the welfare of the community." SOP § 5.6.2. When the state creates such a forum, it "is not required to and does not allow persons to engage in every type of speech." Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001). The government may, for example, reserve the limited

[1] While I disagree with Judge Calabresi's analysis and conclusions, he at least recognizes that the two parts of SOP 3 § 5.11 operate in tandem to effectively preclude worship and the practice of religion from school premises during non-school hours.

public forum "for the discussion of certain topics." Id. (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995)). Any restrictions on speech in a limited public forum must, however, be both viewpoint neutral and "reasonable in light of the purpose served by the forum." Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985). SOP § 5.11 is neither.

Here, the Board opened its schools to the public for purposes of "maximiz[ing] educational, cultural, artistic and recreational opportunities for children and parents," Cahill. Decl. ¶ 13, "assist[ing] in . . . development generally," id., "expand[ing] enrichment opportunities for children," Farina Decl. ¶ 9, and "enhanc[ing] community support for the schools," id. The parties agree, and the majority does not contest, that Bronx Household's intended use of P.S. 15 for "Christian worship services"—which include prayer, the reading and singing of psalms, Bible lessons, personal testimony, communion, preaching, fellowship, and conversation—falls within the purposes of the forum. See, e.g., Transcript of Oral Argument, 10/6/2009 ("Tr."), at 10:7-8, 21:20-21, & 22:20-22 (each statement conceding that Bronx Household's intended use advances the forum's purposes). The majority nevertheless finds that the restriction on religious services is content discrimination that is reasonable in light of the purposes of the limited public forum. I disagree and conclude that the Board's discrimination against Bronx Household is based on its religious viewpoint.

The Supreme Court has consistently held that the exclusion of private speakers from open fora or limited public fora on the basis of their religious message constitutes viewpoint discrimination. In Widmar v. Vincent, for example, the Supreme Court reaffirmed that "religious worship and discussion" are "forms of speech and association protected by the First Amendment." 454 U.S. 263, 269 (1981). On this basis, the Court rejected a university's attempt to prevent a student organization from using an open forum to hold meetings, similar to those at issue here, that included "prayer, hymns, Bible commentary, and discussion of religious views and experiences." Id. at 265 n.2. Significantly, the Court rejected a distinction between protected religious speech and "a new class of religious speech act[s] constituting worship." Id. at 269 n.6 (alteration in original) (citation and internal quotation marks omitted). The Court explained that this proposed distinction lacked "intelligible content" and would not "lie within the judicial competence to administer." Id.

The Supreme Court first addressed private religious speech in a limited public forum in Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993). There, a church sought to use a school's limited public forum, after hours, to show a six-part film series that dealt with "family and child-rearing issues" from a Christian perspective. Id. at 387-89. The Court found that the school district had engaged in viewpoint discrimination by "permit[ting] school property to be used for the presentation of all views about family issues and child rearing except those dealing with

the subject matter from a religious standpoint." Id. at 393. Similarly, in Rosenberger v. Rector & Visitors of the University of Virginia, the Court rejected the University of Virginia's refusal to fund a student newspaper on the basis that the newspaper "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." 515 U.S. 819, 823 (1995). The Court explained that viewpoint discrimination is a subset of content discrimination and that while it is "something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought," religion nevertheless "provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." Id. at 830-31. For that reason, the University's refusal to fund a student publication because of its Christian perspective, while continuing to fund publications with other (secular) perspectives, was impermissible viewpoint discrimination. Id. at 831-32.

More recently, in Good News Club v. Milford Central School, 533 U.S. 98 (2001), the Supreme Court applied its holdings in Lamb's Chapel and Rosenberger to activities that could be labeled "worship." Milford had created a limited public forum that, like SOP § 5.6.2 here, opened its school for purposes "pertaining to the welfare of the community." Good News Club, 533 U.S. at 102. The Good News Club, a private Christian organization, sought to use this forum for weekly meetings, at which participants would "sing[] songs, hear[] a Bible lesson and memoriz[e] scripture." 533 U.S. at 103. In finding Milford's exclusion of these meetings

unconstitutional, the Court explained that "something that is 'quintessentially religious' or 'decidedly religious in nature' can[] also be characterized properly as the teaching of morals and character development from a particular viewpoint." Id. at 111. While declining to challenge Justice Souter's characterization of the Club's activities as "an evangelical service of worship," the Court wrote that "what matters is the substance of the Club's activities," which the Court found to be "materially indistinguishable from the activities in Lamb's Chapel and Rosenberger." Id. at 112 n.4. Because non-religious groups were permitted to teach morals and character development from a secular viewpoint, excluding the Good News Club's efforts to do the same from a religion viewpoint was impermissible.

The majority argues in this case that the Board has not discriminated on the basis of viewpoint and tries to distinguish these prior Supreme Court decisions by focusing narrowly on the Board's exclusion of "religious worship services." The Board, however, has not differentiated these services from religious worship or the practice of religion. Indeed, how could it do so? Nor has the Board offered a definition of religious worship services. Rather, the majority offers its own self-styled definition of "religious worship services," without reference to the record or briefs, as "the conduct of a particular type of event: a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion," the conduct of which "has the effect of placing centrally, and perhaps even of establishing,

the religion in the school." Maj. Op. at 12. The majority's formulation of "religious worship services," including its shoe-horning of a supposed Establishment Clause problem, is conveniently tailored to support its arguments, but leaves no doubt that it is "religious services" and "worship" that the Board is targeting for exclusion. The Board is otherwise unconcerned with comparable ceremonial speech occurring on school premises.[2] The majority's definition, it bears noting, leads to anomalous results: while a Catholic or Episcopal service would be shut out of the forum, a Quaker meeting service, Buddhist meditation service, or other religions worship convocation could be allowed because it would not follow a "prescribed order" or because the leader is not "ordained." Ultimately, the majority's definition also obscures the central issue, barely discussed in the majority opinion, of whether Bronx Household is engaging in speech that fulfills the purposes of the forum and is consistent with non-religious speech occurring on school premises.

---

[2] Indeed, the majority's attempt to differentiate between the "conduct of services," which it defines as "the performance of an event or activity," Maj. Op. at 11, and the conduct of "religious worship services" as two distinct categories of activity relies explicitly on the religious nature of the latter activity. Whereas a Boy Scouts merit badge service constitutes "a collective activity characteristically done according to an order prescribed by and under the auspices of an organized [civic group]" and is "typically . . . conducted by an . . . official of the [group]," Maj. Op. at 12, Bronx Household's weekly "event or activity" is barred solely because it is performed under the auspices of an organized religion and conducted by an ordained official of the religion. Thus, these purportedly distinguishing criteria squarely depend on the fact that religion is the underlying motivation for the expressive activity.

The core of the majority's argument is that by prohibiting "religious worship services," the Board has only prohibited "the conduct of an event or activity that includes expression of a point of view," rather than "excluding the expression of that point of view." Maj Op. at 12. The majority's attempt to differentiate between the conduct of an event, here labeled "services," and the protected viewpoints expressed during the event is futile because the conduct of "services" is the protected expressive activity of the sort recognized in Good News Club and, earlier, in Widmar. The majority turns its back on the Supreme Court's holding in Good News Club that it is viewpoint discrimination for a school to exclude what is effectively "an evangelical service of worship" from a limited public forum that in every material respect is identical to the forum that the Board established in this case. Compare Good News Club, 533 U.S. at 112 n.4, with id. at 137-38 (Souter, J., dissenting). The Board cannot lawfully exclude the conduct of an event based solely on the religious viewpoints expressed during the event.

Indeed, in rejecting the claim that religious worship is not protected speech in Widmar, Justice Powell explained that a carve-out of worship from protected religious speech does not have intelligible content and likely would not "lie within the judicial competence to administer." 454 U.S. at 269 n.6. The carve-out, Justice Powell wrote, also lacks "relevance" because there is "no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts

than for religious worship by persons already converted." Id. (citation omitted).

Fixing upon the label "services" for the program of worship at issue here as a carve-out from protected speech–as opposed to other characterizations such as "meeting," "gathering," "prayer group," or "time of worship"–does nothing to resolve the underlying carve-out problems identified by Justice Powell in Widmar. The same concerns–lack of intelligible content, judicial manageability, and relevance–persist. While the majority tries to address these concerns through its own definition of services, the concerns raised in Widmar adhere in the application of the majority's definition. It is as difficult for a court to ascertain when it is dealing with "services" as with "worship" generally and to manage any such distinction. And ultimately, any distinction between "services" and protected religious speech is irrelevant because, regardless of labels, "what matters is the substance of the [group's] activities." Good News Club, 533 U.S. at 112 n.4.

Moreover, that SOP § 5.11 exclusively targets religious viewpoints is evident from the fact that, as in Good News Club, only "religious" services are shut out of the forum. No similar restriction is placed on secular gatherings that are materially indistinguishable from Bronx Household's use of P.S. 15. While the Board denies Bronx Household a space to celebrate its ideals, it permits other outside organizations, such as the Legionnaire Greys Program and the Boy Scouts, to meet on school premises to further their secular ideals of "military

leadership," or "character building, citizenship, and personal and physical fitness." The Board permits these secular uses despite the fact that these groups also meet according to a prescribed order of conduct that they consider integral to the accomplishment of their goals. See, e.g., 1st Aff. of David Laguer, at ¶¶ 3, 4, & 6 (describing Legionnaire Greys Program meetings as "structured and ordered," each consisting of, inter alia, a ceremonial flag presentation, trumpets playing the national anthem, flag salutes, unit lessons, leadership training, and character building); Aff. of Jeffrey G. Fanara, at ¶¶ 5, 6, & 8 (describing Boy Scout troop meetings as consisting of a "pre-opening, a half-hour gathering period, . . . a formal opening ceremony . . . with a flag ceremony and [ ] a recitation of the Pledge of Allegiance and the Scout Oath or Law," and a "closing ceremony" that "includes a motivational message . . . based on Scouting's values"). There can be little doubt that the Board would similarly allow the use of its facilities by fraternal organizations, such as the Elks or the Freemasons, with comparable missions and ceremonies.

Just as each of these groups meets to address and discuss universal concerns while advancing its organizational mission, so too does Bronx Household's "Sunday morning meeting [act as] the indispensable integration point for [the group]. It provides the theological framework to engage in activities that benefit the welfare of the community." First Aff. of Robert Hall ("1st Hall Aff."), at ¶ 7. Further, it is during Bronx Household's gatherings that participants are taught "to love their neighbors as themselves, to defend the weak and

disenfranchised, and to help the poor regardless of their particular beliefs. It is a venue where people . . . come to talk about their particular problems and needs."[3] Id. Plainly, there can be no claim that Bronx Household's gatherings fail to address subjects that are otherwise permitted in the forum or that they differ from secular groups' meetings in any way other than their invocation of religious doctrine.[4]

---

[3] For this reason, the majority errs by distinguishing Good News Club on the basis of the Supreme Court's statement that the Club meetings in that case did not involve "mere religious worship." 533 U.S. at 112 n.4; see Maj. Op. at 25**,** 38**.** The majority, however, omits a critical modifier: the Court made clear that it did not consider the Club's activities to be "mere religious worship, divorced from any teaching of moral values." Id. (emphasis added). The same is true here: Bronx Household's worship services cannot be divorced from the teaching of moral values that are part and parcel of those services, which include Bible lessons and instruction. Indeed, how can the majority's conception of religious worship services ever be divorced from promoting moral values?

[4] While this case was argued under the First Amendment's Free Speech and Establishment Clauses, the Board's action also raises Free Exercise Clause concerns. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993); see also Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 877 (1990). Thus, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." Church of the Lukumi Babalu Aye, 508 U.S. at 533 (internal citation omitted). Given the plain language of SOP § 5.11, the Board's persistent exclusion of outside organizations seeking to use school facilities for religious purposes, and the

The majority also relies on a number of hypothetical activities to argue that the Board could deny a permit application in order to avoid "either harm to persons or property, or liability, or a mess, which those activities may produce." Maj. Op. at 13. Irrespective of the Board's power to deny permits for such hypothetical uses out of a concern for safety, sanitation, and non-interference with other uses of the schools, see Capitol Square Review & Adv. Bd. v. Pinette, 515 U.S. 753, 758 (1995), none of these concerns has ever been present in this case. Strikingly, while quick to proffer these hypothetical uses, the majority never comes to grips with the significant fact that the Board allows most outside organizations to access its facilities for uses that "pertain[ ] to the welfare of the community" and "promot[e] [children's] development generally," so long, of course, as those organizations' activities do not amount to religious worship services or transform the school into a "house of worship." Despite the majority's arguments to the contrary, it is readily apparent that the Board singles out religious worship for disfavored treatment. The majority's argument that SOP § 5.11 is nothing more

---

Board's repeated statements that SOP § 5.11 is aimed at the practice of religion, it is undisputable that SOP § 5.11 is not neutral. See Smith, 494 U.S. at 877-78. Because SOP § 5.11 specifically burdens religious practices, it must advance a compelling government interest to pass constitutional muster. See id. at 894-95 (O'Connor, J., concurring). Such a compelling interest is absent in this case for the reasons stated in Part II.

than a content-based restriction on a specific type of activity, albeit a religious one, plainly fails.[5]

Finally, the majority argues that my finding of viewpoint discrimination overlooks the Board's Establishment Clause rationale. Maj. Op. at 33-37. As an initial matter, I disagree that the Board's Establishment Clause concerns are reasonable, for the reasons discussed in Part II. Nevertheless, even if the Board were to have legitimate Establishment Clause concerns, those concerns could do nothing to undermine my conclusion that the Board engaged in viewpoint discrimination; at most, they could only serve as a potential justification for such discrimination.

Thus, whether the Board's actions under SOP § 5.11 are properly characterized as the exclusion of worship, the exclusion of "religious worship services," or the exclusion of "the conduct of an event or activity that includes expression of a [religious] point of view," Maj. Op. at 13, the Board has

---

[5] The Board's separate reliance on Faith Center Church Evangelistic Ministries v. Glover, 480 F.3d 891 (9th Cir. 2007), to argue that SOP § 5.11 is content, not viewpoint, discrimination is misplaced. In Faith Center, the Ninth Circuit concluded that Contra Costa County's exclusion of a religious congregation from its library meeting space was content, not viewpoint, discrimination because the congregation's intended use of the space during normal operating hours for "Praise and Worship" services was incompatible with (a) the purpose for which the meeting room forum had been created, and (b) the "library's primary function as a sanctuary for reading, writing, and quiet contemplation . . . available to the whole community." Id. at 902, 909-11. No such incompatibility in either purpose or facility is present here.

discriminated against Bronx Household on the basis of religious viewpoint. The group's proposed use of P.S. 15 fits plainly within the purpose of the limited public forum created under SOP § 5.6.2; is not incompatible with any time, place, and manner restrictions imposed by the Board; and has been denied solely because Bronx Household wishes to address otherwise permissible subjects from a religious viewpoint through its conduct of religious "worship services."

II. Bronx Household's Intended Use of P.S. 15 Raises No Legitimate Establishment Clause Concerns

After concluding that SOP § 5.11 is content discrimination, the majority next considers the reasonableness of SOP § 5.11. However, it does so not in light of the forum's stated purposes, but rather in light of the Board's stated concern that allowing the conduct of "religious worship services" in schools would give rise to a sufficient appearance of endorsement to constitute a violation of the Establishment Clause. See Maj. Op. at 19. Unlike my colleagues in the majority and the Board, I am not prepared to shut out constitutionally-protected speech from a neutral forum on the sole basis that it is "quintessentially religious." Good News Club, 533 U.S. at 111. I would hold that the actions of Bronx Household, a private party, cannot transform the government's neutral action into an Establishment Clause violation. The Board's fear of being perceived as establishing a religion is therefore not reasonable, if the exclusion is viewed (erroneously) as content discrimination, much less sufficiently compelling to

justify the viewpoint discrimination that I believe is occurring.

Just like the defendants in Widmar, the Board and the majority "misconceive[] the nature of the case." 454 U.S. at 273. The Board has not created a forum open only to religious speech. Rather, "it has opened its facilities for use by [the community], and the question is whether it can now exclude groups because of the content of their speech." Id. In fact, the Supreme Court has "[m]ore than once . . . rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." Rosenberger, 515 U.S. at 839 (citing Lamb's Chapel, 508 U.S. at 393-94; Bd. of Educ. of Westside Cmty. Sch. (Dist. 66) v. Mergens, 496 U.S. 226, 248, 252 (1990)). Because the Establishment Clause looks only to the government's role, if any, in establishing religion and not the private speaker's choice in exercising his free speech rights, I reach the opposite conclusion from the majority as to whether a reasonable person would perceive the Board's grant of the neutral-forum permit sought here to be an endorsement of religion.

The Board and the majority invoke Lemon v. Kurtzman, 403 U.S. 602 (1971), to demonstrate that SOP § 5.11 is reasonable, but they misapply the Lemon test, thereby reaching several conclusions that directly contradict controlling Supreme Court precedent. In particular, the majority offers five bases for concluding that SOP § 5.11 is reasonably based on the Board's supposed concern that granting

Bronx Household a permit for "Christian worship services" might have the "principal or primary effect" of endorsing religion, see id. at 612, thereby violating the Establishment Clause.[6] The battle that the majority and the Board wish to fight, however, has already been lost. The Supreme Court has rejected Establishment Clause concerns, including those raised by the majority, in this context because they are premised on the mistaken belief that permitting religious groups to use school facilities for religious purposes on a non-school day in a neutral forum creates a realistic danger that the public will perceive the Board as endorsing religion.

The relevant question to be asked is not whether any person might mistakenly perceive the Board as conveying a message of endorsement or disapproval; rather, the endorsement test asks whether "an

---

[6] The five bases the majority cites are as follows: (1) after-hours use of school premises for "religious worship services" transforms the school into a church because "[t]he church has made the school the place for the performance of its rites," Maj. Op. at 20; (2) the Board might reasonably fear that allowing access for "religious worship services" results in the Board's substantial subsidization of religion, Maj. Op. at 21; (3) granting access for "religious worship services" might permanently convert a school on Sundays into a state-subsidized church "by reason of public perception of endorsement" that "is made particularly acute by the fact that P.S. 15 and other schools used by churches are attended by young and impressionable students," Maj. Op. at 22-23; (4) increased availability of Sunday permits would favor Christian groups over other denominations, see Maj. Op. at 23-24; and (5) deliberate exclusion of certain members of the general public, such as persons excommunicated from the church who advocate the Islamic religion, by a religious organization aggravates existing Establishment Clause concerns, see Maj. Op. at 24.

objective observer, acquainted with the text, legislative history, and implementation of the [challenged law or policy], would perceive it as a state endorsement of [organized religion] in public schools." Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (emphasis added) (quoting Wallace v. Jaffree, 472 U.S. 38, 73, 76 (1985) (O'Connor, J., concurring)). Thus, the majority confuses its analysis when it emphasizes the private speaker's conduct, rather than the government's role, in establishing religion. The fact that a community member might witness an outside organization using a school during non-school hours to further its religious cause does not in itself raise a legitimate concern that the government has acted in contravention of the Establishment Clause. See Capitol Square, 515 U.S. at 767 (Scalia, J., for the plurality) ("By its terms th[e] [Establishment] Clause applies only to the words and acts of government. It was never meant, and has never been read by this Court, to serve as an impediment to purely private religious speech connected to the State only through its occurrence in a public forum." (emphasis in original)).

For these reasons, the majority's focus on the "religious nature" of the speech, without regard to the nature of the speaker, is misplaced. The majority cites McCreary County v. ACLU, 545 U.S. 844 (2005); County of Allegheny v. ACLU, 492 U.S. 573 (1992); and Lee v. Weisman, 505 U.S. 577 (1992), as foundational to its Establish Clause analysis, and of course they would be highly relevant to this case were we dealing with religious speech by the government. In McCreary and County of Allegheny, the government's placement of the Ten

Commandments and a nativity creche, respectively, in county courthouses violated the Establishment Clause, as did the government in Lee v. Weisman when a school official invited a rabbi to give an invocation and benediction at a middle-school commencement exercise. In the case before us, however, the most the government has done is to open up a neutral public forum limited by its laudable educational and community-building purposes. Unlike in these three cited cases, it has neither promoted nor endorsed a religious message.

Also, "a significant factor in upholding government programs in the face of Establishment Clause attack is their neutrality towards religion." Good News Club, 533 U.S. at 114 (quoting Rosenberger, 515 U.S. at 839). Indeed, the Free Speech Clause's requirement of viewpoint neutrality by the government in opening a forum tends to undermine, if not preclude, a finding of school sponsorship in the Establishment Clause context. See Good News Club, 533 U.S. at 114 ("Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, [the school district] faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club.").[7] To an objective, fully informed

[7] Indeed, it bears noting that it was, at least in part, the Second Circuit's previous approval of the Board's rejection of Bronx Household's permit application pursuant to an earlier formulation of the religious-use prohibition ("No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school.") that prompted the Court to grant certiorari in Good News Club. See 533 U.S. at 105-106 (citing Bronx Household I

observer, the fact that the forum is open to a wide spectrum of participants bespeaks the state's neutrality, not its favoring of religion or any other group.

In any event, even if a private actor's conduct could somehow transform a neutral forum into a state endorsement of religion, Bronx Household's services would not do so here. Just as in Lamb's Chapel and Good News Club, Bronx Household's use of P.S. 15 takes place during non-school hours (actually on a day when there is no school), lacks school sponsorship, occurs in a forum otherwise available for a wide variety of uses, and is open to the public. See 1st Hall Dep. at 30 ("Worship services are always open to the public."); 1st Hall Aff., ¶ 5 ("Our Sunday morning meetings are open to all members of the public. The meetings are not closed to a limited group of people, such as church members and their guests.").[8] And while the

---

as one of a number of circuit court cases contributing to a circuit conflict "on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech"). It would not have been unreasonable for the Court to have expected that its Good News Club decision would end this case as well.

[8] While Bronx Household, in accordance with its religious tenets, limits communion to church members who have been baptized, all members of the public are free to attend its Sunday worship services and there is no evidence that Bronx Household has ever refused admission to anyone. The majority's statement that Bronx Household "excludes. . . persons who have been excommunicated or who advocate the Islamic religion from full participation in its services," Maj. Op. at 23, rests on Pastor Robert Hall's answers to hypothetical questions posed to him by the Board during his deposition that

majority in this case cites the "particularly acute" danger that young and impressionable students will perceive the weekend use of their schools by religious groups as the Board's endorsement of religion or certain religious denominations, see Maj. Op. at **[23]**, the Supreme Court rejected this same argument in Good News Club, where it was presented with facts less favorable to Good News Club than those the majority cites to here. See, e.g., Good News Club, 533 U.S. at 117-18. Specifically, the Good News Club's activities took place directly after school and catered to children ages 6-12, id.; here, by contrast, Bronx Household's services occur on Sundays, when the only children present at the school are those attending the services, presumably with their parents.

The majority argues at some length that permitting weekly worship services at P.S. 15 transforms the school into a church. See, e.g., Maj. Op. at 20 ("When worship services are performed in a place, . . . [t]he place has, at least for a time, become the church."). The majority then equates permitting worship services to "subsidizing churches" and "allowing schools to be converted into churches." Maj. Op. at 21**.** The "church" reference appears no less than twelve times in the majority opinion. Such an argument–that somehow a neutral forum is physically (or perhaps metaphysically) transformed into a non-neutral forum by the private activity undertaken there–has the feel of rhetoric.

---

specifically addressed church membership, not public attendance at Sunday worship services. See 2nd Hall Dep. at 35-42.

The same claim could have been made in Widmar and Good News Club, in which decidedly church-related activities were permitted to occur on a regular basis. Bronx Household's services do not convert P.S. 15 into a church any more than the Boy Scout's meetings convert it into a Boy Scout lodge.

The majority also errs in relying on the fact that some outside religious organizations may more easily obtain school-use permits because they worship on Sundays, not Fridays and Saturdays. See Maj. Op. at 23-24. An Establishment Clause violation does not result from either private choice or happenstance. See Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002); Good News Club, 533 U.S. at 119 n.9; Harris v. McRae, 448 U.S. 297, 319 (1980) ("[I]t does not follow that a statute violates the Establishment Clause because it happens to coincide or harmonize with the tenets of some or all religions." (internal quotation marks omitted)). Moreover, that an increasing number of Christian groups have sought Sunday-use permits under SOP § 5.6.2 does not equate to permit unavailability for other religious groups. Indeed, while the majority states that "Jews and Muslims generally cannot use school facilities for their services because the facilities are often unavailable on the days that their religions principally prescribe for services," Maj. Op. at 23-24, the record is clear that Jewish and Muslim groups have been granted weekend access to school premises across the city under the community use policy. See, e.g., J.A. at 88 (Friday permit for Downtown Synagogue's "religious services"); id. at 185 (Saturday permit for Downtown Synagogue's "religious services"); id. at 179 (Saturday permit for

Hope of Israel's "fellowship meetings"); id. at 183 (Saturday permit for Khal Bais Yitzchok's "religious fellowship meetings"); id. at 229 (Saturday permit for Muslimmah of NA's "religious services").[9] Finally, the majority's reliance on County of Allegheny v. ACLU, 492 U.S. 573 (1989), and Lynch v. Donnelly, 465 U.S. 668 (1984), is misplaced because those cases "neither hold[ ] nor even remotely assume[ ] that the government's neutral treatment of private religious expression can be unconstitutional." Capitol Square, 515 U.S. at 765 (Scalia, J., for the plurality).

Supreme Court caselaw also refutes the Board's argument that granting Bronx Household Sunday access to P.S. 15 constitutes direct aid to religion because it allows Bronx Household to bypass the expensive New York City real estate market that

---

[9] The majority relies on the Board's denial of one group's request to hold Jewish services on Saturdays in a school generally used for Christian services on Sundays in support of its argument that permits are unavailable to Jewish and Muslim groups. See Maj. Op. at 24. While the Board implies that there is a lack of availability of Friday and Saturday permits for use of its 1,197 buildings, its own evidence demonstrates that approximately 750 buildings are available for after-school use on Fridays, that 400 buildings are available for Saturday use, and that 900 buildings are available for Sunday use. See Appellant's Br. at 13-14. Thus, that some religious denominations use school premises more often than others may simply indicate their lack of other adequate meeting space in the community and not any increased ability on their part to secure a permit. See 2nd Hall Dep. at 105-06. That some religious groups utilize the extended use policy more than others simply does not give rise to a legitimate perception that the Board grants permits to particular denominations to the exclusion of others.

might otherwise preclude it from establishing a congregation. Cf. Maj. Op. at 21. The Board's argument runs afoul of Rosenberger:

> It does not violate the Establishment Clause for a [school] to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises. . . . The government usually acts by spending money. Even the provision of a meeting room, as in Mergens and Widmar, involved governmental expenditure, if only in the form of electricity and heating or cooling costs. The [analytical] error . . . lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient. If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then Widmar, Mergens, and Lamb's Chapel would have to be overruled.

515 U.S. at 842-43 (emphasis added). Even Justice Souter, who dissented in Rosenberger, agreed that the government does not provide impermissible direct aid to religion each time a non-government speaker utilizes a limited public forum for private religious speech. See id. at 888 (Souter, J., dissenting). Thus, established Supreme Court

precedent effectively forecloses the argument that permitting Bronx Household access to P.S. 15 for the purpose of engaging in private religious speech results in the Board's unlawful provision of direct aid to a religious group.

In sum, while the majority argues that allowing Bronx Household weekly use of P.S. 15 for "religious worship services" would force the Board to render direct aid to religion, convey a message that the Board endorses religion over non-religion, and exhibit a preference for certain religious denominations over others, these arguments are without merit. Rather, the neutrality of the forum is preserved when religious speech, like non-religious speech, is allowed. Accordingly, if Lemon v. Kurtzman is to apply,[10] I would hold that the Board has failed to demonstrate that granting Bronx Household Sunday access to P.S. 15 for worship services would have the principal or primary effect of advancing religion or otherwise conveying a message of endorsement.[11] While I would require the Board to

---

[10] The Supreme Court recently noted that many of its Establishment Clause cases "have not applied the Lemon test," while others "have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test." Van Orden v. Perry, 545 U.S. 677, 686 (2005).

[11] The majority cites Capitol Square for the proposition that a private religious group may so dominate a forum so as to convey a message of governmental approval. See Maj. Op. at 21. While Bronx Household's four-hour use of P.S. 15 on Sundays hardly dominates the limited public forum the Board has created under SOP § 5.6.2, any concern over a given group's prolonged or dominant use of the forum can be

demonstrate some sort of government endorsement (an uphill task, to say the least, given the Free Speech Clause's requirement of forum neutrality) before allowing it to restrict the viewpoint advanced by private religious speech that otherwise falls within the purposes of the forum, the lack of a basis in law for the Board's establishment concerns undermines any holding that SOP § 5.11 is reasonable, even under the majority's flawed analysis that SOP § 5.11 is mere content discrimination, much less a compelling justification for the Board's viewpoint discrimination.

* * * * * *

I have no doubt that this case stirs deep feelings and carries implications far broader than the Board's exclusion of Bronx Household's "Christian worship services" under SOP § 5.11. This case also presents important doctrinal considerations worthy of the Supreme Court's attention. In the meantime, however, as a result of the majority's decision that "religious worship services" can be barred from the neutral limited public forum the Board created under SOP § 5.6.2, numerous religious groups that

---

addressed through reasonable time, place, and manner restrictions. For example, in order to ensure greater weekend availability of a particular school's facilities to more outside organizations, the Board could limit the number of times per year that any one outside organization may use school facilities. Likewise, the Board may revoke any organization's permit if it fails to adhere to neutral rules imposed by the Board, i.e., by failing to include the Board's sponsorship disclaimer in written materials or by actively creating an impression of school sponsorship. The majority's reliance on Pleasant Grove City, see Maj. Op. at 20, is similarly misplaced.

provide recognized benefits to the people and their communities, consistent with the forum's purposes, will be denied access to otherwise available school space simply because their private speech is intertwined with their standard devotional practices and deeply-held religious beliefs. Others will be chilled. Because SOP § 5.11's ban on religious worship services violates the Free Speech Clause, I respectfully dissent.

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF NEW YORK

THE BRONX HOUSEHOLD OF FAITH, ROBERT HALL and JACK ROBERTS,	:	
Plaintiffs,	:	01 Civ. 8598 (LAP)
-v.-	:	ORDER
THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and COMMUNITY SCHOOL DISTRICT NO. 10,	:	
Defendants.	:	

LORETTA A. PRESKA, U.S.D.J.

For the reasons set forth in my decisions in Bronx Household of Faith v. Board of Educ. of City of New York, 400 F.Supp.2d 581 (S.D.N.Y. 2005), vacated 492 F.3d 89 (2d Cir. 2007) (per curiam), and Bronx Household of Faith v. Board of Educ. of City of New York, 226 F.Supp.2d 401 (S.D.N.Y. 2002), Plaintiffs' motions for summary judgment and for a permanent injunction are granted, and Defendants' cross motion for summary judgment is denied. Defendants are hereafter enjoined from enforcing the New York City Department of Education's revised Standard

Operating Procedures Manual ("SOPM") § 5.11 so as to deny Plaintiff or any other similarly situated individual or entity a permit to hold religious worship services in a New York City public school during non-school hours.

SO ORDERED:

DATED: New York, New York
November l, 2007

LORETTA A. PRESKA, U.S.D.J.

06-0725
Bronx Household of Faith v. Bd. of Educ.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2006

(Argued: September 28, 2006 Decided: July 2, 2007)

Docket No. 06-0725-cv

----------x

THE BRONX HOUSEHOLD OF FAITH, ROBERT HALL, AND JACK ROBERTS,

Plaintiffs-Appellees,

-- v. --

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

Defendants-Appellants.

----------x

B e f o r e: WALKER, LEVAL, and CALABRESI, Circuit Judges.

Appeal from denial of summary judgment in favor of, and entry of permanent injunction against, Defendants-Appellants.

VACATED and REMANDED.

DAVID A. CORTMAN, Alliance Defense Fund, Lawrenceville, GA (Jordan W. Lorence, Benjamin W. Bull, and Joseph P. Infranco, Alliance Defense Fund, Scottsdale, AZ, on the brief), for Plaintiffs-Appellees.

JANE L. GORDON, Senior Counsel, Corporation Counsel of the City of New York (Michael A. Cardozo, Corporation Counsel, Edward F.X. Hart, Lisa Grumet, and Janice Casey Silverberg, on the brief), New York NY, for Defendants-Appellants.

DAVID WHITE, Attorney, United States Department of Justice, Civil Rights Division, Appellate Section (Wan J. Kim, Assistant Attorney General, Dennis J. Dimsey and Eric W. Treene, Attorneys, Washington, D.C., Michael J. Garcia, United States Attorney for the Southern District of New York, David J. Kennedy and Andrew W. Schilling, Assistant United States Attorneys, New York, NY, on the brief), Washington, D.C., for Amicus Curiae United States of America.

MITCHELL A. KARLAN (Aric H. Wu, Marci R. Etter, and Farrah L. Pepper, Gibson, Dunn & Crutcher, LLP, Carol Nelkin, Jeffrey P. Sinensky, and Kara H. Stein, the American Jewish Committee, on the brief), Gibson, Dunn & Crutcher, LLP, New York, NY, for Amicus Curiae the American Jewish Committee.

ANTHONY J. COSTANTINI, the Committee on Education and the Law, Association of the Bar of the City of New York (Jonathan R. Bell, Rosemary Halligan, and Laura L. Himelstein, on the brief), New York, NY, for Amicus Curiae Committee on Education and the Law, Association of the Bar of the City of New York.

PER CURIAM:

The Bronx Household of Faith, a Christian church, has applied to use New York City school facilities for Sunday worship services. In 2001, the Board of Education of the City of New York denied Bronx Household's application, relying on Standard Operating Procedure Manual (SOP) § 5.11, its rule then in effect governing the use of school facilities by outside groups for "social, civic, [or] recreational meetings, . . . and other uses pertaining to the welfare of the community." New York Educ. L. § 414(1)(c). The District Court for the Southern

District of New York (Loretta A. Preska, Judge) first preliminarily enjoined the City's enforcement of SOP § 5.11, concluding that the City could not exclude Bronx Household. This court affirmed the preliminary injunction. The district court then entered a permanent injunction barring the City from enforcing a revision of SOP § 5.11. ("Revised SOP § 5.11"). (Judges Walker and Calabresi believe the revision to be the current version of SOP § 5.11, while Judge Leval questions whether the revision has been formally adopted.)[1]

We hereby vacate the permanent injunction, although we reach that conclusion in rather circuitous fashion. Judge Calabresi would hold that this dispute is ripe for adjudication and would vacate the injunction because he concludes that Revised SOP § 5.11, while a restriction on the content of speech permitted on school property, is viewpoint-neutral. Judge Walker agrees that the dispute is ripe for adjudication but would affirm the injunction because he concludes that Revised SOP § 5.11 is viewpoint-discriminatory. Judge Leval expresses no opinion on the merits, but votes to vacate the injunction because he concludes that the dispute is not ripe for adjudication.

Our disparate views of this case leave us without a rationale to which a majority of the court agrees. While two judges who disagree on the merits believe the dispute is ripe for adjudication, the court cannot decide the merits of the case without the vote of the

---

[1] Judges Calabresi and Leval describe the remaining salient facts in their concurring opinions.

third judge, who disagrees as to ripeness. Judge Leval agrees that the dispute over Revised SOP § 5.11 would indisputably become ripe if the City were to deny Bronx Household permission to use school facilities in reliance on the terms of that rule.[2]

In vacating the judgment, we remand the action to the district court for all purposes. We have every reason to believe that both parties hope to bring this protracted litigation to an end by obtaining a decision on the merits. The City is free to adopt Revised SOP § 5.11 (if it has not already done so), and then require that Bronx Household apply to use school buildings pursuant to that rule. In the event Bronx Household does so, and the City denies the application, Bronx Household may seek review of that denial in the district court on an expedited basis. Either party's appeal from any judgment of the district court will be referred to this panel. If the parties desire a speedy resolution of their dispute, we believe all this can be accomplished with little delay; indeed, we direct the parties to advise us should they file another appeal and invite the parties, should they wish to, otherwise to apprise us of subsequent developments, in either case by directing a letter to the Clerk of Court.

---

[2] We express no firm opinion respecting whether or not the preliminary injunction, which preceded Revised SOP § 5.11 and remains in effect, bars the enforcement of Revised SOP § 5.11 (if it has been adopted), nor do we need to decide whether or not if it does, that fact in itself renders the dispute ripe. Rather, we note simply that we do not read the preliminary injunction to preclude the City from adopting Revised SOP § 5.11 (if it has not done so already).

The permanent injunction of the District Court for the Southern District of New York is VACATED. Concurring opinions by Judges Calabresi and Leval, as well as a dissenting opinion by Judge Walker, follow.

CALABRESI, *Circuit Judge*:

Is worship merely the religious analogue of ceremonies, rituals, and instruction, or is worship a unique category of protected expression? I believe the answer to that question determines the result in this case brought under the Free Speech Clause of the First Amendment.

The Bronx Household of Faith ("Bronx Household"), a Christian church, along with its pastors Robert Hall and Jack Roberts, attacked as viewpoint discrimination the refusal of the Board of Education of the City of New York ("the Board") and Community School District No. 10 ("the School District") to permit the church to use school facilities for Sunday worship services. The district court (Preska, *J.*) granted summary judgment in favor of the plaintiffs and permanently enjoined defendants from enforcing their policy that excludes worship services from school facilities. I vote to vacate the court's determination that, as a matter of law, defendants' exclusion of worship services from school facilities is impermissible viewpoint discrimination, and remand the case to the district court for further developments in light of this and the other opinions of this panel filed today.

I. BACKGROUND

The relevant facts are not in dispute. The conflict between these parties began in 1994, when the School District denied plaintiffs' request to rent space in the Anne Cross Mersereau Middle School ("M.S. 206B") for Sunday morning meetings. Bronx

Household's weekly meetings would have included the "singing of Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion, sharing of testimonies" and a "fellowship meal" that allows attendees to talk and provide "mutual help and comfort to" one another. (First Affidavit of Robert Hall at 1).

Under New York State law, local school districts may permit their facilities to be used during after-school hours for a broad range of purposes, including "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be nonexclusive and shall be open to the general public." N.Y. Education Code § 414(1)(c) (McKinney 2006). The statute authorizes the "trustees or board of education of each district" to allow access to school facilities for any use it chooses within this range of purposes. § 414(1). District No. 10, a public school district in the Bronx, is subject to the jurisdiction of the New York City Board of Education.

In 1994, the School District enforced the Board's Standard Operating Procedures Manual (SOP) which, at the time, included a provision barring outside organizations from conducting "religious services or religious instruction on school premises after school," though it allowed groups to "discuss[] religious material or material which contains a religious viewpoint." SOP § 5.9. Plaintiffs brought an action against defendants to compel the School District to grant a permit for Bronx Household's

weekly use of the school facilities, but the district court granted defendants' motion for summary judgment, and dismissed the suit. *Bronx Household of Faith v. Community Sch. Dist. No. 10*, No. 95 Civ. 5501, 1996 WL 700915 (S.D.N.Y. Dec. 5, 1996). We affirmed. 127 F.3d 207 (2d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998) [hereinafter *Bronx Household I*].

We subsequently applied our reasoning from *Bronx Household I* to another viewpoint discrimination challenge brought against the Milford School District by a private Christian organization for children (the Good News Club). We held that the Milford district could deny the Good News Club a permit to conduct religious instruction in school facilities because this amounted to "quintessentially religious" activity. *Good News Club v. Milford Central Sch.*, 202 F.3d 502 (2d Cir. 2000).

The Supreme Court, however, reversed our holding in that case. 533 U.S. 98 (2001). The Court found that the Good News Club was seeking "to address a subject otherwise permitted [in the school], the teaching of morals and character, from a religious standpoint." 533 U.S. at 109. The High Court did not dispute the validity of Justice Souter's description of the Club's activities as including elements of worship, from the opening and closing of meetings with prayer, to activities such as "the challenge," where already "saved" children would ask God for strength, and "the invitation," during which the teacher would "invite" the "unsaved" children to "receive" Jesus as their "Savior from sin." *Id.* at 137-38 (Souter, J., dissenting). Nevertheless

concluding that the Good News Club's activities were not "mere religious worship, divorced from any teaching of moral values," *id.* at 112 n.4, the Court declared: "We disagree that something that is 'quintessentially religious' or 'decidedly religious in nature' cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint," *id.* at 111. On this basis, and given that other types of moral and character development teaching were permitted "after school," the Court condemned Milford's exclusion of the Good News Club as viewpoint discrimination. *Id.* at 102, 108-109. It further held that while it is "not clear" whether a state interest in avoiding an Establishment Clause violation could justify viewpoint discrimination, "[w]e need not . . . confront the issue in this case, because we conclude the school has no valid Establishment Clause interest." *Id.* at 113.

After the Supreme Court's decision in *Good News Club*, Bronx Household in 2001 again applied for and was again denied a permit to use District No. 10's middle school for weekly Sunday meetings. The grounds of this denial remained the Board's SOP provision prohibiting any "outside organization or group" from conducting "religious services or religious instruction on school premises after school." SOP § 5.11 (the section was previously numbered 5.09 in *Bronx Household I*). Bronx Household brought a new action against the defendants, and this time the district court, following the Supreme Court's ruling in *Good News Club*, preliminarily enjoined the School District from denying the permit on the basis of SOP § 5.11 and the religious nature of

the church's weekly meetings. 226 F. Supp. 2d 401 (S.D.N.Y. 2002).[1] A divided panel of our court affirmed: "We find no principled basis upon which to distinguish the activities set out by the Supreme Court in *Good News Club* from the activities that the Bronx Household of Faith has proposed for its Sunday meetings at Middle School 206B." 331 F.3d 342, 354 (2d Cir. 2003) [hereinafter *Bronx Household II*].

In so doing, however, the majority stated that "it cannot be said that the meetings . . . constitute only religious worship, separate and apart from any teaching of moral values," and added:

> Like the Good News Club meetings, the Sunday morning meetings of the church combine preaching and teaching with such "quintessentially religious" elements as prayer, the singing of songs, and communion. The church's Sunday morning meetings also encompass secular elements, for instance a fellowship meal during which church members may talk about their problems and needs.

Id.

---

[1] The action was initially brought under the First Amendment, the Equal Protection Clause, and Sections 3, 8, and 11 of Article I of the New York Constitution. Since the district court granted the injunction requested by plaintiffs on the First Amendment free speech ground without addressing the remaining claims, 226 F. Supp. 2d 401, 426-27 (S.D.N.Y. 2002), plaintiffs have not pursued the alternative claims and they are not before us in the instant appeal.

Notably, in *Bronx Household II*, we specified that "[o]ur ruling is 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.* (emphasis added). We thus left unresolved the instant appeal's central question:

> How does the distinction drawn in our earlier precedent between worship and other forms of speech from a religious viewpoint relate to the dichotomy suggested in *Good News Club* between "mere" worship on the one hand and worship that is not divorced from the teaching of moral values on the other?

Id. at 355. Moreover, and despite our acknowledgment of an "obvious tension" between our ruling in *Bronx Household I* and the district court's application of *Good News Club*, we specifically "decline[d] to review the trial court's further determinations that, after *Good News Club*, religious worship cannot be treated as an inherently distinct type of activity, and that the distinction between worship and other types of religious speech cannot meaningfully be drawn by the courts." *Id.*

Bronx Household thereafter applied for, and was granted, permission to use P.S. 15 in Bronx, New York, on Sundays from 10:00am to 2:00pm. Bronx Household has used the school facilities since August 2002, with attendance on a given Sunday morning reaching approximately 85-100 people. The church's

Sunday meeting activities in the school facilities include "singing songs and hymns; teaching from the Bible; sharing testimonies from people in attendance; socializing; eating; engaging in prayer; and communion." 400 F. Supp. 2d 581, 592 (S.D.N.Y. 2005).

Subsequently, while the preliminary injunction was in effect and the church was exercising its permit to use school facilities, the Board of Education announced that it was modifying the enjoined SOP provision. As revised, § 5.11 states:

> No permit shall be granted for the purpose of *holding religious worship services, or otherwise using a school as a house of worship*. Permits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this chapter on the same basis that they are granted to other clubs for students that are sponsored by outside organizations.

(emphasis added). Having altered § 5.11, defendants notified plaintiffs that:

> Plaintiffs' use of P.S. 15 for the Bronx Household of Faith's regular worship services is prohibited under the revised section 5.11. Defendants are not currently enforcing the revised section 5.11 . . . because of the preliminary injunction Order that was entered in this case. Should defendants prevail in this motion for

> summary judgment and the preliminary injunction Order be vacated, then any future application by plaintiffs to hold their worship services at P.S. 15 or any other school will be denied.

400 F. Supp. 2d at 588.

In March 2005, the parties cross-moved for summary judgment. Bronx Household moved to convert the July 2002 preliminary injunction into a permanent injunction, contending the revised SOP § 5.11 is unconstitutional for the same reason the enjoined SOP provision was held to be unconstitutional. The district court granted plaintiffs' motion for summary judgment, denied defendants' cross-motion for summary judgment, and permanently enjoined the Board from enforcing SOP § 5.11 against appellees.

On appeal, defendants argue that: (1) their categorical exclusion of worship services as an after-hours use of school facilities does not constitute viewpoint discrimination; and (2) even if they are found to have discriminated on the basis of viewpoint, such discrimination was justified to avoid violations of the Establishment Clause. In response, plaintiffs acknowledge that "[f]rom the particular theological perspective of the pastors, . . . these activities done at the Sunday morning meeting [are] collectively a 'worship service.'" (Brief of Appellees at 10). But they contend that worship is protected like any other religious speech, and that under *Good News Club* the state discriminates on the basis of viewpoint when it excludes worship services from

school facilities. Additionally, plaintiffs argue that the state does not possess a sufficiently overriding interest in avoiding an Establishment Clause violation to justify viewpoint discrimination against Bronx Household.

II. DISCUSSION

In *Bronx Household II* we expressly reserved judgment on whether worship is simply speech expressing a religious viewpoint on the same subject addressed in a variety of ways in the rituals, ceremonies, and instruction of secular and religious organizations, or whether worship is a unique subject protected as a *sui generis* category under the Free Speech Clause. *Cf. Bronx Household I*, 127 F.3d at 221 (Cabranes, J., concurring in part and dissenting in part) (stating that "there is no real secular analogue to religious 'services'"). At that time, we upheld a preliminary injunction against defendants' regulation barring the use of school facilities for "religious services or religious instruction," since the latter directly implicated the Supreme Court's ruling in *Good News Club*. But now the Board's modified regulation excludes only worship services that are not part and parcel of religious instruction. As a result, I believe that we must consider the relationship, after *Good News Club*, between worship, simpliciter, and other forms of protected speech, including religious and nonreligious instructional speech and rituals.[2]

---

[2] Judge Leval argues that the propriety of a permanent injunction against the *revised* SOP § 5.11 is not ripe for adjudication. The question is a close one. It turns, in part, on

whether the Board has actually adopted the new SOP § 5.11, or whether the revision has simply been proposed. While there are some comments in the record that could be taken to mean the Board *will* adopt revised SOP§ 5.11, there is also specific evidence in the record that defendants have already done so. *See, e.g.*, Statement of Attorney for the Board ("It is a policy that has been approved at the highest levels of the Department of Education. The only reason that we have not implemented it at this time or applied it to the plaintiffs in this case is because of the court's preliminary injunction."); Letter from Lisa Grumet to Jordan Lorence and Joseph Infranco (Aug. 17, 2005), 400 F. Supp. 2d 581, 588 (S.D.N.Y. 2005) ("The use of P.S. 15 for . . . regular worship services is prohibited under the revised section 5.11. . . . Should defendants prevail in this motion for summary judgment and the preliminary injunction Order be vacated, then any future application by plaintiffs to hold their worship services at P.S. 15 or any other school will be denied."). In deciding to make the injunction permanent and applying it directly to worship services, the court below must be taken to have found that the new SOP § 5.11 was, in fact, adopted, and I cannot say that this fact-finding was clearly erroneous.

Judge Leval relies, as he must, on the Supreme Court's leading decisions on ripeness, including *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977). That case permitted, at a constitutional level and at a prudential level, judicial consideration of an agency regulation prior to its enforcement, in part because the impact of the regulation on the plaintiffs was "sufficiently direct and immediate." *Id*. at 152. In this case, there is one unmistakable "direct and immediate" consequence for the parties; the case has been up and down the courts for years and no resolution as to the rights of the Board or Bronx Household is, as yet, forthcoming. At the prudential level, I do not believe we should ignore that very practical consequence.

Moreover, I am not convinced that there are not more traditionally legal consequences as well. If we simply vacate the permanent injunction without reaching the merits, as Judge Leval's opinion would do, we leave in place the preliminary injunction based on the old SOP § 5.11. That injunction correctly, in light of *Good News Club*, prohibited the Board from excluding Bronx Household's use of school premises

A. Standard of Review

We review *de novo* the district court's grant of summary judgment and construe the evidence in the light most favorable to the non-moving party. *See World Trade Center Properties, L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154, 165-166 (2d Cir. 2003); *Johnson v. Wing*, 178 F.3d 611, 614 (2d Cir. 1999). Summary judgment is appropriate only if there are no genuine issues of material fact such that the

---

for conduct that included "religious instruction," but it did more. It barred the Board from denying plaintiffs' application to rent space in the school "for morning meetings that include *religious worship* . . . ." (emphasis added). That, by itself, more than minimally hampers the Board in seeking to enforce the revised SOP § 5.11. I believe that this comfortably meets the constitutional ripeness requirements of *Abbott* and its progeny, and together with the effects of long delay in this case, weighs heavily on the issue of prudential ripeness.

I fully agree that we should take very seriously our obligation to avoid unnecessary constitutional adjudication. And if I agreed with Judge Leval that this case was not ripe, I would, like him, happily defer consideration. And I would even hope that it would not return or do so only in some constitutionally easier factual context. But once I, unlike Judge Leval, conclude that the case <u>is</u> ripe, I cannot hide from the constitutional issues that are there, fully argued, smack in our faces, and where failure to resolve them subjects the parties to long delay and costly uncertainties. That is, having found ripeness, I must decide the constitutional questions based on the facts before us today and not fail to act in the hope that they might disappear in another case involving other facts.

There are many arguments in favor of the position Judge Leval takes, especially with respect to prudence. I do not wish to undervalue them. All in all, though, I think the correct and prudent thing to do in this case is to bite the bullet and decide what the constitutional consequence of the exclusion of worship services, as against religious instruction, is.

party making the motion is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Peck v. Public Service Mut. Ins. Co.*, 326 F.3d 330, 337 (2d Cir. 2003). This standard applies equally to cases, like the instant one, in which both parties moved for summary judgment. *See Morales v. Quintel Entertainment, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001). As a result, when parties have filed cross-motions for summary judgment, the court "must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Hotel Employees & Rest. Employees Union, Local 100 v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534, 543 (2d Cir. 2002) (quoting *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993)).

B. Applicable Level of Constitutional Scrutiny

The Constitution does not guarantee unlimited freedom to speak on government property. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 799 (1985). The scrutiny applied to restrictions of speech on government property varies with the nature of the forum in which the speech occurs. To guide us, in this respect, the Supreme Court has defined four categories of "fora for expression . . . that, correspondingly, fall along a spectrum of constitutional protection." *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 625 (2d Cir. 2005).

In traditional public fora – streets, parks, and places that "by long tradition . . . have been devoted

to assembly and debate," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) – speakers can be excluded only if the exclusion is "necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius*, 473 U.S. at 800.

We apply the same scrutiny to restrictions in a second category, the "designated public forum." "[W]hen the government has intentionally designated a place or means of communication as a public forum[,] speakers cannot be excluded without a compelling governmental interest," *id.*, and this remains so even though the forum is not traditionally open to public assembly and debate.

The Court has also recognized a third category, the limited public forum. A limited public forum is created when the government designates "a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Id.* at 802. In the limited public forum, an entire class of speakers or subjects may be excluded according to "reasonable, viewpoint-neutral rules governing the *content* of speech allowed." *Peck*, 426 F.3d at 626. But, once the government "allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre." *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 692 (2d Cir. 1991); *see also Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("[T]he State must respect the lawful boundaries it has itself set. The state may not exclude speech where its distinction is not

reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint.") (internal quotation marks and citations omitted).

Finally, in a nonpublic forum, which has not been opened by tradition or designation to the public for communication, speech may be excluded through any "reasonable" content-based restrictions so long as these do not "suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n*, 460 U.S. at 46.

In *Bronx Household I*, we held that defendants' school facilities constituted a limited public forum and, consequently, that speech could be barred only through restrictions that were viewpoint neutral and reasonably related to the limited purposes of the forum. 127 F.3d at 211-214. *Bronx Household II* did not revisit this finding.[3] We remain bound by our finding that the school in the case at bar is a limited public forum. There is nothing in the record that requires us to reconsider that holding. And *Good News Club* in no way calls our reasoning on this

---

[3] Even prior to Bronx Household's suits, we had repeatedly found that New York State, in its statute authorizing the use of school facilities, intended to create only a limited public forum. *Deeper Life Christian Fellowship v. Sobol*, 948 F.2d 79, 83-84 (2d Cir. 2001) (citing *Tretley v. Bd. of Ed.*, 65 A.D.2d 1 (N.Y. App. Div. 1978)); *see also Cornelius*, 473 U.S. at 802; *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 390 (1993) ("There is no question that the [School] District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated.").

point into question. 533 U.S. at 107; *id.* at 136 n.1 (Souter, J., dissenting).[4]

Since the forum involved in this case is a limited public forum, the question of whether defendants' exclusion of worship services constitutes content or viewpoint discrimination becomes crucial. For, as the Supreme Court has stated in *Rosenberger*:

> [I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, *content discrimination*, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, *viewpoint discrimination*, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

515 U.S. at 829-30 (emphasis added).

It is, of course, not always easy to "draw[] a precise line of demarcation" between "what amounts

---

[4] It bears observing that, in constituting this particular limited public forum, defendants excluded in their entirety several other classes of speakers and subjects apart from those at issue in the instant case. Among those excluded were electoral candidates' "political events, activities or meetings," SOP § 5.7, and any "commercial purposes, except for flea market operations." SOP § 5.10. As a result, any redefinition of the nature of the school forum before us would necessarily trigger searching scrutiny of the Board's exclusion from school facilities of political and commercial activities as well as the worship services involved in the current appeal.

to a subject matter unto itself, and what, by contrast, is best characterized as a *standpoint* from which a subject matter is approached." *Peck*, 426 F.3d at 630 (citing *Rosenberger*, 515 U.S. at 831). Nevertheless, the distinction is essential to the Court's balance between a required protection of speech and an essential protection of the government's ability to define the bounds of a limited forum it chooses to open. And, as the Court has written unequivocally, the State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." *Rosenberger*, 515 U.S. at 829. It follows that we may uphold defendants' exclusion of worship services from their limited public forum, but that we may only do so if we find that SOP § 5.11 is a "reasonable, *viewpoint-neutral* rule[] governing the *content* of speech allowed." *Peck*, 426 F.3d at 626 (first emphasis added) (citing *Hotel Employees & Rest. Employees Union Local 100*, 311 F.3d at 545-6); *see also New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 128 (2d Cir. 1998).

C. Viewpoint Neutrality

In the end, I conclude that the barring of worship services from defendants' school facilities is a content-based restriction and does not constitute viewpoint discrimination. In reaching this conclusion, I first examine how the Court has defined viewpoint discrimination, and then analyze the restriction before us.

1. Defining Discrimination on the Basis of Viewpoint

In a limited public forum, speech addressing an otherwise permitted subject may not be restricted on the basis of its viewpoint, and this concept applies directly to protect *religious* approaches to the subject that is being discussed. This core principle of the Supreme Court's religious discrimination jurisprudence derives from three key decisions: *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

In *Lamb's Chapel*, a unanimous Supreme Court declared unconstitutional the denial of an evangelical church's request to use school facilities to show a film series addressing childrearing questions from a Christian perspective. The Court concluded that "it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and childrearing except those dealing with the subject matter from a religious standpoint." 508 U.S. at 393. The Court emphasized that *Lamb's Chapel* concerned not just any religious speech, but specifically a religious perspective on the clearly permitted subject of childrearing and family:

> There is no suggestion . . . that a lecture or film about child rearing and family values would not be a use for social or civic purposes otherwise permitted . . . . That

> subject matter is not one that the District has placed off limits to any and all speakers.

Id.

In *Rosenberger*, the Court found that the University of Virginia discriminated on the basis of viewpoint by denying funding for a student group that published a newspaper with a Christian editorial viewpoint:

> By the very terms of the [University fund's] prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.

515 U.S. at 831. Once again, the Court found it essential that "[t]he prohibited perspective, not the general subject matter, resulted in the [University's] refusal to make . . . payments." *Id.*

Finally, in *Good News Club* the Court affirmed the principle that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." 533 U.S. at 112. The Good News Club had applied to use the Milford District's school facilities for meetings that

included "singing songs, hearing a Bible lesson and memorizing scripture," 533 U.S. at 103, with "the purported purpose . . . to instruct children in moral values from a Christian perspective." 202 F.3d 502, 504 (2d Cir. 2000). The Club characterized itself as a youth organization that aids children's moral and spiritual development through the use of Bible stories to teach such "values as obedience or resisting jealousy." *Id.* at 509. The Club described these and its other activities as follows:

> The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next[,] Club members engage in games that involve, *inter alia,* learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization.

Id. at 507. The Club's materials included a prayer booklet called the "Daily Bread," which "contained stories that refer to the second coming of Christ, accepting the Lord Jesus as the Savior from sin, and believing in the Resurrection and in the descent of the Lord Jesus from Heaven." *Id.* On this basis, the school district concluded that the Club's activities were not discussing "secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself." *Id.*

The Supreme Court overturned this court's finding that Milford's exclusion of the Club was viewpoint neutral. Likening the Club's Bible study instruction to the Lamb's Chapel film series, the Court held:

> 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. This distinction is inconsequential. Both modes of speech use a religious viewpoint.

533 U.S. at 109-10. Significantly, the Court held that even if the Club's activities were "quintessentially religious" or "decidedly religious in nature," they could still be characterized properly as the teaching of morals and character development: "What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations *to provide a foundation for their lessons*." *Id.* at 111 (emphasis added).

2. <u>The Category of Worship Services</u>

What, then, is worship? Is it an approach to or a way of considering an otherwise permitted subject of discussion, or is it a unique subject? Defendants argue that, while a film series on childrearing, a student newspaper, and instruction on moral

development "no doubt dealt with . . . subject[s] otherwise permissible," *Lamb's Chapel*, 508 U.S. at 394, worship is not simply another standpoint on a secular subject. Worship is the *sui generis* subject "that the District has placed off limits to any and all speakers," regardless of their perspective. *Id.* at 393.[5] I agree.

Indeed, the *Good News Club* Court itself recognized this subject matter, worship, as falling outside the boundary of its viewpoint discrimination jurisprudence. In finding that the Club's religious instruction was just one viewpoint among many on moral character and development, the Court emphasized the distinction between this instructional "viewpoint" and the separate category of "mere religious worship, divorced from any teaching of moral values." 533 U.S. at 112 n.4. And the Court's majority specified that the Second Circuit had not characterized the Club's activities as "religious worship." *Id.* It was for this reason that – while acknowledging that the Club's activities would include prayer and be of a "quintessentially

[5] Much of my discussion is consistent with and derives from the very powerful opinion of Judge Cabranes, concurring in part and dissenting in part in *Bronx Household I*, 127 F.3d at 221 ("Unlike religious 'instruction,' there is no real secular analogue to religious 'services,' such that a ban on religious services might pose a substantial threat of viewpoint discrimination between religion and secularism."). The Ninth Circuit has reached the same conclusion in an analogous case, *Faith Ctr. Church Evangelistic Ministries v. Glover*, 462 F.3d 1194, 1211 (9th Cir. 2006) ("Religious worship . . . is not a viewpoint but a category of discussion within which many different religious perspectives abound.").

religious" nature – the Court found no basis for considering the group's "use of religion as something other than a viewpoint merely because of any evangelical message it conveys." *Id.* By contrast, the record in the case before us makes clear that Bronx Household's use of religion was expressly for worship *in itself*, and not as a form of discussion of or approach to other topics.[6]

In applying for a permit to use school facilities, Bronx Household's pastor described the proposed activities with three words: "Christian worship service." (EBT Transcript of Robert Hall (Jan. 24, 2005)). Despite subsequent changes in plaintiffs' account of these activities, Pastor Hall repeatedly confirmed that "Christian worship service" is an "accurate description" of that for which Bronx Household requested permission to use school facilities. *Id.*[7] Specifically, Bronx Household called

---

[6] Justice Souter, in dissent, argued that the Good News Club's activities constituted "an evangelical service of worship." 533 U.S. at 138. Plaintiffs suggest that, because the Court acknowledged Justice Souter's conclusion and determined that "[r]egardless of the label . . . what matters is the substance of the Club's activities," *id.* at 112 n.4, the High Court must have deemed "worship services" to be a viewpoint on an otherwise permitted subject. This argument fails, however, because the majority did no more than validate Justice Souter's recitation of the Club's activities, not his label of them as a worship service. Indeed, the Court expressly stated that these activities did not "constitute mere religious worship, divorced from any teaching of moral values." *Id.*

[7] Defendants note that in subsequent permit applications, plaintiffs listed only the component activities of the Sunday meetings and did so in order to avoid the term "worship." Pastor Hall stated: "As a tactical move, we decided beforehand

its meetings a "church service" and enumerated the activities engaged in as including the "singing of Christian hymn and songs, prayer, fellowship with other church members, Biblical preaching and teaching, communion, sharing of testimonies and social fellowship among the church members." (First Affidavit of Robert Hall). Plaintiff described these many "component activities that go to make up a worship service," as follows:

> In our church service, we seek to give honor and praise to our Lord and Savior Jesus Christ *in everything that we do. To that end* we sing songs and hymns of praise to our Lord. We read the Bible and the pastors teach from it because it tells us about God, what He wants us to do and how we should live our lives. We celebrate the Lord's Supper (communion) each Sunday . . . .

(emphasis added). And Hall expressly characterized his Sunday morning meetings as worship services because "[w]e ascribe worth, our supreme worth, to Jesus Christ."

---

to avoid using the dreaded 'W' word for (shudder) worship. From their point of view, the school rents it building to groups involved in community, civic, and social activity. But worship, according to them, is a uniquely religious activity for which there is no 'secular analog.'" Given Pastor Hall's clear record statement of what the facilities were to be used for, I need not, and do not, consider whether defendants' description of plaintiffs' later permit applications as mere "litigation strategy" is correct.

On appeal to us, however, plaintiffs and their amici argue that the activities in worship services amount only to the expression of a viewpoint on the discussions of social, civic, and community welfare subjects as to which "thousands of permits have been granted [by defendants] to diverse groups, including sports leagues, Legionnaire Greys, Boy and Girl Scouts, community associations, and a college for holding English instruction." In doing this, plaintiffs challenge, in three ways, the characterization of worship as a unique subject. First, they claim that the activities composing their worship services are the same as those involved in the religious instruction protected as a *viewpoint* in *Good News Club*. Second, plaintiffs argue the church's worship services "parallel" the ceremonies and rituals conducted by other groups who are granted access to defendants' schools. In this respect, they claim their "worship" services stand in the same relationship to these permitted rituals as the moral development lessons taught by the Boy Scouts stood, according to the *Good News Club* Court, to the lessons in moral development taught from a religious perspective by the Good News Club. Third, plaintiffs contend, based on Supreme Court precedent, that there can be no intelligible content to the distinction between worship and other religious speech. I believe all three arguments are unavailing.

(i)

In *Good News Club* the Court held that the religious instruction under consideration expressed a protected viewpoint on the permitted subjects of instruction, i.e., character and moral development,

and only on these. The Court specifically concluded that Milford had interpreted "its policy to permit discussions of subjects such as child rearing, and of the 'development of character and morals.'" 533 U.S. at 108; *see also id.* (holding that, according its "Community Use Policy" establishing the limited forum, "there is no question that teaching morals and character development to children is a permissible purpose under Milford's policy"). And the Court's reasoning confirmed that the boundary of its ruling must be defined by the otherwise permitted subject matter at stake. *See, e.g.*, 533 U.S. at 111 ("*[W]hen the subject matter is morals and character*, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters.") (quoting 202 F.3d at 512 (Jacobs, J., dissenting) (emphasis added)). In the case at bar, by contrast, the *subject*, "worship," is not a viewpoint on a "subject matter[,] morals and character," *id.*; the subject is not a lecture or film about childrearing or family values; and the subject is not a variety of topics for journalistic exploration that the defendants permitted, except when they are undertaken from a religious perspective.

Were we to follow plaintiffs' construction of *Good News Club* and consider worship to be just a religious viewpoint on the subject of the welfare of the community, we would, whenever speech implicates religion, eviscerate the Supreme Court's distinction between *viewpoint* and the subject matter to which that viewpoint or approach is applied. That is not the meaning of *Good News Club*, and such a meaning severely misunderstands the nature of worship.

To be sure, some of the same activities that were part of the religious instruction validated in *Good News Club* are included in the worship services that Bronx Household seeks to conduct. The record confirms that the church's proposed activities included the singing of Christian hymns and songs along with Biblical preaching and teaching. But the *Good News Club* Court sanctioned such activities, of a "quintessentially religious nature," only because they could "also be characterized properly as" the viewpoint from which students were instructed in moral and character development. 533 U.S. at 111. The worship services before us today cannot be properly so characterized. For, as Pastor Hall acknowledged, even though the church may "do the same things that a Bible study group does," 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."

(ii)

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. Indeed, holding that *worship* is only an agglomeration of rites would be a judicial finding on the nature of worship that would not only be grievously wrong, but also deeply insulting to persons of faith. As one such person, I find the notion that worship is the same as rituals and instruction to be completely at odds with my fundamental beliefs. 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.

Not surprisingly, therefore, Pastor Hall's own testimony belies plaintiffs' claim that they seek to conduct only the same viewpoint-expressive activities as those of other groups discussing permitted subjects. Hall wrote and distributed an article to church members pointedly distinguishing the church from such other clubs or associations. Unlike an "Ecclesiastical club" or a "political club," Pastor Hall explained, "the church [i]s a covenant community"; the church is "not a group of people who have a common interest in the same way that stamp collecting and coin collecting bring people together." And Hall explicitly contrasted his group's meetings with those of the Boy Scouts whose rituals – flag ceremonies, the Pledge of Allegiance, and the Scout Oath – "might be a parallel, but [are] different": "We engage in the teaching and preaching of the word of God. We administer the sacraments of baptism and the Lord's supper. Those would be the differences. We sing hymns. We sing Christian songs. We pray."

One cannot read what Pastor Hall is saying – or for that matter virtually any religious description of worship – sympathetically, without concluding that to *worship* is not only more than engaging in rituals, but that it is categorically different. In other words, it would be absurd to characterize the Scouts as worshipping the teachings of Lord Baden-Powell, the founder of the Scouts movement, simply because

Scout ceremonies and rituals ascribe worth to his message. What the Scouts are doing and what worshippers do, are categorically different!

(iii)

Plaintiffs base their final argument – that there is no difference between worship and other forms of religious speech – on the Supreme Court's ruling in *Widmar v. Vincent*, 454 U.S. 263 (1981). *Widmar* held that worship, like all other religious expression, is protected under the Free Speech Clause of the First Amendment. Of course it is. The *Widmar* majority rejected the claim of the Justices in "dissent . . . that 'religious worship' is not speech generally protected by the 'free speech' guarantee," 454 U.S. at 269 n.6, and rightly so. But that is not the issue before us.

The *Widmar* Court was concerned solely with whether worship was religious speech, and held that it was. The Court did not consider whether worship was speech of a unique sort, a subject of address that transcended and was different in kind from the subjects whose discussion from a religious viewpoint the Court protected in *Good News Club*, *Rosenberger,* and *Lamb's Chapel*. As a result, the *Widmar* Court certainly did not conclude that the exclusion of worship constituted viewpoint discrimination. It understandably held that a university's exclusion of "religious worship and religious discussion" from school facilities was impermissible *content* discrimination in that public forum. 454 U.S. at 265, 269-70. Consequently, plaintiffs' invocation of *Widmar* to show that

worship cannot be a separate subject of speech is unavailing.

3. Must Worship be Religious?

The bulk of this opinion has been written on the premise that worship is always a religious matter. But I am not sure there cannot be *secular* as well as *religious* worship. When people speak of "worshipping" mammon, sex, or art, are they simply speaking metaphorically, or are they expressing a relationship of adoration that is the secular equivalent of religious worship and is of a different order from participating in ritual or ceremony? While the answer to that question seems to me to be anything but clear, in the end a resolution does not matter for this decision.

If we treat worship as being solely religious, then the first provision in the Board's regulation – barring use of the school for "religious worship services" – is a trivial redundancy that does not affect worship's status as *sui generis*. If, instead, we treat worship as something that can also be secular, then the Board's exclusion of religious (as against secular) worship is clearly invalid. *See Good News Club*, 533 U.S. 98. But the second part of the Board's regulation, which bars use of the school "as a house of worship," nevertheless remains in force. For it excludes religious and secular worship alike. Assuming arguendo, therefore, that secular worship exists, that provision does not distinguish between religious and secular approaches, but instead bars the whole category. Accordingly, it constitutes content rather than viewpoint discrimination.

The record is undisputed that plaintiffs wish to use the school facilities as a house of worship. It follows that, if content discrimination is permitted, then Bronx Household can be excluded.

D. Reasonableness of Content Discrimination

Content discrimination, even in a limited public forum, must be reasonable in light of the purposes of the forum to be constitutionally permitted. *Perry Educ. Ass'n*, 460 U.S. at 49. Given our prior holdings, the Board's exclusion of worship services from school facilities meets this requirement.

In *Bronx Household I*, this court stated:

> We think that it is reasonable in this case for a state and a school district to adopt legislation and regulations denying a church permission to use school premises for regular religious worship. We think that it is reasonable for state legislators and school authorities to avoid the identification of a middle school with a particular church. We think that it is reasonable for these authorities to consider the effect upon the minds of middle school children of designating their school as a church. And we think that it is a proper state function to decide the extent to which church and school should be separated in the context of the use of school premises for regular church services. Education, after all, is a particularly important state

> function, and the use of school premises is properly a matter of particular state concern. Finally, it is certainly not unreasonable to assume that church services can be undertaken in some place of public assembly other than a public middle school in New York City.

127 F.3d at 214. We construed the purposes of the "school" limited public forum in the same way in *Deeper Life Christian Fellowship v. Board of Education of the City of New York*, 852 F.2d 676, 680 (2d Cir. 1988); *see also Deeper Life Christian Fellowship v. Sobol* [*Deeper Life II*], 948 F.2d 79, 83 (2d Cir. 1991) ("We follow our prior opinion in *Deeper Life I* in holding that under § 414, 'access to the school property is permitted only where it serves the interests of the public in general, rather than that of sectarian groups . . . .'").

Similarly, we rejected the claim of the Good News Club that its exclusion – even if it constituted only content discrimination – would be unreasonable because "there is little risk that children would confuse the Club's use of school facilities with the school's endorsement of the religious teachings." We wrote:

> This argument is foreclosed by precedent. In *Bronx Household of Faith,* we stated that "it is a proper state function to decide the extent to which church and school should be separated in the context of the use of school premises." Furthermore, "it is reasonable for state legislators and school

> authorities to avoid the identification of a . . . school with a particular church."

202 F.3d at 509 (quoting *Bronx Household I*, 127 F.3d at 214) (internal citation omitted).

Although the Supreme Court reversed our holding that Milford's restriction was viewpoint neutral, the Court did not address our conclusion that were the restriction only content-based, it would be reasonable in light of the purposes of the limited school forum. Accordingly, we remain bound by our finding in *Bronx Household I* that the content-based restriction in SOP § 5.11 is reasonable.[8]

---

[8] Moreover, the record discloses several grounds on which defendants' exclusion of worship services, if only content-based, can reasonably rest. First, defendants pointed to the concern that "[b]ecause most activities that occur in schools during nonschool hours are, in fact, sponsored by the school, . . . children are unlikely to understand that weekly worship services are not sponsored or supported by the school." (Brief of Petitioners at 18); *see also* Declaration of Carmen Farina (testifying to children's confusion about the church's relationship with the school district after the preliminary injunction compelled access); Declaration of Thomas Goodkind (same); Declaration of Veronica Najjar (same). Deputy Chancellor Fiorina testified that "[a] congregation's presence in a school may be particularly confusing for children":

> I know from my training and experience that children – especially elementary school or middle school children – . . . are unlikely to understand that a church that uses their school for its religious worship services is not sponsored or supported by the school. . . . Young children . . . could easily and understandably conclude that the religious institution is supported by the school.

Second, defendants asserted that members of the *community* who are not church members would feel "marginalized, confused, and shut out by the long-term presence of weekly congregational worship services in their local public school." In this respect, the record reflects many complaints sent to the Board by parents and other community members expressing concerns that public school buildings in their neighborhoods were becoming identified with the church and its religious worship services. We need not resolve here how these complaints would inform an examination of a putative challenge, under the Establishment Clause, to the use of the school as a house of worship. I take note of this concern only as it constitutes an additional reasonable basis for defendants' *content*-based restriction of worship services given the purposes of this limited forum.

Finally, it was reasonable for the Board to determine not to open the use of its limited forum to a class of speech which, in practice, could only be engaged by some but not all religions. Defendants point out that "certain denominations and congregations are shut out of the forum because their day of worship is not Sunday." (Reply Brief of Petitioners at 20). Schools are schools, and are in session during all weekdays. Traditionally, and without any view towards discriminating between one religion and another, many school activities also take place on Saturdays. We need not here concern ourselves with the historical reasons why the school week is such as it is and the possible link to Christianity of that schedule. That long has been settled. *See, e.g.*, *Gallagher v. Crown Kosher Super Market of Mass.*, 366 U.S. 617 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961). As a result, school facilities are only limitedly available during the week or even on Saturday. That means that if the facilities are to be used for worship, which in almost all religions takes place most intensely on a particular day of the week, permission to use school facilities for worship must, as a practical matter, favor Christian over other – especially Jewish and Muslim – religious organizations. We need not decide here whether this lack of neutrality among religions would implicate a potential violation of the Establishment Clause that would be sufficiently overriding as to permit discrimination on the basis of viewpoint. For the question now before us is not *viewpoint*

III. CONCLUSION

I would hold that defendants' exclusion of worship services is viewpoint neutral. Further, seen only as a content-based restriction, I would find that the exclusion is reasonable in light of the purposes of the limited public forum involved. Given the positions taken by the other members of this panel, however, my disposition is limited to holding that the district court's permanent injunction and grant of summary judgment are VACATED, and the case is REMANDED for further developments.

---

discrimination, but simply the existence of a reasonable justification for *content*-based rules. And defendants' desire to avoid seeming to favor some religions is a reasonable ground for limiting this forum only to speech that does not include the category "worship."

LEVAL, *Circuit Judge*:

This appeal is brought by the defendants, the Board of Education of the City of New York ("the Board") and Community School District No. 10 ("the School District") (collectively, "the City" or "the City defendants"), from a permanent injunction entered by the District Court for the Southern District of New York (Preska, *J.*). The injunction bars the City from enforcing a newly proposed Standard Operating Procedure § 5.11 ("Proposed SOP § 5.11") so as to exclude the plaintiff, Bronx Household of Faith ("Bronx Household"), from using a City-owned school building for Sunday church services. Proposed SOP § 5.11 would prohibit the use of New York City public schools for "religious worship services" or as a "house of worship." The district court, relying on the Supreme Court's ruling in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), found that the City's enforcement of Proposed SOP § 5.11 to deny Bronx Household permission to use school facilities for its services would violate the First Amendment.

In ruling on the City defendants' appeal from the judgment, our court divides three ways. Judge Walker would affirm, finding that the district court was correct in enjoining enforcement of Proposed SOP § 5.11. Judge Calabresi would vacate the judgment, finding it to be in error. I would also vacate the judgment but for a different reason, expressing no opinion whether the judgment was based on a correct or incorrect perception of the substantive standards of the First Amendment. In my view, the judgment should be vacated because

there was no ripe dispute between the parties involving the constitutionality of Proposed SOP § 5.11 which the court could appropriately adjudicate.

At the time of the district court's judgment, Bronx Household was suffering no harm by reason of the City's proposed adoption of the new SOP. The proposed rule had never been invoked by the City as a basis for denying Bronx Household access to school facilities. Indeed it had not even been adopted, but was only a proposed rule that had been provisionally approved by City officials. Rather, a former version of SOP § 5.11 ("Old SOP § 5.11") had been invoked to exclude Bronx Household from using school facilities. Litigation over the exclusion under Old SOP § 5.11 had resulted in a preliminary injunction prohibiting enforcement of that provision to exclude Bronx Household. Subsequently, in asking the district court to make its final adjudication on the basis of the new proposed SOP, rather than with regard to the SOP which had been invoked in denying Bronx Household's application, the City asserted that, *if the preliminary injunction against it were lifted and it were granted summary judgment* (effectively allowing the City to exclude Bronx Household under the old standard), the City *would then invoke* Proposed SOP § 5.11 to deny Bronx Household's *future applications*. Given the contingent nature of the City's stated intentions, Proposed SOP § 5.11 may never be enforced against Bronx Household. Indeed, it may never be adopted.

There was no present controversy between the parties involving application of the new standard. The question whether the City might

constitutionally exclude Bronx Household in reliance on Proposed SOP § 5.11 was speculative and hypothetical. In fact, notwithstanding the City's prediction of how it would rule on an application which had never been made, there is sufficient difference between the new standard and the old rule upon which the City previously denied Bronx Household's application as to leave substantial uncertainty as to how such an application might play out.

Especially in view of the undesirablity of rushing into unnecessary constitutional adjudications, the sensitive constitutional question of whether Proposed SOP § 5.11 violates the First Amendment would be better adjudicated by a court after the rule has been adopted and an administrative proceeding has explicitly confronted and ruled on its applicability to the activities of Bronx Household. No party would suffer any meaningful harm if the court deferred adjudication until such time. In my view, the question whether the City could, consistent with the First Amendment, exclude Bronx Household from using school property under authority of Proposed SOP § 5.11 was therefore unripe for adjudication. Accordingly, I vote to vacate the judgment. *See National Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) ("[T]he question of ripeness may be considered on a court's own motion.").

BACKGROUND

New York Education Law § 414 authorizes local school boards to permit the use of school facilities by

outside groups for, among other activities, "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," as long as such meetings are "non-exclusive" and "open to the general public." New York Educ. L. § 414(1)(c). Pursuant to this law, the Board of Education promulgated a written policy permitting the use of school facilities by outside groups for these "social, civic and recreational" meetings. Standard Operating Procedure § 5.6.2. The written policy also included Standard Operating Procedure ("SOP") § 5.9, which prohibited the use of school property for "religious services or religious instruction on school premises after school."[1] *Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207, 210 (2d Cir. 1997) ("*Bronx Household I*").

Bronx Household describes itself as an "urban church whose primary purpose is to bring the Gospel of Jesus Christ to the streets of New York." *See* The Bronx Household of Faith, http://www.bhof.org/bhof1.html (last visited June 22,

---

[1] SOP § 5.9 provided:

> No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose[] of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

Bronx Household of Faith v. Community School District No. 10, 127 F.3d 207, 210 (2d Cir. 1997).

2007). The current dispute between Bronx Household and the City began in 1994, when Bronx Household applied to use space in a middle school located in Community School District Number 10 for its Sunday morning meetings. *Bronx Household I*, 127 F.3d at 211; *Bronx Household of Faith v. Board of Education*, 331 F.3d 342, 345 (2d Cir. 2003) ("*Bronx Household II*"). Concluding that the activities described in Bronx Household's application would constitute "religious services or religious instruction" and would therefore violate § SOP 5.9, the City denied Bronx Household's application. *Bronx Household I*, 127 F.3d at 211.

Bronx Household brought suit to challenge the denial. The district court found no First Amendment violation and thus granted summary judgment in favor of the Board and School District. *Bronx Household of Faith v. Community School Dist. No. 10*, No. 95 Civ. 5501, 1996 WL 700915, at *6 (S.D.N.Y. Dec. 5, 1996). On appeal, we affirmed the judgment. *Bronx Household I*, 127 F.3d at 217. We found that the Board and School District had created a limited public forum by opening school facilities only to certain types of speakers and subjects, and that the exclusion of religious services and religious instruction was viewpoint neutral and reasonable in light of the purposes served by the forum. *Id.* at 211-15; *see also id.* at 215 ("[R]eligious worship services may well be considered the ultimate in speech from a religious viewpoint in an open forum. But the question is whether a distinction can be drawn between it and other forms of speech from a religious viewpoint that District # 10 has elected to allow in

the limited forum of a public middle school. We think it can.").

The Supreme Court denied certiorari, *Bronx Household of Faith v. Board of Education*, 523 U.S. 1074 (1998), and the dispute then lay dormant for some years. It was resurrected in 2001, after the Supreme Court issued its decision in *Good News Club*, which was arguably incompatible with our decision in *Bronx Household I*.

In *Good News Club*, the Supreme Court ruled that it was unconstitutional for another school district in the State of New York to exclude from its facilities a "private Christian organization for children ages 6 to 12" which had requested permission to use the school during afterschool hours to sing songs, read Bible lessons, memorize scripture, and pray. 533 U.S. at 103. Milford Central School had enacted a "community use policy" similar to the City's Standard Operating Procedures, whereby school facilities could be used for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public," but could not be used "by any individual or organization for religious purposes," which school district officials interpreted as prohibiting "religious worship" or "religious instruction." *Id.* at 103-04 (quotation marks omitted). Noting that "any group that 'promote[s] the moral and character development of children' is eligible [under Milford's policies] to use the school building," and that "the [Good News] Club teaches morals and character

development to children," albeit from "a religious standpoint," the Court concluded that exclusion of the Good News Club from school facilities was unconstitutional viewpoint discrimination, *id.* at 108-10 (first alteration in original).

Taking comfort from the Supreme Court's decision in *Good News Club*, Bronx Household again requested to use school facilities for Sunday services. *Bronx Household II*, 331 F.3d at 346. The application was again denied, pursuant to the same SOP (since renumbered as § 5.11). *Id.* at 346-48. Bronx Household again brought suit to challenge the denial. This time the district court granted a preliminary injunction, provisionally requiring the City defendants to allow Bronx Household to use the school during the pendency of the litigation. *Bronx Household of Faith v. Board of Education*, 226 F. Supp. 2d 401, 427 (S.D.N.Y. 2002). On appeal, we affirmed the preliminary injunction. *Bronx Household II*, 331 F.3d at 354.

Bronx Household then moved in the district court for summary judgment to convert the preliminary injunction into a permanent ruling. The City cross-moved for summary judgment in its favor. Up to this point, all adjudications had been with reference to SOP § 5.9, renumbered as SOP § 5.11 (in other words, Old SOP § 5.11). The City, however, wrote to the district court advising that the City "seek[s] to implement a policy with language that varies from the policy language that has been preliminarily enjoined." The City explained that in contrast with the old rule, which prohibited use of school property for "religious services or religious instruction," the

Proposed SOP § 5.11 would prohibit use of school property for "religious worship services, or otherwise using a school as a house of worship."[2] The City told the court that with respect to the motions for summary judgment, the City would be defending the new policy. The district court expressed doubt whether, given Article III's limitations on federal court jurisdiction, it could properly rule on the constitutionality of a proposed SOP, which had not been invoked against Bronx Household. Seeking to allay the court's doubts, the City explained in a letter:

> Should [the City] defendants prevail in their motion for summary judgment and the preliminary injunction Order be vacated, then any future application by [Bronx Household] to hold their worship services at P.S. 15 . . . will be denied [pursuant to the proposed SOP].

---

[2] Proposed SOP § 5.11 provides:

> No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship. Permits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this chapter on the same basis that they are granted to other clubs for students that are sponsored by outside organizations.

Bronx Household of Faith v. Board of Educ. of City of New York, 400 F. Supp. 2d 581, 588 (S.D.N.Y. 2005).

Bronx Household of Faith v. Board of Educ. of City of New York ("*Bronx Household III*"), 400 F. Supp. 2d 581, 588 (S.D.N.Y. 2005) (quoting the City's letter of August 17, 2005).[3] The district court was thereby persuaded that it was presented with a justiciable controversy involving the application of Proposed SOP § 5.11. The court then granted summary judgment in favor of Bronx Household, permanently enjoining the City from enforcing the proposed SOP against Bronx Household. *Id.* at 601. The City defendants then brought this appeal.

DISCUSSION

In my view, the district court's first instincts were sound, and the court was led astray by the City's speculation on possible future adoption and enforcement of the proposed SOP. In my view, no ripe dispute involving the enforcement of Proposed SOP § 5.11 was before the court.

---

[3] The letter stated:

> Plaintiffs' use of P.S. 15 for the Bronx Household of Faith's regular worship services is prohibited under the revised section 5.11. Defendants are not currently enforcing the revised section 5.11 (or advising the field of this change) because of the preliminary injunction Order that was entered in this case. Should defendants prevail in their motion for summary judgment and the preliminary injunction Order be vacated, then any future application by plaintiffs to hold their worship services at P.S. 15 or any other school will be denied.

Bronx Household III, 400 F. Supp. 2d at 588.

I. Principles of Standing and Ripeness That Apply to This Case

Article III of the Constitution limits the judicial power of the federal courts to the adjudication of "cases" and "controversies." Aspects of this generalized limitation are classified in terms of whether a plaintiff has *standing*, or whether a dispute is *ripe*.

Although standing itself has multiple aspects, *see Flast v. Cohen*, 392 U.S. 83, 99 (1968) (noting that standing has been called one of the most amorphous concepts in public law), its "core component" is that, in order to have claims adjudicated by a federal court, the plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief," *Allen v. Wright*, 468 U.S. 737, 751 (1984). While the requirements implicit in the notion of "injury" are "not susceptible of precise definition," *id.*, they have been described in terms of whether the plaintiff has a "personal stake in the outcome," and whether the injury in question is "particular [and] concrete," and whether it results "direct[ly]" from the defendant's actions, *United States v. Richardson*, 418 U.S. 166, 179-80 (1974) (quotation marks omitted). "It is an established principle that to entitle a private individual to invoke the judicial power [of the United States courts] to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." *Id.* at

177-78 (quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (quotation marks omitted)).

Ripeness overlaps in some respects with standing, "most notably in the shared requirement that the [plaintiff's] injury be imminent rather than conjectural or hypothetical," *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 225 (2d Cir. 2006), and courts at times use either term to refer to this requirement. Nonetheless, the central concerns of ripeness doctrine are somewhat distinct from standing. Standing, in its "fundamental aspect," "focuses on the party seeking to get his complaint before a federal court" and whether that party suffers a sufficiently direct and concrete injury to be heard in complaint. *Flast*, 392 U.S. at 99. By contrast, the fundamental concern of ripeness is whether *at the time* of the litigation the issues in the case are "'fit' for judicial decision." *National Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 814 (2003) (Stevens, *J.*, concurring); *see also Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974) ("ripeness is peculiarly a question of timing"). The concept of ripeness assumes that the relationship between the parties might at some point ripen into an injury sufficiently direct and realized to satisfy the requirements of Article III standing. It recognizes, however, that some disputes mature in stages, going through preliminary phases during which the injury is as yet but a speculative possibility, too remote or hypothetical to warrant present submission to a federal court. Such a dispute is considered as yet "unripe" for adjudication.

In the present dispute, there can be no doubt that if the City were to reject Bronx Household's application to use school property on the ground that such use would violate Proposed SOP § 5.11, Bronx Household's claim that such a rejection violates the First Amendment would fully satisfy the requirements of standing and ripeness. In those circumstances, the City's invocation of its SOP to deny a permit would be causing an immediate, direct, and concrete injury to Bronx Household. The concern I express is whether any dispute over the application of Proposed SOP § 5.11 has as yet caused any ripe injury to Bronx Household. I accordingly will focus in the following discussion on those decisions which concern the ripeness of the dispute, regardless of whether they speak in terms of "ripeness" or of "standing."

In its leading case on these concerns, *Abbott Laboratories v. Gardner*, the Supreme Court explained that the "basic rationale" of the doctrine of ripeness is to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements" and to prevent "judicial interference" until the effects of a defendant's actions are "felt in a concrete way" by the plaintiffs. *Abbott*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977). As outlined in *Abbott*, the ripeness inquiry generally requires a federal court to consider "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149.

The plaintiffs in *Abbott*, who were proprietary pharmaceutical manufacturers, brought a challenge to a Food and Drug Administration regulation which required that each time a proprietary drug's brand name appeared on a label, the generic name had to be given as well. *Id.* at 138. The regulations, which were already in effect when the plaintiffs brought suit but had not been enforced against the plaintiffs in any way, carried heavy potential criminal and civil sanctions for violations. *Id.* at 151-52. The Court found that the claim was ripe for adjudication. It noted that the question presented was a "purely legal one," the regulation constituted "final agency action" within the meaning of the Administrative Procedures Act, *id.* at 149 (quotation marks omitted), and the impact of the regulations on the plaintiffs was "sufficiently direct and immediate as to render the issue appropriate for judicial review," *id.* at 152. In particular, the Court noted that the regulation's mere existence put the plaintiffs "in a dilemma" – they had to either comply with the regulations, incurring substantial economic costs to alter their labeling in a manner likely to harm their sales, or risk severe sanctions. *Id.* For more or less the same reasons, the Court found that the plaintiffs had standing to sue. *Id.* at 154.

On the same day, the Supreme Court dismissed a companion case, *Toilet Goods Association v. Gardner*, 387 U.S. 158 (1967), which illustrates the flip-side of the coin. The plaintiffs, a group of cosmetics manufacturers, challenged an FDA regulation which required the plaintiffs to grant the agency access to inspect their manufacturing facilities, processes, and formulae. *Id.* at 161. The

FDA had as yet made no demand under the regulations for access to the plaintiffs' facilities. A number of questions of application remained unresolved, including what enforcement problems the FDA had encountered that would justify such inspections, the reasons that the FDA Commissioner might give to justify a particular order of inspection, and the safeguards the agency would devise to protect trade secrets. *Id.* at 163-64. The Court dismissed the case as unripe, explaining: "We believe that judicial appraisal of these factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here." *Id.* at 164. Of special importance, the Court noted the lack of "hardship" to the parties from postponing judicial review until "more light may be thrown on the Commissioner's statutory and practical justifications for the regulation": "This is not a situation in which primary conduct is affected . . . . [N]o advance action is required . . . [and] no irremediable adverse consequences flow from requiring a later challenge." *Id.* at 164.

In *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993), a class of alien plaintiffs challenged certain Immigration and Naturalization Service regulations which had raised barriers to an undocumented alien's ability to obtain authorization for permanent residency. The Court found the issues presented to be unripe (at least as to some plaintiffs) largely because the regulations at issue, as in *Toilet Goods*, "impose[d] no penalties for violating any newly imposed restriction," but rather "limit[ed]

access to *a benefit* . . . not automatically bestowed on eligible aliens." *Id.* at 58 (emphasis added). In other words, a plaintiff's claim was unripe unless the alien had taken all possible steps to gain access to the immigration benefit, and had been denied the benefit on account of the disputed regulation. *Id.* at 59.

Particularly illustrative is *National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803 (2003). The plaintiff, an association of concessioners doing business in national parks, sought pre-enforcement review of whether a National Park Service regulation could exclude concession contracts from the protective reach of the Contract Disputes Act of 1978. *Id.* at 804-05. The Court concluded that the plaintiff's claims were not yet ripe. As in *Toilet Goods*, the Court noted the lack of hardship to the parties from delaying review, given that the regulation does not "command anyone to do anything or to refrain from doing anything," does not "grant, withhold, or modify any formal legal license, power, or authority," does not "subject anyone to any civil or criminal liability," and creates "no legal rights or obligations." *Id.* at 809 (quoting *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998) (quotation marks omitted)). The Court also found the issue unfit for judicial review, given the parties' explicit or implicit acknowledgment that different types of concession contracts might present different legal questions. *Id.* at 812. As a result, the Court found that "further factual development would 'significantly advance our ability to deal with the legal issues presented,'" and therefore adjudication should "await a concrete dispute about a particular

concession contract." *Id.* (quoting *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 82 (1978)).

The concurring and dissenting Justices in *National Park* agreed with the framework of the majority's ripeness analysis, while disagreeing with some of the majority's conclusions. The concurring opinion would have found that the case was ripe for review but that the plaintiff lacked standing. *See National Park*, 538 U.S. at 814-17 (Stevens, *J.*, concurring). Justice Breyer's dissenting opinion would have found that the dispute satisfied both standing and ripeness requirements. In his view, the challenged regulation "causes a present injury" that is "immediate" and "concrete," in the form of higher contract implementation costs which force concessioners bidding for government contracts to pay more to obtain a contract than they believe it is worth. *Id.* at 818-19 (Breyer, *J.*, dissenting).

In concluding that a case is "unripe," courts often mean that the dispute has not yet matured into a "case" or "controversy" within the meaning of Article III, so that the court is without jurisdiction to enter judgment. *See, e.g.*, *Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d 469, 478 (2d Cir. 1999) (describing and applying ripeness analysis as a constitutional prerequisite, without discussing prudential concerns). Courts have also, however, invoked the ripeness doctrine to justify dismissal in circumstances where adjudication would not necessarily have exceeded the courts' constitutional power but the prospect of injury was nonetheless sufficiently remote or conjectural that the court

considers it prudent not to exercise jurisdiction until the dispute has further ripened to produce a more palpable injury. *See, e.g.*, *Simmonds v. I.N.S.*, 326 F.3d 351, 358, 361 (2d Cir. 2003) (finding that plaintiff's claims "surely present a live case or controversy," but dismissing the petition on the grounds of prudential unripeness). Although in many cases courts fail to employ a strict taxonomy distinguishing constitutional from prudential considerations, *see, e.g.*, *National Park*, 538 U.S. at 808 (noting simply that ripeness doctrine derives from Article III and from prudential considerations), other courts have distinguished "prudential unripeness" from "constitutional unripeness," *see Simmonds*, 326 F.3d at 357.[4]

---

[4] In *Simmonds* we explained these two aspects of ripeness as follows:

> These two forms of ripeness are not coextensive in purpose. Constitutional ripeness is a doctrine that, like standing, is a limitation on the power of the judiciary. It prevents courts from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless the resolution of an actual dispute requires it. But when a court declares that a case is not prudentially ripe, it means that the case will be *better* decided later and that the parties will not have constitutional rights undermined by the delay. It does not mean that the case is not a real or concrete dispute affecting cognizable current concerns of the parties within the meaning of Article III. Of course, in deciding whether "better" means later, the court must consider the likelihood that some of the parties will be made worse off on account of the delay. But that, and its degree, is just one – albeit important – factor the court must consider. Prudential ripeness is, then, a tool that courts may use to enhance the accuracy of

The ripeness principles elaborated in the foregoing cases bear heightened importance when, as in the present case, the potentially unripe question presented for review is a constitutional question. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944). The principle of constitutional avoidance is an integral part of the ripeness analysis in such cases, and tilts the balance in favor of finding a constitutional issue unripe for review. *Poe v. Ullman*, 367 U.S. 497, 503-04 (1961) ("The various doctrines of 'standing,' 'ripeness,' and 'mootness' . . . are but several manifestations – each having its own 'varied application' – of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." (footnotes omitted)). In cases involving the constitutionality of state legislation the Supreme Court has therefore

---

> their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial.

Simmonds, 326 F.3d at 357. It is unclear to me why the *Simmonds* Court believed that prudential ripeness requires that the parties "will not have *constitutional* rights undermined by the delay." In my view, the undermining of any rights, and not only constitutional rights, argues against a finding of unripeness.

warned federal courts to consider, before passing on the merits of the question, whether "questions of construction, essentially matters of state law, remain unresolved or highly ambiguous." *Rescue Army v. Municipal Court of City of Los Angeles*, 331 U.S. 549, 568, 574 (1947); *cf. Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997) ("Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court."). Jurisdiction should be exercised in such cases only when the constitutional issues are presented "in clean-cut and concrete form, unclouded by any serious problem of construction." *Rescue Army*, 331 U.S. at 584.

II. Adjudication of Proposed SOP § 5.11

The circumstances confronted by the district court when asked to rule on the constitutionality of Proposed SOP § 5.11 are those which have led courts to the conclusion that the case was unripe for adjudication.

A. Lack of Present Harm to the Party Opposing the Regulation

To start with two obvious propositions: (1) There is without question a ripe controversy between the parties involving the application of Old SOP § 5.11 to bar Bronx Household from using school property. The fact, however, that one controversy between the

parties is ripe for adjudication does not mean that all disputes between the parties present ripe questions. Without doubt the district court could properly have entered a final judgment on the constitutionality of Old SOP § 5.11. It is the adjudication of the constitutionality of the new proposed SOP that is problematic. (2) Had Proposed SOP § 5.11 been invoked by the City as the basis for denying Bronx Household use of school property, Bronx Household would have standing to challenge its constitutionality, and the dispute would be ripe for adjudication. This, however, has not happened. In fact, it appears the proposed SOP has not even been adopted, and that the City is awaiting the court's judgment on its constitutionality before adopting it.

Not only has the City never relied on Proposed SOP § 5.11 to deny Bronx Household's application, but Bronx Household has never even applied to use school property under the standards of Proposed SOP § 5.11. Bronx Household has been excluded under the standards of the predecessor SOP and has obtained a preliminary injunction granting it provisional access to school property on the basis of the probable unconstitutionality of that SOP. At present Bronx Household is therefore not being excluded from the schools at all, much less by reason of the proposed SOP.

I recognize that a regulation can cause harm to a covered entity even without being enforced. Thus in *Abbott* the Supreme Court found that the FDA's labeling regulation caused actual harm to covered drug manufacturers even without being enforced, because the manufacturer was required either to

adopt a disadvantageous change in its labeling practices or risk incurring serious penalties and liabilities. *See Abbott*, 387 U.S. at 153 ("[W]here a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts . . . must be permitted . . . ."); *see also AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 386 (1999) ("When . . . there is no immediate effect on the plaintiff's primary conduct, federal courts normally do not entertain pre-enforcement challenges . . . ."); *Texas v. United States*, 523 U.S. 296, 301 (1998) (no "hardship" because plaintiff "is not required to engage in, or to refrain from, any conduct"). And in *National Park*, the majority and the dissent disagreed over whether the obligation on would-be concessioners to increase their bids in anticipation of increased operating costs resulting from the questioned regulation caused sufficient injury to confer ripeness on the concessioners' challenge to the regulation.

Here, the City's proposed adoption of a new SOP causes no such harm to Bronx Household. Even if the proposed SOP had been adopted, Bronx Household would not be obligated by it to amend its practices in any way. The provision would not command Bronx Household to do anything or to refrain from doing anything, nor would it grant, withhold, or modify any legal license, power, or authority, nor would it subject Bronx Household to civil or criminal liability. *See National Park*, 538 U.S. at 809. The proposed SOP would merely create a possibility that at some future time, it may cause Bronx Household to be excluded from use of the

schools – at which time Bronx Household could challenge its constitutionality. *See Simmonds*, 326 F.3d at 360 ("The mere possibility of future injury, unless it is the cause of some present detriment, does not constitute hardship.").

B. Lack of Harm to Either Party from Delay

Among the factors courts examine to determine ripeness is whether *either* party to the dispute would be harmed by delaying adjudication until the dispute ripens. I think it clear that neither party would be harmed by delay in adjudicating the constitutionality of Proposed SOP § 5.11. Bronx Household continues to be protected by the preliminary injunction, and there is no impediment to the entry of final judgment relating to the SOP that was actually enforced against it (Old SOP § 5.11). The City will suffer no harm if adjudication of the constitutionality of Proposed SOP § 5.11 awaits such time as it is actually adopted and invoked. The parties may find it convenient to get this resolved now. But loss of such convenience is not sufficient harm to make a hypothetical future dispute ripe for immediate adjudication.

In a deviation from the conventional pattern, it is the governmental entity sponsoring the regulation, rather than the person potentially affected, that has asked that the lawfulness of the regulation be immediately adjudicated. However, the City is not barred from vindicating its governmental interest by adopting and enforcing the proposed standard against Bronx Household. The preliminary injunction, which was in effect when the parties

cross-moved for summary judgment, barred the City from excluding Bronx Household *under the old rule*. It did not purport to bar the City from adopting or enforcing different standards.[5]

---

[5] The preliminary injunction barred the defendant "from enforcing the [Old SOP § 5.11] so as to deny plaintiffs' application." It contained no suggestion that the City was barred from adopting or enforcing a new, different standard. The Order stated:

> It is hereby ordered, adjudged and decreed that, for the reasons set forth in the Opinion dated June 26, 2002, defendants are hereby enjoined from enforcing the New York City Board of Education's Standard Operating Procedure § 5.11 [Old SOP § 5.11] so as to deny plaintiffs' application to rent space in a public school operated by the Board of Education for morning meetings that include religious worship or the application of any similarly-situated individual or entity.

(Although this has little or no bearing on the present 1 dispute, I question the appropriateness of the district court's grant of injunctive relief barring the City not only from denying the application of the plaintiffs, but also from denying the application of "any similarly-situated individual or entity." Assuming such an order may be proper in some circumstances (even absent class certification), *cf. Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973), I believe it was not appropriate in this case, at least without the court also giving a reasonably precise definition of the meaning of "similarly-situated." There are many grounds upon which the City might reject another entity's permit application, which might raise altogether different issues than those involved in Bronx Household's case. A defendant ought not to be subjected to the risk of contempt without a reasonably clear delineation of the circumstances in which the defendant is forbidden to act.)

When the City's attorney expressed a concern that the preliminary injunction might bar the City from enforcing the new policy, the district court judge responded, "I don't recall that the injunction prohibited the [Department of Education] from changing its policy." If the City still entertained doubts about a risk of contempt, it could have sought further assurance from the district court.[6]

By asking the court to rule on the constitutionality of a policy that had neither been enforced nor even adopted, the City was essentially asking for an advisory ruling on courses of action it had contemplated but not taken. The City was asking the court: *if* the City adopts the proposed SOP, and *if* Bronx Household applies to use school space under that new provision, and *if* the City denies that permit application on the grounds that Bronx Household plans to use the school space for "worship," would that denial be constitutional? To answer would be to give an advisory opinion on a hypothetical question.

C. Fitness For Adjudication

The circumstances that have led courts to find that issues are unfit for adjudication are present

---

[6] In the unlikely event that the district court would have advised the City that the court would regard such action as a violation of the injunction, the City would then have been armed with an argument supporting ripeness to adjudicate the constitutionality of the new SOP, as the City would then have been harmed by denial of the opportunity to enforce the new standard pending final adjudication of the constitutionality of the old.

here. The proposed SOP, focusing on the exclusion of "worship," has played no role in the exclusion of Bronx Household from use of the school facilities. Furthermore, adjudication of the constitutionality of the new SOP would be illuminated by the resolution of questions that will inevitably come into play if and when the City enforces the proposed SOP upon Bronx Household's application. *See Toilet Goods*, 387 U.S. at 164. In *Toilet Goods*, *Reno*, and *National Park*, the Supreme Court determined that adjudication of the legal question was unripe in part because the adjudication would benefit from having the "factual components fleshed out" by "some concrete actions applying the regulation." *National Park*, 538 U.S. at 808 (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990) (quotation marks omitted)).

The same considerations apply here. It is impossible to know at this stage exactly how the process of Bronx Household's application and the City's ruling will play out when so much remains uncertain. For starters, how will Bronx Household describe its proposed activities in an application designed to secure admission under this policy focused on worship? One cannot assume that a new application seeking approval under the new SOP will be formulated in the same terms as Bronx Household's previous applications, which were addressed to different standards. The term "worship," which did not appear in the old SOP but is central to the new one, is of uncertain meaning. I recognize that, when worship was not determinative, Bronx Household described the activities for which it sought permission as "worship." It will not

necessarily continue to do so when seeking admission under a rule which explicitly excludes "worship." In any event, what will matter on a new application is not whether *Bronx Household* considers its activities to be "worship," but whether its activities are "worship" *within the meaning of the City's new SOP*. It is uncertain how the City will interpret its new criterion. Will the City formulate guidelines to help determine what does and what does not constitute forbidden worship? How will the City define the term in passing on applications?

After the Supreme Court's decision in *Good News Club*, the constitutional significance of "worship" is far from clear. In a footnote responding to Justice Souter's observation in dissent that the Good News Club's activities added up to "an evangelical service of worship," the majority asserted that the activities "do *not* constitute *mere religious worship*, divorced from any teaching of moral values." *Good News Club*, 533 U.S. at 112 n.4 (emphasis added); *see also id.* at 138 (Souter, *J.*, dissenting). Later in the same footnote, the Court acknowledged Justice Souter's characterization of the Club's activities as "worship," but responded simply that "[r]egardless of the label Justice Souter wishes to use, what matters is the substance of the Club's activities . . . ." *Id.* at 112 n.4.

The Court's insistence that Good News Club's activities did not constitute "mere worship" seems to indicate that the Court attaches constitutional significance to whether "worship" was involved, and may even suggest, as Judge Calabresi notes, that the Supreme Court will ultimately conclude that worship may be excluded, while associated teaching

of moral values may not. *See* Calabresi Op., *supra* at **26**. Otherwise, there would be little point in distinguishing the Club's activities from "mere worship." On the other hand, the Court's dismissal of Justice Souter's characterization of the activities as "worship" as essentially irrelevant may suggest it is constitutionally irrelevant whether an applicant to use public school facilities intends to conduct worship services. *Cf.* Walker Op., *post* at **93**.

When and if the City faces Bronx Household's application to use school facilities under Proposed SOP § 5.11, given the City's obligation to act consistently with the Constitution, it will need to interpret the Supreme Court's First Amendment position. Perhaps by that time the Supreme Court will have given additional guidance. The City will have to determine the meaning of "worship" as used in the new SOP, and do so in consideration of whatever light new court rulings may have shed on the puzzling ambiguities of the footnote in *Good News Club*. Before a federal court adjudicates whether the City's exclusion of "worship" is constitutionally permissible, it would be useful to know how the City construes excluded "worship," and the best way to find out is to wait until the City relies on its rule to deny an application. Until the City denies Bronx Household's application based on a policy forbidding "worship," there is no ripe question of the constitutionality of such an action.

Because the central question in the dispute is one of constitutionality, the importance of the conclusion that the present dispute is not yet fit for adjudication is heightened by the general rule

counseling against deciding *constitutional* questions unnecessarily. This court has been asked to adjudicate a significant and delicate question of constitutional law, whose outlines are by no means clearly dictated by prior authority; the answer may turn in part on how the City interprets and enforces its policy. This is exactly the type of question the court should not reach out to decide prematurely, when many factors which may influence the analysis are as yet undeveloped. As the Supreme Court noted in *Spector Motor Service*:

> [A]s questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. Avoidance of such guesswork . . . merely heeds this time-honored canon of constitutional adjudication.

Spector Motor Serv. v. McLaughlin, 323 U.S. 101, 105 (1944) (citations omitted). In the present case the constitutional question may be substantially altered – or even mooted entirely – by whether the City ever enforces Proposed SOP § 5.11 and, if so, the manner in which enforcement proceeds.

It would in no way answer these ripeness concerns to say that, because the constitutionality of the City's Proposed SOP will need to be decided soon, we might as well decide it now rather than make the parties wait. There are at least two strong

responses to any such argument. For starters, the question whether Proposed SOP § 5.11 embodies prohibited viewpoint discrimination (as the district court found) may never be presented to the court. Second, and more important, the ripeness doctrine assumes that the question may well need to be decided in the future, but nonetheless avoids premature decision based on the belief that the adjudication will be better informed and wiser if it occurs when the dispute has crystallized, thus bringing its latencies to the surface. I discuss these two considerations below.

Courts that have dismissed on the grounds of unripeness have noted that, as the dispute among the parties advances, the unripe issue may become moot and thus may never be presented to a court, or alternatively may be presented in a much altered form. *See Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1217 (9th Cir. 2006) (en banc) (three-judge plurality opinion) (finding the case unripe because, in part, "[w]e are . . . uncertain about whether, or in what form, [the] question might be presented to us"); *Simmonds v. I.N.S.*, 326 F.3d 351, 357 (2d Cir. 2003) (Calabresi, *J.*) ("Prudential ripeness is . . . a tool that courts may use . . . to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial."). In this case as well, there is a significant possibility that the constitutional issue which the district court undertook to determine will be mooted by future events, and either will never be presented for adjudication or will be presented in a

substantially different form. Notwithstanding the City's facile prediction that it would deny Bronx Household's future applications under the proposed SOP, there are many other reasonable possibilities. Among them: The City's administration, whose composition inevitably will change over time, might adopt a different approach. The City might become persuaded – perhaps by subsequent rulings of the Supreme Court or other courts – that it cannot constitutionally exclude worship, and might therefore decide not to adopt the proposed SOP, or it might grant Bronx Household's application notwithstanding the SOP. The City might grant Bronx Household's application in part, allowing it to use school facilities for some of its projected activities – those the City recognizes are protected by *Good News Club* – but specifying that others – those which the City views as "worship" and beyond the protection of *Good News Club* – are not permissible. The free speech concerns underlying the district court's decision might also be mooted if the City concluded that, in practice, any attempt to enforce Proposed SOP § 5.11 would violate the *Establishment Clause* of the First Amendment, because of church-state entanglement resulting from the City's need to distinguish "worship" from other religious activities. *See Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981) ("We agree . . . that the University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.'"); *Bronx Household III*, 400 F. Supp. 2d at 598 (merely identifying "religious worship services" fosters "an excessive government entanglement with religion"); *see* Walker Op., *post* at **95**. Or, as noted above, for any of

a number of reasons, Bronx Household might never reapply.

Furthermore, in denying Bronx Household's future application the City might also rely on a ground which either moots the constitutional inquiry or at least alters the constitutional calculus. The New York statute authorizing the Board to open its schools for public use for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community" specifies that such uses "*shall be non-exclusive and shall be open to the general public.*" New York Educ. L. § 414(1)(c) (emphasis added).[7] While Bronx Household has described its meetings as "open to the public," the City has questioned this characterization, and the evidence already adduced suggests that Bronx Household's meetings may not be open to the public. It appears, for instance, that Bronx Household has "excommunicated two Church members since they began meeting at P.S. 15," and that an excommunicated member "is not permitted to attend [Bronx Household's] services, unless the person seeks to be restored to the Church." Grounds for discipline include publicly advocating the Islamic religion. Furthermore, Bronx Household's Pastor has also testified that "communion," which is part of Bronx Household's typical Sunday service, is not

[7] Although in *Bronx Household I* we dismissed the relevance of the possibly exclusive nature of Bronx Household's meetings, we did so in the context of upholding on other grounds the City's denial of a permit to Bronx Household. *See Bronx Household I*, 127 F.3d at 215. The discussion did not imply that exclusivity could not furnish an alternate ground for the City's denial.

given to "people who have not been baptized." For these and other reasons, there may therefore be a substantial question whether Bronx Household's meetings are truly "open" to people who reject Christianity.

If such evidence were further developed, it is reasonably possible that upon Bronx Household's future application under the proposed SOP the City would deny access on the ground that Bronx Household's Sunday meetings are out of compliance with New York's statutory mandate that all meetings be "non-exclusive" and "open to the general public." New York Educ. L. § 414(1)(c). Were the City to exclude Bronx Household on this basis, the question whether the City may constitutionally exclude "worship" would in all likelihood be mooted. *Cf. Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (even in a "public forum" the state may regulate protected expression with "reasonable, content-neutral time, place, and manner restrictions").

The fact that the proposed provision has never been applied against Bronx Household and may never be applied as the basis for excluding the group from school facilities counsels strongly in favor of finding the question of its constitutionality unfit for judicial review. *See Simmonds*, 326 F.3d at 359 (fitness analysis "is concerned with whether the issues sought to be adjudicated are contingent on future events or may never occur" (quoting *Isaacs v. Bowen*, 865 F.2d 468, 478 (2d Cir.1989) (quotation marks omitted)); *Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conservation*, 79 F.3d

1298, 1305 (2d Cir. 1996) ("The [ripeness] doctrine prevents the premature adjudication of issues that may never arise."). Refraining from decision on issues that may never materialize is particularly important where the underlying issue, as here, is of constitutional import. *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

Even if it were certain that the constitutionality of Proposed SOP § 5.11 would be back before the court, that is not a reason to decide that question prematurely, before a dispute over the application of the SOP has crystallized or caused harm. The ripeness doctrine seeks better information and thus improved accuracy in decision making. As discussed above, there are many ways in which the constitutional question may be shaped and informed by the manner in which the City chooses to apply and interpret its proposed policy. We cannot anticipate the exact form this dispute will take when it ripens into an actual conflict. The ripeness doctrine requires that our decision await that time (even if it is in the near future), because the issue will be better illuminated when the contours of the conflict are clear. At this stage, the particulars of the dispute between Bronx Household and the City regarding the new proposed SOP are a matter of speculation.

A finding that Bronx Household's meetings are not open to the public or that it refuses sacraments

based on whether the person professes the Christian faith might also present a different constitutional issue. The Supreme Court found in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), that the school did not violate the Establishment Clause by permitting religious groups to use school facilities because the activity "would not have been during school hours, would not have been sponsored by the school, *and would have been open to the public, not just to church members*. The District property had repeatedly been used by a wide variety of organizations. *Under these circumstances* . . . there would have been no realistic danger that the community would think that the District was endorsing religion . . . ." *Id.* at 395 (emphasis added). Again, in *Capitol Square Review and Advisory Board v. Pinette*, a plurality of the Court repeated these sentiments: To permit "access by a religious group in *Lamb's Chapel*, it was sufficient that the group's activity was not in fact government sponsored, that *the event was open to the public*, and that the benefit of the facilities was shared by various organizations." 515 U.S. 753, 767 (1995) (plurality opinion) (emphasis added). Finally, in *Good News Club* the Court rejected the defendant's Establishment Clause defense by noting: "As in *Lamb's Chapel*, the Club's meetings were held after school hours, not sponsored by the school, and *open to any student who obtained parental consent, not just to Club members*." 533 U.S. at 113 (emphasis added); *cf. id.* at 144 (Souter, *J.*, dissenting) (permitting Good News Club to meet on school property might result in an Establishment Clause violation, in part because "[t]he club is open solely to

elementary students (not the entire community, as in *Lamb's Chapel*)").

These cases may suggest that there is a constitutional requirement that religious meetings conducted on public school property be "open to the public," and that would-be recipients not be denied sacraments on the basis of their failure to espouse the tenets of a particular faith, lest such exclusions be perceived as state "endorsement" of a particular faith. *Cf. Lamb's Chapel*, 508 U.S. at 395. Were the City to permit Bronx Household to use school facilities to perform activities such as communion only for those of a certain faith, or to close the school doors to persons who reject Christianity, this might well be deemed a violation of the Establishment Clause. *Cf. Good News Club*, 533 U.S. at 113 ("[I]t is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination.").

In any event, the possibility that the City's response to an application under the proposed SOP might be affected by such considerations, such that the provision will never be applied in the manner currently anticipated by the parties (if at all), argues against the fitness of the question for present adjudication. Courts do not rush to adjudicate unripe disputes, especially those involving constitutional questions, because judgments on important questions will be better informed and sounder if they

await the time when the dispute has crystallized and a party has suffered harm.[8]

---

[8] My colleagues offer a number of arguments in favor of a finding of ripeness. I do not find them convincing. Judge Calabresi, acknowledging that it is a "close" question, argues as follows. First, he contends the record reflects actual promulgation of the revision and adds that the district court "must be taken to have found" that the City adopted the rule. Nothing in the district court's discussion suggests that the court made such a finding; furthermore, when the court raised the ripeness concern, counsel for the City acknowledged that while the revision had been "approved at the highest levels of1 the Department," it had neither been "implemented" nor "applied . . . to the plaintiffs." The City subsequently acknowledged that it was "not currently enforcing the revised section 5.11" nor even "advising the field of this change." *Bronx Household III*, 400 F. Supp. 2d 581, 588 (S.D.N.Y. 2005).

More importantly, however, my finding of unripeness does not turn on whether the revision was adopted by the Board as an SOP. It is undisputed that the revision was never applied against Bronx Household. While the apparent failure of the City to promulgate the revision formally makes the unripeness of the dispute more obvious, my conclusion would be the same, for the reasons expressed throughout this opinion, regardless of whether the revision was adopted but not invoked against Bronx Household, or not even adopted. The most important factor is that the revision caused Bronx Household no harm.

Judge Calabresi seems to concede that this revision of the SOP has caused no harm to Bronx Household; at least he makes no argument to the contrary. He argues that ripeness may be found on two bases: first, that a finding of unripeness would further delay the ultimate resolution of the dispute, and second, that the City should be entitled to get a ruling on the constitutionality of the revision, even before applying it, because the City might have believed that the terms of the preliminary injunction prohibited the City from enforcing it.

As for the delay, there are two answers. First, the delay necessary to await a true ripe conflict over the revised SOP need not have been lengthy. Had the district court declined to adjudicate the constitutionality of the revised SOP until the

City invoked it to exclude Bronx Household, and the parties desired speedy resolution, the resulting delay would have been extremely brief. If, instead of trying to convince the court to adjudicate the constitutionality of a rule that had never been enforced, the City had advised the court that it was adopting a different standard, and invited Bronx Household to apply under the new standard, Bronx Household could then have promptly submitted an application, and the City could have promptly ruled. The parties could then have cross-moved for summary judgment. Any delay in the court's ruling until a true adversity developed between the parties over a new standard thus need not have exceeded a few weeks. Second, and more important, resultant delay of adjudication is ordinarily not the kind of harm that renders an unripe claim ripe. Delay is an *inevitable* consequence whenever a court declines to adjudicate a question by reason of unripeness. In several cases discussed in the body of this opinion, the Supreme Court and this court have declined to adjudicate because of the unripeness of the question, notwithstanding that the refusal to adjudicate would cause the parties delay in securing an answer to the question. If such delay conferred ripeness, no case would ever be unripe for adjudication.

Judge Calabresi finally argues that ripeness can be derived from the harm to the City of being barred by the preliminary injunction from implementing its newly revised policy. As explained more fully in earlier passages of this opinion, the terms of the preliminary injunction simply did not forbid the City from revising its policy or from enforcing a policy different from the one enjoined. When the City's attorney advised the district court, "We did not believe that, in light of the preliminary injunction, that we could go forward [with implementation of the revised policy] without this court's approval," the court responded, "I don't recall that the injunction prohibited the DOE [Department of Education] from changing its policy." If the City had further qualms, it could have asked the judge for assurance.

Judge Walker argues that the issue is ripe because Bronx Household is harmed by an "*in terrorem* effect" of the revised rule – the *in terrorem* effect being that Bronx Household must concern itself that, if the revised standard is some day enforced against it, it would be forced to seek another location to conduct

CONCLUSION

The district court should not have entertained and adjudicated the question whether the City may constitutionally exclude Bronx Household from access to City school facilities under the provisions of Proposed SOP § 5.11. The question was not ripe for adjudication. It is unnecessary to determine whether this was prudential unripeness, constitutional unripeness, or both. The question was at least prudentially unripe. The court should have declined to jump ahead to make this premature adjudication. I therefore vote to vacate the judgment.

---

worship services. In support, Judge Walker cites the Supreme Court's decision in *Abbott*. However, the reason the Supreme Court found ripeness in *Abbott*, notwithstanding that the new regulations had not been enforced, was that the plaintiff drug manufacturers needed immediately either to adopt the disadvantageous labeling practices mandated by the regulation or risk serious punishments. Their vulnerability to punishment was crucial to the finding of ripeness. Here, there is no such thing. The revised SOP causes no harm to Bronx Household. It is free for the time being to conduct its worship services in the schools without any risk of punishment. The recognition that the revised SOP might some day be enforced to exclude Bronx Household from conducting its worship services in the schools causes it no present harm. If the mere possibility of future enforcement of a new rule were sufficient to confer ripeness, a governmental entity's mere adoption of a new rule would allow all persons who might some day be required by it to change their practices to challenge its lawfulness in federal court. This is clearly not the accepted standard of ripeness.

The arguments of my colleagues do not persuade me that a ripe controversy exists over the constitutionality of this revision of the City's SOP, which has clearly not been enforced and has caused Bronx Household no harm.

JOHN M. WALKER, JR., Circuit Judge, dissenting:

This dispute between the Bronx Household of Faith, a Christian church, and the New York City Board of Education is old and bitter. Bronx Household wishes to use school facilities for Sunday worship services; the Board wishes to keep them out and invokes a rule precluding groups who meet on school premises after hours from "holding religious worship services, or otherwise using a school as a house of worship." Standard Operating Procedures Manual § 5.11 ("SOP § 5.11").[1]

While I agree with Judge Calabresi that this dispute is ripe for adjudication, and join his opinion in that limited respect without reservation,[2] I cannot

---

[1] What is termed "Revised" SOP § 5.11 in the court's per curiam opinion, I call simply SOP § 5.11.

[2] I agree with Judge Leval that we should not reach out to decide unnecessary constitutional questions. The Board, however, has repeatedly and implacably sought to exclude religious viewpoints -- whether out of the mistaken belief that such exclusion is necessary to comply with the Establishment Clause or due to some hostility to religious groups. Indeed, this marks the third time that a New York school board has denied religious groups access to school property. Under these circumstances, and in light of the fact that I believe the Board has adopted SOP § 5.11, I think we owe the litigants a duty to decide this dispute now; the alternative would permit the Board to rely on the in terrorem effect of SOP § 5.11 to prevent Bronx Household from pursuing its principal goal -- the establishment of a community of believers -- as Bronx Household would need to account at every turn for the possibility that at any moment it might be forced to resume its peripatetic search for a building wherein to house its

agree that SOP § 5.11 is viewpoint neutral. Indeed, after comparing the purposes of Bronx Household's proposed use of school property with the purposes for which the Board has opened that property to the public, I can only conclude that by promulgating SOP § 5.11 the Board has engaged in a form of invidious viewpoint discrimination forbidden by the First Amendment. With the history of this dispute in mind and in light of the Supreme Court's recent decision in Good News Club v. Milford Central School, 533 U.S. 98 (2001), I vote to affirm the district court's permanent injunction.

Rather than inquiring into the purposes of the proposed expressive activity and the purposes of the forum, Judge Calabresi follows a different analytical course, with which I cannot agree. Starting with the premise that in a "limited public forum" the government may restrict any expressive activity that does not "parallel" expressive activity the government has already chosen to permit, Judge Calabresi asks whether "worship [is] merely the religious analogue of ceremonies, rituals, and instruction [which the Board has chosen to permit], or . . . [whether it is] a unique category of protected expression." Calabresi Op., supra at **6.** He then completes the syllogism by holding that worship is sui generis, unlike expressive activity the Board has already chosen to permit, and thus impermissible. The result is Bronx Household's excommunication from the broad group of after-school users who are welcome on school property.

---

worshipers. Cf. Abbott Labs. v. Gardner, 387 U.S. 136, 152 (1967).

Judge Calabresi's approach is fatally defective in two principal ways: (1) He fails to define the "limits" of the Board's limited public forum, rendering the comparison he draws between permitted expressive activity and Bronx Household's proposed expressive activity so indeterminate and malleable that its result is foreordained; and (2) He fails to articulate an objective definition of "worship," the term he uses to describe Bronx Household's proposed expressive activity, choosing instead to leave that task to the Board and thereby likely ensuring that the Board's entanglement in the process will violate the Establishment Clause.

The First Amendment is not like a book in the "Choose Your Own Adventure" series, in which it is easy -- albeit theoretically improper -- to select an outcome and, working backwards, decide how the plot and characters will develop; nor, for that matter, may we decline the adventure itself. The First Amendment does not teach Judge Calabresi's simple calculus. Cf. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 693-94 (1992) (Kennedy, J., concurring) ("Our public forum doctrine ought not to be a jurisprudence of categories rather than ideas . . . ."). Because I agree with Judge Calabresi that we must decide this case, because I conclude that the Board has engaged in impermissible viewpoint discrimination, and because Judge Calabresi's approach relies more on judicial legerdemain than judicial reasoning, I must respectfully dissent from the court's decision to vacate the permanent injunction.

I. Bronx Household's Free Speech Claim

A. The Board's Viewpoint Discrimination

Despite the two flaws in Judge Calabresi's approach, I begin with three points on which he and I are in agreement. I agree that in a limited public forum, the government may exclude all entities except those "entities of similar character" to those it has chosen to include, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 48 (1983), as long as any such exclusion is not a facade for covert viewpoint discrimination, Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 812 (1985). Indeed, we have concluded, a limited public forum is (1) a sub-set of the designated public forum as to "expressive activities of [the] genre" the government has chosen to permit on its property, Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991), and (2) a sub-set of the nonpublic forum as to all other expressive activities. See also Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998) (holding that if the government excludes "a speaker who falls within the class to which a designated public forum is made generally available" its decision is subject to strict scrutiny). 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." Good News Club, 533 U.S. at 139 (Souter, J., dissenting). And, finally, I agree that courts should not analyze the "substance" of proposed expressive activity as the district court did in this case. See Bronx Household of Faith v. Bd. of Educ. (Bronx Household III), 400 F.

Supp. 2d 581, 591 (S.D.N.Y. 2005) (describing Bronx Household's proposed activity as "singing songs and hymns; teaching from the Bible.")**.** By deconstructing religious worship into components, the district court denigrates it.[3]

Judge Calabresi and I part ways, however, in how we propose to ascertain whether the Board is just excluding an entity dissimilar to those it has already chosen to permit on its premises or whether it is engaging in unlawful viewpoint discrimination. I would compare the purposes of Bronx Household's proposed expressive activity to the purposes for which the Board has created its limited public forum and, if the fit is close, inquire searchingly of the government's motives. This accords with the various cases Judge Calabresi cites in his opinion, but barely analyzes. The Good News Club Court, for instance, emphasized purpose. Compare Good News Club, 533 U.S. at 108 ("Milford has opened its limited public forum to activities that serve a variety of purposes . . . .") (emphasis added), and id. ("[T]here is no question that teaching morals and character development to children is a permissible purpose

[3] The district court's approach is also impractical, for if worship is merely the singing of hymns and reading from the Bible, the singing of hymns might be considered simply a vibration of the vocal chords; finally, the district court's approach seems in tension with the Supreme Court's decision in Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 109, 111 (1943) ("[T]he mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise."). I note in passing that for these same reasons I fail to see how the Board could grant Bronx Household's putative future application in part while denying it in part. Cf. Leval Op., supra at **70**.

under Milford's policy . . . ."), and id. at 109 (discussing "the [Lamb's Chapel] films' purpose"), with id. at 131 (Stevens, J., dissenting) (distinguishing discussion of "political issues from meetings whose principal purpose is to recruit new members to join a political organization") (emphasis added).[4] And our court has often deemed analysis of the parties' purposes essential to resolution of limited public forum cases. See Deeper Life Christian Fellowship, Inc. v. Bd. of Educ., 852 F.2d 676, 680 (2d Cir. 1988) (government's purpose relevant to determining whether property is public forum or nonpublic forum); Knolls Action Project v. Knolls Atomic Power Lab., 771 F.2d 46, 50 (2d Cir. 1985) (ostensible subject-matter restriction "impermissible [if] it was motivated [in fact] by a dislike of the content of [plaintiff]'s message").

More importantly, whether Bronx Household's proposed expressive activity constitutes "worship" can only be discerned by inquiring of that activity's purpose. See Welsh v. United States, 398 U.S. 333, 339 (1970) (accepting the subjectivity of "religious belief" and abjuring any objective definition of the term); United States v. Seeger, 380 U.S. 163 (1965) (same); cf. Murdock, 319 U.S. at 109 (noting evangelical purpose to sale of religious literature).

---

[4] See also Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 829 (1995); id. at 846 (O'Connor, J., concurring) ("This insistence on government neutrality toward religion explains why we have held that schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all.").

Under the approach most faithful to Supreme Court precedent, whether Pastor Hall chooses to label Bronx Household's proposed expressive activity a "worship service" is not determinative; we must independently examine the purpose of that activity. Compare McCreary County v. ACLU, 125 S. Ct. 2722, 2732 (2005) (discerning hidden religious purpose) with N. Pac. Union Conference Ass'n of the Seventh-Day Adventists v. Clark County, 118 Wash. App. 22, 28-29 (2003) (discussing whether "education" should be considered "'a vital part of the Church's worship program'" for tax purposes). Defendants' purpose in opening school property to the public is to improve "school-community relations in ways that can enhance community support for the school." Cahill Decl. ¶ 14; Farina Decl. at ¶ 9 (noting that the Board wishes to "expand enrichment opportunities for children and to enhance community support for the schools") (emphasis added). Simply put, defendants wish to foster a community in their geographic vicinity in ways that will inure to their benefit. Upon review of the record, Bronx Household's proposed expressive activity fits within this paradigm. Bronx Household's essential purpose is the development of a community of believers, which has as its anticipated result increased community support for the school. See 1st Hall Dep. at 19, 20, 38, 46.

Because the fit between the government's purpose in opening the forum and the purpose of Bronx Household's proposed expressive activity is sufficiently close, more searching scrutiny of the government's motives is required. Cf. Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617,

631 (2d Cir. 2005) (Calabresi, J.) (postulating hostility to religion from teacher's conduct). The Board's avowed purpose in enforcing the regulation in this case, see Bronx Household III, 400 F. Supp. 2d at 599 (noting that "[t]he Board is quite candid in acknowledging its intent to 'reinstitute a policy that would prevent any congregation from using a public school for its worship services'"), and its long-standing hostility to religious groups, leads ineluctably to the conclusion that the Board, in fact, has undertaken to exclude a particular viewpoint from its property.

I acknowledge Judge Calabresi's concern that New York's schools not resemble St. Patrick's Cathedral. However, analysis of the parties' purposes does not raise that concern; it leaves the Board ample room to regulate the use of its property.[5] As the Supreme Court explained in Good News Club, the government "may be justified 'in reserving [a forum] for certain groups.'" 533 U.S. at 106 (emphasis added); Perry, 460 U.S. at 49 ("We believe it is more accurate to characterize the access policy as based on the status of the respective unions . . . .") (emphasis added). The Board thus remains free to distinguish between outside speakers and student-sponsored groups (as indeed the text of SOP § 5.11 hints it may). Cf. Bronx Household III, 400 F. Supp. 2d at 600 n.18 (noting that the Board could "amend the SOPs to create a neutral distinction

[5] Moreover, because the Board has a compelling interest in avoiding Establishment Clause violations, it can exclude religious groups whose presence would convey to the public the message that the government endorses religion (or a particular religion). Cf. Lamb's Chapel, 508 U.S. at 394-395.

based on the speaker"). Moreover, the Board may also impose reasonable time, place or manner restrictions on Bronx Household.

B. Two Flaws in Judge Calabresi's Reasoning

Judge Calabresi's conclusion that "defendants' exclusion of worship services is viewpoint neutral," Calabresi Op., supra at **38**, is grounded not upon a comparison of the purposes of the activities allowed and the purpose of Bronx Household's proposed activity, but upon a comparison between the expression already permitted on school premises and "worship." Compare Calabresi Op., supra at **31** (comparing worship services to "Boy Scouts rituals or . . . Elks Club ceremonies" and finding substantial differences) with Good News Club, 533 U.S. at 111 (finding few differences between Good News Club's proposed activity and Boy Scouts rituals). After he pronounces worship sui generis, Judge Calabresi not surprisingly finds that "worship" is not included within the set of expressive activity hitherto permitted by the Board. This will not do. In order to determine whether an element is within a set, a court should both define the set, see Child Evangelism Fellowship of New Jersey Inc. v. Stafford Township Sch. Dist., 386 F.3d 514, 527 (3d Cir. 2004) (discussing the limited public forum's limits), and analyze the element, to discern whether it has the attributes required for admission to the set, see Goulart v. Meadows, 345 F.3d 239, 252 (4th Cir. 2003) (explaining the importance of identifying "which of . . . various indicia of similarity is the relevant one"). See generally Nix v. Hedden, 149 U.S. 304 (1893) (determining whether tomatoes

should be classified as "fruit" or "vegetable" by first defining "fruit" and "vegetable" and then analyzing "tomatoes"). Yet Judge Calabresi defines neither the set -- the "limits" of the limited public forum -- nor the element -- "worship." His comparison is therefore susceptible to reductio ad absurdum, as both the scope of the set and the nature of its prospective member remain substantially unknown.[6]

1) Judge Calabresi does not define the limits of the limited public forum.

The first flaw in Judge Calabresi's analysis lies with his delimitation of the limited public forum. He says that we are bound by our decision in Bronx Household of Faith v. Community School District No. 10 (Bronx Household I), 127 F.3d 207, 211-14 (2d Cir. 1997), that the school has created a limited public forum. But the character of a forum is defined by its uses and the uses to which it is put change over time. See Paulsen v. County of Nassau, 925 F.2d 65, 69 (2d Cir. 1991); cf. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (stating that "[t]he crucial question is whether the manner of expression [that the petitioner wishes to engage in] is basically incompatible with the normal activity of a particular place at a particular time") (emphasis added). Therefore, while his implicit assumption that the character of the forum has not changed may be correct, he cannot reach this conclusion by simple

[6] Indeed, Judge Calabresi holds that "worship" is sui generis. But how is it possible to determine whether one activity that is by hypothesis in a class of its own, Webster's Third International Dictionary 2286 (1981) (defining "sui generis"), is within a set comprised of other activities?

judicial say-so; such a conclusion must be based on a factual inquiry into the forum's current uses, not those of a decade ago.

Even were I to agree with Judge Calabresi that we should unquestioningly adopt our decade-old legal analysis of the forum, the term "limited public forum" does no judicial work unless we know "the class to which . . . [the] forum is made generally available," Forbes, 523 U.S. at 677. And on this point his opinion is silent.[7]

---

[7] I hold no illusion that defining the limits of a limited public forum is an easy task. For instance, Cornelius instructs that we should consider the government's intent. 473 U.S. at 802; see, e.g., Deeper Life, 852 F.2d at 680; Calash v. City of Bridgeport, 788 F.2d 80, 83 (2d Cir. 1986). But how to distinguish a change of mind -- which the government, like any property owner, is assuredly permitted, see, e.g., Perry, 460 U.S. at 46 -- from viewpoint hostility? Compare Knolls, 771 F.2d at 49-50 ("In the instant case, therefore, whatever previous use has been allowed does not foreclose KAPL from asserting its rights at this time.") (emphasis added) with Robert C. Post, Between Management and Governance: The History and Theory of the Public Forum, 34 UCLA L. Rev. 1713, 1756 ("If the reach of the forum is determined by the intent of the government, and if the exclusion of the plaintiff is the best evidence of that intent, then the plaintiff loses in every case."), and with New York Magazine v. Metro. Transp. Auth., 136 F.3d 123, 129-30 (2d Cir. 1998). On the other hand, if we fix the definition of the forum at the time the government first permits members of the public to use its property for expression, how do we account for the inherently contingent nature of a property's taxonomy? See ISKON, 505 U.S. at 698 (Kennedy, J., concurring) (arguing that if "expressive activity would be appropriate and compatible with [a property], the property is a public forum"); see also Lebron v. Nat'l R.R. Passenger Corp., 69 F.3d 650, 655-56 (2d Cir. 1995); supra (discussing Grayned).

(2) Judge Calabresi does not define worship.

Judge Calabresi's reasoning has a second flaw: It posits that judges can define "worship." He assumes that worship is distinguishable from activities that are plainly within the forum's limits: These include gathering for the purpose of gaining religious instruction, engaging in Bible study, and, if it be the disposition of the participant in such activities, feeling the deity's presence. Indeed, to some men and women of faith, political activism, proselytizing, or even education,[8] amount to worship.[9] How can one

---

Moreover, courts sometimes make this task even more difficult by covertly collapsing the inquiry into forum definition and forum boundary. See, e.g., Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 246-50 (1990) (inquiry into whether a secondary school had in fact opened a limited public forum within the meaning of 20 U.S.C. § 4071(a) conducted in tandem with inquiry into whether the secondary school provided "equal access"); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1375-76 (3d Cir. 1990) (considering at the same time whether the school had in fact tightened its control over expressive activity on its premises and whether it was engaging in impermissible viewpoint discrimination).

While I believe that these tensions in First Amendment doctrine are ripe for Supreme Court clarification -- in this respect, at least, I agree with Judge Leval -- Judge Calabresi should not so easily eschew his obligation to define the contours of the limited public forum the Board has allegedly created.

[8] Cf. DeBoer v. Village of Oak Park, 267 F.3d 558, 568 (7th Cir. 2001) ("In adopting the philosophical and theological position that prayer . . . can never be 'civic,' the Village has discriminated . . . ."); Lassonde v. Pleasanton Unified Sch. Dist., 320 F.3d 979, 984 (9th Cir. 2003) (suggesting that "proselytizing, no less than prayer, is [worship]") (internal quotation marks omitted); Seventh-Day Adventists, 118 Wash.

quarrel with Justice Souter's classification of Good News Club's after-school Bible study program, permitted by the Court, as "worship," 533 U.S. at 138 (Souter, J., dissenting)? Of course, because the concept of worship is so ephemeral and inherently subjective, Judge Calabresi is able to indulge his preference that worship be defined not by what it is, but by what it is not. And what worship is not, in his view (and convenient for his purposes), is anything that the Board has already permitted to occur in the forum. Yet the fact is that none of us, who are judges, are competent to offer a legal definition of religious worship.[10]

App. at 28-29 ("[T]he Church maintains that worship must be broadly defined to include missionary work, education, charitable giving, communication, publication, and planning and growth activities because these are 'a vital part of the Church's worship program.'").

[9] Moreover, as Judge Bybee explained in his dissent from the Ninth Circuit's denial of rehearing en banc in Faith Center Church Evangelistic Ministries v. Glover, Judge Calabresi may assume a definition of worship that works to "treat[] religious groups differently." 480 F.3d 891, 901 (9th Cir. 2007) (Bybee, J., dissenting from denial of rehearing en banc) (explaining that "[l]iturgically oriented denominations such as Episcopalians and Catholics will [likely] find themselves subject to greater burdens [as] [t]he worship elements of their services are more distinct and easily severable from the non-worship elements").

[10] I do not suggest that "worship" is not possible to define -- just that it is impossible for a court to define. Were worship truly legally indistinguishable from activities carried on from a 'religious perspective,' laws like the Equal Participation of Faith-Based Organizations, 69 Fed. Register 41,712 (July 9, 2004) (codified at 24 C.F.R. § 5.109) (prohibiting only "inherently religious activities" and defining the term to

Even assuming that judges could define "worship," Judge Calabresi does not explain how he would do so -- perhaps he knows it when he sees it?[11] Cf. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Judge Calabresi suggests that one may worship "mammon, sex, or art." Calabresi Op., supra at **34.** Perhaps he means to concede that the term can connote simple reverence for something or someone (like "Tiger Woods" or, in earlier eras, "Frank Sinatra," "Rita Hayworth," or "The Beatles"). See Webster's Third International Dictionary 2637 (1981) (defining worship as "to regard with respect, honor, or devotion"). Or perhaps he means something different; but if so, there is no hint to art history professors everywhere as to how they might turn their classrooms into houses of worship -- surely a useful feat! In short, Judge Calabresi speaks with an obliquity of which any prophet would be proud.

---

include worship, religious instruction, or proselytism), might well be unconstitutional.

[11] On this score, I find Judge Calabresi's treatment of Widmar v. Vincent singularly unpersuasive. Widmar counsels that we should decline to establish a line which, when crossed, transforms the "'singing [of] hymns, reading scripture, and teaching biblical principles,'" . . . [into] unprotected 'worship.'" See Widmar, 454 U.S. 263, 270 n.5 (1981) (internal citation omitted). But Judge Calabresi simply dismisses Widmar with the cursory explanation that "Widmar . . . did not conclude that the exclusion of worship constituted viewpoint discrimination." Calabresi Op., supra at **33**. He ignores the question actually posed, and deemed unanswerable, by the Widmar Court: What is worship?

Judge Calabresi's various attempts to avoid defining "worship" are unavailing.[12] First, Judge Calabresi suggests that "Good News Club itself recognized this subject matter, worship, as falling outside the boundary of its viewpoint discrimination jurisprudence." Calabresi Op., supra at **26**. Good News Club did nothing of the sort. The Court simply declined to reach the question presented by this case, which, while not necessary to that case, is to this one, see Good News Club, 533 U.S. at 112 n.4 ("[W]e conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values."), as Judge Calabresi recognizes elsewhere in his opinion, when it suits him, see Calabresi Op., supra at **11** (noting that "the instant appeal's central question" was "unresolved").

Second, Judge Calabresi relies heavily on Pastor Robert Hall's admission that Bronx Household wishes to conduct worship services on school premises. But if we accept plaintiffs' self-description, we should accept their self-definition. And Pastor Hall defines worship as the ascription of "worth to a variety of values and skills," 1st Hall Dep. at 41-42 (discussing 'worshiping' a sunset or work of art); Bronx Household of Faith v. Bd. of Educ. (Bronx Household II), 226 F. Supp. 2d 401, 424 (S.D.N.Y. 2002), not much different in kind from the dictionary definition, supra, "to regard with respect, honor, or devotion." If that is to be the operative definition of

[12] Nor can I agree with Judge Leval that the Board is likely to propound a useful definition of worship at some future date. I see no evidence in the record that the Board is prone to giving fulsome explanations concerning its decisions to grant or deny applications to use school facilities.

"worship," Bronx Household is surely correct that the Board permits other community groups that "ascribe worth to a value or skill" -- i.e.,"worship" -- to use their facilities. Cf. id. ("[T]he Semanonans Stickball players . . . would likely join plaintiffs in worshiping David Wells' pitching prowess.").[13]

Moreover, and more fundamentally, Judge Calabresi, while he dismisses Bronx Household's as applied challenge to SOP § 5.11, does not reckon with its facial challenge to the rule. Compl. at 6; cf. Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1219 (9th Cir. 2006) (Tallman, J., dissenting) ("Faith Center also brought a facial challenge to the policy."). Bronx Household's facial challenge to SOP § 5.11 implicates the rights of other religious groups, which might not "make [the] nice admission" that they wish to engage in "worship." Id.

Finally, any attempt to define worship places Judge Calabresi upon the horns of a dilemma. Either he clarifies the meaning of "worship," and risks entangling the judiciary in religious controversy in violation of the First Amendment, or he delegates the task of flouting the Establishment Clause to the

---

[13] Judge Calabresi notes that Pastor Hall distinguished worship from Boy Scouts meetings. But he quotes selectively from Pastor Hall's deposition; Pastor Hall also explicitly explains that "[w]e will ascribe worship or praise to David Wells when he almost pitched a second no-hitter. . . . We will praise a sunset. We will also praise a work of art. We will ascribe worth and value to something that we find valuable." 1st Hall Dep. at 41-42. Reading Pastor Hall's deposition "sympathetically," I cannot but conclude that his definition of worship is broader than the (unarticulated) definition upon which Judge Calabresi relies.

Board, which will no doubt have to "interpret religious doctrine or defer to the interpretations of religious officials" in order to keep worship, and worship alone, out of its schools. Commack Self-Service Kosher Meats v. Weiss, 294 F.3d 415, 427 (2d Cir. 2002); see also Glover, 462 F.3d at 1220 (Tallman, J., dissenting); cf. Good News Club, 533 U.S. at 127 (Scalia, J., concurring).

II. The Board's Establishment Clause Defense

Judge Calabresi does not consider whether the Board can show a compelling interest in applying SOP § 5.11 to Bronx Household; because, however, I would find that the Board's exclusion of Bronx Household from the forum is viewpoint-discriminatory, I must address the argument, advanced in the district court, that the Board can justify its position as necessary to avoid an Establishment Clause violation. While avoiding an Establishment Clause violation may as a general matter be a compelling state interest, in this case, the Board's argument is unavailing because Bronx Household's worship at the school does not offend the Establishment Clause.

The endorsement test -- which the Supreme Court now uses to identify Establishment Clause violations -- asks whether "an objective observer, acquainted with the text, legislative history, and implementation of the [challenged law or policy], would perceive it as a state endorsement" of religion. Santa Fe Indep. Sch. Dist. v. Bd., 530 U.S. 290, 308 (2000). The Board argues -- and Judge Calabresi obliquely suggests -- that permitting Bronx

Household the use of school property on Sundays amounts to government endorsement of religion in two ways: (1) It suggests that the state favors religion over non-religion; and (2) Because Bronx Household uses school premises on a more frequent basis than other religious groups, it suggests that the state favors Christianity over Judaism, Islam, or other faiths. Neither argument has merit.

As we recognized in Deeper Life, "'the semblance of official support is less evident where a school building is used at night . . . by religious organizations, under a program that grants access to all charitable groups.'" 852 F.2d at 681 (citing Brandon v. Bd. of Educ., 635 F.2d 971, 978-79 (2d Cir. 1980)); see also Lamb's Chapel, 508 U.S. at 395 (noting that meetings were not "during school hours . . . [or] sponsored by the school . . . [and are] open to the public, not just church members"). Just so, Bronx Household does not meet during school hours, and its meetings are open to all. See 1st Hall Dep. at 30 ("Our services are always open to the public.").[14] Nor do religious groups dominate the forum. See Bronx Household III, 400 Supp. 2d at 596; cf. Widmar, 454 U.S. at 275. Under these circumstances, there is no likelihood that "an adult who, taking full account of

[14] While it is of course true that a Muslim might not be welcome at Bronx Household's worship service, 2d Hall Dep. at 39, it is beyond cavil that the Boy Scouts -- a group the Board readily permits on school property -- also exclude those who refuse to adopt their core beliefs, see Boy Scouts of America v. Dale, 530 U.S. 640 (2000). Thus, I do not see how the Board could deny Bronx Household's putative future application on this ground without also denying applications from, among others, the Boy Scouts. Cf. Leval Op., supra at **71-72**.

the policy's text, history, and implementation, do[ing] so mindful . . . [of the particular perspective of] impressionable schoolchildren," Skoros, 437 F.3d at 23, would understand Bronx Household's use of school premises to reflect the government's preference for religion over non-religion.[15]

I also disagree that the reasonable observer is likely to believe the government favors Christianity over other faiths because, due to the vagaries of the school calendar, the forum is available on Sundays – when Christians worship – and not on Saturdays or Fridays – which are holy to Jews and Muslims. As the Supreme Court explained in Zelman v. Simmons-Harris, 536 U.S. 639 (2002), and Good News Club, an Establishment Clause violation does not result from either private choice or happenstance. Zelman, 536 U.S. at 652; Good News Club 533 U.S. at 119 n.9; see also Harris v. McRae, 448 U.S. 297, 319 (1980) ("[I]t does not follow that a statute violates the Establishment Clause because it happens to coincide or harmonize with the tenets of some or all religions.") (internal quotation marks omitted).

To the extent the Board is troubled by Bronx Household's use of its property, it is free to impose

---

[15] Indeed, this case seems the precise opposite of Van Orden v. Perry. In Van Orden, Justice Breyer noted that "the short (and stormy) history of the courthouse Commandments' displays demonstrates the substantially religious objectives of those who mounted them." Van Orden, 125 S.Ct. 2854, 2871 (2005) (Breyer, J., concurring). Here, the decade-long (and equally stormy) history of the Board's dispute with Bronx Household is compelling evidence that the Board lacks a religious objective.

different reasonable time, place or manner restrictions. Ward v. Rock Against Racism**,** 491 U.S. 781, 790 (1989).

* * * * * *

In the end, this case is one that requires judges to draw lines. Judge Leval has drawn a prudential line in the sand and declines to cross it to decide this case. Judge Calabresi, meanwhile, has drawn a circle around our schools to keep worship (whatever that may be) out. Cf. Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1073 (Boggs, J., concurring) ("He drew a circle that shut me out -- Heretic, Rebel, a thing to flout. But Love and I had the wit to win / We drew a circle that took him in!"). The approach I follow, while admittedly imperfect in this uncertain legal terrain, at least abjures sleight of hand and ipse dixits. It is also more sensitive to Bronx Household's First Amendment rights. Yet there is no doubt that this particular dispute -- no stranger to the Supreme Court and now focused on worship -- would benefit from a more conclusive resolution by that Court.

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF NEW YORK

THE BRONX HOUSEHOLD OF FAITH, ROBERT HALL and JACK ROBERTS,	:	
Plaintiffs,	:	
	:	01 Civ. 8598 (LAP)
-against-	:	
	:	OPINION
THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and COMMUNITY SCHOOL DISTRICT NO. 10,	:	
Defendants.	:	

LORETTA A. PRESKA, U.S.D.J.:

INTRODUCTION

The liberty afforded by the First Amendment of the Bill of Rights to pursue religious expression free of government molestation was presciently observed by the Framers of the Constitution to be among the most divisive and factious to imperil societal harmony. See The Federalist No. 10, at 41-42 (James Madison) (Terence Ball ed., 2003) ("A zeal for different opinions concerning religion . . . ha[s] . . . divided mankind into parties, inflamed them with

mutual animosity, and rendered them much more disposed to vex and oppress each other than to cooperate for their common good."); U.S. Const. amends. I, XIV. In fact, this inherent tension recently was evidenced by the Supreme Court's seemingly divergent rulings regarding public display of the Ten Commandments. McCreary County, Ky. v. ACLU of Ky., 125 S. Ct. 2722, 2733 n.10 (2005) (prohibiting display of the Ten Commandments in county courthouses and noting that "Establishment Clause doctrine lacks the comfort of categorical absolutes"); Van Orden v. Perry, 125 S. Ct. 2854 (2005) (permitting display of the Ten Commandments in public space outside the Texas State Capitol).

Thus, it is perhaps not surprising that the Supreme Court's jurisprudence has evolved throughout our history from sometimes unabashed support of religion, see, e.g., Church of the Holy Trinity v. United States, 143 U.S. 457, 458, 471 (1892) (holding that a statute making it unlawful for any person "in any manner whatsoever, to prepay the transportation" or otherwise import an alien "to perform labor or service of any kind in the United States" could not have been intended to apply to a church's contracting for a pastor from England: "If we pass beyond these [historical] matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth . . . that this is a Christian nation."), toward a requirement of neutrality toward religion, see, e.g., Everson v. Bd. of Educ. of the Twp. of Ewing, 330 U.S. 1, 18 (1947) (permitting government funding for

children's transportation to school, both public schools and religious schools: "Th[e First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.") and Agostini v. Felton, 521 U.S. 203, 231 (1997) (reversing its earlier decision and finding no Establishment Clause violation in a federally funded program providing remedial instruction to children on a neutral basis: "[W]here the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis . . . the aid is less likely to have the effect of advancing religion."). It is that requirement of neutrality that prescribes the outcome in this case.

The Bronx Household of Faith, Robert Hall, and Jack Roberts ("Plaintiffs") brought this action against the Board of Education of the City of New York (the "Board") and Community School District No. 10 (the "School District," collectively, "Defendants"), alleging that Defendants' refusal to rent space in a New York City public middle school to the Bronx Household of Faith (the "Church"), a Christian church, for Sunday morning meetings that include worship violated the First Amendment, the Equal Protection Clause, and Sections 3, 8, and 11 of Article I of the New York Constitution. Plaintiffs and Defendants now cross-move for summary judgment. For the reasons set forth below, Plaintiffs' motion for

summary judgment is granted, and Defendants' motion is denied.

BACKGROUND

The factual and procedural history of this action is set forth in detail in my June 26, 2002 Opinion granting Plaintiffs' motion for a preliminary injunction. 226 F. Supp. 2d 401 (S.D.N.Y. 2002) ("Bronx II"). Accordingly, only those facts relevant to the instant motions are set forth below.

In September 1994, the School District denied the request of the Church to rent space in Public School M.S. 206B, Anne Cross Merseau Middle School ("M.S. 206B" or the "School") for Sunday morning meetings that include religious worship. The denial was based on the Board's Standard Operating Procedure § 5.9 (1993) ("Former SOP § 5.9") and New York Education Law Section 414 (McKinney 2000), both of which prohibited rental of school property for the purpose of religious worship. In 1995, Plaintiffs brought an action in this Court challenging the School District's denial on constitutional grounds. See Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, No. 95 Civ. 5501 (LAP), 1996 WL 700915 (S.D.N.Y. Dec. 5, 1996). I found that the School District had created a limited public forum and that its regulations were reasonable and related to a legitimate government interest. Thus, I denied Plaintiffs' motion for summary judgment and granted Defendants' cross-motion for summary judgment. In 1997, the Court of Appeals affirmed the judgment, 127 F.3d 207 (2d

Cir. 1997) ("Bronx I"), and in 1998, the Supreme Court denied certiorari. 523 U.S. 1074 (1998).

Employing reasoning similar to its reasoning in Bronx I, the Court of Appeals affirmed the District Court's grant of summary judgment in favor of the defendant school district in The Good News Club v. Milford Cent. Sch., 202 F.3d 502 (2d Cir. 2000). The Good News Club is "a community-based Christian youth organization" that sought to use Milford Central School facilities for after-school meetings of children involving "'singing songs, hearing Bible lesson[s], and memorizing scripture.'" Id. at 504, 507. The majority found that the Good News Club is "focused on teaching children how to cultivate their relationship with God through Jesus Christ[,]" a pursuit that is "quintessentially religious" "under even the most restrictive and archaic definitions of religion." Id. at 510. Thus, the Court concluded, the Milford School District properly excluded the Good News Club on the basis of "content, not viewpoint." Id. at 511.

In a dissenting opinion, Judge Jacobs faulted the majority for distinguishing between groups that teach secular morality and those that teach morality that stems from religious beliefs. "The fallacy of this distinction is that it treats morality as a subject that is secular by nature, which of course it may be or not, depending on one's point of view." Id. at 515 (Jacobs, J., dissenting). Furthermore, Judge Jacobs observed, "[e]ven if one could not say whether the Club's message conveyed religious content or religious viewpoints on otherwise-permissible content, we should err on the side of free speech. The

concerns supporting free speech greatly outweigh those supporting regulation of the limited public forum." Id.

The Supreme Court granted certiorari, 531 U.S. 923 (2000), and reversed the decision of the Court of Appeals, 533 U.S. 98 (2001). The majority accepted the parties' agreement that the school had created a limited public forum but disagreed with the Court of Appeals' characterization of the Good News Club's activities, particularly its characterization of religious activities as different from other activities in the school relating to the teaching of moral values. Id. at 106, 110-11. The Court noted:

> Despite our holdings in Lamb's Chapel and Rosenberger, the Court of Appeals, like Milford, believed that its characterization of the Club's activities as religious in nature warranted treating the Club's activities as different in kind from the other activities permitted by the school.

Id. at 110-11 (citation omitted).

The Court went on to reject definitively the treating of "quintessentially religious" activities as different in kind from the teaching of character and morals from a particular viewpoint:

> We disagree that something that is "quintessentially religious" or "decidedly religious in nature" cannot also be characterized properly as the teaching of morals and character development from a

> particular viewpoint. See 202 F.3d at 512 (Jacobs, J., dissenting) ("When the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters"). What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons.

Id. at 111.

The Court further disagreed with the Court of Appeals' implicit finding that "reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not." Id. Ultimately, the Court held that "Milford's exclusion of the Club from use of the school, pursuant to its community use policy, constitute[d] impermissible viewpoint discrimination." Id. at 112.

Shortly after the Supreme Court issued its opinion in Good News Club, Plaintiffs in this case contacted the School District to renew their request to meet at M.S. 206B from 10:00 a.m. to 2:00 p.m. each Sunday to engage in singing, the teaching of adults and children from the viewpoint of the Bible, and social interaction among members of the Church to promote their welfare and that of the community.

Pagliuca Decl., Ex. A.[1] On August 16, 2001, an attorney for the Board informed Plaintiffs' counsel that Defendants "were denying [the application] because the meetings would violate the defendants' policy prohibiting religious services or instruction in the school buildings." Compl. ¶ 15.[2] The policy to which the Board referred was SOP § 5.11 (2001) ("Enjoined SOP § 5.11") (precedently Former SOP § 5.9), which provided:

> No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

Enjoined SOP § 5.11.

Shortly after receiving Defendants' refusal letter, Plaintiffs filed the Complaint on September 24, 2001. On July 3, 2002, in light of the Supreme Court's decision in Good News Club, I granted Plaintiffs' motion for a preliminary injunction. I found the deprivation of Plaintiffs' First Amendment rights to constitute irreparable harm. 226 F. Supp. 2d at 412. Turning to Plaintiffs' likelihood of success on the

---

[1] "Pagliuca Decl." refers to the Declaration of Frank Pagliuca sworn to on December 5, 2001.

[2] "Compl." refers to the Complaint filed on Sept. 24, 2001.

merits, I found that Plaintiffs' proposed activities amounted to more than "mere religious worship" in that they included singing, teaching, socializing, and eating--"activities benefitting the welfare of the community, recreational activities and other activities that are consistent with the defined purposes of the limited public forum." Id. at 414-15. I also found that Defendants' argument that worship is different in kind from other activities was precluded by Good News Club. Id. at 416. Even if, arguendo, there were discernible categories of worship and non-worship, it would be futile to attempt to distinguish "religious content from religious viewpoint where morals, values and the welfare of the community are concerned." Id. at 418. Moreover, "the government may not, consistent with the First Amendment, engage in dissecting speech to determine whether it constitutes worship." Id. at 423. In response to Defendants' claim that their viewpoint discrimination was justified in light of their asserted compelling interest in avoiding an Establishment Clause violation, I held that permitting Plaintiffs to use space in the School would not lead to such a violation because Plaintiffs meet during nonschool hours, the meetings are obviously not endorsed by the School District, and the meetings are "open to all members of the public." Id. at 426.

The Court of Appeals affirmed the preliminary injunction on June 6, 2003, acknowledging "the factual parallels between the activities described in Good News Club and the activities at issue in the present litigation." 331 F.3d 342, 354 (2003) ("Bronx III"). The Court of Appeals

> f[ou]nd no principled basis upon which to distinguish the activities set out by the Supreme Court in Good News Club from the activities that the Bronx Household of Faith has proposed for its Sunday meetings at Middle School 206B. Like the Good News Club meetings, [Plaintiffs intended to] . . . combine preaching and teaching with such "quintessentially religious" elements as prayer, the singing of Christian songs, and communion.

Id. Because the Board opened its schools for other social, civic, and recreational meetings so long as those uses are nonexclusive and open to the public, the Court found a substantial likelihood that Plaintiffs would be able to demonstrate that Defendants' refusal of Plaintiffs' permit application constitutes unconstitutional viewpoint discrimination. Id. The Court again noted the similarity of the instant facts to those in Good News Club and upheld the finding in Bronx II that Defendants were not justified in refusing Plaintiffs' application because allowing Plaintiffs to conduct their activities in the School would not give rise to an Establishment Clause violation. Id. at 356. The Court of Appeals did not reach the further determination that worship cannot be treated as a distinct activity, noting that this view contradicts the Court's position as expressed in Bronx I and was not explicitly rejected in Good News Club. Id. at 355.

Plaintiffs thereafter applied for, and were granted, permission to use P.S. 15 located at 2195 Andrews Avenue, Bronx, New York ("P.S. 15"), on

Sundays from 10:00 a.m. to 2:00 p.m. See Grumet Decl. I, Ex. F.[3] On March 23, 2005, the Board of Education announced its plans to modify Enjoined SOP § 5.11 to read as follows:

> No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship. Permits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this chapter on the same basis that they are granted to other clubs for students that are sponsored by outside organizations.

Pl. Rule 56.1 Stmt. ¶ 53.[4]

To clarify that the revised policy presents an actual case or controversy, on August 17, 2005, Defendants notified Plaintiffs that

> Plaintiffs' use of P.S. 15 for the Bronx Household of Faith's regular worship services is prohibited under the revised section 5.11. Defendants are not currently enforcing the revised section 5.11 (or advising the field of this change) because of the preliminary injunction Order that was entered in this case. Should defendants

[3] "Grumet Decl." refers to the Declaration of Lisa Grumet executed on April 11, 2005.

[4] "P1. Rule 56.1 Stmt." refers to Plaintiffs' Local Rule 56.1 Statement of Material Facts dated April 8, 2005.

> prevail in their motion for summary judgment and the preliminary injunction Order be vacated, then any future application by plaintiffs to hold their worship services at P.S. 15 or any other school will be denied.

Letter from Lisa Grumet to Jordan Lorence and Joseph Infranco (August 17, 2005).

On March 18, 2005, the parties were granted permission to cross-move for summary judgment, and they have done so. Amicus briefs were filed by the United States in support of Plaintiffs' motion and by The Association of the Bar of the City of New York in support of Defendants' motion. In addition, Agudath Israel of America previously filed an amicus brief in support of Plaintiffs' position.

Plaintiffs seek to convert the July 2002 preliminary injunction into a permanent injunction by way of their motion for summary judgment and contend that the present SOP § 5.11 (2005) ("Present SOP § 5.11") is unconstitutional in the same manner as was the Enjoined SOP.

Defendants argue that their refusal to rent space to Plaintiffs for Sunday morning meetings does not violate Plaintiffs' First Amendment rights and that, even if such refusal infringes on the First Amendment rights of Plaintiffs, the infringement is necessary so that Defendants can avoid a violation of the Establishment Clause.

DISCUSSION

I. Summary Judgment Standard and Record

Summary judgment is appropriate when the pleadings, depositions, interrogatories, admissions, and affidavits demonstrate that there are no genuine issues of material fact in dispute and that one party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Because summary judgment searches the record, Bayway Ref. Co. v. Oxygenated Mktg & Trading A.G., 215 F.3d 219, 225 (2d Cir. 2000), the affidavits submitted on the preliminary injunction motion also may be considered. "[A] party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). "Factual disputes that are irrelevant or unnecessary" cannot defeat a motion for summary judgment. Id. at 248. All ambiguities must be resolved, and all reasonable inferences drawn, against the moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1982)). Only if it is apparent that no rational finder of fact "could find in favor of the nonmoving party because the evidence to support its case is so slight" should summary judgment be granted. Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1224 (2d Cir. 1994).

I note at the outset that despite Defendants' repeated urging that the facts have changed since the preliminary injunction was entered, the record reflects otherwise. The record is larger, but much of the material submitted is speculative, that is, based on what might (or might not) happen in the future. For example, Defendants contend that disclaimers are difficult to enforce and people "who are not part of a congregation may have contact with congregation members . . .," Def. Mem. in Support at 19[5] (emphasis added); "worship in schools can be highly visible . . .," Def. Mem. in Support at 21 (emphasis added); "community members may hold school officials responsible for the congregation's actions . . .," Def. Mem. In Support at 25 (emphasis added). Much of the material in the now-larger record also is irrelevant to the issues at hand. For example, at oral argument, Defendants' counsel stated:

> The situation we have here is based on the past two to three years. Most of the groups that we know have come in after the Second Circuit decision, and plaintiffs themselves have expressed an interest in having churches in all 1,200 of the city's public schools. They have talked about the importance of this for church planting and for establishing new churches.

---

[5] "Def. Mem. in Support" refers to Defendants' Memorandum of Law in Support of their Motion for Summary Judgment dated April 11, 2005.

Tr. 33:24-34:6[6] (emphasis added).

I am unable to appreciate the legal relevance of Plaintiffs' statements about church planting and establishing additional churches operating out of schools in the future. Just as the Supreme Court did in Good News Club, I look past any labels, see 533 U.S. at 112, n.4 ("Regardless of the label Justice S[outer] wishes to use, what matters is the substance of the Club's activities . . . .") and motivations. Instead, I look to the substance of the Church's activities which, it is undisputed, consist of: "(1) singing of songs and hymns to honor and praise the Lord Jesus Christ, (2) teaching and preaching from the Bible, (3) sharing of testimonies from people attending the meeting, (4) fellowship and social interaction with others, (5) celebrating the Lord's supper (communion), in which the members share bread and grape juice which reminds them of the body and blood of Christ given to them on the Cross," Pl. Rule 56.1 Stmt. ¶ 44 (citing First Affidavit of Robert Hall, sworn to on December 13, 2001, ¶¶ 3-4 ("First Hall Aff.")), the same activities that were proposed at the preliminary injunction stage. Thus, with the exception of the modification of Enjoined SOP § 5.11, which is discussed below, the record appears to be substantially the same as it was at the preliminary injunction stage. Although not dispositive, I note that the parties concede that there are no material facts in dispute. Tr. 6:12-7:20.

---

[6] "Tr." refers to the transcript of the oral argument held on August 11, 2005.

II. Free Speech

A. The Forum

The first step in analyzing the constitutionality of a state's restriction on private speech in a public forum is to determine the nature of the forum. Good News Club, 533 U.S. at 106 (citing Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 44 (1983)). In Bronx I, the Court of Appeals confirmed that the Board had created a limited public forum by restricting access to school buildings to certain speakers and subjects. 127 F.3d at 212, 214. While Plaintiffs argue that the Board has created an open or designated forum, Pl. Br. 18-19,[7] the Board argues that Plaintiffs are precluded from relitigating the issue of the type of forum created by the Board, see Def. Mem. in Support at 4.

Just like the facts regarding Plaintiffs' activities during their Sunday meetings, the facts supporting the Court's characterization of the forum opened by the Board as a limited public forum have not changed.[8] The Board continues to offer school space

---

[7] "Pl. Br." refers to Plaintiffs' Brief in Support of Motion for Summary Judgment dated April 8, 2005.

[8] Defendants argue that the individual school at issue, here M.S. 206B that plaintiffs applied to use or P.S. 15 which they actually use, is the appropriate forum to be considered, not the School District or the City. E.g., Tr. 14:23; 15:11-12; 22:4-5. While each school has its own students within a geographic boundary, the proximity of schools to each other within the City certainly makes other schools relevant to the present analysis. Tr. 30:21-23 ("[W]ithin 1.9 miles of P.S. 15 . . . there are 149 schools available."). The policies at issue are the policies of the

for use by student and community groups, permitting "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community, so long as these uses are non-exclusive and open to the public." Bronx III, 331 F.3d at 354; see SOP 5.6.2. Accordingly, there is no reason to depart from the prior holding that the Board has established a limited public forum.

B. Viewpoint Discrimination

It is well established that in a limited public forum such as that presented here, the Board may not impose restrictions on private speech that discriminate on the basis of viewpoint. Good News Club, 533 U.S. at 106-07 (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)). Defendants' pertinacious argument that Present SOP § 5.11 (and Defendants' prior exclusion of Plaintiffs pursuant to Enjoined SOP § 5.11) does not amount to unconstitutional viewpoint

---

Board applicable citywide. Compl. ¶¶ 9, 20. Permits are applied for and ultimately issued by the Board based on those citywide policies. Grumet Decl., Ex. F. Also, Defendants do not seem to suggest that the Board's policy should be litigated on a school-by-school basis (or that the policy differs from one school to another) and, indeed, Defendants have submitted citywide data in support of their motion in addition to anecdotal data relating to schools other than P.S. 15. While consideration of evidence relating to individual schools, including but not limited to M.S. 206B and P.S. 15, is appropriate, cabining consideration only to a single school is not appropriate. Thus, I also have considered citywide evidence. Whether limited to evidence as to M.S. 206B or P.S. 15 or expanded to evidence of citywide statistics, there is no question that the forum opened by the Board is a limited public forum.

discrimination is astonishing in light of the Supreme Court's clear holding in Good News Club. 533 U.S. at 112 ("[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."). The Court squarely held that "teach[ing] moral lessons from a Christian perspective through live storytelling and prayer," id. at 110, characterized by the Court of Appeals as "quintessentially religious," 202 F.3d at 510, and by Justice Souter as "an evangelical service of worship," 533 U.S. at 138 (Souter, J., dissenting), also may constitute "the teaching of morals and character development from a particular viewpoint," id. at 111. The Supreme Court in Good News Club expressly found that "the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values." Id. at 112 n.4. Thus, the Supreme Court "conclude[d] that Milford's exclusion of the Club from use of the school . . . constitutes impermissible viewpoint discrimination." Id. at 112. In Bronx III, the Court of Appeals "f[ou]nd no principled basis upon which to distinguish the activities set out by the Supreme Court in Good News Club from the activities that the Bronx Household of Faith has proposed for its Sunday meetings at Middle School 206B," Bronx III, 331 F.3d at 354,[9] and, as noted above, the activities proposed

[9] The Court of Appeals' discussion on this topic in Bronx III is as follows:

> We find no principled basis upon which to distinguish the activities set out by the Supreme Court in Good News Club from the activities that the Bronx Household of Faith has proposed for its

are the activities actually undertaken. The Sunday activities of the Church do not fall within a separate category of speech, are not "mere religious worship," 533 U.S. at 112 n.4, and, accordingly, may not

---

> Sunday meetings at Middle School 206B. Like the Good News Club meetings, the Sunday morning meetings of the church combine preaching and teaching with such "quintessentially religious" elements as prayer, the singing of Christian songs, and communion. The church's Sunday morning meetings also encompass secular elements, for instance, a fellowship meal during which church members may talk about their problems and needs. On these facts, it cannot be said that the meetings of the Bronx Household of Faith constitute only religious worship, separate and apart from any teaching of moral values. 533 U.S. at 112 n.4.
>
> Because the Board of Education has authorized other groups, like scout groups, to undertake the teaching of morals and character development on school premises, there is a substantial likelihood that plaintiffs would be able to demonstrate that the Board cannot exclude, under Supreme Court precedent, the church from school premises on the ground that the church approaches the same subject from a religious viewpoint. Additionally, the defendants' school building use policy permits social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community, so long as these uses are non-exclusive and open to the public. Therefore, there is a substantial likelihood that plaintiffs would be able to demonstrate that the defendants cannot bar the church's proposed activities without engaging in unconstitutional viewpoint discrimination.

Bronx III, 331 F.3d at 354.

constitutionally be prohibited from the limited public forum the Board has established.

Defendants argue that I should define the nature of the expression engaged in by the Bronx Household on Sundays not based on the descriptions of the substance of the activities in the record but by relying on the Church members' characterization of their activities as "services." Def. Mem. in Support at 10. As I held at the preliminary injunction stage, this argument is precluded by Good News Club. Bronx II, 226 F. Supp. 2d at 416. The majority in Good News Club responded to Justice Souter's characterization of the Club's activities as "an evangelical service of worship" by saying: "Regardless of the label Justice S[outer] wishes to use, what matters is the substance of the Club's activities, which we conclude are materially indistinguishable from the activities in Lamb's Chapel and Rosenberger." Good News Club, 533 U.S. at 112 n.4. Accordingly, Defendants' evidence regarding labels applied to Plaintiffs' activities is irrelevant. As noted above, the substance of the Church's activities remains the same as it was at the preliminary injunction phase: singing songs and hymns; teaching from the Bible; sharing testimonies from people in attendance; socializing; eating; engaging in prayer; and communion. Bronx II, 226 F. Supp. 2d at 414; Pl. Rule 56.1 Stmt. ¶ 44; First Hall Aff. ¶¶ 3-4. The record is clear that Plaintiffs are not engaged in "mere religious worship, divorced from any teaching of moral values." See Good News Club, 533 U.S. at 112 n.4. Accordingly, I cannot adopt a conclusion contrary to that reached in Good News Club and Bronx III, viz., Plaintiffs seek to continue using the School to engage in activities

that, while in part quintessentially religious, amount to the teaching of moral values from a religious viewpoint. Defendants' discrimination against Plaintiffs on the basis of this religious viewpoint is, therefore, a violation of Plaintiffs' First Amendment rights.

III. The Establishment Clause

Defendants attempt to excuse their viewpoint discrimination by arguing that it is necessary to avoid the kind of excessive entanglement that violates the Establishment Clause. See Def. Mem. in Support at 23; Tr. 11:23-12:5. However, the Establishment Clause is not violated where the policy at issue has a secular purpose, and does not, in its principal or primary effect, advance or inhibit religion or foster an excessive government entanglement with religion. Widmar v. Vincent, 454 U.S. 263, 271 (1981) (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).

A. Secular Purpose

The policies of the Board regulating the use of school space are set out in its SOPs and are clearly secular in purpose. SOP § 5.3 provides: "The primary use of school premises must be for Board of Education programs and activities." Grumet Decl., Ex. A.[10] Similarly, SOP § 5.5 provides: "After Board of Education programs and activities, preference will

[10] "Grumet Decl." refers to the Declaration of Lisa Grumet, dated April 11, 2005, in support of Defendants' motion for summary judgment.

be given to use of school premises for community, youth and adult group activities." Grumet Decl., Ex. A. SOP § 5.6.2 allows school premises to be used "[f]or holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such uses shall be non-exclusive and open to the general public." Grumet Decl., Ex. A.

The policies are neutral toward religion. The object of the Board quite clearly is to provide a forum for Board programs and activities and for students and community members to engage in a variety of social, civic, recreational, and entertainment activities and "other uses pertaining to the welfare of the community." SOP § 5.6.2. The policies of the Board are, by any reading, secular in their purpose.

B. Primary or Principal Effect

The primary or principal effect of allowing the Church to meet in P.S. 15 is ascertained by asking "whether an objective observer, acquainted with the text, legislative history, and implementation of the [SOP allowing community groups to use the School], would perceive it as a state endorsement of" religion. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000). Similar to the concept of the reasonable person in tort law, the reasonable observer spoken of frequently by Justice O'Connor in this context must be deemed "aware of the history and context of the community and forum" and must "recognize the distinction between speech the government supports and speech that it merely allows in a place that traditionally has been open to a range of private

speakers." Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780, 782 (1995) (O'Connor, J., concurring); see also Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 65 (2004) ("the relevant viewpoint is that of a reasonable observer, fully cognizant of the history, ubiquity, and context of the practice in question") (O'Connor, J., concurring); Elewski v. City of Syracuse, 123 F.3d 51, 54 (2d Cir. 1997). The Supreme Court has recently cautioned that "the world is not made brand new every morning." McCreary County, Ky. v. ACLU of Ky., 125 S. Ct. 2722, 2736 (2005). "[R]easonable observers have reasonable memories, and [the Court's] precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the Church's use of the School] arose.'" Id. at 2737 (quoting Santa Fe, 530 U.S. at 315).

Here, a reasonable observer of Plaintiffs' activities would observe the following undisputed facts:

1. the School space is offered to all student and community groups only when regular classes are not in session;

2. after giving preference to "Board of Education programs and activities," the School is available for "community, youth and adult group activities" on a first-come first served basis, SOP § 5.5; see Def. Reply Mem. at 2 n.2;

3. the Plaintiffs' activities take place only on Sunday mornings when classes are not in session;

4. not only does the Board not endorse Plaintiffs' activities, but it has actively opposed them for close to a decade;

5. employees of the School do not attend Plaintiffs' activities in their official capacities;[11]

6. like other groups using the School, Plaintiffs engage in ritual, storytelling, teaching of character and morals, eating, socializing, recreation and "other uses pertaining to the welfare of the community," SOP § 5.6.2; Bronx II, 226 F. Supp. 2d at 414;

7. Plaintiffs' meetings are non-exclusive and open to the public; and

8. Defendants require groups using schools to include on all public notices and other materials that mention the school's name or address a disclaimer noting that the activity is not sponsored by the Board and that the views of the sponsoring organization do not necessarily reflect those of the Board, Farina Decl. ¶ 20 and Ex. A.[12]

---

[11] Although Defendants note that a parent from P.S. 89 is the main Pastor at Mosaic, a church that meets in P.S. 89, there is no indication that he does so in any capacity other than as a member of the community, viz., not in any official, Board of Education capacity, see Declaration of Thomas Goodkind dated April 15, 2005 ("Goodkind Decl."), and there is no evidence suggesting that any special attention is drawn to the coincidental connection.

[12] "Farina Decl." refers to the Declaration of Carmen Farina dated April 7, 2005.

See also Bronx II, 226 F. Supp. 2d at 425-26 (similar findings at the preliminary injunction stage). On these undisputed facts, the reasonable observer would conclude that Plaintiffs' meetings constitute speech that the Board merely allows, under protest, in a forum where other groups engage in similar speech and that the principal effect is neutrality toward religion. Allowing Plaintiffs' speech does not advance or inhibit religion but merely allows it on the same neutral basis as similar speech in the same forum.

Defendants have argued that their policies respond to the complaints about Plaintiffs' speech from members of the public. The Supreme Court has ruled, however, that the government may not use the opposition of listeners--the "heckler's veto"--to silence unpopular speakers or to exclude them from a forum. "Listeners' reaction to speech is not a content-neutral basis for regulation. Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 134-35 (1992) (citations omitted). Indeed, it is the unpopular speech that generally needs protection, not popular speech. See, e.g., Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Twp. Sch. Dist., 386 F.3d 514, 527 (3d Cir. 2004) ("To exclude a group simply because it is controversial or divisive is viewpoint discrimination. A group is controversial or divisive because some take issue with its viewpoint.") (Alito, J.)).

The Supreme Court also rejected the "heckler's veto" to censor private religious speakers from a

forum where supposedly impressionable youth are present, writing: "We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive." Good News Club, 533 U.S. at 119 (citing Capitol Square, 515 U.S. at 779-80) (emphasis added). Despite this clear authority, Defendants contend that the child who happens to be at or near P.S. 15 on a Sunday when the Church is using space in that school is the reasonable observer whose assessment is relevant to the Establishment Clause analysis. See, e.g., Goodkind Decl. at 3.[13] This argument is squarely precluded by the Supreme Court's holding in Good News Club, 533 U.S. at 119, and its prior discussions of the reasonable observer, see, e.g., Capitol Square, 515 U.S. at 765 ("erroneous conclusions do not count").

Defendants also rely on an incident where children on their lunch period entered the public park across the street from M.S. 51 and received hot chocolate from members of the Sovereign Grace City Church who had set up a tent in the park and who

[13] "I know from conversations I have had with my younger daughter that she associates Mosaic [a church that meets in P.S. 89,] with P.S. 89, and is confused by the relationship between the Church and the School. The main Pastor at Mosaic is a parent at P.S. 89, who my daughter has seen in the School and at School events as a parent. For her, it is unclear where her School ends and the Church begins. I also know from my conversations with her that, in addition to being confused, she feels uncomfortable about the relationship between the Church and the School because my family does not share the Church's religious beliefs."

handed the children pamphlets and informed them that their church "meets in your school." Tr. 9:11-19; see Declaration of Gail Rosenberg dated April 7, 2005 ("Rosenberg Decl."). This encounter is irrelevant; the speech of adults in a public park directed toward children in a public park has no bearing on the School Board's alleged endorsement of religion. In any event, those expressing their discomfort at that church's meeting in M.S. 51 are not the reasonable observers contemplated by the Supreme Court but rather uninformed observers whose "erroneous conclusions do not count." Capitol Square, 515 U.S. at 765; see, e.g., Rosenberg Decl. & Declaration of Daniel R. Schaffer dated March 25, 2005. In any event, "even if [I] were to inquire into the minds of schoolchildren in this case, [I] cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the [Church] were excluded from the public forum." Good News Club, 533 U.S. at 118.

Defendants make much of the fact that the schools are otherwise occupied with regular classes and student activities on Fridays and school-related groups on Saturdays, rendering them generally unavailable for religious groups that hold services or religious instruction on Fridays and Saturdays. For example, at oral argument Defendants cited an incident where "a Jewish group that requested to use a Brooklyn high school for services on Saturday was denied permission because of the school's Saturday academic programs," Tr. 8:4; 8:20-22, as evidence that the forum is not equally open for other religious groups. This argument is without merit.

First, the Establishment Clause "mandates governmental neutrality between religion and religion, and between religion and nonreligion." McCreary, 125 S. Ct. at 2733 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)). Here, the Board's application process is neutral toward religious and secular groups; that the Church takes advantage of the neutral benefit program to use P.S. 15 on Sundays and that P.S. 15 is unavailable for use on most Fridays and Saturdays is incidental. See Zelman v. Simmons-Harris, 536 U.S. 639, 655, 658 (2002) (that 46 of 56 private schools participating in voucher programs were religious and 96% of voucher students were attending religious schools did not render neutral program unconstitutional). Second, where a school is a limited public forum "available for use by groups presenting any viewpoint," there is no Establishment Clause violation merely because only groups with religious viewpoints have sought to use the forum. Good News Club, 533 U.S. at 119 n.9. "[I]t does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'" Harris v. McRae, 448 U.S. 297, 319 (1980) (citing McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

At oral argument, Defendants emphasized the concern raised by Justice O'Connor in Capitol Square that a forum may become so dominated by a private religious group "that a formal policy of equal access is transformed into a demonstration of approval." Capitol Square, 515 U.S. at 777 (O'Connor, J., concurring) (citing Widmar, 454 U.S. at 275). Here, however, as noted above, Defendants have not

identified any evidence of such domination--either in P.S. 15, in the School District, or in the City. Indeed, according to the Board, Def. Mem. in Opp. At 16,[14] 9,804 non-government, non-construction contractor permits were issued for use of school property in the 2003-2004 school year. By comparison, in the 2004-2005 school year, approximately "23 congregations held regular worship services in public schools." Def. 56.1 Stmt. ¶ 57.[15] Only 13 congregations have held services in a school for more than one year, and three, including Bronx Household, have held worship services for more than two years on Sundays. Def. 56.1 Stmt. ¶ 58. In comparison, as of February 2005 for the 2004-2005 school year, "school-sponsored" activities occur in approximately 300 school buildings on Sundays, 450 buildings on Friday nights, and 800 school buildings on Saturdays. Def. 56.1 Stmt. ¶ 7. By any measure, the data reflecting the use by religious congregations of schools cannot be deemed dominant in the Capitol Square sense. And even if a religious organization such as Bronx Household were, under some measure, considered the "dominant" user numerically, the later Zelman case suggests that that is "irrelevant" to establishing a First Amendment violation. See Zelman, 536 U.S. at 658 ("we have recently found it irrelevant even to the constitutionality of a direct aid program that a vast majority of program benefits went to religious

---

[14] "Def. Mem. in Opp." refers to Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Further Support of their Motion for Summary Judgment dated May 10, 2005.

[15] "Def. 56.1 Stmt." refers to Defendants' Local Civil Rule 56.1 Statement of Undisputed Facts dated April 11, 2005.

schools") (citing Agostini v. Felton, 521 U.S. 203, 229 (1997)).

It is of no moment that organizations serving children may meet on school premises at the same time as the Church and that some children might thereby become aware of the religious nature of the Church's activities. See Good News Club, 533 U.S. at 115 ("[W]e have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present."). As noted above, the Supreme Court has proscribed the use of a "modified heckler's veto" to exclude religious speech from a public forum based on the perceptions of the youngest audience members. See Good News Club, 533 U.S. at 119. Thus, the Board may not engage in unconstitutional viewpoint discrimination to avoid the difficulty perceived by the Board that might arise when private speakers in a limited public forum espouse views and engage in religious activities that engender discomfort among other members of the community, either children or adults. "Dealing with misunderstandings--here, educating the students in the meaning of the Constitution and the distinction between private speech and public endorsement--is . . . what schools are for." Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1299 (7th Cir. 1993).

It appeared at oral argument that some of Defendants' Establishment Clause concerns stem not from the fact that churches meet in schools but from the manner in which some churches communicate

the fact of their meeting to the community or from modifications made by churches to school buildings. Examples of the problems Defendants identified at oral argument include: at a PTA event in 2003, a church came and distributed church literature and balloons, which had crosses on them, to the children in attendance; a church advertises its services by distributing postcards, posting signs by the school, and mass mailing. Tr. 10:1-18; compare Declaration of Francis Rabinowitz dated March 29, 2005, Ex. A (postcard advertising Sovereign Grace City Church (without disclaimer)), and Declaration of Veronica Najjar dated April 11, 2005, Ex. B and ¶ 5 (banner in front of P.S. 89 announcing "Mosaic Manhattan [the Church] meets here"), with Declaration of William Fraenkel, Esq., dated April 11, 2005, Ex. A (postcard advertising Community Christian Church (with disclaimer: "This activity is not sponsored nor [sic] endorsed by the New York City Department of Education. The views and opinions expressed by the sponsoring organization do not necessarily state or reflect those of the New York City Department of Education"));[16] see also Declaration of Sandy Brawer dated April 6, 2005, ¶¶ 2, 4 (regarding allegation that Christ Tabernacle Church had installed a satellite dish on the roof of Bushwick High School without obtaining approval and had requested permission to install a T-1 line--a high-speed internet connection--within the school).

---

[16] As set out in the Farina Decl. ¶ 20 and Ex. A, the Board "requires that outside organizations include with materials that mention the school's name a disclaimer that states that [the Department of Education] does not sponsor or endorse the organization's activities."

In each of these situations, however, any appearance of endorsement can be minimized with neutral time, place, and manner restrictions, for example, regulating use of banners or signs outside of the school, requiring Board permission for permanent installation of equipment or alteration of buildings, or enforcing disclaimer requirements. After all, government "may impose reasonable, content-neutral time, place, or manner restrictions . . ., but it may regulate expressive content only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest." Capitol Square, 515 U.S. at 761.

In sum, on this record, the undisputed facts demonstrate that permitting the Church to meet in P.S. 89 neither advances nor inhibits religion.

C. Excessive Entanglement

Finally, because SOP § 5.11 requires the Board to identify "religious services" (Enjoined SOP § 5.11) or "religious worship services" (Present SOP § 5.11), the Board's policy fosters an excessive government entanglement with religion. Just as the dissent did in Widmar, Defendants' policies "seem[] to attempt a distinction between the kinds of religious speech explicitly protected by [the Supreme Court's] cases and a new class of religious 'speech [acts]' constituting 'worship.'" Widmar, 454 U.S. at 270 n.6 (citation omitted). The Widmar Court explicitly rejected that distinction, concluding that there is no "intelligible content" or other basis to determine when "'singing hymns, reading scripture, and teaching biblical principles,' cease to be 'singing,

teaching, and reading,'--all apparently forms of 'speech,' despite their religious subject matter--and become unprotected 'worship.'" Id. (citation omitted). "The fact is that the line which separates the secular from the sectarian in American life is elusive." Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 231 (1963) (Brennan, J., concurring). No litmus test can be applied to determine when worship ends and when religious teaching or instruction begins. And the Supreme Court expressly has "not excluded from free-speech protections . . . acts of worship." Capitol Square, 515 U.S. at 760. Thus, the distinction Defendants seek to make in both Enjoined and Present SOP § 5.11 between constitutionally protected speech relating to religion and a separate, different-in-kind category of unprotected speech or speech acts called "worship" has been expressly rejected by the Supreme Court.

Even if the Board (and, inevitably, the courts) were competent to parse through hymns, verses, teaching, and ritual to separate "mere worship" from the teaching of character and morals, doing so would require government actors to scrutinize and dissect religious practice and doctrine, leading to a level of government involvement in religious matters that offends the First Amendment principles Defendants supposedly seek to honor. In Widmar, after observing that the distinction between religious worship and protected religious speech lacked "intelligible content," the Court stated that even were such a distinction possible, it would violate the non-entanglement prong of the Establishment Clause:

> Merely to draw the distinction would require the university--and ultimately the court--to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.

454 U.S. at 270 n.6; see also Good News Club, 533 U.S. at 127 (Scalia, J., concurring) (even if "courts (and other government officials) were competent, applying the distinction would require state monitoring of private, religious speech with a degree of pervasiveness that we have previously found unacceptable") (citing Rosenberger, 515 U.S. at 844-46).[17] As Justice Souter explained in his concurring

---

[17] In Rosenberger, the Court concluded that the University's denial of funding for a student-run Christian public policy magazine constituted viewpoint discrimination. The Court held that government actors' parsing religious expression implicated both the Free Speech Clause and the Establishment Clause:

> [t]he viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.

515 U.S. at 845-46.

opinion in Lee v. Weisman, "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible" than "comparative theology." 505 U.S. 577, 616-17 (1992) (Souter, J., concurring).

Here, the Board's SOP § 5.11, both Enjoined and Present, requires it to distinguish "religious services" (Enjoined SOP § 5.11) and "religious worship services" (Present SOP § 5.11) from the teaching of character and morals from a religious viewpoint as described in Good News Club. Undertaking that distinction would entangle state actors with religion by requiring them "to dissect and categorize the substance of plaintiffs' speech during their four-hour meeting and determine, inter alia, 'when "singing hymns, reading scripture, and teaching biblical principles" cease to be "singing, teaching, and reading" . . . and become unprotected "worship."'" Bronx II, 226 F. Supp. 2d at 424 (quoting Widmar, 454 U.S. at 270 n.6); see Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 675 (1970) (excessive entanglement may result when the involvement between government and religion "is a continuing one calling for official and continuing surveillance"). Such excessive entanglement is offensive to the Constitution.

IV. The New Policy

As noted above, the Board adopted its Present SOP § 5.11:

> No permit shall be granted for the purpose of holding religious worship services, or

> otherwise using a school as a house of worship. Permits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this chapter on the same basis that they are granted to other clubs for students that are sponsored by outside organizations.

Pl. Rule 56.1 Stmt. ¶ 53. The Board is quite candid in acknowledging its intent to "reinstitute a policy that would prevent any congregation from using a public school for its worship services." Def. Mem. in Support at 8. Recognizing the holding of Good News Club, based as it was on a similar policy grounded on the same state statute upon which the Board's SOPs are based, Good News Club, 533 U.S. at 102 (school board policy based on N.Y. Educ. Law § 414 (McKinney 2000) and providing that district residents may use the school for, inter alia, "'social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community'"), the Board's Present SOP § 5.11 expressly permits religious clubs for students. The Board argues that the distinction the Present SOP § 5.11 seeks to draw between student religious speech and nonstudent religious speech is permitted based on the identity of the speaker, citing Widmar. Def. Mem. in Support at 9; Def. Mem. in Opp. at 5-10.[18]

---

[18] Defendants imply that groups like Plaintiffs' might crowd out other activities, e.g., "If [P]laintiffs' reasoning should become law, school officials would have no ability to reserve school space for, or give preference to, after school programs for children attending the school." Def. Mem. in Opp. at 5. First, there is no evidence in the record of the activities of groups like

At oral argument, counsel for the Board acknowledged that the policy was clarified "in order to make clear that we are--we are complying with the Good News Club decision." Tr. 66:2-3. When asked whether the policy reflects the facts of Good News Club but not the principles, counsel responded, "We think that this is consistent with the principle of the Good News Club, which is that when you have different student groups, as you have in the Good News Club, that are meeting, that you need to allow religious student groups also. We think that this is something different." Tr. 66:6-10. This approach suffers from several infirmities.

First, the Board has already distinguished between and among speakers. As set out in Bronx II, SOP § 5.3 provides that "[t]he primary use of school premises must be for Board of Education programs and activities." 226 F. Supp. 2d at 409. SOP § 5.5 then provides that "[a]fter Board of Education programs and activities, preference will be given to use of school premises for community, youth and adult group activities." Id. There is no separate category for "student" activities. Thus, the neutral Board policy already provides for preference to Board of Education programs and activities followed by community, youth and adult group activities. The Board's Present SOP § 5.11 permits "religious clubs for students that are sponsored by outside

---

Plaintiffs' crowding out other activities. Second, the remedy for such crowding out, were it to occur, is not to ban speech from a religious viewpoint but to amend the SOPs to create a neutral distinction based on the speaker, e.g., Board activities given first preference, student activities next, community activities next, etc.

organizations," that is, non-Board of Education programs and activities, but prohibits "holding worship services" or using a school as a "house of worship," presumably events also involving community speakers. Under SOP §§ 5.3 and 5.5, however, these non-Board of Education activities are at the same level of priority, viz., behind Board of Education-sponsored programs and activities. Thus, the Present SOP, as explained by Defendants, is inconsistent with SOP §§ 5.3 and 5.5.

Second, the principles of Good News Club instruct that if community groups teach character and morals or engage in other social, educational, or recreational activities for the benefit of the community, other community groups like Plaintiffs must be permitted to do so from a religious perspective. The new policy, as interpreted by Defendants, would not do so, but instead would treat Plaintiffs' speech differently from similar speech of other community groups based on religious perspective and thus is inconsistent with Good News Club.

Third, just as in McCreary, 125 S. Ct. at 2722, a reasonable observer cognizant of the history of this matter would recognize the Board's new policy as a post hoc attempt to avoid the prior holdings in this case and the holding in Good News Club. Having not "turn[ed] a blind eye to the context in which [the Board's Enjoined SOP § 5.11] arose," McCreary, 125 S. Ct. at 2737, the reasonable observer would recognize that the Board's new policy attempts, yet again, to prohibit the teaching of character and morals from a religious viewpoint, clearly a government attempt to prefer nonreligion over

religion, id. at 2733 ("The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between . . . religion and nonreligion.'").

Finally, even if the Board were permitted to distinguish among speakers in the manner Defendants interpret Present SOP § 5.11 to require, the activities at issue here may not be prohibited because they are not "mere religious worship, divorced from any teaching of moral values." See Good News Club, 533 U.S. at 112.

Accordingly, I find unconstitutional the enforcement of Present SOP § 5.11 to bar Plaintiffs from holding Sunday morning meetings that include worship in P.S. 15 or any other New York City public school.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment [dkt. no. 41] is granted, and Defendants' cross-motion [dkt. no. 45] is denied. Defendants are permanently enjoined from enforcing Present SOP § 5.11 so as to exclude Plaintiffs or any other similarly situated individual from otherwise permissible after-school and weekend use of a New York City public school. Counsel shall confer and submit a proposed order.

SO ORDERED:

Dated: New York, New York
November 16, 2005

LORETTA A. PRESKA, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2002

(Argued November 4, 2002 Decided 2003)

Docket No. 02-7781

THE BRONX HOUSEHOLD OF FAITH, ROBERT HALL and JACK ROBERTS,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

Before:

CARDAMONE, MINER, and KATZMANN,
Circuit Judges.

Defendants, New York City Board of Education and Community School District No. 10, appeal from a preliminary injunction entered July 3, 2002 in the United States District Court for the Southern District of New York (Preska, J.). The preliminary injunction, granted upon motion of plaintiffs the Bronx Household of Faith, Robert Hall and Jack Roberts, enjoined defendants from enforcing the New York City Board of Education's Standard Operating Procedure § 5.11 so as to deny plaintiffs' application to rent space in a public school operated by the Board of Education for morning meetings that include religious worship or the application of any similarly situated individual or entity.

Affirmed.

Judge Miner dissents in a separate opinion.

JANE L. GORDON, New York, New York (Edward F.X. Hart, Lisa Grumet, Michael A. Cardozo, Corporation Counsel of the City of New York, New York, of counsel), for Defendants-Appellants.

JORDAN W. LORENCE, Scottsdale, Arizona (Benjamin W. Bull, Alliance Defense Fund Law Center, Scottsdale, Arizona; Rena Lindevaldsen, Esanu, Katsky, Korins & Siger, LLP, New York, New York; Joseph P. Infranco, Migliore & Infranco, Commack, New York, of counsel), for Plaintiffs-Appellees.

Jay Worona, New York State School Boards Association, Inc., Latham, New York (James R. Sander, Carol Gerstyl, United Federation of Teachers, New York, New York, of counsel), filed a joint amicus curiae brief on behalf of the New York State School Boards Association, Inc. (NYSSBA), and The United Federation of Teachers (UFT).

Jennifer Levin, Washington, D. C. (Ralph F. Boyd, Jr., Assistant Attorney General, David K. Flynn, Eric W. Treene, Civil Rights Division, U.S. Department of Justice, Washington, D.C.; James B. Comey, U.S. Attorney, David J. Kennedy, Neil M. Corwin, Gideon A. Schor, Assistant U.S. Attorneys, Southern District of New York, New York, New York, of counsel), filed a brief for the United States as Amicus Curiae.

Anthony R. Picarello, Jr., Washington, D.C. (Roman P. Storzer, Derek L. Gaubatz, The Becket Fund for Religious Liberty, Washington, D.C., of counsel), filed a brief for The Becket Fund for Religious Liberty as Amicus Curiae.

CARDAMONE, Circuit Judge:

This appeal concerns the proposed use of a public school building for Sunday worship services by an evangelical Christian church. Courts often struggle to reconcile the principle of equal access to government buildings with a competing principle of American public life, that is, the separation of church and state. In the case before us, the district court resolved this tension in favor of allowing religious speech on public property. Recent Supreme Court precedent requires that we affirm.

BACKGROUND

A. Prior Legal Proceedings

Plaintiff, the Bronx Household of Faith (church), is an evangelical Christian church founded in 1971 and located in the Bronx, New York. Plaintiffs Robert Hall and Jack Roberts are its co-pastors. This litigation represents plaintiffs' second attempt to compel defendants, the Board of Education of the City of New York and Community School District No. 10 (collectively defendants or appellants), to allow plaintiffs to rent space in public school M.S. 206B, Anne Cross Mersereau Middle School (Middle School 206B), for Sunday morning meetings that include, at least in part, activities that may be characterized fairly as religious worship.

Plaintiffs' first application to rent space in Middle School 206B was rejected by defendants in 1994, resulting in litigation between the present plaintiffs and defendants in the Southern District of New

York. In that case, the district court granted defendants' motion for summary judgment dismissing plaintiffs' complaint. Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, No. 95 Civ. 5501, 1996 WL 700915 (S.D.N.Y. Dec. 5, 1996). We affirmed, and the Supreme Court denied certiorari. Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207 (2d Cir. 1997), cert. denied, 523 U.S. 1074 (1998) (Bronx Household I).

In 2001 plaintiffs again applied for use of space in Middle School 206B and, when their application was denied, brought the present action in the United States District Court for the Southern District of New York (Preska, J.). The plaintiffs' central point before the district court was that the Supreme Court's decision in Good News Club v. Milford Central School, 533 U.S. 98 (2001), effectively overruled our holding in Bronx Household I. Plaintiffs contend that, as a result, the Education Board's policy of excluding community groups from renting school premises for purposes of "religious services or religious instruction" -- while allowing most other types of community groups to hold meetings -- violates their First Amendment right to freedom of speech.

Agreeing that plaintiffs were substantially likely to prevail on the merits of their claim, Judge Preska granted their motion for a preliminary injunction. Bronx Household of Faith v. Bd. of Educ., 226 F. Supp. 2d 401 (S.D.N.Y. 2002) (Bronx Household II). The preliminary injunction enjoins defendants "from enforcing the New York City Board of Education's Standard Operating Procedure § 5.11 so as to deny

plaintiffs' application to rent space in a public school operated by the Board of Education for morning meetings that include religious worship or the application of any similarly-situated individual or entity." From the grant of this preliminary injunction, defendants appeal. The district court and we denied defendants' application for a stay pending appeal.

In reviewing the grant of this preliminary injunction, we revisit a dispute that is no stranger to this Court. Although we have reached the merits in this litigation previously, the issues now raised return to us in a different procedural posture, requiring employment of a different standard of review than that used in Bronx Household I**.** The instant litigation also arises against a backdrop of additional Supreme Court precedent. In Good News Club, a recent school and religion case with facts that parallel in many respects those here, the Supreme Court held that "quintessentially religious" activities could be "characterized properly as the teaching of morals and character development from a particular viewpoint." 533 U.S. at 111. The Supreme Court also reiterated in its Good News Club decision that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint. Id. at 109-10. The defendants in this case, like the defendant in Good News Club, have opened the relevant limited public forum to the teaching of morals and character development. Accordingly, we affirm and hold that the district court did not abuse its discretion when it

granted plaintiffs' motion for a preliminary injunction.

B. Facts

On July 6, 2001 plaintiffs wrote to the School District renewing their prior request to rent Middle School 206B, citing the Supreme Court's Good News Club decision as the basis for the renewed request. Plaintiffs sought to meet at the school from 10:00 a.m. to 2:00 p.m. each Sunday morning, beginning on September 30, 2001, to engage in "singing," "the teaching of adults and children . . . from the viewpoint of the Bible," and "social interaction among the members of [the] church, in order to promote their welfare and the welfare of the community."

Frank Pagliuca, Director of School Facilities and Planning for the School District, responded in writing to the church's request, stating that it appeared to intend to use the school for the same purpose -- i.e., "weekly worship service" -- that the School District had denied in 1994. Mr. Pagliuca's letter reminded plaintiffs that the District's prior denial "was upheld by the Federal Appeals Court," and advised them that if plaintiffs intended different usage than before, they should submit additional information. Plaintiffs state that on August 16, 2001 their counsel was informed by Deborah King, Esq., an attorney for the Board of Education, that defendants were denying the church's request for rental space "because the meetings would violate the defendants' policy prohibiting religious services or instruction in the school buildings."

Although in this second request to rent space in Middle School 206B, the church did not describe its proposed use as "religious service" or "religious instruction" -- likening it instead to other uses permitted under School Board policy -- the School Board correctly perceived that plaintiffs were, in substance, renewing their prior request to conduct activities that included a weekly worship service. Plaintiffs have since offered a fuller description of the activities in which they seek to engage:

> The Sunday morning meetings service consists of the singing of Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion, sharing of testimonies and social fellowship among the church members.
>
> In our church service, we seek to give honor and praise to our Lord and Savior Jesus Christ in everything that we do. To that end we sing songs and hymns of praise to our Lord. We read the Bible and the pastors teach from it because it tells us about God, what He wants us to do and how we should live our lives. . . . In keeping with ancient tradition, we have a light fellowship meal after the service, which consists basically of coffee, juice and bagels. This gives us opportunity to meet new people, talk to one another, share one another's joys and sorrows so as to be a mutual help and comfort to each other.

. . .

The Sunday morning meeting is the indispensable integration point for our church. It provides the theological framework to engage in activities that benefit the welfare of the community. Those who attend the Sunday morning meetings are taught to love their neighbors as themselves, to defend the weak and disenfranchised, and to help the poor regardless of their particular beliefs. It is a venue where people can come to talk about their particular problems and needs. Over the years we have helped people with basic needs such as food, clothing, and rent. We have also provided, by means of counseling, friendship and encouragement, help for people to get out of the multi-generational welfare cycle, to lead productive lives, to leave a life of crime and/or drugs to become responsible citizens, and to counsel people whose personal finances are out of control.

In one recent case we helped an individual who was about to get evicted. . . . It is through the Sunday meeting where we directly or indirectly learn of these situations and where we can converse with the individuals involved in order to monitor the progress of the issue to be resolved.

In years past, the church meeting was a very important place for Cambodian Refugees to come in order for us to get to

> know them so that we could help them with food, clothing and to help them get acclimated to American society. Most of them were Buddhists.

The Sunday morning meetings of the church are open to all members of the public. The church currently conducts its Sunday meetings in a large house or outdoors under a tent or canopy. The church also owns a vacant lot and asserts that it eventually intends to construct its own building.

The School District's denial of the church's request to rent school space -- in 1994 and again in 2001 -- was based on the Education Board's Standard Operating Procedures (SOP) Manual that sets forth a hierarchy of permitted uses of school facilities. According to the SOP Manual, the primary use of school premises must be for programs and activities of the Board of Education. After the Board's programs and activities, school premises may be used for a variety of community activities, including "social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community," as long as these uses are "non-exclusive and open to the general public."

Section 5.11 of the SOP Manual -- enumerated as section 5.9 at the time of Bronx Household I -- prohibits any "outside organization or group" from conducting "religious services or religious instruction on school premises after school." The same section permits the use of school premises "for the purpose of discussing religious material or material which

contains a religious viewpoint or for distributing such material."

The School District has over the years permitted a variety of organizations to use school premises for meetings and activities after school hours and on weekends. Examples of organizations that received such permission during the 2000-2001 school year include Girl Scouts; the Mosholu Community Center, which organizes sports and other recreational activities; University Heights, which sponsored sports events, holiday shows and activities relating to Black History Month; and Lehman College, which held classes in teaching English as a second language. At the same time, the School District has never granted an application seeking to use school facilities for religious services.

We pass now to a discussion of the rules governing the issuance of a preliminary injunction in general, and then apply those rules to this case.

DISCUSSION

I Standard of Review

A district court's grant of a preliminary injunction is reviewed for an abuse of discretion. Such an abuse occurs when the district court bases its ruling on an incorrect legal standard or on a clearly erroneous assessment of the facts. See Fun-Damental Too, Ltd. v. Gemmy Indus. Corp., 111 F.3d 993, 999 (2d Cir. 1997). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence

is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). In cases raising First Amendment issues, "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 284-286 (1964)).

To obtain a preliminary injunction a party must demonstrate: (1) that it will be irreparably harmed if an injunction is not granted, and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation, and a balance of the hardships tipping decidedly in its favor. See Forest City Daly Hous., Inc. v. Town of North Hempstead, 175 F.3d 144, 149 (2d Cir. 1999). Where the requested preliminary injunction would stay government action taken in the public interest pursuant to a statutory or regulatory scheme -- as it does here -- the less rigorous burden of proof standard envisioned by the phrase "fair ground for litigation" does not apply, and instead the party seeking injunctive relief must satisfy the more rigorous prong of "likelihood of success." This higher standard of proof requires judicial deference to those regulations developed through reasoned democratic processes. See id.

Moreover, an even higher standard of proof comes into play when the injunction sought will alter

rather than maintain the status quo. In such case, the movant must show a "clear" or "substantial" likelihood of success. See Rodriguez ex rel. Rodriguez v. DeBuono, 175 F.3d 227, 233 (2d Cir. 1999) (per curiam). Because the plaintiffs here sought an injunction that commands a positive act that alters the status quo, the district court correctly required that plaintiffs demonstrate a "clear" or "substantial" likelihood of success on the merits.

II Irreparable Harm

In determining whether there was an abuse of discretion in the grant of injunctive relief, we first address the issue of irreparable harm. In finding irreparable harm, the district court observed that the plaintiffs' claims implicate First Amendment speech rights that are the bedrock of our liberties, and concluded that the church will suffer serious damage were an injunction not to issue. Although "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," Elrod v. Burns, 427 U.S. 347, 373 (1976), we have not consistently presumed irreparable harm in cases involving allegations of the abridgement of First Amendment rights, see Amandola v. Town of Babylon, 251 F.3d 339, 343 (2d Cir. 2001) (per curiam).

On the one hand, we have said that since violations of First Amendment rights are presumed to be irreparable, the allegation of a First Amendment violation satisfies the irreparable injury requirement. Tunick v. Safir, 209 F.3d 67, 70 (2d Cir. 2000). On the other hand, we have suggested

that, even when a complaint alleges First Amendment injuries, irreparable harm must still be shown -- rather than simply presumed -- by establishing an actual chilling effect. See Latino Officers Ass'n v. Safir, 170 F.3d 167, 171 (2d Cir. 1999).

Whatever tension may be said to exist in our case law regarding whether irreparable harm may be presumed with respect to complaints alleging First Amendment violations, we think is more apparent than real. Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed. For example, in Tunick an artist was denied a city permit to conduct a photographic shoot of nude models on a residential street. 209 F.3d at 69. In Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996), groups of visual artists opposed enforcement of a city regulation prohibiting them from exhibiting or selling their work in public places without a general vendor's license; under the regulation, only a limited number of the licenses could be in effect at any time. Id. at 691-92. In both cases the challenged government action directly limited speech and irreparable harm was presumed. See Tunick, 209 F.3d at 70; Bery, 97 F.3d at 693-94.

In contrast, in instances where a plaintiff alleges injury from a rule or regulation that may only potentially affect speech, the plaintiff must establish a causal link between the injunction sought and the alleged injury, that is, the plaintiff must demonstrate that the injunction will prevent the feared deprivation of free speech rights. The

Supreme Court instructs us on this issue in Laird v. Tatum, 408 U.S. 1 (1972), that to establish a cognizable claim founded on the chilling of First Amendment rights, a party must articulate a "specific present objective harm or a threat of specific future harm." Id. at 14.

Thus, in Latino Officers Ass'n, plaintiffs challenged a police department's requirements that all officers notify the department of their intention to speak before a governmental agency or a private organization about department policy, and that they provide an after-the-fact summary of their comments. 170 F.3d at 169, 171. We found the theoretical possibility of a chilling effect on officers' speech too conjectural and insufficient to establish irreparable harm. Id. at 171. In Charette v. Town of Oyster Bay, 159 F.3d 749 (2d Cir. 1998), we ruled the record insufficient to decide a topless bar operator's motion to enjoin enforcement of a zoning regulation that resulted in the bar's closing. The record contained no evidence indicating how soon after the issuance of the injunction, if at all, the bar could be reopened. Id. at 750-51, 756-57; see also Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv., 766 F.2d 715, 722 (2d Cir. 1985) (reversing a preliminary injunction enjoining employee's discharge pending arbitration because discharge did not chill First Amendment rights of members of union sufficiently to cause irreparable harm).

Here, the alleged deprivation of plaintiffs' First Amendment rights results directly from a policy of the defendant Board of Education that prohibits "religious services or religious instruction" in school

facilities. Since it is this policy that led to a denial of the church's request to rent space in Middle School 206B and directly limits plaintiffs' speech, irreparable harm may be presumed. Because the plaintiffs' allegations entitle them to a presumption of irreparable harm, the district court's finding that the plaintiffs have fulfilled this requirement for the issuance of a preliminary injunction cannot be said to be an abuse of discretion.

III Likelihood of Success on the Merits

Given that plaintiffs have demonstrated irreparable harm, we now reach the more difficult issue of whether the district court properly found that plaintiffs had shown a likelihood of success on the merits. As noted earlier, because they seek an injunction that alters rather than preserves the status quo plaintiffs must satisfy a more rigorous standard of proof and demonstrate a clear or substantial likelihood of such success. Rodriguez, 175 F.3d at 233.

In determining whether defendants' denial of the plaintiffs' application to rent the school violates plaintiffs' First Amendment rights, we tread familiar ground. Faced with the same parties and identical facts, we reached the merits of this issue in Bronx Household I, upholding the district court's summary judgment ruling in favor of the defendants Board of Education and School District. Plaintiffs now insist that the Supreme Court's decision in Good News Club, in effect, overruled our holding in Bronx Household I. Judge Preska was persuaded to this view and hence ruled plaintiffs had demonstrated a

substantial likelihood of success on the merits of the litigation. In order to ascertain whether this holding was an abuse of discretion, we examine our earlier decision in Bronx Household I and the Supreme Court's opinion in Good News Club.

A. Bronx Household I

In Bronx Household I, we observed that the right to exercise free speech on government property depends on the kind of forum where the speech occurs, noting that the Supreme Court has identified three kinds: the traditional public forum, the designated public forum or "limited public forum," and the nonpublic forum. 127 F.3d at 211 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)). Although the church argued that Middle School 206B is an open public forum where the exercise of First Amendment rights cannot be excluded absent a compelling state interest, see 127 F.3d at 212, we were not persuaded that the school was "a place that has been devoted to general, unrestricted public assembly by long tradition or by policy or practice," id. at 213. Instead, we reasoned that the Board of Education, by restricting access to certain speakers and subjects, had created a limited public forum. Id. Within such a limited forum, the government may restrict access based on speaker identity and subject matter, but only if "the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Id. at 211-12 (quoting Cornelius, 473 U.S. at 806).

Having decided that the school was a limited public forum, we next addressed the question of whether the Education Board's rule prohibiting religious services and instruction is reasonable and viewpoint neutral. We held it reasonable for state legislators and school authorities to avoid identifying a public school with a particular church, when considering the effect of such identification on the minds of school children. Id. at 214. We also deemed the regulation viewpoint neutral, since it "specifically permits any and all speech from a religious viewpoint." Id. We recognized that religious worship services were barred, but believed a permissible distinction could be drawn between religious worship and other forms of speech from a religious viewpoint. Id. at 215. For those reasons and because Middle School 206B was a limited public forum, we affirmed the summary judgment ruling in favor of the defendants.

B. Good News Club

Subsequent to our decision in Bronx Household I, the Supreme Court decided Good News Club v. Milford Central School. At issue in Good News Club was defendant Milford Central School's community use policy that prohibited the use of school premises "by any individual or organization for religious purposes." 533 U.S. at 103. Because of this policy the school refused to allow plaintiff Good News Club, a private Christian organization for children between the ages of six and 12, to use school premises for activities that included praying, singing, reading, and learning the Bible. The school denied plaintiff's request to use its facilities because it thought "the

kinds of activities proposed to be engaged in by the Good News Club were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself." Id. at 103-04.

The Good News Club sued challenging the school's policy on First Amendment grounds. The district court granted the school's motion for summary judgment and we affirmed, reasoning that the exclusion of the Club's "quintessentially religious" activities was constitutional content discrimination, not unconstitutional viewpoint discrimination. Good News Club **v.** Milford Cent. Sch., 202 F.3d 502, 510-11 (2d Cir. 2000). The Supreme Court granted certiorari to resolve the conflict among the circuits "on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech." Good News Club, 533 U.S. at 105. In the context of stating its intention to resolve that conflict, the Court mentioned our opinion in Bronx Household I and noted that it was on the same side of the split as Campbell v. St. Tammany's School Board, 206 F.3d 482 (5th Cir. 2000), a decision relying in part on our opinion in Bronx Household I, and one which the Supreme Court subsequently vacated and remanded in light of Good News Club, see Campbell v. St. Tammany's Sch. Bd., 533 U.S. 913 (2001). See Good News Club, 533 U.S. at 105-06.

In reversing the judgment of this Court, a divided Supreme Court found that by excluding the meetings of the Good News Club while allowing other types of

instruction on moral and ethical issues the school maintained an exclusionary policy that "constitutes viewpoint discrimination." Id. at 107. The majority characterized the Club's proposed activities as teaching morals and character from a religious perspective. It did not think something that is "'quintessentially religious' or 'decidedly religious in nature' cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint." Id. at 111. Because the school allowed teachings about morals and character from a variety of other, secular perspectives, the Court continued, the school could not legally exclude the Club's meetings solely because of the religious viewpoint it advocated. Id. at 111-12. The Court concluded by stating, "What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons." Id. at 111.

Significantly, the majority found no meaningful distinction between the case before it and Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993). Good News Club, 533 U.S. at 111-12. In Lamb's Chapel, the Supreme Court held that a school could not prohibit an outside group's demonstration of a film about family values simply because the film addressed the issue from a religious perspective, where the school admittedly would have allowed demonstration of a film addressing family values from a secular perspective. 508 U.S. at 393-94. The Good News

Club majority reasoned that the Club -- like the Lamb's Chapel plaintiffs -- was seeking "to address a subject otherwise permitted [in the school], the teaching of morals and character, from a religious standpoint." The fact that the Good News Club proposed to conduct the teaching through "storytelling and prayer" rather than through film, as in Lamb's Chapel, was an "inconsequential" distinction. 533 U.S. at 109-12.

The dissenting members of the Supreme Court -- Justices Stevens, Souter, and Ginsburg -- perceived the speech at issue in Good News Club to be sufficiently different from that in Lamb's Chapel to require the opposite result. Justice Stevens drew a distinction between three types of speech for religious purposes: (1) "religious speech that is simply speech about a particular topic from a religious point of view," such as the film at issue in Lamb's Chapel, (2) "religious speech that amounts to worship, or its equivalent," and (3) an "intermediate category that is aimed principally at proselytizing or inculcating belief in a particular religious faith." The Good News Club's meetings, in his estimation, fell into the third or proselytizing category. 533 U.S. at 130, 133 (Stevens, J., dissenting).

Justice Souter was of the opinion that. "Good News intends to use the public school premises not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion." Id. at 138 (Souter, J., dissenting). He emphasized that the Club's intended activities

included elements of worship that made the case as different from Lamb's Chapel "as night from day." Id. at 137. Justice Souter further observed that the Club's meetings opened and closed with prayer, and that at the heart of each meeting was "the challenge," when the already "saved" children were invited to ask God for strength; and "the invitation," when the teacher would "invite" the "unsaved" children to "receive" Jesus as their "Savior from sin." Id. at 137-38. This dissenting justice criticized the majority's characterization of the Club's activities as "teaching of morals and character, from a religious standpoint" as ignoring reality. Id. at 138-39.

The Supreme Court majority was not persuaded by the distinction drawn by the dissenters between speech from a religious perspective on the one hand and worship or proselytizing on the other. It did agree with Justice Souter's description of the Club's activities, which we just related, but concluded that those activities "do not constitute mere religious worship, divorced from any teaching of moral values." 533 U.S. at 112 n.4. The majority saw "no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys." Notwithstanding Justice Souter's forcefully expressed challenge, it explicitly rejected his characterization of the Club's activities as an "evangelical service of worship," saying that "[r]egardless of the label Justice Souter wishes to use, what matters is the substance of the Club's activities, which we conclude are materially indistinguishable from the activities in Lamb's Chapel and Rosenberger [v. Rector and Visitors of

Univ. of Va., 515 U.S. 819, 832 (1995) (holding that a university's refusal to pay a third-party contractor for the printing costs of a student publication, based on the publication's religious editorials, was viewpoint discrimination)]." Id.

IV Resolution of Instant Appeal

A. Free Speech

Having laid out for purposes of comparison our holding in Bronx Household I and the Supreme Court's Good News Club opinion, we turn to an analysis of Bronx Household II, the appeal presently before us. We start with the holding of the trial court. In granting plaintiffs' motion for a preliminary injunction it relied on the Supreme Court's holding in Good News Club, believing that the activities proposed by the plaintiff church are similar to those in Good News Club. The trial court also thought that, after Good News Club, religious worship could not be treated as an inherently distinct type of activity, and was instead comparable to other activities involving ritual and ceremony, such as Boy and Girl Scout meetings. Additionally, it viewed the distinction between worship and other types of religious speech as one that cannot meaningfully be drawn by the courts.

Based upon our reading of the Supreme Court's decision in Good News Club, we do not think the district court abused its discretion in determining that the plaintiffs were substantially likely to establish that defendants violated their First Amendment free speech rights. Central to our

conclusion is a candid acknowledgment of the factual parallels between the activities described in Good News Club and the activities at issue in the present litigation.

Although the majority in Good News Club characterized the Club's activity as "the teaching of morals and character development from a particular viewpoint," 533 U.S. at. 111, this characterization cannot be divorced from Justice Souter's detailed description of the Club's activities that the majority adopted as accurate. Id. at 112 n.4. In Justice Souter's view, the Club's meetings did not consist solely of teaching, but also included elements consistent with "an evangelical service of worship." Id. at 138 (Souter, J., dissenting). The majority did not say that the meetings were somehow distinct from worship services, but simply observed that they were not "mere religious worship, divorced from any teaching of moral values." Id. at 112 n.4.

We find no principled basis upon which to distinguish the activities set out by the Supreme Court in Good News Club from the activities that the Bronx Household of Faith has proposed for its Sunday meetings at Middle School 206B. Like the Good News Club meetings, the Sunday morning meetings of the church combine preaching and teaching with such "quintessentially religious" elements as prayer, the singing of Christian songs, and communion. The church's Sunday morning meetings also encompass secular elements, for instance, a fellowship meal during which church members may talk about their problems and needs. On these facts, it cannot be said that the meetings of

the Bronx Household of Faith constitute only religious worship, separate and apart from any teaching of moral values. 533 U.S. at 112 n.4.

Because the Board of Education has authorized other groups, like scout groups, to undertake the teaching of morals and character development on school premises, there is a substantial likelihood that plaintiffs would be able to demonstrate that the Board cannot exclude, under Supreme Court precedent, the church from school premises on the ground that the church approaches the same subject from a religious viewpoint. Additionally, the defendants' school building use policy permits social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community, so long as these uses are non-exclusive and open to the public. Therefore, there is a substantial likelihood that plaintiffs would be able to demonstrate that the defendants cannot bar the church's proposed activities without engaging in unconstitutional viewpoint discrimination.

We hold the district court did not commit an error of law or fact and therefore did not abuse its discretion by determining that plaintiffs were substantially likely to establish that defendants violated their First Amendment free speech rights. Our ruling is 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.

We decline to review the trial court's further determinations that, after Good News Club, religious worship cannot be treated as an inherently distinct type of activity, and that the distinction between worship and other types of religious speech cannot meaningfully be drawn by the courts. We recognize that these conclusions are in obvious tension with our previous holding that a permissible distinction may be drawn between religious worship and other forms of speech from a religious viewpoint, Bronx Household I, 127 F.3d at 215, a proposition that was seriously undermined but not explicitly rejected in Good News Club. It is unnecessary for us to reach these issues in order to affirm the trial court's grant of a preliminary injunction in this case.

We pause, however, to note some unresolved issues that arise from the recent Supreme Court precedent that, as an appellate court, we are bound to follow. Would we be able to identify a form of religious worship that is divorced from the teaching of moral values? Should we continue to evaluate activities that include religious worship on a case-by-case basis, or should worship no longer be treated as a distinct category of speech? How does the distinction drawn in our earlier precedent between worship and other forms of speech from a religious viewpoint relate to the dichotomy suggested in Good News Club between "mere" worship on the one hand and worship that is not divorced from the teaching of moral values on the other?

Further, how would the state, without imposing its own views on religion, define which values are morally acceptable and which are not? And, if such a

choice is impossible to make, would the state be required to permit the use of public school property by religious sects that preach ideas commonly viewed as hateful? When several religious groups seek to use the same property at the same time, would not the state have to choose between them? What criteria would govern that choice? In all of this process, is there not a danger of excessive entanglement by the state in religion?

How the Supreme Court answers these difficult questions will no doubt have profound implications for relations between church and state. The American experiment has flourished largely free of the religious strife that has stricken other societies because church and state have respected each other's autonomy. Religion and government thrive because each, 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.

B. Establishment Clause

We must resolve one final issue, that is, whether it is substantially likely that defendants will not succeed in demonstrating that their denial of plaintiffs' application is necessary to avoid a violation of the Establishment Clause.

The First Amendment to the United States Constitution, applicable to the states under the Fourteenth Amendment, prohibits the enactment of any "law respecting an establishment of religion."

U.S. Const. amend I. Defendants maintain that, even if their actions infringe on plaintiffs' First Amendment rights, the infringement is justified because it is necessary to avoid an appearance of state endorsement of religion and excessive entanglement between state and religion, in violation of the Establishment Clause.

In Good News Club, the majority acknowledged that a state's interest in avoiding an Establishment Clause violation "may be characterized as compelling, and therefore may justify content-based discrimination." 533 U.S. at 112. The Court then noted that, although its precedent did not yet establish whether that interest may also justify viewpoint-based discrimination, it did not need to resolve the issue because the school did not have a valid Establishment Clause interest. Id. at 113. In so ruling, the Supreme Court emphasized that the Good News Club's meetings were held after school hours, were not sponsored by the school, and were open to all students who obtained parental consent. It also noted that the school had made its forum equally available to other organizations. Id.

In addition, the Supreme Court rejected the argument that the young age of the children attending the elementary school impermissibly increased the danger of misperception of endorsement, stating that the Court had "never extended [its] Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present." Id. at 115. The Court emphasized

that "even if [it] were to inquire into the minds of schoolchildren in [that] case, [it could not] say the danger that children would misperceive the endorsement of religion [was] any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum." Id. at 118.

Relying on the Supreme Court's Good News Club rationale, the district court here concluded that there was a substantial likelihood that the church would be able to demonstrate that the School Board does not have a valid Establishment Clause interest because the proposed meetings: (1) occur on Sunday mornings, during nonschool hours; (2) are not endorsed by the School District; (3) are not attended by any school employee; (4) are open to all members of the public; (5) and there is no evidence that any school children would be on the school premises on Sunday mornings or would attend the meetings. To this list the district court might have added that the church apparently intended to pay rent for the use of the space. The district court believed that by allowing the meetings defendants were more likely to demonstrate neutrality toward religion, and would therefore probably not violate the Establishment Clause.

In light of the Supreme Court's refusal to find a valid Establishment Clause interest in Good News Club, and the strong factual similarities between this case and Good News Club, the district court's ruling is adequately supported at this stage of the litigation. The dissent's conclusion to the contrary, in our estimation, misapplies the necessarily

deferential standard of review. We hasten to add, however, that this issue is factual and its resolution in favor of plaintiffs now does not foreclose the possibility that defendants may, with further development of the record, ultimately prevail on it.[1]

C. Res Judicata and Collateral Estoppel

As an endnote in our analysis, we hold the district court did not abuse its discretion in concluding that plaintiffs' claims were not barred by the principles of res judicata and collateral estoppels. Although defendants contend that plaintiffs' claims are barred by these doctrines they concede that a change in a controlling legal principle precludes their application. The defendants' argument that no such change has occurred is answered by our discussion.

CONCLUSION

In sum, in the district court's grant of plaintiffs' motion for a preliminary injunction we find no errors of law or clearly erroneous findings of fact that could be said to constitute an abuse of discretion. The trial court properly found that the plaintiffs' claims are entitled to a presumption of irreparable harm and that, in light of the Supreme Court's opinion in Good News Club, plaintiffs are substantially likely to prevail on the merits.

---

[1] For this very reason, the opening sentence of the dissent severely mischaracterizes the impact of our holding.

The grant of a preliminary injunction is accordingly affirmed.

MINER, Circuit Judge, dissenting:

Today, the Majority permits a public school building in the Bronx to be designated "Middle School 206B and The Bronx Household of Faith." For more than sixty years, the sovereign State of New York has not included religious worship services in the list of uses permitted in public school buildings. The Board of Education of the City of New York and Community School District No. 10 (collectively, the "School Board") have specifically excluded such usage. More than five years ago, in a case brought by the same parties as those before us today concerning the use of the same public school facilities, a panel of this court unanimously held that this longstanding legislative policy did not violate the Free Speech Clause of the First Amendment. Review of our decision was sought in the Supreme Court, and that request for review was denied. In concluding that Plaintiffs have a clear or substantial likelihood of succeeding on the merits of their First Amendment claim, the Majority thwarts the will of the people of the State and City of New York to regulate a sphere of public life that has been traditionally left to state and local democratically elected bodies, as well as casts aside a binding precedent of this court. The sole justification offered by the Majority for these actions is that facts from the rather undeveloped record in the case before us parallel those in a Supreme Court decision involving religious instruction. Because I believe that, on the record before us, such a parallel does not exist, I respectfully dissent.

I.

A.

Section 414, subdivision 1 of the Education Law of the State of New York, duly adopted by the New York Legislature and approved by the Governor, provides, in relevant part, that "[s]choolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the Trustees or board of education of the district" N.Y. Educ. Law § 414(1) (McKinney 2002). The statute confers upon boards of education the authority to promulgate reasonable regulations for the use of the schoolhouses within their school districts, subject to review on appeal to the Commissioner of Education. Id. Subject to the regulations adopted, a board of education may,

> permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes:
>
> > (a) For the purpose of instruction in any branch of education, learning or the arts.

(b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

(c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.

(d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firefighters or volunteer ambulance workers.

(e) For polling places for holding primaries and elections and for the

registration of voters and for holding political meetings. But no meetings sponsored by political organizations shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

(f) For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civic forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and

supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be non-exclusive and open to the general public.

(g) For classes of instruction for mentally retarded minors operated by a private organization approved by the commissioner of education.

(h) For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school.

(i) To provide child care services during non-school hours, or to provide child care services during school hours for the children of pupils attending the schools of the district and, if there is additional space available, for children of employees of the district, and, if there is further additional space available, the Cobleskill-Richmondville school district shall

> provide child care services for children ages three and four who need child care assistance due to lack of sufficient child care spaces. Such determination shall be made by each district's board of education, provided that the cost of such care shall not be a school district charge but shall be paid by the person responsible for the support of such child; the local social services district as authorized by law; or by any other public or private voluntary source or any combination thereof.
>
> (j) For graduation exercises held by non-for-profit elementary and secondary schools, provided that no religious service is performed.

Id.

As is apparent from the foregoing, there is no provision in New York law for the use of public schoolhouses for purposes of religious worship. (Nor is there provision for partisan political meetings and various other purposes.) Moreover, it is of note that, where admission fees are charged for uses that are ordinarily permitted, such as entertainments, meetings and similar occasions, such uses are barred where the "proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination." Id. § 414(1)(d). It is the clear policy of the State of New York to bar religious activities from the public schools to the greatest extent possible. In furtherance of the New York

policy, and in accordance with the authority conferred to promulgate regulations that "conform to the purposes and intent" of the statute relating to the uses of schoolhouses and grounds, the Board of Education of the City of New York has adopted the following regulation:

> No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purposes of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

New York City Board of Education, Standard Operating Procedures § 5.11 (formerly § 5.9).

The "religious viewpoint" language in the second sentence of § 5.11 is an exception obviously derived from Supreme Court precedent. This precedent was summed up in the most recent Supreme Court pronouncement on the use of school property for religious speech:

> [W]e reaffirm our holding in Lamb's Chapel [v. Center Moriches Union Free School District, 508 U.S. 384 (1993),] and Rosenberger [v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995),] that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground

> that the subject is discussed from a religious viewpoint. Thus, we conclude that [the school district's] exclusion of the [Good News] Club[, an evangelical Christian organization for children ages six to twelve] from use of [a public school] pursuant to its community use policy, constitutes impermissible viewpoint discrimination.

Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112 (2001).

B.

The linchpin of the Majority's conclusion that the policies described above violate the Free Speech Clause is its conclusion that "[o]n these facts, it cannot be said that the meetings of the Bronx Household of Faith constitute only religious worship, separate and apart from any teaching of moral values." The facts relied on by the Majority are taken from a self-serving letter written by Bronx Household of Faith co-Pastors Robert Hall and Jack Roberts requesting the use of Middle School ("M.S.") 206B and a self-serving affidavit submitted by Pastor Hall after his deposition was taken in this case. Both documents - probably written with the assistance of counsel[1] - tellingly decline to mention the church's intent to use M.S. 206B for worship services and instead attempt to persuade the reader that the church's proposed use of the public school involves instruction from a "religious viewpoint." While the Majority sees through this ruse by

[1] The letter was copied to counsel.

correctly observing that "plaintiffs were, in substance, renewing their prior request to conduct activities that included a weekly worship service," the Majority declines to focus on the undisputed facts elicited during Pastor Hall's deposition that put to rest any doubts about whether the church's proposed meetings are anything but religious worship services.

According to Pastor Hall, the reason why the Bronx Household of Faith requested to use M.S. 206B on Sundays between the hours of 10 a.m. and 2 p.m. was that this was the regular weekly time when it held its religious worship services. These services are held on Sundays because that day is "the Christian day of worship." The purpose of these meetings is to "engage in singing of Christian songs and psalms, to pray, to do Bible preaching and to do fellowship with other church members." The service is led by one of four men, two of whom are pastors, but the "preaching is done primarily" by the two pastors.

The service, which is preceded by an hour of Sunday school, begins at approximately 11 a.m. and lasts for about two hours. The meeting usually "opens with a prayer," which is typically followed by "a reading from a psalm," the singing of psalms, and a prayer from the congregation. Sometimes, personal testimonials are then made by members of the congregation about how the church helped them with a personal problem. Personal testimonials are followed by communion, which is "feeding a piece of bread that speaks to us of the body of Christ and drinking a cup of grape juice that speaks to us of the

blood of Christ. It is the picture of the person and work of Christ." Only "members in good standing and those who feel that they are in good standing before the Lord, in their own consciences," and have been baptized may participate in communion. Following communion is "preaching of the word of God," then more singing, and then a coffee and bagel hour, where people frequently "engage in conversation and discussion and sometimes even counseling." Baptisms are performed on rare occasions. Finally, donations are collected by attendees placing money in a "non-descript gray [offering] box with a slit in the top of it."

The services are attended mostly by church members from the community, although they are open to all. Church membership is open to anyone who has been baptized, attends a membership class and demonstrates that he "believe[s] in the basic historic[al] Christian gospel." There are currently approximately forty-seven members of the Church, and attendance at Sunday services ranges from 85 to 100 people. If the Church were permitted to use M.S. 206 for its Sunday services, it would use "a flyer to tell people where [to] meet."

At his deposition, Pastor Hall defined "worship services" as "ascrib[ing] worth, our supreme worth, to Jesus Christ." He distinguished the church from traditional clubs because it "engage[s] in the teaching and preaching of the word of God[, and it] administer[s] the sacraments of baptism and the Lord's supper." Thus, he also said that the church is not composed of "a group of people who have a common interest in the same way that stamp

collecting and coin collecting bring people together." Indeed, Pastor Hall stated his belief that the church differs from a Bible study club or group because the latter groups do not "administer the sacraments of baptism and the Lord's supper." Finally, Pastor Hall noted that the church attaches no religious significance to a structure called a "church." Thus, it does not "build churches"; it builds "meeting houses." Therefore, anywhere the congregation of the Bronx Household of Faith meets for Sunday services is, in the church's view, a church.

II.

I agree with the Majority's statement that, to prevail on their request for a mandatory preliminary injunction seeking to "stay government action taken in the public interest pursuant to a statutory or regulatory scheme," Plaintiffs must show a "clear" or "substantial" likelihood of success on their First Amendment claim. For the reasons set forth below, I find not only that Plaintiffs have fallen far short of carrying this heavy burden but also that their attempt to do so is barred by the doctrines of stare decisis, res judicata and collateral estoppel.[2]

---

[2] Because I find that Plaintiffs have failed to carry their burden of showing a clear or substantial likelihood of success on the merits, I do not address whether the District Court abused its discretion in concluding that Plaintiffs have made out a showing of irreparable harm.

A.

As the Majority correctly observes, we are "tread[ing on] familiar ground." In Bronx Household of Faith v. Community School District No. 10, 127 F.3d 207 (2d Cir. 1997) ("Bronx Household I"), the same Plaintiffs that are currently before us challenged the constitutionality of the School Board's denial of their request to hold religious worship services at M.S. 206B. After concluding that M.S. 206B was a "limited public forum,"[3] see id. at 212-14, we turned to the question of whether "'the distinctions drawn [by the School Board were] reasonable in light of the purpose served by the forum and [were] viewpoint neutral,'" id. at 211-12 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund Inc., 473 U.S. 788, 806 (1985)). We answered these questions in the affirmative, finding that it was reasonable "for a state and a school district to adopt legislation and regulations denying a church permission to use school premises for regular religious worship" and that it was "reasonable for state legislators and school authorities to avoid the identification of a middle school with a particular church." Bronx Household I, 127 F.3d at 214. With respect to viewpoint neutrality, we found that "the regulation in question specifically permit[ted] any and all speech from a religious viewpoint" but that it did not "permit . . . religious worship services," which had never been permitted to be conducted at the

[3]There seems to be no serious question that M.S. 206B is a limited public forum. See Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829-30 (1995).

school. Id.[4] Subsequent to our decision, certiorari was sought and denied. See 523 U.S. 1074 (1998).

B.

Our decision in Bronx Household I thus presents Plaintiffs with several obstacles to overcome in making their showing of a clear or substantial likelihood of success on the merits of their First Amendment claim. First, Plaintiffs face the doctrine of stare decisis. "A decision of a panel of this [c]ourt is binding unless and until it is overruled by the [c]ourt en banc or by the Supreme Court." Jones v. Coughlin, 45 F.3d 677,679 (2d Cir. 1995). Second, Plaintiffs must overcome the additional hurdles of res judicata and collateral estoppel. A claim bought in a subsequent proceeding is barred by the doctrine of res judicata if (i) the prior action involved an adjudication on the merits, (ii) the prior action involved the same parties or their privies and (iii) the claims asserted in the subsequent action were (or could have been) raised in the prior action, and by the doctrine of collateral estoppel if (a) the issues in both proceedings were identical, (b) the issue in the prior proceeding was actually litigated and actually decided, (c) there was a full and fair opportunity to litigate in the prior proceedings and (d) the issue previously litigated was necessary to support a valid and final judgment on the merits. Irish Lesbian &

[4] We also rejected (over Judge Cabranes' partial dissent) Plaintiffs' constitutional attack against the School Board's prohibition of religious instruction. As discussed below, this part of our decision was overruled by the Supreme Court's decision in Good News Club.

Gay Org. v. Giuliani, 143 F.3d 638, 644 (2d Cir. 1998). To overcome these hurdles, Plaintiffs rely on Good News Club – a case decided by the Supreme Court more than three years after our decision in Bronx Household I – which Plaintiffs argue effectively overruled Bronx Household I.

In Good News Club, a divided panel of this court rejected a Bible club's challenge brought under the Free Speech Clause to a school district's policy prohibiting the club from holding weekly meetings on school premises after hours, where the activities conducted at the meetings included singing hymns, prayer, memorizing scripture and Bible lessons. See 202 F.3d 502 (2d Cir. 2000), rev'd, 533 U.S. 89 (2001). While never characterizing these activities as religious worship services, my opinion for the majority found that it was constitutionally legitimate for the school district to draw a distinction between discussing secular subjects from a religious viewpoint and religious instruction. These activities, we held, did "not involve merely a religious perspective on the secular subject of morality." Good News Club, 202 F.3d at 510. Rather, they offered "children the opportunity to pray with adults, to recite biblical verse, and to declare themselves 'saved.'" Id.

Accepting that "these practices [were] necessary because [the Bible club's] viewpoint [was] that a relationship with God [was] necessary to make moral values meaningful," we nevertheless concluded that it was "clear from the conduct of the meetings that the [Bible club] [went] far beyond merely stating its viewpoint." Id. Instead, it was "focused on teaching

children how to cultivate their relationship with God through Jesus Christ," and thus under, "even the most restrictive and archaic definitions of religion, such subject matter [was] quintessentially religious." Id. Indeed, while characterizing the Bible club's activities as religious instruction instead of religious worship, we found it "difficult to see how the . . . activities differ[ed] materially from" religious worship, for "each ha[d] prayers and devotional songs; each ha[d] a central sermon or story with a message; each ha[d] a portion in which attendees [were] called upon to be 'saved.'" Id. Accordingly, because "[a]pplying a different label to the same activities d[id] not change their nature or import," id., we found the school board's restrictions to be permissible content-based restrictions rather than impermissible viewpoint-based restrictions" Id. at 511.

Judge Jacobs dissented, although he characterized his agreement with the majority as being "substantia1." Id. (Jacobs, J., dissenting). Significantly, Judge Jacobs' view that the Bible club's "message [was] in fact the teach[ing of] morals from a religious perspective" was based on the fact that its "focus appear[ed] to be on teaching lessons for the living of a morally fit life, and not on worship." Id. at 515 (internal quotation marks omitted and emphasis added).

The Supreme Court granted certiorari in Good New Club and reversed, rejecting the notion that "something that is 'quintessentially religious' or 'decidedly religious in nature' cannot also be characterized properly as the teaching of morals and

character development from a particular viewpoint." 533 U.S. 98, 111 (2001). What mattered for purposes of the Free Speech Clause, the Court stated, was that there was "no logical difference in kind between the invocation of Christianity by the [Bible club] and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons." Id. Thus, the Court rejected the notion that "any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a 'pure' discussion of those issues." Id. "[R]eliance on Christian principles," the Court continued, did not "taint[] moral and character instruction in a way that other foundations for thought or viewpoints do not." Id. Rather, the Court "reaffirm[ed]" the principle "that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." Id. at 111-12. Thus, the Court concluded that the school district's exclusion of the Bible club from using the school to provide religious instruction constituted impermissible viewpoint discrimination. Id. at 112.[5]

---

[5] I here note my understanding of the hierarchical nature of the Federal Court System and the need to follow Supreme Court precedent where it can be ascertained. I say this because the Supreme Court found my failure, as author of the subsequently reversed Lamb's Chapel case in our court, see Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381 (2d Cir. 1992), rev'd, 508 U.S. 384 (1993), to cite Lamb's Chapel in the opinion for our court in Good News Club, to be "particularly incredible." 533 U.S. at 109 n.3. I was quite aware of the Lamb's Chapel case and cited it extensively in Bronx Household I, which was in turn cited extensively in our court's Good News Club opinion. It seemed to me then that Lamb's Chapel just did not govern the evangelical activities described

C.

Our holding in Bronx Household I that religious worship services could be prohibited from being held in public school buildings without running afoul of the Free Speech Clause remains good law, notwithstanding the Supreme Court's holding in Good News Club that constitutionally meaningful distinctions could not be drawn between religious and secular viewpoints in the context of religious instruction conducted in those same school buildings.[6] The Majority recognizes as much when it seeks to distance itself from the District Court's determinations that "religious worship cannot be treated as an inherently distinct type of activity, and that the distinction between worship and other types

---

in Good News Club. The Supreme Court majority did find a similarity, and that is the law of the land, right or wrong.

[6] The Majority seems to suggest that the vacatur and remand by the Supreme Court of the Fifth Circuit's decision in Campbell v. St. Tammany's School Board, 206 F.3d 482 (5th Cir. 2000), vacated and remanded, 533 U.S. 913 (2001), in light of Good News Club somehow demonstrates that the Court rejected our holding in Bronx Household I concerning religious worship services in public schools. But, in taking such action, the Court did not express its views on the merits of the Fifth Circuit's decision. In fact, the Court's decision to vacate and remand a lower court's decision in light of a recently decided case does not necessarily mean that the lower court's decision was incorrectly decided. Indeed, in several such cases, the Court has later declined to review the case notwithstanding the fact that the lower court did not change its conclusion on remand. See, e.g., Carter v. Johnson, 131 F.3d 452 (5th Cir. 1997), cert. denied, 523 US. 1099 (1998); Stutson v. United States, 128 F.3d 733 (11th Cir. 1997) (mem.), cert. denied, 522 U.S. 1135 (1998).

of religious speech cannot meaningfully be drawn by the courts." As the Majority correctly observes, these determinations "are in obvious tension with our previous holding that a permissible distinction may be drawn between religious worship and other forms of speech from a religious viewpoint . . . a proposition that was . . . not explicitly rejected in Good News Club," Thus, the Majority appears to concede that, if the activities conducted at Bronx Household of Faith meetings are inherently religious worship and nothing else, our decision in Bronx Household I would govern and this action would be dismissed on the grounds of res judicata and collateral estoppel.

In reaching its conclusion that Plaintiffs have shown a substantial or clear likelihood that they will succeed on the merits of their Free Speech Clause claim, the Majority finds "no principled basis upon which to distinguish the activities set out by the Supreme Court in Good News Club from the activities that [Plaintiffs have] proposed for its Sunday meetings at [M.S.] 206B." In particular, the Majority concludes that these activities do not "constitute only religious worship, separate and apart from any teaching of moral values." For the reasons set forth below, I do not believe that such a conclusion can be supported on the present record. Indeed, my view of the record is that it supports the exact opposite conclusion.

Even though the Supreme Court's analysis in Good News Club was confined to religious instruction rather than religious worship services, the Majority attempts to extrapolate that analysis to the case at bar based on the Court's response to the

characterization of the facts in Good News Club by Justice Souter in his dissenting opinion. In particular, Justice Souter opined that the Bible club "intend[ed] to use the public school premises not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion." Good News Club, 533 U.S. at 138 (Souter, J., dissenting).

The specific facts to which Justice Souter alluded were that the Bible club's meetings began and ended with a prayer and that "at the heart of the meeting" was the "'challenge' and 'invitation,'" which were "repeated at various times throughout the lesson" and which involved "saved children" being "challenged to stop and ask God for the strength and the want . . . to obey Him" and "unsaved children" being "invite[d] . . . to trust the Lord Jesus to be [their] Savior from sin, and receiv[e] [him] as [their] Savior from sin." Id., at 137-38 (internal quotation marks omitted). The Good News Club majority responded to Justice Souter in a footnote by characterizing his "recitation of the [Bible club's] activities" as "accurate," but it declined to characterize the Bible club's activities as "mere religious worship, divorced from any teaching of moral values." Id. at 112 n.4. What mattered, according to the Good News Club majority, was that the substance of the Bible club's activities involved conveying ideas from a religious viewpoint. Id.

Based on the interchange between Justice Souter and his colleagues, the Majority concludes that the "factual parallels between the activities described in

Good News Club and the activities at issue" here justify its conclusion that there is a substantial or clear likelihood that Plaintiffs will prevail in showing that the School Board's prohibition against religious worship services in public schools constitutes viewpoint discrimination, To quote from Justice Souter's dissent in Good News Club, the activities at issue here make this case as different from Good News Club "as day from night." Id. at 137 (Souter, J., dissenting),

Here, the "meeting" is led by a member of the clergy, who leads the attendees (largely made up of members of the church's congregation) in prayer and the singing of psalms, administers Communion only to those who have been baptized, delivers a sermon from the pulpit and collects a religious offering from those present. To say that these activities are no different from secular meetings (such as a scouts meeting) where people eat, drink, sing, learn, socialize and engage in certain "rituals" like saluting the flag is to blink reality. As Judge Cabranes observed in Bronx Household I:

> Unlike religious "instruction," there is no real secular analogue to religious "services," such that a ban on religious services might pose a substantial threat of viewpoint discrimination between religion and secularism. Indeed, the dictionary definition of the term "services" in this context suggests as much: "a) public worship b) any religious ceremony...." Because "services" are by definition religious in nature, it does not appear that

> they could ordinarily be understood to serve as a vehicle for both religious and secular viewpoints."

127 F.3d at 221 (Cabranes, J., concurring in part and dissenting in part) (quoting Webster's New World Dictionary 1226 (1994)); see also Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 306-07 & n.19 (2000) (in holding that student-led prayer at public school athletic events violated Establishment Clause, Court relied on definition of "invocation" in Webster's Third New International Dictionary, which defined the term to mean "a prayer of entreaty that is usual[ly] a call for the divine presence and is offered at the beginning of a meeting or service of worship"). Indeed, in the context of the Free Exercise Clause, the Supreme Court has held that worship services constitute the exercise of religion in pure form. See Employment Div. v. Smith, 494 U.S. 872, 877 (1990) ("'[T]he exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.").

I have no quarrel with the findings of the Majority that the School Board has authorized other groups, like the Boy Scouts and Girl Scouts, to teach morals and character development on school premises, that the School Board permits social, civic and other uses pertaining to the welfare of the community, and that therefore organizations or activities that undertake and promote speech from a

religious viewpoint cannot be barred from school property. But I cannot abide the Majority's leap of logic that, based on Plaintiffs' self-serving statements that their "teaching comes from the viewpoint of the Bible" and their emphasis on the social and community aspects of the "meetings" of the church, their religious worship services are suddenly transformed into speech from a religious viewpoint. To do so would be no different from upholding the admissibility of a criminal defendant's confession made in the absence of a Miranda warning based solely upon the self-serving statements of the police that the defendant was not the subject of a custodial interrogation.

At bottom, based on the limited record before us, I find that the activities engaged in by Plaintiffs are religious worship services - nothing more and nothing less.[7] Accordingly, Plaintiffs have not met their burden of showing a clear or substantial likelihood that they will succeed on the merits of their Free Speech Clause claim, given our holding concerning religious worship in Bronx Household of Faith I and the Supreme Court's failure to disturb that holding in Good News Club. Consequently, I find that the District Court abused its discretion in concluding otherwise.

---

[7] See Oxford English Dictionary 577 (2d ed. 1989) (definition 8(a) of "worship": "Reverence or veneration paid to a being or power regarded as supernatural or divine; the action or practice of displaying this by appropriate acts, rites, or ceremonies").

D.

Even if I found that the District Court did not abuse its discretion in determining that Plaintiffs had shown a likelihood of success on their Free Speech Clause Claim, I would still disagree with the Majority's conclusion that the School Board has not succeeded in demonstrating a likelihood that its prohibition against religious worship services being conducted in public schools was necessary to avoid a violation of the Establishment Clause. It cannot be gainsaid that a state has an interest in avoiding an Establishment Clause violation. See Widmar v. Vincent, 454 U.S. 263, 271 (1981) (allowing use of university open forum for worship but noting "that the interest of the University in complying with its constitutional obligations may be characterized as compelling"). In concluding that there would be no Establishment Clause violation if Plaintiffs were permitted to hold religious worship services at M.S. 206B, the Majority again relies heavily on the Supreme Court's Good News Club decision. There, the Court rejected the school district's Establishment Clause defense to its ban on religious instruction in public school buildings. As the Majority correctly observes, in doing so, the Court emphasized that the religious instruction "was held after school hours, [was] not sponsored by the school, and [was] open to all students who obtained parental consent."

Once again, I believe the Majority misses the mark. In Good News Club, the Court concluded that the risk was low that the school district would be perceived as endorsing religion because a Bible club was one of many clubs that met at the school

building to discuss its views. There was no significance to when the club wanted to hold its meetings. Here, of course, Plaintiffs have made it quite clear that they want to hold their religious worship services at M.S. 206B every Sunday morning because Sunday is "the Christian day of worship." Moreover, Plaintiffs have also made it clear that they will use flyers to advertise the fact that their religious services will be held on Sunday mornings at M.S. 206B and that they regard M.S. 206B as a "church" based on the fact that the school is where they are holding their services. Surely it cannot be gainsaid that there is a substantial risk that the School Board will be perceived as endorsing religion if flyers begin appearing in the neighborhood advertising that Bronx Household of Faith religious worship services will be held every Sunday morning at the group's new "church" located at M.S. 206B. See Altman v. Bedford Cent. Sch. Dist., 245 F.3d 49, 75 (2d Cir.), cert. denied, 534 U.S. 827 (2001).

In addition to the above concerns relating to the perceived endorsement of religion by the School Board, I am also concerned that Plaintiffs' proposed activities will create significant risks of entanglement between the School Board and religious groups.[8] The School Board's first-come-first-serve policy of assigning space in public schools to groups that request it may work fine when the

[8] That the Majority shares this concern is demonstrated by the cataloging of issues "unresolved" by the Supreme Court and found in Part IV. A of the Majority Opinion. These issues speak to the need to adhere to our precedent until the Supreme Court speaks.

users are largely ambivalent about which day or night of the week they can be allocated space. But what will happen when other churches, synagogues and mosques in New York City follow Plaintiffs' lead and request use of school facilities during specific and limited time periods when these groups are required by their religions to worship and the supply of space is not sufficient to accommodate the demand? The quantity and quality of entanglement between school officials and religious groups in these circumstances goes well beyond what was involved in Good News Club. Accordingly, the use of a publicly financed building for private religious worship services, prohibited in New York through the democratic process,[9] simply runs afoul of the Establishment Clause.

III.

I end with a response to the historical justifications for the Church-State merger accomplished in this case advanced by the Becket

[9] In a dispatch to the New York Times earlier this year, it was reported that a Justice of the Supreme Court gave a speech in which he noted, as is his wont, that the constitutional separation of church and state has not been correctly interpreted by his Court or by the lower courts. In response to a sign saying: "Get religion out of our government," carried by a demonstrator during the speech, the Justice is reported to have remarked: "I have no problem with that philosophy being adopted democratically." See N.Y. Times, Jan. 13, 2003, at A19. The exclusion of religious worship services from New York public school buildings was adopted democratically.

Fund for Religious Liberty in its amicus brief. [10] The Becket Fund apparently invokes the shade of Thomas Jefferson in its brief to justify the use of public buildings for church services because Jefferson is said to have attended services in the hall of the House of Representatives. As the author of the Virginia Statute of Religious Freedom, a strong supporter of popular sovereignty and states' rights, including the rights of nullification and secession, a critic of the Supreme Court's assumption of the power to declare state laws unconstitutional, and an Atheist (at least so considered by some), Jefferson lends little support to the position taken by the Becket Fund in this case.[11] Indeed, given that during Jefferson's lifetime the First Amendment applied only to the federal government and not the states, it seems strange to suggest that Jefferson would have countenanced (1) a federal court declaring

---

[10] Amicus briefs were also filed on behalf of the New York State School Boards Association, Inc. and the United Federation of Teachers, as well as by the United States. It is surprising that the United States has taken the unusual position of filing an amicus brief supporting Plaintiffs in this court, especially given the current administration's policies favoring state and local control over education and its aversion to "activist federal judges" who seek to substitute their judgment in the place of democratically elected state and local policymakers.

[11] See, e.g., Noble E. Cunningham, Jr., In Pursuit of Reason: The Life of Thomas Jefferson 55-58, 164-67, 217-19, 225 (1987); Stanley Elkins & Eric McKitrick, The Age of Federalism: The Early American Republic, 1788-1800 at 197, 719-21 (1993); James F. Simon, What Kind of Nation: Thomas Jefferson, John Marshall and the Epic Struggle to Create a United States 21,58-61, 285-88 (2002).

unconstitutional a policy, (2) adopted pursuant to a state statute, (3) prohibiting worship services from being conducted on public school property.[12]

Absent from the Becket Fund's amicus brief is any recognition of the unbroken tradition of federal court deference in constitutional cases to democratically elected state and local governments in matters concerning education. See, e.g., Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977) ("[L]oca1 autonomy of school districts is a vital national tradition."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973) (same).[13] It has been said that

---

[12] As for the attendance of John Quincy Adams at church services in the Supreme Court chambers, also invoked in the Becket Fund's amicus brief, suffice it to say that, like the hall of the House of Representatives, (1) no legislation excluded chambers from being used for services; (2) chambers was not a facility devoted to the public education of children, even in the time of John Quincy Adams; and (3) the period of use is unknown. Considering the present direction of Supreme Court decisions in the area of church-state separation, however, see, e.g., Zelman v. Simmons-Harris, 536 U.S. 639 (2002), we may once again see church services conducted in the Supreme Court courtroom.

[13] See also Missouri v. Jenkins, 515 U.S. 70, 131-32 (1995) (Thomas, J., concurring) ("We have long recognized that education is primarily a concern of local authorities. . . . Federal courts do not possess the capabilities of state and local school officials in addressing difficult educational problems. State and local school officials not only bear the responsibility for educational decisions, they also are better equipped than a single federal judge to make the day-to-day policy, curricular, and funding choices necessary to bring a school district into compliance with the Constitution."); United States v. Lopez, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) ("It is well

> [i]n pioneer times and during the era of the one-room country schoolhouse, before automobile transportation became commonly available, it probably was not at all unusual, in many rural and village areas, for the residents of the neighborhood to use the public schoolhouse as a meeting place for many community nonschool purposes, during nonschool time[, including] for holding Sunday church services or Sunday school meetings, or for evangelical or other religious meetings in the evenings, often because it was the only available building or hall in the community which could accommodate such a gathering.

CT. Foster, Annotation, Use of Public School Premises for Religious Purposes During Nonschool Time, 79 A.L.R.2d 1148, 1150 (1961). However, such use was subject to a critical condition: that the "utilization of the public schoolhouse as a meeting place for religious services, outside of school time, where permitted by school authorities, generally was allowed pursuant to common consent of the inhabitants of the region." Id. (emphasis added) Here, the inhabitants of the State of New York have for decades withheld such consent.[14] Indeed, the fact that the policy in question here has been an affirmative policy of the State of New York for

---

established that education is a traditional concern of the states.").

[14]Moreover, the present-day availability of meeting places is much greater than it was in pioneer days.

almost three quarters of a century also militates in favor of its constitutionality. See Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970) ("Yet an unbroken practice of according [a tax] exemption to churches openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside." (emphasis added)).

IV.

I believe that Plaintiffs' claims are barred by collateral estoppel and res judicata, as well as stare decisis. I therefore disagree with my colleagues that Plaintiffs have made a clear or substantial showing of a likelihood of success on the merits. Accordingly, I would vacate the preliminary injunction and remand the case to the District Court with instructions to enter a judgment dismissing the action with prejudice.

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF NEW YORK

THE BRONX HOUSEHOLD OF FAITH, ROBERT HALL and JACK ROBERTS, Plaintiffs,	:	01 Civ. 8598 (LAP)
-v.-	:	OPINION
THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and COMMUNITY SCHOOL DISTRICT NO. 10, Defendants.	:	

LORETTA A. PRESKA, United States District Judge:

Plaintiffs The Bronx Household of Faith, Robert Hall and Jack Roberts bring this action against defendants Board of Education of the City of New York and Community School District No. 10 ("School District") alleging violations of the Free Exercise, Free Speech, Free Assembly and Establishment Clauses of the First Amendment, the Equal Protection Clause and Sections 3, 8 and 11 of Article I of the New York Constitution. Plaintiffs move for a preliminary injunction to prevent defendants from

denying plaintiffs' application to rent space in Public School M.S. 206B, Anne Cross Merseau Middle School ("M.S. 206B"), for Sunday morning meetings that include religious worship. For the reasons set forth below, the motion for a preliminary injunction is granted.

BACKGROUND

Bronx Household -- District Court

In 1995, plaintiffs brought an action in this Court challenging the School District's denial of plaintiffs' request to rent space in M.S. 206B in September 1994 for Sunday morning meetings that include religious worship. Bronx Household of Faith v. Cmty. 8ch. Dist. No. 10, No. 95 Civ. 5501 (LAP), 1996 WL 700915, at *1 (S.D.N.Y. Dec. 5, 1996). The School District's denial was based on its "Standard Operating Procedures: Topic 5: Regulations Governing the Extended Use of School Facilities" ("SOP") and New York Education Law § 414 (McKinney's 1995), both of which prohibited rental of school property for the purpose of religious worship. Id. Specifically, section 5.9 of the SOP provided:

> No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

Id. New York Education Law § 414 provided that school facilities could be used for meetings, with the following exception:

> [S]uch use shall not be permitted if such meeting, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization . . . .

Id. at *2.

In considering plaintiffs' free speech claim, I found that the School District had created a limited public forum and that its regulations "constitute[d] reasonable regulations of expression related to the legitimate government concern of preserving and prioritizing access to the Middle School primarily for educational purposes and, secondarily, for nonexclusive public and community activities." Id. at *6. I denied plaintiffs' motion for summary judgment and granted defendants' cross-motion for summary judgment. Id.

Bronx Household -- Court of Appeals

The Court of Appeals affirmed the judgment, see 127 F.3d 207 (2d Cir. 1997), and the Supreme Court denied certiorari, see 523 U.S. 1074 (1998). In connection with its holding that M.S. 206B was "not an open public forum as that term has been defined

by the Supreme Court," Bronx Household, 127 F.3d at 213, the Court of Appeals noted the distinction made by the Supreme Court in, inter alia, Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819 (1995), and Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993), "between discrimination against speech because of its subject matter, considered permissible to preserve the purposes of the limited forum, and viewpoint discrimination, considered impermissible if directed against speech within the limitations of the forum." Bronx Household, 127 F.3d at 213 (citations omitted). The Court found that:

> SOP 5.9 preserves that distinction by prohibiting religious worship and religious instruction by outside groups, a prohibition that state authorities consider necessary to preserve the purposes of the limited public school forum, and by specifically permitting religious viewpoint speech in relation to matters for which the public school forum is open.

Id. The Court found the regulations to be reasonable, ("[w]e think that it is reasonable in this case for a state and a school district to adopt legislation and regulations denying a church permission to use school premises for regular religious worship" (id. at 214)), and the regulations to be viewpoint neutral, (id. at 215). In so finding, the Court noted that:

> the regulation in question specifically permits any and all speech from a religious

> viewpoint. What it does not permit is religious worship services.

Id. In elaborating on the distinction, the Court observed that:

> [t]he purposes for which the schools in District # 10 have been opened to outside organizations encompass a wide variety of civic and social uses, and any speech conducted in connection with those uses may be bottomed on a religious viewpoint. Worship and religious instruction are forms of speech and cannot be prohibited in an open forum such as a public university. See Widmar [v.Vincent], 454 U.S. [263,] 269 n.6, 102 S. Ct. [269,] 274 n.6 [1981]. Indeed, religious worship services may well be considered the ultimate in speech from a religious viewpoint in an open forum. But the question is whether a distinction can be drawn between it and other forms of speech from a religious viewpoint that District # 10 has elected to allow in the limited forum of a public middle school. We think it can.

Id. at 214-15. Indeed, the Court of Appeals was of the opinion that the "distinction between [discussion of secular matters from a religious viewpoint] on one hand, and religious services and instruction on the other, is not difficult for school authorities to make." Id. at 215.

Good News Club – Court of Appeals

Approximately two and one-half years after its decision in Bronx Household, the Court of Appeals decided The Good News Club v. Milford Central School, 202 F.3d 502 (2d Cir. 2000), rev'd, 533 U.S. 98 (2001), which affirmed the District Court's grant of summary judgment to a defendant school district. There, The Good News Club ("Good News Club" or the "Club"), "a community-based Christian youth organization open to children between the ages of six and twelve," id. at 504, sought to use school facilities for after-school meetings of children with parental permission to "have 'a fun time of singing songs, hearing [a] Bible lesson and memorizing scripture.'" Id. at 507. The Milford Central School District ("Milford") had adopted a policy in accordance with New York Education Law § 414 (the "Community Use Policy"). Id. at 504. The Community Use Policy provided that residents of the district could use school facilities for "holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public." Id. The Community Use Policy, however, also provided that:

> School premises shall not be used by any individual or organization for religious purposes. Those individuals and/or organizations wishing to use school facilities and/or grounds under this policy shall indicate on a Certificate Regarding Use of School Premises form provided by the District that any intended use of school premises is in accordance with this policy.

Id. The parties agreed that the school district had opened a limited public forum. Id. at 509. Finding that the proposed use was "the equivalent of religious worship . . . rather than the expression of religious views or values on a secular subject matter," the Interim Superintendent of Schools in Milford denied the Club's request, id. at 507, and the District Court upheld that denial, id. at 508.

On appeal, the Court of Appeals reviewed the activities proposed by the Club. It noted that as children arrived for the meetings, those who recalled and recited a "memory verse" from the previous meeting were rewarded with a prize. Id. at 504. The meeting officially began with a prayer recited by a minister, and the group sang The Good News theme song, which refers to Christ. Id. at 504-05. The next portion of the meeting

> involves a "moral or value" lesson centered around a verse from either the Old or the New Testament and its teachi.ng. To learn the "memory verse" for the lesson, the Club members play games that focus on repetition of the verse. Next, the children are told a Bible story that emphasizes the same moral value that is represented in the day's memory verse. The story concludes with a "challenge and invitation" segment, which challenges the children to live by the value taught in the day's lesson through trust in God and Jesus Christ. Depending on the elapsed time, when the story is concluded, the group leader may ask the

> children questions about the story or play a game that emphasizes the teaching in the story. The group may also sing a song that relates to the story.

Id. at 505.

In arguing that Milford's application of the Community Use Policy was not viewpoint neutral, the Club noted that just like the Boy Scouts, Girl Scouts and 4-H Clubs, it taught moral values and argued that it was excluded from school facilities because it sought to teach moral values from a Christian viewpoint. Id. at 509. The majority found that the Club's argument that the restriction was unreasonable was foreclosed by its holding in Bronx Household. See id. ("[I]t is a proper state function to decide the extent to which church and school should be separated in the context of the use of school premises." (quoting Bronx Household, 127 F.3d at 214)). More specifically, the majority responded that "[t]hough [the Club's] teachings may involve secular values such as obedience or resisting jealousy, the Christian viewpoint, as espoused by Reverend Fournier [, pastor of Milford Center Community Bible Church, husband of one of the plaintiffs and father of another,] contains an additional layer:

> [T]hese morals or these values are senseless without Christ, that's to the children who know Christ as Savior, we would say, you know you cannot be jealous because you know you have the strength of God. To the children who do not know Christ, we would say, you need Christ as

> your Lord and Savior so that you might overcome these, you know, feelings of jealousy."

Id. at 509-10 (footnote omitted).

Thus, the majority concluded that the Club "is doing something other than simply teaching moral values. [It is] focused on teaching children how to cultivate their relationship with God through Jesus Christ. Under even the most restrictive and archaic definitions of religion, such subject matter is quintessentially religious." Id. at 510. The majority observed that, as had been noted in the Court's opinion in Bronx Household, it was not difficult to discern that "the activities of the Club fall clearly on the side of religious instruction and prayer," id., and that the Club's activities could be readily compared to "religious worship," id. The majority rejected the Club's argument that its activities were akin to the Boy Scouts', Girl Scouts and 4-H Clubs' teaching of moral values, albeit from a Christian viewpoint. It found, for example, that:

> [w]hile the Boy Scouts teach reverence and a duty to God generally, this teaching is incidental to the main purpose of the organization, which is personal growth and development of leadership skills. Moreover, there is nothing in the record to indicate that the Boy Scouts require any particular means of demonstrating reverence and duty to God. Similarly, the Girl Scouts vow to "try . . . [t]o serve God and [their] country."

Id. at 511 (footnote omitted). Accordingly, the majority found that the school excluded the Club on the basis of "content, not viewpoint." Id.

In dissent, Judge Jacobs criticized the majority's finding that the school district excluded the Club on the basis of content, not viewpoint. He wrote:

> The majority rules against Good News nevertheless on the basis of two complementary distinctions. First, although the school district would be obliged to accept "an organization seeking to teach morals from a religious perspective," the school district is not obliged to accept a "religious youth organization that proposed religious instruction and prayer." See Maj. Op. at 508. Second, the majority emphasizes that the Club discusses "religious material through religious instruction and prayer" rather than "secular subjects from a religious viewpoint." See Maj. Op. at 510 (citing Bronx Household of Faith, 127 F.3d at 215).
>
> On the basis of these two distinctions, the majority concludes that the Club's rejection was based solely upon the subject matter of its meetings and not upon its religious viewpoint. In my view, when the subject matter is morals and character, it is quixotic to attempt a distinction between

> religious viewpoints and religious subject matters.

Id. at 512 (emphasis added) (Jacobs, J., dissenting). Judge Jacobs emphasized that "[t]he distinction between content discrimination and viewpoint discrimination is elusive and subtle," id. at 514, citing Rosenberger, 515 U.S. at 829 ("Viewpoint discrimination is . . . an egregious form of content discrimination."), and Good News/Good Sports Club v. school District, 28 F.3d 1501, 1506-07 (8th Cir. 1994) ("[T]he Supreme Court has 'refused to cabin religious speech into a separate excludible speech category; rather, the Court [has] adopted a more expansive view, recognizing that a religious perspective can constitute a separate viewpoint on a wide variety of seemingly secular subject matter.'"). He then offered his analysis:

> The school district allows use of its facilities by certain groups that focus on "moral development" of young people. The majority argues that the activities of the Club are "quintessentially religious," while the other groups deal only with the "secular subject of morality." Maj. Op. at 510. The fallacy of this distinction is that it treats morality as a subject that is secular by nature, which of course it may be or not, depending on one's point of view. Discussion of morals and character from purely secular viewpoints of idealism, culture or general uplift will often appear secular, while discussion of the same issues from a religious viewpoint will often appear

essentially -- quintessentially -- religious. There is no indication when 'singing hymns, reading scripture, and teaching biblical principles' cease to be 'singing, teaching, and reading' -- all apparently forms of 'speech,' despite their religious subject matter -- and become unprotected 'worship.'" Widmar v. Vincent, 454 U.S. 263, 269 n. 6, 102 S. Ct. 269, 274 n.6, 70 L. Ed. 2d 440 (1981) (internal citation omitted). Because the Club's focus appears to be on teaching lessons for the living of a morally fit life, and not on worship, I believe that the Club's message is in fact the teach[ing of] morals from a religious perspective," Maj. Op. at 508.

Even if one could not say whether the Club's message conveyed religious content or religious viewpoints on otherwise-permissible content, we should err on the side of free speech. The concerns supporting free speech greatly outweigh those supporting regulation of the limited public forum.

* * *

Whenever public officials, in executing the school's access policy, evaluate private speech "to discern [its] underlying philosophic assumptions respecting religious theory and belief," the result is "a denial of the right of free speech."

> Rosenberger, 515 U.S. at 845, 115 S. Ct. at 2525.

Id. at 515 (Jacobs, J., dissenting)

Good News Club -- Supreme Court

The Supreme Court granted certiorari in Good News Club to resolve the "conflict among the Courts of Appeals on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech." 533 U.S. at 105. In listing the cases evidencing the conflict, the Court included the Court of Appeals' opinion in Bronx Household, 127 F.3d 207, which it characterized as "concluding that a ban on religious services and instruction in the limited public forum was constitutional," for comparison to the Eighth Circuit's opinion in Good News/Good Sports Club, 28 F.3d 1501. Good News Club, 533 U.S. at 105-06. Ultimately, the Court reversed the Court of Appeals' holding in Good News Club (thus casting doubt on the Court of Appeals' opinion in Bronx Household)

In analyzing the Club's free speech claim, the Court accepted the parties' agreement that Milford had created a limited public forum. Justice Thomas, writing for the majority, noted that Milford had opened its facilities to events "pertaining to the welfare of the community," including "the development of character and morals from a religious perspective." Id. at 108. But the Court disagreed with the Court of Appeals' belief "that its characterization of the Club's activities as religious in nature warranted treating the Club's activities as different

in kind from the other activities permitted by the school." Id. at 110-11. Justice Thomas wrote:

> We disagree that something that is "quintessentially religious" or "decidedly religious in nature" cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint. See 202 F. 3d, at 512 (Jacobs, J., dissenting) ("[W]hen the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters"). What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons. It is apparent that the unstated principle of the Court of Appeals' reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a "pure" discussion of those issues. According to the Court of Appeals, reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not. We, however, have never reached such a conclusion. Instead, we reaffirm our holdings in Lamb's Chapel and Rosenberger that speech discussing otherwise permissible subjects cannot be

> excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint. Thus, we conclude that Milford's exclusion of the Club from use of the school, pursuant to its community use policy, constitutes impermissible viewpoint discrimination.

Id. at 111.

Of particular relevance here is the footnote following that holding that states:

> Despite Milford's insistence that the Club's activities constitute "religious worship," the Court of Appeals made no such determination. It did compare the Club's activities to "religious worship," 202 F.3d, at 510, but ultimately it concluded merely that the Club's activities "fall outside the bounds of pure 'moral and character development'" id., at 511. In any event, we conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values.
>
> Justice Souter's recitation of the Club's activities is accurate. See post, at 2116-2117 (opinion of Souter, J.). But in our view, religion is used by the Club in the same fashion that it was used by Lamb's Chapel and by the students in Rosenberger: religion is the viewpoint from which ideas are conveyed. We did not find the Rosenberger students' attempt to

> cultivate a personal relationship with Christ to bar their claim that religion was a viewpoint. And we see no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys. According to Justice Souter, the Club's activities constitute "an evangelical service of worship." Post, at 2117. Regardless of the label Justice Souter wishes to use, what matters is the substance of the Club's activities, which we conclude are materially indistinguishable from the activities in Lamb's Chapel and Rosenberger.

Id. at 112 n.4 (emphasis added).

Justice Souter, joined by Justice Ginsburg, described the substance of the Club's activities in detail in his dissent[1] and, after characterizing those

---

[1] As Justice Souter detailed:

> Good News's classes open and close with prayer. In a sample lesson considered by the District Court, children are instructed that "[t]he Bible tells us how we can have our sins forgiven by receiving the Lord Jesus Christ. It tells us how to live to please Him . . . . If you have received the Lord Jesus as your Savior from sin, you belong to God's special group--His family." App. to Pet. for Cert. C17-C18 (ellipsis in original). The lesson plan instructs the teacher to "lead a child to Christ," and, when reading a Bible verse, to "[e]mphasize that this verse is from the Bible, God's Word" and is "important--and true--because God said it." The lesson further exhorts the teacher to "[b]e sure to give an opportunity for the 'unsaved' children in your class to respond to the Gospel" and cautions against "neglect[ing] this responsibility." Id., at C20.
>
> While Good News's program utilizes songs and games, the heart of the meeting is the "challenge" and "invitation," which are repeated at various times throughout the lesson. During the challenge, "saved" children who "already believe in the Lord Jesus as their Savior" are challenged to "'stop and ask God for the strength and the "want" . . . to obey Him.'" Ibid. They are instructed that
>
> > "[i]f you know Jesus as your Savior, you need to place God first in your life. And if you don't know Jesus as Savior and if you would like to, then we will--we will pray with you separately, individually. . . . And the challenge would be, those of

activities as "an evangelical service of worship," id. at 138 (Souter, J., dissenting), criticized the majority's rejection of that characterization as "merely semantic," id. at 138 n.3.

Bronx Household's Present Application

Following the Good News Club decision, on July 6, 2001, plaintiffs wrote a letter to Frank Pagliuca, the Director of School Facilities and planning for the School District. (Declaration of Frank Pagliuca, sworn to on Dec. 5, 2001 ("Pagliuca Decl."), Ex. A). Plaintiffs wrote that, in light of Good News Club,

---

> you who know Jesus as Savior, you can rely on God's strength to obey Him." Ibid.
>
> During the invitation, the teacher "invites" the "unsaved" children "'to trust the Lord Jesus to be your Savior from sin,'" and "'receiv[e] [him] as your Savior from sin.'" Id., at C21. The children are then instructed that
>
> > "[i]f you believe what God's Word says about your sin and how Jesus died and rose again for you, you can have His forever life today. Please bow your heads and close your eyes. If you have never believed on the Lord Jesus as your Savior and would like to do that, please show me by raising your hand. If you raised your hand to show me you want to believe on the Lord Jesus, please meet me so I can show you from God's Word how you can receive His everlasting life." Ibid.

Id. at 137-38 (Souter, J., dissenting)

they were renewing their request to rent M.S. 206B. (Id.). Plaintiffs sought to meet at the school from 10 a.m. to 2 p.m. each Sunday morning, beginning on September 30, 2001, to engage in "singing," "the teaching of adults and children . . . from the viewpoint of the Bible" and "social interaction among members of our church, in order to promote their welfare and the welfare of the community." (Id.). On September 5, 2001, Pagliuca responded that plaintiffs appeared to intend to use the school for the same purposes that the School District initially rejected in September 1994. (Id., Ex. B). Plaintiffs allege that on or about August 16, 2001, Deborah King, an attorney for the Board of Education, informed plaintiffs' counsel that defendants "were denying [the application] because the meetings would violate the defendants' policy prohibiting religious services or instruction in the school buildings." (Compl. ¶ 15).

Pursuant to the SOP, "[t]he primary use of school premises must be for Board of Education programs and activities." (SOP 5.3).[2] "After Board of Education programs and activities, preference will be given to use of school premises for community, youth and adult group activities." (Id. 5.5). The SOP also permits school premises to be used for, among other things, the following purposes:

---

[2] The current version of the SOP, as opposed to the version that existed at the time of the first Bronx Household case, can be found at Exhibit A to the Declaration of John Musico, sworn to on December 5, 2001 ("Musico Decl.").

> 5.6.1 For the purpose of instruction in any branch of education, learning or the arts; examinations; graduations;
>
> 5.6.2 For holding social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community; but such uses shall be non-exclusive and open to the general public;
>
> 5.6.5 For civic forums and community centers in accordance with applicable law.

(Id. 5.6, 5.6.1, 5.6.2, 5.6.5). The SOP specifically forbids any outside organization or group from "conduct[ing] religious services or religious instruction on school premises after school." (Id. 5.11). The SOP further provides, however, that "the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible." (Id.).

Plaintiffs offer the following description of the types of activities that they seek to engage in at M.S. 206B:

> The Sunday morning meetings service consists of the singing of Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion, sharing of testimonies and social fellowship among the church members. . . .

In our church service, we seek to give honor and praise to our Lord and Savior Jesus Christ in everything we do. To that end we sing songs and hymns of praise to our Lord. We read the Bible and the pastors teach from it because it tells us about God, what He wants us to do and how we should live our lives . . . .

In keeping with ancient tradition, we have a light fellowship meal after the service, which consists basically of coffee, juice and bagels. This gives us opportunity to meet new people, talk to one another, share one another's joys and sorrows so as to be a mutual help and comfort to each other . . . .

The Sunday morning meeting is the indispensable integration point for our church. It provides the theological framework to engage in activities that benefit the welfare of the community. Those who attend the Sunday morning meetings are taught to love their neighbors as themselves, to defend the weak and disenfranchised, and to help the poor regardless of their particular beliefs. It is a venue where people can come to talk about their particular problems and needs. Over the years we have helped people with basic needs such as food, clothing, and rent. We have also provided, by means of counseling, friendship and encouragement, help for

> people to get out of the multi-generational welfare cycle, to lead productive lives, to leave a life of crime and/or drugs to become responsible citizens, and to counsel people whose personal finances are out of control. . . .
>
> In one recent case we helped an individual who was about to get evicted. Church members helped him budget his income in order to meet his primary expenses, get rid of his excessive credit card debt and pay off overdue taxes. He now has a savings account of almost $1000.00. It is through the Sunday meeting where we directly or indirectly learn of these situations and where we can converse with the individuals involved in order to monitor the progress of the issue to be resolved. . . .
>
> In years past, the church meeting was a very important place for Cambodian Refugees to come in order for us to get to know them so that we could help them with food, clothing and to help them get acclimated to American society. Most of them were Buddhists.

(First Affidavit of Robert Hall, sworn to on Dec. 13, 2001 ("Hall Aff."), ¶¶ 3-4, 7-9 (emphasis added)). The Sunday morning meetings "are open to all members of the public" and are "not closed to a limited group of people, such as church members and their guests." (Id. ¶ 5).

On September 10, 2001, plaintiffs filed a verified complaint in the instant action, seeking declaratory and injunctive relief against the School District and the Board of Education of the City of New York, both of whom were also defendants in the first case. As with the first case, plaintiffs assert here that the defendants' policy of excluding community groups from renting school buildings for purposes of "religious worship and religious instruction"--while allowing most other types of community groups to hold meetings in those buildings--"violates the Plaintiffs' rights of freedom of speech, freedom of assembly, free exercise of religion, equal protection under the law, and freedom from establishment of religion." (Compl. ¶ 1). And as with the first case, plaintiffs challenge New York Education Law § 414 and the School District's SOP 5.9 (now re-numbered, with identical language, as SOP 5.11), as applied to the plaintiffs. (Id. ¶¶ 9, 20, 24; Declaration of John Musico, sworn to on Dec. 5, 2001 ("Musico Decl."), ¶ 13).[3] In the instant case, however, plaintiffs assert that the Supreme Court's decision in Good News Club effectively reversed the Court of Appeals' decision in Bronx Household, 127 F.3d 207. (Compl. ¶ 11). Accordingly, plaintiffs allege, they renewed their request to the School District for permission to meet on Sunday mornings at M.S. 206B but were again denied permission for those meetings. (Id. ¶¶ 14-15).

---

[3] With the exception of certain changes made in October 2001 to Topic 5 of the SOP concerning political activities, the content of the SOP remains the same as it was at the time of plaintiffs' earlier application. (Musico Decl. ¶ 10).

DISCUSSION

I. Standard for Preliminary Injunction

A preliminary injunction generally may be granted when the moving party can establish both (1) irreparable harm and (2) either (a) a likelihood of success on the merits or (b) sufficient questions on the merits to "make them a fair ground for litigation and a balance of hardships tipping decidedly" in the movant's favor. Warner-Lambert Co. v. Northside Dev. Corp., 86 F.3d 3, 6 (2d Cir. 1996).

Generally, preliminary injunctions are prohibitory in nature, designed to "maintain the status quo pending a trial on the merits." Tom Doherty Assocs., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 34 (2d Cir. 1995). Where, however, the terms of an injunction would "alter, rather than preserve, the status quo by commanding some positive act, the injunction is mandatory." Air Transport Int'l, LLC v. Aerolease Fin. Group, Inc., 993 F. Supp. 118, 123 (D. Conn. 1998) (citing Tom Doherty, 60 F.3d at 34). "To obtain a mandatory injunction, the moving party must demonstrate a clear or substantial likelihood of success on the merits, or that it will suffer extreme or very serious damage if denied preliminary relief." Anderson v. Mexico Acad. & Cent. Sch., 186 F. Supp. 2d 193, 201 (N.D.N.Y. 2002) (citing Tom Doherty, 60 F.3d at 34).[4]

---

[4] As the Court of Appeals has observed, "[t]he distinction between mandatory and prohibitory injunctions is not without ambiguities or critics. Determining whether the status quo is to be maintained or upset has led to distinctions that are 'more semantic [ ] than substantive.'" Tom Doherty, 60 F.3d at 32

Here, plaintiffs seek, inter alia, to require defendants to grant plaintiffs' request to rent space in M.S. 206B for Sunday morning meetings that include religious worship. Plaintiffs currently hold their meetings either in a large house or under a canopy on a piece of property they own. (Hall Aff. ¶ 10). If plaintiffs' preliminary injunction request is granted and plaintiffs are permitted to hold their meetings at M.S. 206B, the status quo would be altered. Accordingly, because plaintiffs seek mandatory injunctive relief, they must meet a higher burden of proof before such relief will be granted.

II. Irreparable Harm

Plaintiffs' claims implicate, inter alia, their First Amendment free speech rights. (See, e. g., Compl. ¶¶ 16-21). In Amandola v. Town of Babylon, 251 F.3d 339, 343 (2d Cir. 2001), the Court of Appeals recognized that it "has not spoken with a single voice on the issue of whether irreparable harm may be presumed with respect to complaints alleging the abridgement of First Amendment rights." The great majority of recent cases in this Circuit, however, have found that such irreparable harm may be presumed. See, e.g., DeRusso v. City of Albany, No. 1:01-CV-699 (FJS/RFT), 2002 WL 1275466, at *2 (N.D.N.Y. June 4, 2002); Hershcraft v. City of New York, No. 02-CV-677 (CBA) (LB), 2002 WL 1204780, at *6 (E.D.N.Y. Feb. 15, 2002); Anderson, 186 F. Supp. 2d at 202 ("[I]f plaintiffs sustain their allegation that Mexico Academy's exclusion of their

---

(quoting Abdul Wali v. Coughlin, 754 F. 2d 1015, 1025 (2d Cir. 1985)).

bricks from the walkway violates their First Amendment rights, they will have established irreparable harm."); People for the Ethical Treatment of Animals v. Giuliani, 105 F. Supp. 2d 294, 303 (S.D.N.Y. 2000) ("'Because First Amendment rights are presumed irreparable,' allegations directly implicating these rights by their 'very nature,' satisfy the irreparable injury requirement for a preliminary injunction." (quoting Tunick v. Safir, 209 F.3d 67, 70 (2d Cir. 2000))), aff'd, 18 Fed. Appx. 35 (2d Cir. 2001); see also Elrod v. Burns, 427 U.S. 347, 373 (1976) ("[L]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Here, plaintiffs allege that defendants' denial of their application has deprived them of various constitutional rights, including their First Amendment free speech rights. (Compl. ¶¶ 16-21). Based on the authorities noted above, I find that because of the importance of these rights, going to the very foundation of our liberties, plaintiffs have demonstrated that they will suffer damage of the most serious kind if an injunction is not issued. [5]

III. Likelihood of Success on the Merits

The lengthy background section provided above is sufficient at least to determine that the Supreme

[5] That plaintiffs "do not want to meet permanently" in M.S. 206B but need additional space until their building is constructed, (Hall Aff. ¶ 11), has no legal effect on the present and continuing interference with, inter alia, their First Amendment free speech rights.

Court has cast doubt upon the Court of Appeals' majority opinion in Bronx Household. Because there has been a change in the law, another look at the situation is justified. [6] Concomitantly, the change in the law is sufficiently serious to reject defendants' assertion that plaintiff's preliminary injunction motion should be denied on the grounds of res judicata or collateral estoppel. As the Court of Appeals recently instructed, "[r]es judicata and collateral estoppel do not cement the status quo into perpetuity. '[M]odifications in "controlling legal principles" could render a previous determination inconsistent with prevailing doctrine,' and changed circumstances may sufficiently alter the factual predicate such that new as-applied claims would not be barred by the original judgment." Monahan v. New York Dep't of Corr., 214 F.3d 275, 290 (2d Cir. 2000) (citations omitted).

A. Free Speech

There is no argument that the law or the facts have changed as to the nature of the forum opened

---

[6] I note that plaintiffs did not file a motion for reconsideration pursuant to Rule 60(b) (6) of the Federal Rules of Civil Procedure, which "can be granted if there is an intervening change of controlling law." Stonewall v. 866 3rd Next Generation Hotel, LLC, No. 99 Civ. 4780 (LTS) (KNF), 2002 WL 655591, at *1 (S.D.N.Y. Apr. 19, 2002) (citing Virgin Atlantic Airways v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992)). Rather, plaintiffs filed an entirely new complaint, in which the two defendants were also defendants in the first case. The third defendant from the first case--Charles Williams, in his official capacity as the President of the Board of Education for the School District--is not a defendant in the instant case.

by the School District. Accordingly, based on principles of collateral estoppel, I deny reconsideration of that finding and adhere to my prior holding, affirmed by the Court of Appeals, (see Bronx Household, 1996 WL 700915, aff'd, 127 F.3d 207), that defendants have opened a limited public forum at M.S. 206B.

In Good News Club, the Supreme Court recited the familiar test applicable to speech in limited public fora:

> When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be "reasonable in light of the purpose served by the forum."

533 U.S. at 106-07 (citations omitted). It was the Court's application of this test in Good News Club that shifted the seeming firmament on which the prior decisions in Bronx Household were based.

1. Plaintiffs' Activities Do Not Constitute "Mere Religious Worship"

As noted above, the Court granted certiorari in Good News Club to resolve "the conflict among the

Courts of Appeals on the question of whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech." Id. at 105. The Court of Appeals' Bronx Household decision (which the Court characterized as "concluding that a ban on religious services and instruction in the limited public forum was constitutional," (id. at 105-06)), was one that the conflict was resolved against. Specifically, the Supreme Court disagreed with the Court of Appeals' belief in Good News Club that "characterization of the Club's activities as religious in nature warranted treating the Club's activities as different in kind from the other activities permitted by the school." Id. at 110-11. Also, in contrast to the Court of Appeals' view in Bronx Household that a distinction can be drawn without difficulty between religious worship services and other forms of speech from a religious viewpoint, see 127 F.3d at 214-15, the Court cited to Judge Jacobs' dissent in Good News Club where he termed attempts to make such a distinction "quixotic" when the subject is morals and character. Good News Club, 533 U.S. at 111 (quoting Good News Club, 202 F.3d at 512 (Jacobs, J., dissenting)). The Court specifically held that, in its assumed limited public forum, Milford could not prohibit activities that, while "quintessentially religious," were not "mere religious worship, divorced from any teaching of moral values." Id. at 111 & 112 n.4.

Applying the Court's holding in Good News Club to the facts at issue, plaintiffs have demonstrated a substantial likelihood of success in showing that the School District's rejection of plaintiffs' application violates their First Amendment free speech rights.

As noted above, in Good News Club, the Court held that Milford could not prohibit activities such as prayer and religious instruction--activities characterized by the Court as "quintessentially religious"--that were otherwise consistent with the Board's policy of permitting "teaching of morals and character development, from a particular viewpoint." Id. at 111. While declining to label the activities there at issue, the Court noted that they were not "mere religious worship, divorced from any teaching of moral values." Id. at 112 n.4.

Here, like in Good News Club, the Church's proposed activities cannot be categorized as "mere religious worship, divorced from any teaching of moral values" or other activities permitted in the forum.[7] Certain activities the Church seeks to engage

---

[7] The significance of the identification of those activities permitted in a particular forum--the teaching of moral values in Good News Club--is highlighted by Amandola, 251 F.3d 339, which was decided prior to the Supreme Court's Good News Club decision. There, a church and its pastor brought suit against the Town of Babylon (the "Town") and James Namely, the Town's Commissioner of General Services. Id. at 341. Plaintiffs had applied to use the Town Hall Annex, a limited public forum, "for purposes of Bible study" every Thursday evening and Sunday morning. Id. Plaintiffs' application was approved and they met three times. Id. After that, the pastor advertised in a local classified ad that the church was opening its services to the public "as a 'new ministry' and inviting the public to attend its Thursday evening Bible study meetings and Sunday morning services at the Annex." Id. Shortly thereafter, the Town revoked plaintiffs' permit. Id. Plaintiff then commenced the action and moved for a preliminary injunction. Id.

in are "quintessentially religious," e.g., prayer and communion (Hall Aff. ¶¶ 3-4), and, if conducted in isolation, could arguably fall within the category of mere religious worship. The other proposed activities, however, are clearly consistent with the type of activities previously permitted in the forum and consistent with activities expressly permitted by the School District's SOP. As SOP 5.6 states, "school premises may . . . be used for the following purposes: . . . [f]or holding social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community." Plaintiffs' proposed activities include several benefitting the welfare of the community:

> Over the years we have helped people with basic needs such as food, clothing, and rent. We have also provided, by means of

---

The Court of Appeal s held that the Town's revocation of plaintiffs' permit was a violation of plaintiffs' First Amendment right to free speech. Id. at 344. The Court reasoned that:

> [b]ecause the written policy itself was utterly silent on the issue of whether the Annex could be used for religious activities of any kind, it could not serve as the basis for a reasonable, viewpoint neutral exclusion from the Annex of religious worship services, such as those conducted by the Church.

Id. Specifically, the Court noted that because the Town had the right to refuse or terminate permission to use the Annex "for any reason," Namely had "unfettered discretion 'to discriminate based on the content or viewpoint of speech,'" which was impermissible under the First Amendment. Id. (citation omitted).

> counseling, friendship and encouragement, help for people to get out of the multi-generational welfare cycle, to lead productive lives, to leave a life of crime and/or drugs to become responsible citizens, and to counsel people whose personal finances are out of control.

(Hall Aff. ¶ 7; see also Letter from Hall and Roberts to Pagliuca of 7/6/01 (referring to the "welfare of the community")). The proposed activities also include the teaching of moral values--another activity benefitting the welfare of the community. (Hall Aff. ¶ 7) ("Those who attend the Sunday morning meetings are taught to love their neighbors as themselves, to defend the weak and disenfranchised, and to help the poor regardless of their particular beliefs."). Further, the proposed activities include singing, socializing and eating--clearly recreational activities. (Id. ¶¶ 3, 5-8). Therefore, the facts presented here fall squarely within the Supreme Court's precise holding in Good News Club: the activities are not limited to "mere religious worship" but include activities benefitting the welfare of the community, recreational activities and other activities that are consistent with the defined purposes of the limited public forum. [8] Pastor Hall's testimony that "the

[8] It should be noted that while plaintiffs' proposed activities include, inter alia, the teaching of moral values, and, thus, are not "mere religious worship, divorced from any teaching of moral values" within the meaning of Good News Club's footnote 4, the teaching of moral values is not necessarily required. In Good News Club, the School District opened its forum to, inter alia, events "pertaining to the welfare of the community" which the Board interpreted as permitting use by any group that

Sunday morning meeting . . . provides the theological framework to engage in activities that benefit the welfare of the community" demonstrates that plaintiffs engage in those permitted activities from a religious viewpoint. Accordingly, plaintiffs have

---

"promotes the moral and character development of children." 533 U.S. at 108 (citing appellees' briefs to the Court of Appeals). The Club argued, and the Supreme Court agreed, that the Club's activities, in fact, involved promoting moral and character development of children, albeit from a religious perspective. Thus, the Club's activities were found to be within the range of activities for which the forum had been opened. Accordingly, Good News Club referred to the teaching of moral values. Footnote 4, however, may be interpreted more broadly to mean that the only type of activity that may arguably be banned is mere religious worship, divorced from any activities consistent with the types of activities otherwise permitted in the limited public forum.

This point is illustrated in DeBoer v. Village of Oak Park, 267 F.3d 558 (7th Cir. 2001), a post-Good News Club case. There, the Seventh Circuit held that a village had engaged in viewpoint discrimination by refusing to allow plaintiffs to use the Village Hall as part of National Day of Prayer. The Village's Use Policy, which governed the use of the Village Hall by members of the public, provided that the event at issue must, inter alia, "have as its primary purpose providing a civic program or activity which benefits the public as a whole." Id. at 561. The Seventh Circuit found that the National Day of Prayer assembly was, in fact, a "civic program or activity" and that, "[i]n adopting the philosophical and theological position that prayer, the singing of hymns and the use of Bible commentary can never be 'civic,' the Village has discriminated against the speech of those of its citizens who utilize these forms of expression to convey their point of view on matters relating to government." Id. at 568. The Seventh Circuit later provided the following parenthetical to Good News Club, 533 U.S. at 112 n.4: "(concluding that the Club's activities did not constitute 'mere religious worship, divorced from any teaching of moral values [a permissible subject matter in the forum]')." DeBoer, 267 F.3d at 570 n.11 (brackets in original).

demonstrated a substantial likelihood that the denial of their application is contrary to the holding of Good News Club.

2. "Worship" is Not an Activity Different in Kind from Activities Previously Permitted in the Forum

In Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction, defendants argue that Good News Club is inapplicable because the present case involves worship and the Court of Appeals in Bronx Household found that worship is different in kind from other activities allowed in the limited public forum. (Defs.' Mem. Opp'n P.I. at 26; see Bronx Household, 127 F.3d at 214-15 (observing that "a distinction can be drawn between [religious worship services] and other forms of speech from a religious viewpoint" that are allowed in "the limited forum of a public middle school")). Defendants also argue that plaintiffs' proposed activities should not be analyzed according to their component parts because the "context" of these activities is different:

> The activities which make up the service cannot be viewed as discrete, as they are linked by the overarching purpose of religious worship, and also by ceremony and ritual. Participation in a religious service involves more than religious belief or expression of belief; it involves organized conduct in exercise of religion. See Employment Division v. Smith, 494 U.S. 872, 884-85 (1990) ("The 'exercise of

> religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.") (emphasis added). Worship services may involve rituals with special significance for a particular religious faith.

(Defs.' Mem. Opp'n P.I. at 27).

First, the argument that plaintiffs' activities should not be analyzed according to their component parts is precluded by Good News Club. As noted above, the majority dismissed attempts to label the activities there at issue but concluded that regardless of the label applied, "what matters is the substance of the Club's activities." Good News Club, 533 U.S. at 112 n.4; see also Widmar, 454 U.S. at 265 n.2 ("A typical Cornerstone meeting included prayer, hymns, Bible commentary and discussion of religious views and experiences."). Defendants' argument to the contrary is thus unavailing.

Second, defendants' position that religious services or worship are distinct activities not comparable to other activities in the limited public forum is also precluded by Good News Club.[9] There,

[9] Indeed, the Supreme Court had already expressly considered such an argument in Widmar. There, the majority noted that "the dissent seems to attempt a distinction between

as noted above, the majority rejected the Court of Appeals' treatment of activities that are "decidedly religious in nature" or "quintessentially religious" as "differen[t] in kind" from other permitted activities. Good News Club, 533 U.S. at 111.[10] Instead, the majority "reaffirm[ed] [the Court's] holdings in Lamb's Chapel and Rosenberger that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." Id. at 111-12; see also, e.g., Good News/Good Sports Club, 28 F.3d at 1506-07 (observing that the Supreme Court has "refused to cabin religious speech into a separate excludible speech category").

---

the kinds of religious speech explicitly protected by our cases and a new class of religious 'speech act[s],' constituting 'worship.'" 454 U.S. at 270 n.6 (citation omitted). The Court rejected that distinction:

> [T]he dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," cease to be "singing, teaching, and reading"--all apparently forms of "speech," despite their religious subject matter--and become unprotected "worship."

Id. at 270 n.7 (citations omitted).

[10] As noted earlier, in the Court of Appeals' opinion in Bronx Household, the majority observed that "religious worship services may well be considered the ultimate in speech from a religious viewpoint in an open forum." 127 F.3d at 215.

Here, as noted, defendants argue that worship is different because, inter alia, the discrete activities "are linked . . . by ceremony and ritual [and] may involve rituals with special significance for a particular religious faith." (Def. Mem. Opp' n P.I. at 27). The record, however, reflects use of public middle school facilities by various groups that also engage in ceremony and ritual of particular significance to the group. For example, Dave Laguer, Director of the Legionnaire Greys Program, explains that the group meets in M.S. 206B on Fridays from 6 to 9 p.m. and on Saturday from 9 a.m. to 2 p.m. and counts approximately sixty to seventy people in attendance from age 10. (First Affidavit of Dave Laguer, sworn to on December 13, 2001 ("Laguer Aff.") ¶ 2). The group's program is geared toward teaching United States history, and because "the format of our meetings is framed in an army military style environment, uniforms are required, ranks are held and salutes are mandatory to higher ranked individuals just as in the military." (Id. ¶ 3). Lageur also explains that:

> at the start of each meeting, the students line up into proper formation and stand at attention as we begin with ceremonial flag presentation. During this ceremony, the flags are brought in and posted while a trumpeter plays the national anthem. At this time, the students stand at attention and salute while the colors are presented and then posted.

(Id. ¶ 4).

Likewise, Jeffrey G. Fanara, the Director of Learning for Life and Urban Emphasis at the Greater New York Councils, Boy Scouts of America, describes the activities of the four Cub Scout Packs and six Boy Scout Troops that meet in New York City public schools in the Bronx. (Affidavit of Jeffrey G. Fanara, sworn to on Dec. 17, 2001 ("Fanara Aff.)). Each Scout takes an oath promising: "On my honor I will do my best [t]o do my duty to God and my country. . . ." (Id. ¶ 3). Troop meetings start with an initial gathering period "followed by a formal opening ceremony," and end with a "formal closing ceremony." (Id. ¶ 5). An induction ceremony is held for each new boy who joins the Troop, and advancements in rank "are marked by more elaborate ceremonies called Courts of Honor." (Id. ¶ 9). On the basis of this uncontradicted evidence, there is no dispute that the Greys Legionnaires engage in ceremony and ritual at M.S. 206B and that the Boy Scouts engage in ceremony and ritual at various New York City public schools in the Bronx.[11]

To the extent that the School District's denial of plaintiffs' application was based on their including ceremony and ritual (as suggested in defendants' brief quoted above), it was apparently because the ceremony and ritual involved is religious ceremony and ritual. Such an exclusion runs afoul of the Court's holdings in Good News Club, Lamb's Chapel and Rosenberger that the government may not treat

[11] Fanara's affidavit does not indicate specifically whether the Boy Scout ceremonies have occurred at M.S. 206B--although I note that the School District approved the Boy Scouts of America for "Extended Use" permits during the 2000-01 school year for various activities. (Pagliuca Decl., Ex. C).

activities that are similar to those previously permitted as different in kind just because the subject activities are conducted from a religious perspective.

3. Even If "Worship" Were an Activity Different In Kind from Activities Previously Permitted In the Forum, It Cannot and May Not Be Effectively Regulated

If, however, as defendants argue, plaintiffs propose to engage in an activity labeled "worship" that is different in kind from other activities permitted by the School District, the questions then squarely presented in this case are: (1) can one distinguish between viewpoint discrimination and discrimination based on content when the subjects include religion, prayer, character, morals, the welfare of the community and the like, on one hand, and worship, on the other; and (2) may the government engage in such analysis consistent with the First Amendment?

a. Distinction Cannot Be Made

Although question (1) was not squarely presented in Good News Club, the futile quest that Judge Jacobs presciently foresaw there arises here. A reading of the Supreme Court's jurisprudence in this area reveals the Court's increasing difficulty in distinguishing religious content from religious viewpoint where morals, values and the welfare of the community are concerned.

In Widmar, the University of Missouri at Kansas City (the "University") permitted a variety of student groups to meet in its facilities, and from 1973 until 1977, a registered student group called Cornerstone was granted permission to meet on University premises. Cornerstone was "an organization of evangelical Christian students from various denominational backgrounds, . . . and [a] typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences." 454 U.S. at 263 n.2. In 1977, the University withdrew its permission for Cornerstone to meet on University premises on the basis of an earlier-passed regulation prohibiting the use of University facilities "for purposes of religious worship or religious teaching." Id. at 263.

The Supreme Court ruled against the University in an opinion by Justice Powell; Justice Stevens filed a concurring opinion, and Justice White filed a dissent. The Court held that the University had created a forum generally open for use by student groups, id. at 267,[12] and that it "had discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion," id. at 269. In

[12] Most courts have interpreted the Court as having treated the University's forum as a limited public forum. See, e.g., Summum v. Callaghan, 130 F.3d 906, 914 (l0th Cir. 1997) ("In Widmar v. Vincent, for example, the Supreme Court held that a state university had created a 'limited public forum.'") (citation omitted); Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160, 165 (5th Cir. 1993) ("Widmar undeniably premised its constitutional conclusions on the existence of a limited public forum.").

recognizing that religious worship and discussion are "forms of speech and association protected by the First Amendment," id., as noted above, the Court rejected the categorization of worship as a separate class of religious speech, id. at 270 n.7.[13] The Court emphasized that the basis of its holding was the University's content-based exclusion of religious speech in the open university forum:

> Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.

Id. at 278.

In Lamb's Chapel, the Board of the Center Moriches Union Free School District had also adopted a forum limitation, specifically a policy pursuant to Section 414 opening its facilities to "social, civic or recreational use" but prohibiting use "for religious purposes." 508 U.S. at 387. Pursuant to this policy, the school district denied the application of plaintiffs Lamb's Chapel (an evangelical church) and its pastor to use school facilities for a film series dealing with family and child-rearing issues and containing the message that contemporary media influences "could only be counterbalanced by

[13] See supra note 9.

returning to traditional, Christian family values." Id. at 388. The school district denied plaintiffs' first application because the film was "church related," id. at 388-89, as well as the second application which characterized the film as a " [f]amily oriented movie--from a Christian perspective." Id. at 389.

In the Supreme Court, the school district argued that excluding this category of "church related" speech was reasonable because, inter alia, all religions and all religious uses were treated the same way. Id. at 393. The Court, however, did not view the policy as content-based but as an impermissible viewpoint restriction. It noted that lectures on child rearing and family values were within the "social or civic purposes" for which the forum was open and held that the school district's denial of plaintiffs' application on the basis of its religious perspective was invalid. Id. at 393-94. Justice White delivered the opinion of the Court; Justice Kennedy concurred in part and in the judgment; and Justice Scalia, joined by Justice Thomas, concurred in the judgment.

In Rosenberger, which was decided just two years after Lamb's Chapel, the Court considered the University of Virginia's limited forum where Student Activities Funds were available to student groups for activities "related to the educational purpose of the University," including "student news, information, entertainment or academic communications media groups." 515 U.S. at 824. The funding was not available for religious activity or activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." Id. at 825.

Plaintiffs' student organization sought funding to publish "Wide Awake: A Christian Perspective at the University of Virginia" which, according to its editors, "offer[ed] a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia." Id. at 826. The paper committed "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." Id. The plaintiffs' application for funding was denied on the ground that the paper was a "religious activity" within the meaning of the forum rules. Id. at 827.

Just like the Board of the Center Moriches Union Free School District in Lamb's Chapel, the University of Virginia argued in the Supreme Court that its rules were based on content--specifically, religious activity--and not viewpoint. Id. at 830. In response, the Court acknowledged the difficulty in discerning content discrimination from viewpoint discrimination[14] but concluded that "[t]he prohibited

---

[14] The Court wrote:

> As we have noted, discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. See, e.g., R.A.V. [v. St. Paul, 505 U.S. 377,] 391 [1992]. And, it must be acknowledged, the distinction is not a precise one. It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence

> of a divine being have been subjects of philosophic inquiry throughout human history. We conclude, nonetheless, that here, as in Lamb's Chapel, viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake. By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.
>
> The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.

Id. at 830-32 (emphasis added).

perspective, not the general subject matter, resulted in the refusal to [fund plaintiffs' paper], for the subjects discussed were otherwise within the approval category of publications." Id. at 831. Justice Kennedy delivered the opinion of the Court; Justices O'Connor and Thomas filed concurring opinions; and Justice Souter filed a dissenting opinion in which Justices Stevens, Ginsburg and Breyer joined.

Although the majority in Good News Club termed Milford's exclusion of the Club as "indistinguishable" from the exclusions in Lamb's Chapel and Rosenberger, see 533 U.S. at 107, the Court seemed to labor to apply the content/viewpoint distinction, perhaps most evidently in the concurring and dissenting opinions. In concurring, Justice Scalia noted that the Court had "previously rejected the attempt to distinguish worship from other religious speech, saying that 'the distinction has [no] intelligible content,' and further, no 'relevance' to the constitutional issue." 533 U.S. at 126 (Scalia, J., concurring) (quoting Widmar, 454 U.S. at 269 n.6). According to Justice Scalia, "[t]hose holdings are surely proved correct today by the dissenters' inability to agree, even between themselves, into which subcategory of religious speech the Club's activities fell." Id. at 126-27.

In dissent, Justice Stevens divided religious speech into three categories: (1) "speech about a particular topic from a religious point of view," (2) "worship, or its equivalent," and (3) "proselytizing or indicating belief in a particular religious faith." Id. at 130 (Stevens, J., dissenting). He acknowledged that a school may create a limited public forum that allows

"speech about a particular topic from a religious point of view," id., but opined that a school can "allow discussion of topics such as moral development from a religious (or non-religious) perspective without thereby opening its forum to religious proselytizing or worship," id. at 132. He acknowledged, however, that "[t]he line between the various categories of religious speech may be difficult to draw. . . ." Id. at. 133. He found that in opening its forum for "religious purposes," Milford "did not intend to exclude all speech from a religious point of view . . . [but] sought only to exclude religious speech whose principal goal was to 'promote the gospel.'" Id. at 132-33.

Justice Souter, joined in dissent by Justice Ginsburg, believed that "the sole question" was whether "Milford was misapplying its unchallenged restriction in a way that amounted to imposing a viewpoint-based restriction on what could be said or done by a group entitled to use the forum for an educational, civic, or other permitted purpose." Id. at 136 (Souter, J., dissenting). He concluded that Milford was not, because, after dissecting the Club's activities at length, he found the activities to amount to "an evangelical service of worship," rather than the "mere discussion of a subject from a particular, Christian point of view." Id. at 138-39.

Of most relevance for present purposes, of course, is the majority opinion where, as noted above, the Court analyzed the various component parts of the Good News Club's meeting before deciding that the Milford's rejection of the Club's application was viewpoint-based discrimination and thus impermissible. Unlike Justice Souter in dissent, id.

at 138 n.3, the majority did not characterize the Club's activities as worship, id. at 112 n.4. Thus, the Court's citation to Judge Jacobs' characterizing as "quixotic" any attempt to distinguish between the teaching of character and morals from a religious viewpoint and religious subject matters is arguably dictum. That dictum, however, foreshadowed the result that is compelled here.

Here, plaintiffs propose to engage in "worship" as defined by Pastor Hall, a topic covered by defendants in his deposition:

> Q. How do you define "worship services"?
>
> A. The way I teach it is that the word "worship" itself is a neutral word. It does not have inherently any religious connotation, that the word literally means "to ascribe worth to something." And then I go from there to say that we are all creatures of worship, that there is something that we will ascribe worship or praise to. We will ascribe worship or praise to David Wells when he almost pitched a second no-hitter. I was at that game. We will praise a sunset. We will praise a work of art. We will ascribe worth and value to something that we find valuable and worthy of our praise so that it is a human phenomenon.

Q. Do you characterize your Sunday services as worship services?

A. We ascribe worth, our supreme worth, to Jesus Christ.

Q. So do you agree that your services are worship services?

A. In that sense that I have used it, that I have defined the word, yes.

(Declaration of Lisa Grumet, sworn to on Dec. 5, 2001, Ex. I, Deposition of Robert G. Hall ("Hall Dep."), at 41-42). By ascribing worth to non-religious attributes, e.g., pitching prowess, or items, e.g., a sunset or a piece of art, such "worship" falls within the School District's SOP permitting "instruction in the arts" (SOP 5.6.1) or "social, or recreational meetings . . . pertaining to the welfare of the community" (id. 5.6.2). Because plaintiffs ascribe worth to a variety of nonreligious attributes and items but also ascribe their supreme worth to Jesus Christ, their activities fall within SOP 5.6.2, albeit from a religious perspective.

Similarly, plaintiffs' proposed activities benefitting the community, e.g., aiding the needy and counseling those involved in drugs or other criminal activity (Hall Aff. ¶¶ 3, 5-8), taken together with Pastor Hall's explanation that plaintiffs' Sunday morning meeting "provides the theological framework to engage in activities that benefit the welfare of the community" (id. ¶ 7), fall within activities permitted by SOP 5.6.2, albeit from a

religious perspective. Just as in Widmar, singing hymns, biblical reading and instruction are among the activities in which plaintiffs propose to engage. (Id. ¶ 4). Singing, instruction in various branches of learning and, as noted above, ceremony and ritual are regularly permitted in M.S. 206B. Indeed, while section 5.11 of the School District's SOP prohibits "religious services or religious instruction," it expressly permits "discussing religious material or material which contains a religious viewpoint . . . ." Defendants, however, argue that some or all of these activities constitute a separate class of religious speech called worship.

How, then, can one locate the line that divides (1) worship and (2) non-worship or (1) religious services and instruction and (2) discussion of religious material or material which contains a religious viewpoint?[15] Judge Jacobs summed up the problem in his Good News Club dissent:

---

[15] An observation by the Court of Appeals in Good News Club illustrates the point:

> It is difficult to see how the Club's activities differ materially from the "religious worship" described in Full Gospel Tabernacle [v. Cmty. Sch. Dist. 27, 164 F.2d 829 (2d Cir. 1999) (per curiam)]: each has prayers and devotional song; each has a central sermon or story with a message; each has a portion in which attendees are called upon to be "saved." Applying a different label to the same activities does not change their nature or import.

Id. at 510.

The distinction between content discrimination and viewpoint discrimination is elusive and subtle. "Viewpoint discrimination is . . . an egregious form of content discrimination." Rosenberger, 515 U.S. at 829, 115 S. Ct. at 2516. "[D]iscrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. And, it must be acknowledged, the distinction is not a precise one." Id. at 830-31, 115 S. Ct. at 2517 (internal citation omitted). The distinction is especially slippery where the viewpoint in question is religious, in part because the sectarian religious perspective will tend to look to the deity for answers to moral questions. The idea that moral values take their shape and force from God seems to me to be a viewpoint for the consideration of moral questions. True, religious answers to questions about morals and character tend to be couched in overtly religious terms and to implicate religious devotions, but that is because the sectarian viewpoint is an expression of religious insight, confidence or faith--not because the religious viewpoint is a change of subject:

> It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought . . . .

> Religion may be a vast area of inquiry, but it also provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.

Good News Club, 202 F.3d at 514 (quoting Rosenberger, 515 U.S. at 831) (Jacobs, J., dissenting). Based on the compelling logic of Judge Jacobs' dissent and the Court's dictum in Good News Club, I find it impossible to distinguish between, on one hand, activities proposed by the plaintiffs that are within the activities expressly permitted in this forum, viz., discussing religious material or material which contains a religious viewpoint and activities contributing to the welfare of the community and, on the other hand, an activity different in kind called worship.[16] (See Letter Br. from Eytah A. Kobre, Agudath Israel of America, to the Hon. Loretta Preska, dated Dec. 17, 2001 ("Agudath Br."), at 3 (arguing that, even if plaintiffs' proposed activities

---

[16] In a footnote to the original Bronx Household case before me in 1995, I rejected plaintiffs' contention that "the SOP's permitting social, civic and other community welfare topics must, by its very breadth, be read to encompass religious worship." 1996 WL 700915, at *5 n.1. The basis for this rejection was that "[h]istorically and constitutionally in this country . . . religion cannot be lumped with other social, civic and community welfare activities" and that, therefore, "the assumption that broadly stated purposes such as 'civic' and 'community' must also encompass 'religious' is unfounded." Id. To the extent that that footnote treated religious activities consistent with the purposes of the forum as different in kind from other activities allowed in the forum, it is precluded by Good News Club.

are different from the activities permitted in Good News Club, it is "a distinction without any discernable difference")).

Aside from the weighty secular precedents referred to above, I note that the Encyclopedia of Religion has found a similar difficulty. In the entry relating to ceremony and religion, the commentator states:

> [A] strict distinction between secular and religious activity is problematic. Historical phenomena do not exhibit the discrete boundaries found in precise theoretical categories. Although they are dissociated from institutionalized religion, many secular rituals make reference to religious belief or make use of religious symbols. The invocation of God and the use of the Bible in presidential inaugurations and Memorial Day observances in the United States and in coronations in Great Britain are illustrative.

(Bobby C. Alexander, Ceremony, in 3 The Encyclopedia of Religion 181 (Mircea Eliade ed., 1987) (citations omitted)). In discussing civil religion, "a form of religion characteristic of highly secularized and technologically oriented modern nation states," the commentator cites the following example:

> In the United States, for example, the use of Judeo-Christian symbols in presidential inaugurations, State of the Union addresses, Memorial Day celebrations,

> funerals of national leaders, and the like are intended to secure the continuation of divine blessing on the social and political order.

(Id. at 181-82 (citations omitted)). The commentator proceeds to describe "the blurring of boundaries between religious and secular. ritual" in the Fiesta celebration in Santa Fe, New Mexico, and other Hispanic-American celebrations. (Id. at 182) It is a similar blurring of boundaries--evident in the Supreme Court's apparently increasing difficulty in dealing with these topics--that renders impossible the distinctions defendants seek to draw. See, e.g., DeBoer, 267 F.3d at 568 (holding that National Day of Prayer assembly is a "civic program or activity" and that "worship and prayer directed enlightenment of civic leaders are methods of expressing a religious viewpoint about civic subject matter").

b. Distinction Should Not Be Made

Finally, even if it were possible to distinguish between various activities already permitted in the forum from a religious perspective and worship, the answer to question 2 above is a resounding "no": the government may not, consistent with the First Amendment, engage in dissecting speech to determine whether it constitutes worship. As Judge Jacobs stated in dissent in the Court of Appeals' Good News Club decision:

> Even if one could not say whether the Club's message conveyed religious content or religious viewpoints on otherwise-

> permissible content, we should err on the side of free speech. The concerns supporting free speech greatly outweigh those supporting regulation of the limited public forum.
>
> * * *
>
> Whenever public officials, in executing the school's access policy, evaluate private speech "to discern [its] underlying philosophic assumptions respecting religious theory and belief," the result is "a denial of the right of free speech." Rosenberger, 515 U.S. at 845, 115 S. Ct. at 2525.

202 F.3d at 515 (Jacobs, J., dissenting); see also. e.g., Bronx Household, 127 F.3d at 221 ("In some circumstances, enforcement of the exclusion of religious 'services' might lead to 'excessive entanglement with religion.'") (Cabranes, J., concurring) (quoting Lemon v. Kurtzman, 403 U.S. 602 (1971)); Lee v. Weisman, 505 U.S. 577, 616-17 (1992) (Souter, J., concurring) (observing that "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible" than "comparative theology"); A. Louise Oliver, Tearing Down the Wall: Rosenberger v. Rector of the University of Virginia, 19 Harv. J.L. & Pub. Pol'y 587, 594 n.57 (1996) ("The Supreme Court has refused to define the 'centrality' of worship activities in the Free Exercise context because such a definition would entail too great an examination into the tenets of particular religions." (citing Lyng v.

Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 457-58 (1988)); Richard W. Garnett, A Quiet Faith? Taxes, Politics, and the Privatization of Religion, 42 B.C. L. Rev. 771, 795 (2001) ("[T]he opinions in Good News . . . call for caution. They should prompt us to wonder how government is able to distinguish religious purposes from secular ones, worship from perspective, discussion from proselytization."); Agudath Br. at 4 ("As numerous Supreme Court decisions have recognized, it is within neither the role nor the competence of governmental bodies to determine the significance of a religion's beliefs and practices for its practitioners.").

Here, in order to execute its policy of prohibiting worship but permitting discussion of religious material or material that contains a religious viewpoint (SOP 5.11), the School District would be required to dissect and categorize the substance of plaintiffs' speech during their four-hour meeting and determine, inter alia, "when 'singing hymns, reading scripture, and teaching biblical principles,' cease to be 'singing, teaching, and reading' . . . and become unprotected 'worship,'" Widmar, 454 U.S. at 270 n.6 (citation omitted). (See Hall Aff. ¶ 4 ("In our church service, we seek to give honor and praise to our Lord and Savior Jesus Christ in everything that we do. To that end we sing songs and hymns of praise to our Lord. We read the Bible and the pastors teach from it because it tells us about God, what He wants us to do and how we should live our lives.")).

In worshiping or ascribing worth to a variety of values and skills (see Hall Dep. at 41-42), plaintiffs'

meetings are no different from other meetings permitted in the school. Although the record is silent, one may presume that the Little Leaguers of Love Gospel-BX, the Semanonans Stickball players and the youth basketball players of the Hebrew Institute of Riverdale–all of whom were approved by the School District for Extended Use permits in 2000-01, (Pagliuca Decl., Ex. C)--would likely join plaintiffs in worshiping David Wells' pitching prowess. The Greys Legionnaires ascribe worth to "hav[ing] character and be [coming] model citizens of the United States" through learning "the importance of qualities such as honesty, integrity, teamwork, etc." (Lageur Aff. ¶ 6). The Boy Scouts ascribe worth to "reinforc[ing] in young people the traditional moral values reflected in the Scout Oath and Law." (Fanara Aff. ¶ 3). Plaintiffs ascribe their ultimate worth as human beings to Christ. (See Hall Dep. at 41-42 ("We ascribe worth, our supreme worth, to Jesus Christ.")).[17] To permit, indeed, to require the School District "to evaluate private speech 'to discern [its] underlying assumptions respecting religious theory and belief'" and to make a determination whether that speech is discussion of religious material or worship is "a denial of the right of free speech." Rosenberger, 515 U.S. at 845.

---

[17] In addition to illustrating the impermissible degree of government exploration of the tenets of plaintiffs' faith and the nature and content of their speech that is required by SOP 5.11, these comparisons also tend to illustrate the "elusive and subtle" distinction between content discrimination and viewpoint discrimination. Good News Club, 202 F.3d at 514 (Jacobs, J., dissenting).

For all of the above reasons, I find that plaintiffs have demonstrated a substantial likelihood of success on the merits of their First Amendment free speech claim.

2. Establishment Clause

Plaintiffs assert that permitting other community groups to use the school facilities but excluding religious services and instruction violates the Establishment Clause of the First Amendment. (Compl. ¶ 31). Defendants, in turn, assert that they have a compelling state interest in avoiding an Establishment Clause violation by denying plaintiffs' request to rent space in M.S. 206B. (Defs. Mem. Opp'n P.I. at 32-35).

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. In Good News Club, the Court rejected Milford's contention that even if it engaged in viewpoint discrimination, that discrimination was necessary to avoid violation of the Establishment Clause. 533 U.S. at 113-14. For support, the Court pointed to Lamb's Chapel and Widmar:

> In Lamb's Chapel, the Court explained that "[t]he showing of th[e] film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just church members." 508 U.S. at 395, 113 S. Ct. at 2141. Accordingly, Lamb's Chapel found that "there would have been no

> realistic danger that the community would think that the District was endorsing religion or any particular creed." Ibid. Likewise, in Widmar, where the university's forum was already available to other groups, this Court concluded that there was no Establishment Clause problem. 454 U.S., at 272-273, and n.13, 102 S. Ct. at 269.

Id. at 113. The Court concluded that the Establishment Clause "fare[d] no better in this case," because "the Club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just club members." Id. The Court also noted that, "[a]s in Widmar, Milford made its forum available to other organizations." Id. Further, the Court rejected Milford's attempts to distinguish Lamb's Chapel and Widmar on the basis that elementary school children were involved. Specifically, the Court held that: (1) allowing the Good News Club to speak on school grounds "would ensure neutrality, not threaten it"; (2) to the extent that it would "consider whether the community would feel coercive pressure to engage in the Club's activities, the relevant community would be the parents, not the elementary school children," because the children could not attend without their parents' permission; and (3) it has "never extended [its] Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present." Id. at 114-15; see also, e.g., Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995)

(O'Connor, J., concurring) (observing that, to assess properly an Establishment Clause violation claim, one must consider whether a plaintiff has "so dominate[d]" a forum that children would perceive endorsement by the school of a particular religion). The Court observed that the individuals giving the lessons in Good News Club were not schoolteachers, there was no evidence children were permitted to loiter around the school after school hours and the children who participated in the group were not all the same age as in a normal classroom setting. Good News Club, 533 U.S. at 117-18.

As in Good News Club, there is a substantial likelihood that plaintiffs will be able to demonstrate here that defendants do not have a compelling state interest in avoiding an Establishment Clause violation by denying plaintiffs' request to rent space at M.S. 206B. Plaintiffs' proposed meetings would occur on Sunday mornings--i.e., during nonschool hours. (E.g., Hall Aff. ¶ 3).[18] The meetings are obviously not endorsed by the School District. (Id. ¶ 15). No M.S. 206B employee attends plaintiffs' Sunday morning meetings. (Hall Dep. at 32). Further, the meetings are "open to all members of the public" and "not closed to a limited group of people, such as church members and their guests."

---

[18] See, e.g., Charles J. Russo & Ralph D. Mawdsley, And the Wall Keeps Tumbling Down: The Supreme Court Upholds Religious Liberty in Good News Club v. Milford Central School, 157 Ed. Law Rep. 1, 12 (2001) ("One can argue that, if refusing to provide equal access to religious groups during school hours can represent hostility, then hostility would seem to be an even more plausible claim when the access sought is after school hours.").

(Hall Aff. ¶ 5). Nor is there any evidence that children are present around M.S. 206B on Sunday mornings or that any M.S. 206B students even attend plaintiffs' Sunday school or services. (Hall Dep. at 31-32). In short, it can hardly be said that plaintiffs' proposed meetings would so dominate M.S. 206B that children would perceive endorsement by the School District of a particular religion. Indeed, permitting plaintiffs to hold their Sunday morning meetings "would ensure neutrality, not threaten it," because plaintiffs are "seek[ing] nothing more than to be treated neutrally and given access to speak about the same topics as are other groups." Good News Club, 533 U.S. at 114; see also Board of Educ. v. Mergens, 496 U.S. 226, 248 (1990) ("[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."). Here, because the School District's policy is hostile to religion, not neutral, plaintiffs are substantially likely to succeed in demonstrating that permitting them to hold their Sunday morning meetings at M.S. 206B would not violate the Establishment Clause.

3. Plaintiffs' Remaining Claims

Because I find that plaintiffs have demonstrated a likelihood of success with respect to their free speech claim, and that defendants lack a compelling state interest in preventing plaintiffs from renting space in M.S. 206B for their Sunday morning meetings so as to avoid violation of the Establishment Clause, there is no need to address the remaining assertions contained in plaintiffs' complaint at this juncture.

CONCLUSION

Plaintiffs' motion for a preliminary injunction to prevent defendants from denying plaintiffs' application to rent space in Public School M.S. 206B, Anne Cross Merseau Middle School, for Sunday morning meetings that include religious worship is granted. Counsel shall confer and deliver a proposed form of preliminary injunction no later than June 28, 2002. If they are not in agreement, counsel shall appear at a conference to discuss the proposed order on July 1, 2002, at 9:00 a.m., Courtroom 12A, United States District Court, Southern District of New York, 500 Pearl Street, New York, New York.

SO ORDERED:
Dated: New York, New York
June 26, 2002

Loretta A. Preska
LORETTA A. PRESKA, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 27th day of July, two thousand eleven,

---

ORDER
Docket No: 07-5291-cv

The Bronx Household of Faith, Robert Hall, Jack Roberts,

Plaintiffs-Appellees,

v.



Board of Education of the City of New York, Community School District No. 10,

Defendants-Appellants.

Appellees The Bronx Household of Faith, Robert Hall and Jack Roberts filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has

considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES
COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 8th day of Sept two thousand three.

THE BRONX HOUSEHOLD OF FAITH, ROBERT HALL and JACK ROBERTS,

Plaintiffs - Appellees,



v. 02-7781

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

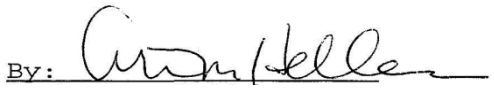
Defendants - Appellants.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Board of Ed, et al.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: 
Arthur M. Heller,
Motions Staff Attorney

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK



----------X

THE BRONX HOUSEHOLD OF FAITH, ROBERT HALL and JACK ROBERTS,

Plaintiffs,

01 **CIVIL** 8598 (LAP)

-against-

JUDGMENT

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.

Defendants.

----------X

Plaintiffs having moved for summary judgment and a temporary restraining order; defendants having cross-moved for summary judgment, and the matter having come before the Honorable Loretta A. Preska, United States District Judge, and the Court, on November 1, 2007, having rendered its Order granting plaintiff's motion for summary judgment and for a permanent injunction, denying defendants' cross-motion for summary judgment, and enjoining defendants from enforcing the New York City Department of Education's revised Standard Operating Procedures Manual ("SOPM") 5.11 so as to deny plaintiff or any other similarly situated

individual or entity a permit to hold religious worship services in a New York City public school during non-school hours, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated November 1, 2007, plaintiff's motion for summary judgment and for a permanent injunction is granted; defendants' cross-motion for summary judgment is denied; and defendants are enjoined from enforcing the New York City Department of Education's revised Standard Operating Procedures Manual ("SOPM") 5.11 so as to deny plaintiff or any other similarly situated individual or entity a permit to hold religious worship services in a New York City public school during non-school hours.

Dated: New York, New York
November 5, 2007

J. MICHAEL McMAHON

_____

Clerk of Court

BY:



_____

Deputy Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON _____

MANDATE

SDNY/New York City
01-cv-8598
Preska

United States Court of Appeals
FOR THE
SECOND CIRCUIT

JUDGMENT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 2nd day of July, two thousand seven

Before: Hon. John M. Walker, Jr.
Hon. Pierre N. Leval
Hon. Guido Calabresi
Circuit Judges



Docket No. 06-0725-cv

THE BRONX HOUSEHOLD OF FAITH, ROBERT HALL, AND JACK ROBERTS,

Plaintiffs-Appellees,

-v.-

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

Defendants-Appellants.

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

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said District Court be and it hereby is VACATED and REMANDED in accordance with the opinion of this Court.

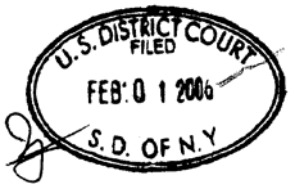
A TRUE COPY
Catherine O'Hagan Wolfe, Clerk
by _____ DEPUTY CLERK

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk
by
Arthur M. Heller
Motions Staff Attorney

Issued as Mandate: SEP 13 2007

Doc #85

Closed 1/1/06



UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

----------x

THE BRONX HOUSEHOLD OF FAITH, ROBERT HALL and JACK ROBERTS,

Plaintiffs,

-against-

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

Defendants.

----------x

JUDGMENT

01 **CV** 8598 (LAP)

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, for the reasons set forth in the Opinion of the Court dated November 16, 2005, defendants are hereby permanently enjoined from enforcing the New York City Department of Education's Present Standard Operating Procedures Manual section 5.11 so as to deny plaintiffs or any other similarly situated individual or entity a permit

to hold religious worship services in a New York City public school during non-school hours.

MICROFILM
FEB - 2 2006 -9 00 AM

January 18, 2004

SO ORDERED:

Loretta A. Preska
U.S.D.J.

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 2/1/06

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF NEW YORK

----------X

THE BRONX HOUSEHOLD OF FAITH, ROBERT HALL and JACK ROBERTS,

01 civ. 8598 (LAP)

Plaintiffs,

JUDGMENT

-against-

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

Defendants.

----------X

WHEREAS, plaintiffs commenced this action by filing a summons and complaint on September 10, 2001, alleging, inter alia, that defendants violated their "rights of freedom of speech, freedom of assembly, free exercise of religion, equal protection under law, and freedom from establishment of religion" when defendants denied plaintiffs' application to rent space in Public School M.S. 206B, Anne Cross Merseau Middle School ("M.S. 206B") to conduct Sunday morning meetings that include religious worship because such meetings would violate defendants' policy prohibiting religious services or instruction in school buildings;

WHEREAS, defendants served and filed an Answer dated November 5, 2001 denying any and all liability arising out of plaintiffs' allegations;

WHEREAS, in their complaint, plaintiffs seek declaratory and injunctive relief against defendants; and

WHEREAS, by Motion for Preliminary Injunction dated September 10, 2001, plaintiffs sought an order permitting "The Bronx Household of Faith to meet in M.S. 206B for weekly Sunday morning meetings on the same terms and conditions as all other groups" and enjoining "defendants from enforcing any policy that excludes private speakers from engaging in religious services or religious interaction during non-school hours at the Defendants' buildings";

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, for the reasons set forth in the Opinion dated June 26, 2002, defendants are hereby enjoined from enforcing the New York City Board of Education's Standard Operating Procedure § 5.11 so as to deny plaintiffs' application to rent space in a public school operated by the Board of Education for morning meetings that include religious worship or the application of any similarly-situated individual or entity.

SO ORDERED:

Loretta A. Preska
U.S.D.J.

Standard Operating Procedures:
Financial Management Centers
Division of Business and Administration

Chapter: Extended Use of School Buildings
Topic: Table of Contents

NUMBER	TOPIC
1	Introduction
2	Permit Processing and Completing the Permit Application
3	Completing the Application and Accounting for Receipts
4	Processing Space Sheets and Accounting for Custodial Fees
5	Regulations Governing the Extended Use of School Buildings
6	Summer Day Camps
7	Guidelines Governing Fees (During Hours Schools are Not Open)

Standard Operating Procedures:
Financial Management Centers
Division of Business and Administration

Chapter: Extended Use of School Buildings
Topic: 1. Introduction

1.1 School buildings are frequently used during non-school hours, weekends and holidays for both extracurricular and community activities. This usage is called "Extended Use of School Buildings."

1.2 As used in this chapter, the term Financial Management Center (FMC) refers to the applicable Community School District, the Division of High Schools or the Division of Special Education.

1.3 Each Community Superintendent shall designate a district employee whose responsibility shall be to maintain an Extended Use Schedule for the schools within the district. This will enable an applicant to ascertain which schools are available and at what cost.

1.4 Each High School principal and Citywide Special Education principal shall maintain an Extended Use Schedule for their school.

1.5 Depending on the organization and activity, the cost of custodial services for Extended Use is either assumed by the FMC or paid for by

the imposition of fees on the organizations using the facilities.

1.6 Funds are allocated to, and budgeted by. each FMC for those activities whose Extended Use charges are assumed by the FMC.

The FMC assumes the charges for the following extended use activities:

1.6.1 Parents Association Meetings (twice a month);

1.6.2 Activities connected with Open School Week;

1.6.3 Public meetings of the Community School Board; and

1.6.4 Executive meetings of the Community School Board where district offices are located within a school building.

1.7 Extended Use of School Buildings shall be subject to this Chapter, the strictures contained in Education Law – Section 414, and all other applicable laws and regulations.

1.8 Permits may be revoked by the central Board of Education or the Community School Board for violation of this Chapter, including, but not limited to, the regulations contained in Topic 5 of this Chapter, and all other applicable laws

and regulations governing the use of schoolhouses and grounds.

1.9 A copy of this Chapter shall be available for inspection in each school for the applicant to review.

Standard Operating Procedures:
Financial Management Centers
Division of Business and Administration

Chapter: Extended Use of School Buildings
Topic: 2. Permit Processing and Completing the Permit Application

2.1 Applicants may obtain a Permit Application (Exhibit A Form PO 68) at the appropriate permit office, these include the Community School District Office, high school superintendent's office or the special education regional office, or at the school at a time and place designated by the principal (the custodian/engineer's office may not be the designated place).

2.2 After applicant for a Permit has read the Board of Education's regulations (refer to Topic 5), the applicant completes the Permit form. Permits must be made out in the name of an organization.

2.3 The holder of a Permit must agree to observe the rules and regulations contained in this Chapter, and to conform to all applicable laws and regulations governing the extended use of school buildings. The Permit holder shall exercise the utmost care in the use of school premises and property; make good any damage arising from the occupancy of any part of school premises; and save harmless the Board of Education from any claim, loss or damage incurred by the Board by reason of

any act or omission on the part of the holder, its members, officers, employees, and agents, and any person using the premises by invitation or with the permission of the holder.

2.4 A Permit Application must be submitted to the appropriate permit office or school (at a time and place designated by the principal) one month before the date being requested. An approval or denial of the Permit will be returned to the school and applicant two weeks prior to the activity date.

2.5 After the Permit Application is completed, it will be sent to the custodian/engineer for determination of availability of space and required staff. The Permit Application is then forwarded to the principal for review and approval of the requested date. Once approved, the Permit Application is forwarded to the appropriate permit office for determination of the charge and final approval by the Superintendent or his designee.

2.6 The applicant should contact the district office processing the Permit within five working days of submitting the Permit to ascertain the final determination of fees to be charged. If charges are applicable, the applicant must send a certified check or money order made payable to the Board of Education for the full amount, to the appropriate permit office (include the Permit number on the check). Checks drawn on New York City Agency accounts need not be certified. No Permit will

be issued until all applicable fees are paid in full.

2.7 No Permit Application may be approved for a use whose scheduled duration exceeds that for which payment is made. Renewal requires a new application. The longest permissible time period for a Permit shall be twelve months (one fiscal year). Permits may not cross fiscal years.

2.8 A request for an appropriate number of rest rooms must be included in every Permit Application for Extended Use of School Buildings.

2.9 Organizations requiring special services, such as running an elevator, removing or receiving equipment, arranging stages or other areas, operating stage lighting and other stage equipment, or any other service(s) not included in normal building custodial operations, shall pay additional charges for such services, which shall be entered on the application at the time the Permit is completed by the custodian/engineer.

2.10 NO PERMIT SHALL BE CONSIDERED APPROVED UNLESS IT BEARS THE SIGNATURE OF THE APPROPRIATE HIGH SCHOOL SUPERINTENDENT, CITYWIDE SPECIAL EDUCATION SUPERINTENDENT OR DISTRICT SUPERINTENDENT, OR THAT OF THEIR DESIGNEE AND UNTIL RECEIVED BY THE APPLICANT.

2.11 When, in connection with meetings, entertainments and occasions where admission fees are charged, an organization is using school premises, the following specific rules must be observed:

2.11.1 If the organization holding the Permit is charging admission (and/or has pre-sold tickets. to an event), or is accepting or collecting money, or soliciting donations, the proceeds must be expended for the benefit of a recognized charitable or educational institution, except that such permit use shall not be permitted if such meetings are under the exclusive control and the proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization, other than organizations of veterans and volunteer firemen;

2.11.2 Charging admission fees, including pre-sale of tickets, or soliciting or accepting donations, or fund-raising activities of any kind (including the sale of refreshments), shall not be permitted <u>unless specifically approved on the Permit</u> and conducted in accordance with applicable laws and regulations, including the provisions and

regulations contained in this Chapter;

Chapter: Extended Use of School Buildings

2.11.3 When admission fees are charged, including pre-sale of tickets, or donations are to be solicited or accepted, or any fund-raising activity is to take place, the applicant must state on the Permit Application:

-- the admission fee (if applicable); and

-- the name of the organization designated as beneficiary of' the proceeds resulting from admission fees, solicitations or donations.

2.11.4 The following must be attached to the Permit Application prior to final approval and retained by the appropriate Permit Office:

-- A letter on official stationery from the charitable or educational organization that is to receive the proceeds stating that it approves of the fund-raising function and will use the proceeds for recognized charitable or educational purposes. The letter must be specific about the nature of these purposes (e.g., providing a Senior Citizen'' Program);

-- A brief listing of expenditures and projected profits by the applicant organization; and

-- A New York State Tax Exempt Approval Form (for Non-Board of Education organizations).

2.12 Any Permit holder requesting a refund and/or change in the term of the original Permit shall file an "Amendment or Refund Application" (Exhibit B Form PO 301). When signed by the custodian engineer and principal, this form will be forwarded to the High School Permit Office, Special Education Permit Office or the Community School District Permit Office, for approval. This form shall be available at the Community School District Office, High School Office, Special Education Office or the desired school at a place and time designated by the principal. All questions regarding refunds are to be directed to the appropriate permit office.

NOTE: The Permit holder must notify the school at least twenty-four (24) hours in advance of the scheduled date and time of use to cancel or change the terms of the Permit to avoid being charged applicable fees.

Standard Operating Procedures:
Financial Management Centers
Division of Business and Administration

Chapter: Extended Use of School Buildings
Topic: 3. Completing the Application and Accounting for Receipts

3.1 The Permit Application (Exhibit A) is the form to be used for requesting Extended use of School Buildings. It is completed as follows:

3.1.1 The applicant completes Section 1 providing information regarding the name and address of the organization, day and times of building use, etc. If the applicant answers "yes" to any question in the "Special Requests" box, the appropriate parts of Section 5 must be completed.

3.1.2 An authorized representative of the organization must sign in the appropriate place in Section 1, agreeing to observe all applicable rules and regulations and pay all appropriate fees.

3.1.3 The applicant must also complete appropriate parts in Section 3 (Space Section), entering requested information on days, dates, times of use, and space utilization requests (rooms and space are alphabetically

coded by type of room – refer to Exhibit C for codes).

3.1.4 After completing all applicable items, the Permit Application will be transmitted to the custodian/engineer for verification of the availability of space and staff and completion of Section 2. The custodian/engineer will then forward the Permit to the principal for review, and approval of the date requested.

3.1.5 For organizations requiring <u>special custodial services</u>, the custodian/engineer will enter the appropriate code and number of units in the Special Service section (rooms and space are alphabetically coded by type of room - refer to Exhibit C for codes).

3.1.6 When an account code <u>other than</u> the FMC's account code is charged, the person responsible for the charged account code must sign the Permit Application. The term FMC refers to the FMC in charge of the facility to be used.

NOTE: Detailed instructions concerning completion of the Permit are on the Permit Application.

3.2 Permits must first be signed by the custodian engineer to indicate that space and staff are available (Section 6). The prinlipal will then sign signifying his/her approval (Section 7) and forward the Permit Application to the District Office for approval (Section 7) and completion of Section 4. In addition, the District Office will compute the applicable charges in Section 3 (Fees for Service).

3.3 The applicant must contact the district office processing the Permit within <u>five</u> working days of submitting the Permit to ascertain the fees to be charged. If charges are applicable, the applicant must send a certified check or money order made payable to the Board of Education for the full amount to the district office (include the Permit number on the check). Checks drawn on New York City agency accounts need <u>not</u> be certified. <u>No Permit</u> will be issued until all applicable fees are paid in full.

3.4 NO PERMIT SHALL BE CONSIDERED APPROVED:

3.4.1 UNLESS IT BEARS THE SIGNATURE OF THE HIGH SCHOOL SUPERINTENDED, CITYWIDE SPECIAL EDUCATION SUPERINTENDENT OR DISTRICT SUPERINTENDENT, OR THAT OF THEIR DESIGNEE AS APPROPRIATE; AND

3.4.2 UNTIL RECEIVED BY THE APPLICANT.

Where Permits (originals) require checks, the Permit Office shall affix the checks to the Cash Receipts Form and forward them to the Central Business Office in the Division of Business and Administration with a copy of the permit (see item 3.5.1).

3.5 The person designated, pursuant to item 1.3, by the Community Superintendent, Executive Director of High Schools or Executive Director of Special Education will distribute 5 copies of the permit as follows:

3.5.1 Where Permits require checks, a copy to the Central Business Office;

3.5.2 A copy retained for the FMC's records; and

3.5.3 Remaining copies to the Principal, who will send the appropriate copies to the applicant and custodian engineer, and keep a copy in his files

Standard Operating Procedures:
Financial Management Centers
Division of Business and Administration

Chapter: Extended Use of School Buildings
Topic: 4. Processing Space Sheets and Accounting for Custodial Fees

4.1 After the activity is completed, a Report of Authorized Space and Custodian Services Rendered Form (Exhibit D Form PO 67) must be completed by the custodian/engineer to request payment for services rendered. This form is commonly referred to as a Space Sheet.

4.1.1 Space Sheets are the source documents from which charges for Extended Use services are calculated and paid for.

4.2 Space Sheets are also used by the district to verify labor costs.

4.3 The custodian/engineer is not required to be present for extra activities conducted after 5 p.m. daily, or on Saturdays, Sundays, or holidays. If an activity takes place during this time, and the custodian/engineer will not be available, then the custodian/engineer will provide a suitable substitute to carry out his duties.

4.4 At the end of each month the custodian engineer must prepare a Space Sheet for each activity in his school. Each Space Sheet

itemizes the space utilized by the activity, by date.

4.5 For each activity on which extended use of the school building is made, the custodian/engineer is required to record the following information on the Space Sheet prior to the user's signature being affixed:

4.5.1 Days of the week and dates of use.

4.5.2 Time of use.

4.5.3 Space Used – Rooms and space are alphabetically coded by type of room (refer to .Exhibit C for codes). The number of rooms is entered in the appropriate box for each type of room used. For activities requiring special services, enter the proper code and number of units in the special services box.

4.5.4 The signature(s) of individual(s) in charge of the activity are required in the space(s) provided.

4.5.5 The custodian engineer shall not record any space used continuously on more than one space sheet.

4.6 The custodian engineer will then do the following:

4.6.1 Complete the heading of the Space Sheet.

4.6.2 Sign at the top of Space Sheet entitled "Signature of custodian/engineer;"

4.6.3 Forward Copy 1 to the Bureau of Non-Pedagogic Payroll, Custodial Payroll Unit;

4.6.4 Retain Copy 2 for his records; and

4.6.5 Forward Copy 3 to the official designated by the Community School District Superintendent, Executive Director of High Schools, or Executive Director of Special Education (see item 1.3).

4.7 For every payroll cycle, the Custodial Payroll System will generate a detailed accounting report reflecting the total amount of labor costs. The Community School District, division of High School Permit Office or Division of Special Education Permit Office reconciles the charges in conjunction with the Custodial Payroll Unit.

Standard Operating Procedures
for Schools and FMCs
Division of Financial Operations

Chapter: Extended Use of School Buildings
Topic 5: Regulations Governing the Extended Use of School Facilities

Applicants are responsible for adhering to all applicable provisions of this chapter, including the regulations set forth below.

5.1 Permit holders shall exercise the utmost care in the use of school premises and property; make good any damage arising from the occupancy of any part of school premises; and save harmless the Board of Education from any claim, loss, or damage by reason of any act on the part of the permit holder, its members, officers, employees and agents, or any person using or coming upon the premises by invitation or by permission of the permit holder.

5.2 The use of school facilities must be in accordance with federal law, New York State law, local law and Board of Education policies.

5.3 The primary use of school premises must be for Board of Education programs and activities.

5.4 Every group or organization must have an approved Permit to use a School's premises.

5.5 After Board of Education programs and activities, preference will be given to use of school premises for community, youth and adult group activities.

5.6 In addition to the use described in items 2.11. 5.3 and 5.5. school premises may also be used for the following purposes:

5.6.1 For the purpose of instruction in any branch of education, learning or the arts; examinations; graduations;

5.6.2 For holding social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community; but such uses shall be non-exclusive and open to the general public;

5.6.3 For polling places for holding primaries, elections and special elections for the registration of voters;

5.6.4 For conducting candidate forums, provided all candidates are invited to participate. Permit applications for such forums must include a written representation that all candidates have been invited to participate. Once approved by the school and the superintendent, the Permit must be submitted to the Office of Community School District Affairs for approval;

5.6.5 For civic forums and community centers in accordance with applicable law;

5.6.6 For recreation, physical training and athletics, including competitive athletic contests of children attending nonpublic, nonprofit schools; and

5.6.7 For such other uses as may be authorized by law.

5.7 School Buildings may not be used for conducting political events, activities or meetings except as indicated in 5.6.4 above. Political events, activities or meetings include but are not limited to:

5.7.1 Use of any school by a person, group, organization, committee, etc. on behalf of, or for the benefit of, any elected official, candidate, candidates, slate of candidates or political organization/committee except as indicated in 5.6.4 above; and

5.7.2 Rallies, forums, programs etc. on behalf of, or for the benefit of any elected official, candidate, candidates, slate of candidates, or political organization/committee as indicated in 5.6.4 above; and

5.8 No candidate for public office or elected official seeking re-election may use any school building during the 60 calendar days prior to a primary

and/or election, except if directly related to the elected official's public duties and responsibilities.

5.9 Organizations requesting space where fund-raising or solicitation or acceptance of donations will take place. must observe the specific rules outlined in 2.11

SOPM – Extended use of School Buildings
Date: October 2001 (Revised)

Standard Operating Procedures
EXTENDED USE OF SCHOOL BUILDINGS
Topic: 5: Regulations Governing the Extended Use of School Buildings
Revised: July 2007
New York City Department of Education
Division of Financial Operations

5.10
School premises may not be used for commercial purposes, except for flea market operations authorized pursuant to Regulations of the Chancellor A-650.

5.11
No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship. Permits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this Chapter on the same basis that they are granted to other clubs for students that are sponsored by outside organizations.

5.12
Classrooms and offices must be left in the same condition in which they were found. Desks, displays, papers, etc., shall not be disturbed.

5.13
Masking tape, plastic tape and similar substances shall not be used to affix materials to painted surfaces or chalkboards.

5.14

Where services by Department of Education employees are required by these regulations, the applicant organization is responsible for all charges incurred.

5.14.1

When shop rooms, home economics rooms, or similar rooms with special equipment are required, a licensed Department of Education teacher must be assigned.

5.14.2

Where kitchen equipment is to be used in the preparation of food, an Office of School Foods employee must be assigned.

5.14.3

For the use of audio-visual equipment, public address systems, stage lighting, pianos and similar items, prior approval of the principal must be obtained in writing, with a copy attached to the Permit Application. Only Department of Education assigned persons may operate school equipment.

Standard Operating Procedures
for Schools and FMCs
Division of Financial Operations

Chapter: Extended Use of School Buildings
Topic 5: Regulations Governing the Extended Use of School Facilities

5.14.4 For the use of swimming pools, one Board of Education licensed swimming teacher or a licensed Board of Education teacher with current American Red Cross Water Safety Instructor's certification must be assigned for every 25 pool participants. All persons participating in pool activities must have their head and shoulders above the water at the shallow end of the pool. No more than 40 persons may utilize the pool at any one time. The appropriate Department of Health regulations regarding the use and operation of swimming pools must be observed.

5.14.5 Scuba Diving instructors must hold a license or certificate indicating special training. One instructor must be provided for every 25 pool participants.

5.15 Athletic fields, gymnasiums, auditoriums, swimming pools and other large areas shall not be scheduled in a way that creates an unreasonable restriction of use by others.

5.16 Title 27, Chapter 4, Sub-Chapter 28, Section 27-4256(b) of the NYC Administrative Code mandates that "in all places of public amusement or entertainment not provided with (uniformed members of the Fire Department), there shall be employed by the owner or proprietor thereof, one or more persons who possess a certificate of fitness as a fireguard issued by the commissioner, who shall be on duty continuously in the main audience area during the performance to protect and guard the occupants of such buildings from fire and other sources of danger."

THE APPLICANT SHALL BE RESPONSIBLE FOR COMPLIANCE WITH THIS SECTION.

5.17 The number of tickets sold or the number of persons admitted must not exceed the capacity listed on the fire regulations for the area.

5.18 Those participating in athletic activities in the gymnasium must wear sneakers.

5.19 Tips shall not be solicited or accepted on school premises.

5.20 Boxing and wrestling shall not be permitted on school premises.

5.21 Gambling shall not be permitted on school premises.

5.22 Intoxicating substances shall not be brought to nor consumed upon school premises.

5.23 The selling of refreshments on school premises shall be prohibited unless specifically approved on the Permit.

5.24 Organizations using school premises are responsible for providing appropriate security and supervision of the program activity. The organization must provide appropriate building security at the main door, and supervision in the room *or* rooms in which the activities are being conducted. This supervision and security shall be provided by a responsible, mature adult.

5.25 Responsible adults must be in attendance at all times when youth groups are using school premises.

5.26 Permits cannot be extended beyond midnight unless special permission has been granted by the Community School District or High School or Citywide Special Education Superintendent, as applicable.

5.27 No group or organization which invites members of the public to a meeting in a school facility may exclude persons on the basis of race, religion or any other impermissibly discriminatory reason.

SOPM – Extended Use of School Buildings
Date: October 2001 (Revised)

Standard Operating Procedures:
Financial Management Centers
Division of Business and Administration

Chapter: Extended Use of School Buildings
Topic: 6. Summer Day Camps

Summer day camps:

6.1 Camp operations must be non-profit.

6.2 Camp operations must be community-oriented.

6.2 Camp operations must be open to all eligible children of the community.

6.4 Camp operations must maintain the insurance described in 6.5.

6.5 At the discretion of the Board of Education, the applicant shall maintain and pay all premiums on a Comprehensive General Liability Insurance Policy naming the Board of Education as an additional insured and as a certificate holder, in an amount not less than $1,000,000.00 per occurrence for personal injury and $250,000.00 per occurrence for property damage.

6.6 The camp shall obtain and maintain all licenses, permits etc., required by applicable laws and regulations for the operation of summer day camps.

6.7 The summer day camp shall advise the parents or guardians of the campers by means of a written statement on all applications and/or registration forms that:

THE (Name of the Camp) SUMMER DAY CAMP IS NOT A PROGRAM OF, OR OTHERWISE SPONSORED BY, THE NEW YORK CITY BOARD OF EDUCATION.

6.8 The books and records of summer day camps shall be available for inspection and duplication by the Chancellor or his designee upon five (5) days prior notice.

Standard Operating Procedures:
Financial Management Centers
Division of Business and Administration

Chapter: Extended Use of School Buildings
Topic: 7. Guidelines Governing Fees for the Extended use of School Buildings (During Hours Schools Are Not Open)

7.1 Fee Schedule Organizations

The organizations listed below shall be charged the fees as stated in the most current "Fee Schedule," available from the appropriate Permit Office or the Office of School Facilities. All other organizations are categorized as cost schedule organizations (see item 7.2).

7.1.1 Local Adult Groups, which include local tenants groups, taxpayer associations, drama clubs, local merchant associations, senior citizens groups, and local chapters of tax-exempt organizations using the school facilities for non-fund raising purposes;

7.1.2 Local Youth Groups, including scouts, little leagues, teen clubs, etc.;

7.1.3 Government Organizations, which include federal, state and city organizations and programs (e.g. Parks Department, Police and Fire

Departments, Board of Elections, etc.); and

7.1.4 Board of Education related groups or activities.

7.2 Cost Schedule Organizations

The following organizations shall be charged a supplemental fee of at least 10%. However, where two or more organizations request simultaneous use of premises, the applicable fees and space charges may be shared.

7.2.1 Use of school facilities for nonpublic employee recreation;

7.2.2 Unions, professional societies, and similar organizations;

7.2.3 Non-Board of Education-related educational agencies, including private schools and universities;

7.2.4 Social Service Agencies which charge a membership, registration, or other fee and use the school facilities in the absence of their own facility. These include local "Y"s, settlement houses, and similar agencies.

7.3 PERMITS WILL BE PROCESSED ON A FIRST-COME, FIRST-SERVED BASIS; PROVIDED, HOWEVER, THAT FEE SCHEDULE ORGANIZATIONS DESCRIBED

UNDER 7.1 SHALL RECEIVE PREFERENCE TO CHOICE OF FACILITIES OVER THOSE COST SCHEDULE ORGANIZATIONS DESCRIBED UNDER 7.2.

7.4 Discretionary Fee Schedule

Organizations falling within the cost schedule category (7.2) whose programs will be open to the general pub1ic at no cost or at a very modest charge and with a primary emphasis on youth, senior citizens, the handicapped or the needy may, at a district·s discretion, be treated as a "fee schedule" organization and thus subject to item 7.1 and the supplemental fees waived.

The Division of High Schools, the Division of Special Education or Community School Districts may at their discretion charge a higher supplemental fee than 10% to organizations charging admission, soliciting donations or contributions (refer to item 7.2) or to profit-making organizations.

D-180
EXTENDED USE OF SCHOOL BUILDINGS
03/24/10

DEFINITIONS

Beacon Programs:

Programs funded by the NYC Department of Youth and Community Development ("DYCD"). Beacon Community Centers operate a minimum of six (6) days and 42 hours a week in the afternoons and evenings, on weekends, during school holidays and vacation periods, and during the summer. Myriad community programs are offered to students and residents free of charge.

Custodial Payroll System ("CPS"):

An online, automated system, which is used to calculate and process the cost of custodial services based upon the amount of space used, the nature of the space and day/time of usage.

Custodial Entity:

A school's Custodial Engineer/Building Manager or his/her designee(s).

Extended Use:

The use of a school building by the School, Outside Organizations and/or Community Based Organizations ("CBOs"), i.e., the "User," outside normal school hours and days when school is not

in session (mornings prior to the start of classes or a recognized breakfast program, late afternoons, evenings, weekends and holidays) consistent with this regulation.

Extended Use Permit:

A permit must be obtained to reserve space for activities occurring outside normal school hours and days when schools are not in session. The permit application can be accessed through the Extended Use web application by school personnel and completed online. The User must complete and sign the permit when applying for space to be reserved.

Extended Use Application Process:

An online system that allows Organizations/Users to formally request the use of a school building. See Attachment No. 1 for additional details.

Integrated Service Centers ("ISCs")

The sources of operational support for schools and programs in the DOE. Their focus is to align services and resources with instructional priorities and School-based need to support teaching and learning.

OST – Out of School Time:

Programs funded by the NYC Department of Youth and Community Development ("DYCD"). OST programs offer a range of activities for young

people during the hours they are not in school, i.e., after school, weekends and holidays, and during up to twenty (20) days of school and summer vacations, to support their social, emotional, and academic development while providing a safe and supportive environment while their parents work.

Space Fees:

The cost for the Custodial Entity to prepare and clean the actual space required by a User to carry out the functions of its programs.

Space Sheet:

A form prepared by the School's Custodial Entity and validated by the User for the purpose of reporting the actual space and/or services used (sometimes referred to as the *Report of Authorized Space and Custodian Services Rendered Form)*. This report is used to determine the actual contractual costs incurred for usage and to generate the appropriate custodial payments to cover the additional labor services, referencing the approved Permit Application. See Attachment No. 2 for additional details.

User:

Any individual, Community Based Organization ("CBO"), or other group using a school building during extended use time.

ABSTRACT

This regulation governs the extended use of school buildings. It establishes the procedures for organizations and individuals to follow in order to use NYC public school buildings outside normal school hours and on days when school is not in session, including weekends and holidays. It supersedes the Standard Operating Procedures chapter on this topic.

INTRODUCTION

The Department of Education ("DOE") encourages the use of its public schools for purposes consistent with this Extended Use policy. School building principals, custodial engineers/building managers ("Custodial Entity"), the group, individual and/or organization wishing to use the school (the "User"), the Division of School Facilities ("DSF"), the Division of Financial Operations ("DFO"), and the Integrated Service Centers ("ISCs") are the principal entities with key roles in the Extended Use process.

I. USE OF SCHOOL BUILDINGS

A. The Extended Use of School Buildings is subject to this regulation, New York State Education Law § 414 and all other applicable federal, state and local laws.

B. The primary use of a school's premises must be for DOE programs and activities. After DOE programs and activities,

preference will be given to use of school premises for community, youth and adult group activities.

C. Responsible adults must be in attendance at all times when youth groups are using school premises.

D. Events which are personal in nature (e.g., weddings, showers, engagement parties) are strictly forbidden.

E. Permits may be granted for the purpose of instruction in any branch of education, learning, or the arts.

F. Permits may be granted for civic forums and community centers in accordance with applicable law.

G. Permits may be granted for recreation, physical training and athletics, including competitive athletic contests of children attending nonpublic, not-for-profit schools.

H. Permits may be granted for holding social, civic, and recreational meetings and entertainment, and other uses pertaining to the welfare of the community. All such uses shall be non-exclusive and open to the general public.

I. Permits may be granted for holding PTA/PA meetings. Such meetings must be non-exclusive and open to the general

public, pursuant to New York State Education Law § 414.

J. Athletic fields, gymnasiums, auditoriums, swimming pools and other large areas shall not be scheduled in a way that creates an unreasonable restriction of use by others.

K. "Take the Field."
Take the Field athletic fields are available free of charge to certain CBOs/Users that demonstrate a financial hardship. Outside usage must be consistent with DOE policies and procedures and must be allowed only when the field is not being utilized by the respective school. This arrangement applies only to the athletic field, not the use of any space within the confines of the school building. If the User wishes to use space within the building including, but not limited to, lavatories, if applicable, usage fees must be paid. Many refurbished fields under the "Take the Field" program have portable lavatories in the athletic field area. Before a User applies for the athletic field and begins the permit process, it must first contact the "Take the Field" organization at 212-521-2232. A representative will guide the User through the process to determine if the organization/user is eligible to have the applicable fees waived.

L. School premises may not be used for commercial purposes except for flea market

operations authorized pursuant to Chancellor's Regulations A-650.

M. Permits may be granted for such other uses as may be authorized by law.

N. Gambling is not permitted on school premises.

O. The sale, use, consumption and/or possession of any alcoholic beverage in any school building by youth or adults are strictly prohibited.

P. The selling of refreshments on school premises is prohibited unless specifically approved on the permit.

Q. No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship.

> Due to pending litigation entitled Bronx Household of Faith v. Bd. of Education, the DOE is currently enjoined from enforcing Section I.Q of Chancellor's Regulation D-180. Permits may not be denied solely because a User seeks a permit for the purpose of holding religious worship services or otherwise using a school as a house of worship. Contact the DOE Office of Legal

Services at 212-374-6888 with any questions concerning this provision.

R. No group or organization, which invites members of the public to a meeting in a school facility, may exclude persons on the basis of any impermissible discriminatory reason as set forth in Chancellor's Regulation A-830.

S. Permits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this regulation on the same basis that they are granted to other clubs for students that are sponsored by outside organizations.

T. Any User who obtains a permit to use a NYC public school building may not use the school premises as a mailing or business address.

U. The DOE, in light of the inherent risk of injury to participants, reserves the right in its sole discretion to decline permission for any event.

V. The Chancellor reserves the right to waive this regulation or any portion(s) thereof, that is not otherwise required by law, if he determines it to be in the best interests of the school system. Requests for waivers from the Chancellor shall be directed to the

Deputy Chancellor for Infrastructure and Planning.

II. REVIEW AND APPROVAL OF PERMIT APPLICATION

A. Every User must have an approved permit to use a school's premises (see Attachment No. 1 for the Procedures for Processing and Completing an Extended Use Application).

B. The permit is required to be completed by each User wishing to use the school building during extended use time regardless of whether the User is paying the required space and/or security fees (if applicable) or not.

C. In order to use the school building during times other than normal school hours or days when the school is not in session, a public charter school must submit a permit application.

D. Principals are responsible for making the decision to approve or deny a permit application, based on a determination as to whether the space is available for use and the User has satisfied the requirements of this regulation. Principal approval is subject to review by the ISC and Central DOE.

E. Before a Principal approves a permit for an outside organization to use a school

building, a thorough check of the potential User should be made.

F. No permit shall be considered approved unless it bears the approval of the User representative, Principal, Custodial Entity, and ISC Director (or their designees).

G. Permits are not transferable. A User receiving a permit may not transfer any portion of the premises covered by the permit to another User.

H. Permits cannot be extended beyond midnight unless special permission has been granted by the ISC.

I. No Permit Application may be approved where the scheduled duration exceeds that for which payment is made. Renewal requires a new application. The longest permissible time period for a permit shall be twelve months, i.e., one fiscal year from July 1 through June 30. Permits may not cross fiscal years.

J. A permit must be initiated <u>at least 30 days prior to the scheduled event</u>. If a permit is not used, the ISC or User must delete it, because such a permit will remain in the system until action is taken. <u>This does not apply to construction vendors responsible for repairs and/or refurbishing to a school/site</u>. Such construction vendors must file a permit to enter the building after school hours. Once authorized by the

Principal and Custodial Entity, these permits with payment are submitted directly to the DSF.

K. The User must agree to the following when signing an Extended Use Permit Application:

- that the information provided on the Permit Application is complete and accurate to the best of the User's knowledge;

- that rates are subject to change by DOE;

- to observe all of the rules and regulations contained in this regulation and in the Permit Application;

- to conform to all applicable laws and regulations governing the Extended Use of School Buildings;

- to provide adequate supervision of the activity at all times;

- to complete a User Organization Incident Report when safety/criminal incidents occur and return it to the Principal/designee and/or the School Safety Agent ("SSA") if on duty; and,

- to save the DOE harmless from any claim, loss or damage by reason of any act on the part of the applicant, its members, officers, agents, or any person using the premises invitation or with permission of the User.

L. Providing incorrect, incomplete, or misleading information on the Permit Application or the failure to conform to any of the guidelines and/or limitations contained in this regulation, as well as any other applicable laws and regulations governing the use of school buildings and grounds, may lead to the revocation of the permit, the denial of future Permit Applications and other legal actions by the DOE.

M. DOE may terminate any permit at any time when it is in the best interest of the DOE. Absent an emergency, a minimum of one week notice will be provided. In the event of termination, DOE shall refund a pro-rated portion of the permit amount.

N. Appropriate number of <u>restrooms</u> must be included in every Permit Application. Where possible, separate restrooms should be made available for male/female adults <u>and</u> male/female children.

O. If special services are required, the User must request approval for the provision of

such services from the principal. The user is responsible for these additional costs. Examples of such services may include, but are not limited to the following:

- utilizing a certificate of fitness holder to operate air conditioning equipment when required;

- having a trained and knowledgeable individual to operate stage equipment, including lighting, sound and stage sets.

III. CARE OF SCHOOL PREMISES AND PROPERTY

A. Users must exercise the utmost care in the use of school premises and property; make good any damage arising from the occupancy of any part of school premises; and save harmless the DOE from any claim, loss, or damage by reason of any act on the part of the permit holder, its members, officers, employees and agents, or any person using or coming upon the premises by invitation or with the permission of the permit holder.

B. Classrooms and offices must be left in the same condition in which they were found. Displays, papers, etc. must not be disturbed. If desks are moved, they should be returned to the original location before vacating the room.

C. Modification or alteration, whether permanent or temporary, to the physical plant systems (i.e., electrical, heating, ventilation, air conditioning (HVAC), plumbing, or architectural) is prohibited unless written approval from DSF is secured.

D. The following shall apply regarding the use of signs, banners and posters:

1. Signs, banners, posters or other notices of the permitted activity shall not be posted on school property including, but not limited to, walls, gates, columns, doors, windows, floors, elevators, building exteriors, sidewalks, emergency telephones, light standards and trees, except that they may be posted to indoor or outdoor notice boards, display cases or in other locations designated by the Principal at the time of the activity, only for the purpose of identifying the room where the activity is held.

2. Unless the activity is sponsored or supported by the school, the DOE, or New York City, the following disclaimer is required to be made by the User on all public notices or any other material, including media or internet use, that mentions the school name or school address in connection with the activity to be held on school grounds, and on any

signs posted inside or outside the school at the time of the activity.

> "This activity is not sponsored or endorsed by the New York City Department of Education or the City of New York."

3. The disclaimer must be clearly displayed in typeface of similar size as used in the public notice or materials. Use of the school name is restricted to identifying the location of the activity and may not create an impression of sponsorship or endorsement by the DOE, the school and/or school personnel.

4. Other considerations:

   - Approval of the school's Principal must be obtained prior to the posting of any material.

   - The individual or organization responsible for disseminating the information shall be identified on all materials posted on school property.

   - Material posted on school property may not demean or expose any individuals or groups to ridicule.

- Advertising related to private, commercial activities is not permitted on school property.

IV. PASS-ALONG CONTRACTUAL COSTS/ FEES FOR USING SCHOOL SPACE

A. While the DOE imposes no excess charge (profit or overhead) on extended use of its schools, there are pass-along contractual costs (determined through a collective bargaining agreement between the DOE and Custodial Engineers Local 891), i.e., costs incurred in schools for custodial services when the use is outside of normal school hours on school days and anytime on weekends, holidays and when school is not in session. These costs may vary depending on several factors such as type of space required, time of day of usage, and number of days required. Extended use fees can be less costly if activities are planned during timeframes that minimize the use of additional labor (e.g., between 3:00 and 6:00 p.m. on school days, when there is no fee applied for usage.) Contractual costs for security services provided by school safety agents, generally after 4:00 p.m., are passed along to the Users at all schools.

B. Except as otherwise provided in this regulation, fees for using school space are required to be paid with respect to use by all organizations and individuals, e.g.,

unions, Community Based Organizations ("CBOs"), other government entities, elected officials that conduct an allowable activity that shall not have been directly engaged by the school or the DOE, even if the activity involves students, staff, or parents from the school. The fee is applicable to schools managed by both custodial engineers and building managers. The DOE's automated CPS system calculates the cost of custodial services based upon the amount of space used, the nature of the space and day/time of usage."

C. No part of any fee shall directly or indirectly benefit or be deposited into an account which inures to the benefit of the Custodial Entity.

D. Cancellation and Refunds

If cancellation of a scheduled school usage is necessary, the User must notify the ISC and respective school Custodial Entity of such cancellation at least one week in advance of the scheduled activity. The User could reschedule the event, which is the preferred alternative, or request a refund from the respective ISC. Failure to provide one week notice of cancellation will result in a 15% charge of the fee for the date when the activity was scheduled. In order for any refund to be issued, the payee must complete a W-9 Form which can be found at

https://a127-pip.nyc.gov/LoginExternal/Forms/Substitute_W_9_Certification_Form.pdf

and submit it to the Comptroller's Office by fax or mail as indicated on the form. In addition, the school or ISC must enter the adjustments to the permit and forward a request for refund to DFO's Bureau of Financial Management and Reporting for issuance.

V. USE OF SPECIALIZED ROOMS AND EQUIPMENT

A. Where services by DOE employees are required by this regulation, the User is responsible for all charges incurred. ISCs and respective schools will calculate the charges based on the current contractual per session pay rates for the concerned employee.

B. When shop rooms, home economics rooms, or similar rooms with special equipment are required, licensed DOE staff must be assigned. A DOE teacher and/or Custodial Entity/designee must be used for the operation of school equipment such as stage lighting and audio/visual apparatus. Prior approval of the Principal must be obtained in writing, with a copy of the approval affixed to the Permit Application.

C. Where kitchen equipment is to be used in the preparation of food, an Office of School Food employee must be assigned.

D. For the use of swimming pools, one DOE-licensed swimming teacher or a licensed DOE teacher with current American Red Cross Water Safety Instructor's Certification must be assigned for every 25 pool participants. All pool participants involved in non-instructional pool time activities (except for Scuba Diving instruction – see below) must have their heads and shoulders above the water at the shallow end of the pool. No more than 40 persons may utilize the pool at any one time. All applicable New York State Department of Health and New York City Dept. of Health and Mental Hygiene regulations regarding the use and operation of swimming pools must be adhered to at all times. Such regulations include but are not limited to the following:

- All DOE swimming pools must have Level IIa aquatic supervision; and,

- Aquatic supervisory staff shall be at poolside providing direct supervision of pool participants. Aquatic supervisory staff on duty shall be engaged only in activities that involve direct supervision of pool participants.

- When instructional activities occur including, but not limited to, learn to swim programs, physical education classes and swim team activities, and the required supervisory staff provide the instruction, at least one additional staff member meeting at least Supervision Level III must be supplied for each aquatic supervisory staff member engaging in instructional activities.

- When a Supervision Level III staff member is used to assist a Supervision Level II staff member with direct supervision of pool participants during instruction, the Supervision Level III staff member must possess certification in aquatic injury prevention and emergency response as set forth in 10 N.Y.C.R.R. § 6-1.31(c)(2).

- Each school's written pool policy safety plan must describe the duties, positioning at poolside, and interaction between the Supervision Level II and III staff members which ensures adequate bather supervision and emergency response.

- With each extended use Permit Application for swimming pool use, the applicant must submit photocopies of

the above required certifications and photo identification of the supervisory staff members whom the applicant will use as required above. As supervisory personnel changes, the permit holder must provide updated copies of the above required certifications and photo identification. All supervisory staff must have photo identification cards on their persons while performing their duties at DOE swimming pools.

- Scuba Diving instructors must hold a license or certificate indicating special training. One instructor must be provided for every eight (8) pool participants engaging in Scuba Diving instruction.

VI. SECURITY

A. All DOE sponsored events must have security provided by the New York Police Department School Safety Division (NYPDSSD). (See Section VI.C below).

B. All non-DOE sponsored events must have adequate security to provide for the safety and well-being of the attendees at the function and the integrity of school property. Prior to approving a permit, the Principal must determine whether the proposed security is adequate for the nature of the activity. A Principal may

determine that in circumstances where there is an increased security risk, the User must provide and pay for security by the NYPDSSD (e.g., where a large crowd is expected).

C. A comprehensive guide entitled, "Request for After School Security Coverage," published by the NYPDSSD sets forth the procedures to follow for obtaining an NYPD SSA. The guide may be obtained from the Commanding Officer, NYPDSSD, Administration Operations Unit at 718-730-8528.

Questions regarding security coverage should be addressed to either to the ISC or External Program Coordinators.

Please see Attachment No. 1 for details on how to process a request for SSA coverage and Attachment No. 2 for details on how to pay for the required services.

VII. INSURANCE

A. The DOE has established mandatory insurance requirements for the following events and activities:

Summer Camps - See Section XIII.A

Carnivals – See Section XIII.B

Flea Markets – See Section XIII.C

Boxing, Wrestling and Martial Arts – See Section XII.C

Contact Sports Instruction or Activities – See Section XIII.D

B. The DOE may require that a User seeking a permit to conduct an activity or event other than that listed in VII.A. above, maintain and pay all premiums on a Commercial General Liability insurance policy with a limit of not less than $1,000,000 per occurrence. Such policy shall list the DOE and the City of New York, including their respective officials and employees, as additional insureds. The organization applying for the permit must inform its insurance broker that such additional insured coverage is to comply with Insurance Services Office (ISO) Form CG 20 26, a standard insurance industry-wide form. Prior to and as a condition to any event, the User shall provide a certificate of insurance evidencing such insurance to the principal.

VIII. FEES PAID BY THE CENTRAL DOE (AGAINST CENTRAL BUDGETARY ACCOUNTS

A. No fees should be charged to:

1. Reimbursable program or grants that directly provide full funding for Extended Use of school space.

2. Activities which are authorized by the school, conducted on behalf of the school or operated in partnership with the school. Such activities include, but are not necessarily limited to, the following:

   - Parent meetings or forums;

   - Activities connected with Open School Week or Parent/Teacher Conferences;

   - Public meeting of the Community/Citywide Education Councils;

   - Beacon Programs;

   - Out-of-School Time (OST) activities; and,

   - School clubs and other school-sponsored events.

3. PTAs/PAs are entitled to free use of school buildings, including school safety or security coverage for one hundred ten (110) hours per year outside of school

hours. These hours apply twelve (12) months per year and are not transferable. If more than one PA is in a given school building, each is entitled to the full one hundred ten (110) hours per year. See Chancellor's Regulation A-660.

4. In rare situations, an extended use fee to an outside organization may be subsidized from the school's budget when the school's Principal authorizes the charge of these fees to his/her school budget for an activity that provides a direct educational service to students and parents of the concerned school and community by supplementing or complementing the existing curriculum at the school.

5. For extenuating circumstances, a request by the User to centrally fund the pass-through costs may be granted by the Executive Director of DFO at 65 Court Street, Room 1801, Brooklyn, NY 11201.

   Before submitting this request, outside organizations should ensure that the following questions have been addressed:

   - Is the User/organization a not-for-profit, § 501 (c)(3), entity?

- Can the activity be performed between the hours of 3:00 p.m. and 6:00 p.m.?

- Has the activity/organization been approved in writing by the Principal of the concerned school?

- Does the activity provide a direct educational service to students and parents of the concerned school and community by supplementing or complementing the existing curriculum at the school?

- Does the activity/organization provide an in-kind service, which is equal to or greater than the Extended Use costs/fees?

- Can the User provide historical precedents which will assist in evaluating its subsidy request?

- Can the User prove (providing financial statements and other supporting documentation) that paying the fee will result in severe financial hardship to that organization?

IX. FIRE REGULATIONS

The number of tickets sold or the number of persons admitted must not exceed the capacity listed on the fire regulations for the area.

X. FUND RAISING/DONATIONS/ ADMISSION FEE

A. The following applies if a User is charging admission (and/or has pre-sold tickets to an event), or is accepting or collecting money, or soliciting donations or conducting fund-raising activities of any kind (including, but not limited to, the sale of refreshments):

1. The net proceeds (revenues less actual production costs) must be expended for the benefit of a charitable or educational purpose except that the proceeds may not be applied for the benefit of a society, association or organization of a religious sect or denomination, or a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firefighters or volunteer ambulance workers.

2. The Permit Application must indicate the admission fee (if applicable); and the name of the organization designated as beneficiary of the proceeds resulting

from admission fees, solicitations or donations.

3. The following must be attached to the Permit Application prior to final approval, and retained by the appropriate ISC:

   - A letter on official stationery from the charitable or educational organization that is to receive the proceeds stating that it approves of the fund-raising function and will use the proceeds for recognized charitable or educational purposes. The letter must be specific about the nature of these purposes (e.g., providing a Senior Citizens' Program);

   - A brief listing of expenditures and projected net proceeds by the user; and,

   - A § 501(c)(3) Tax Exempt Approval Form (for non-DOE organizations) from the organization which is to receive the proceeds.

XI. POLITICAL AND ELECTION ACTIVITIES (See Chancellor's Regulation D-130 which sets forth the procedures which

must be followed regarding the use of a school building for political purposes.)

A. School buildings and other DOE facilities **may** be used for:

   1. Polling places for holding primaries, general elections and special elections for the registration of voters; and

   2. Conducting candidate forums, provided, **all** candidates are invited to participate. Permit applications for such forums must include a written representation that all candidates have been invited to participate. Once the permit, with the above written statement attached, has been approved by the school and the ISC, it must be submitted to the Office of Public Affairs, 52 Chambers Street, New York, NY 10007, 212-374-4947.

B. School Buildings may **not** be used for conducting **political events**, activities or meetings, unless the purpose is for a candidate's forum as indicated above.

C. The use of any school during extended hours by any person, group, organization, committee, etc., on behalf of, or for the benefit of any elected official, candidate, candidates, slate of candidates, or political organization/committee is **prohibited** except as indicated in Section XI.A.2.

D. No rallies, forums, programs, etc., on behalf of, or for the benefit of any elected official, candidate, candidates, slate of candidates, or political organization/committee may be held in a school building after school/business hours except as indicated in Section XI.A.2 above.

E. No candidate for public office or elected official seeking re-election may use any DOE school building after school business hours during the 60 calendar days prior to a primary and/or general election, except if directly related to the elected official's public duties and responsibilities.

XII. OTHER CONSIDERATIONS

A. Those participating in athletic activities in the gymnasium must wear appropriate footwear and apparel.

B. Tips shall not be solicited or accepted on school premises.

C. CBOs and other User organizations wishing to conduct boxing, wrestling, or martial arts programs on school premises must meet the following criteria:

1. The activity is sanctioned by a recognized organization established to conduct such events. As an example, Golden Glove Boxing is a nationally

sanctioned event under the auspices of the U.S. Olympic Committee.

2. The sponsoring organization for any boxing, wrestling or martial arts event shall maintain and pay all premiums on a Commercial General Liability insurance policy with a limit of not less than $1,000,000 per occurrence, and an excess or umbrella liability policy (or policies) with a limit of not less than $5,000,000 per occurrence. All such policies shall list the DOE and the City of New York, including their respective officials and employees, as additional insureds with coverage at least as broad as provided by Insurance Services Office (ISO) Form CG 20 26. Prior to and as a condition to any event, the sponsoring organization shall provide a certificate of insurance evidencing such insurance to the principal.

3. Sponsors understand and accept that they will pay for the full cost of security provided by DOE School Safety Officers (SSAs). The number of SSAs will be determined by the DOE School Security Office. Payment for the estimated cost of security must be paid in advance.

4. The event may not be for-profit and all proceeds (i.e., admission fees, charges, etc.) must go to a recognizable

charitable or educational organization as set forth in Section X.

D. The DOE, in light of the inherent risk of injury to participants, reserves the right in its sole discretion to decline permission for any event.

E. The use of a school yard or other school property for parking privileges by outside organizations/Users is prohibited.

XIII. SUMMER DAY CAMPS, CARNIVALS, FAIRS, FLEA MARKETS AND CONTACT SPORTS INSTRUCTION/ACTIVITIES

A. Summer Day Camps

The operation of Summer Day Camps is permitted as set forth below:

1. Camp operations must:

- be not-for-profit;
- be community oriented;
- be open to all eligible children of the community; and,
- maintain necessary insurance.

2. The User shall maintain and pay all premiums on a Commercial General Liability insurance policy with a limit of not less than $1,000,000. per occurrence, and an excess or umbrella liability policy (or policies) with a limit of not less than $5,000,000 per occurrence. All such policies shall list the DOE and the City of New York, including their respective officials and employees, as additional insureds with coverage at least as broad as provided by Insurance Services Office (ISO) Form CG 20 26. Prior to and as a condition to any event, the User shall provide a certificate of insurance evidencing such insurance to the principal.

3. The camp shall obtain and maintain all licenses, permits, etc., required by applicable laws and regulations for the operation of summer day camps.

4. The camp shall advise the parents or guardians of the campers by means of a written statement on all applications and/or registration forms that:

   THE (Name of the Camp) IS NOT A PROGRAM OF, OR OTHERWISE SPONSORED BY, THE NEW YORK CITY DEPARTMENT OF EDUCATION.

5. The books and records of summer day camp operations shall be available for inspection and duplication by the Chancellor or his designee within five (5) days of written notification.

B. Carnivals and Fairs

Carnivals and fairs are permitted as set forth below:

1. The User shall maintain and pay all premiums on a Commercial General Liability insurance policy with a limit of not less than $1,000,000 per occurrence. Such policy shall list the DOE and the City of New York, including their respective officials and employees, as additional insureds with coverage at least as broad as provided by Insurance Services Office (ISO) Form CG 20 26. In the event the carnival or fair includes "rides," "moonwalks" or other facilities provided by a commercial company, the User shall assure that such company maintains a Commercial General Liability insurance policy with a limit of not less than $1,000,000 per occurrence, and an excess or umbrella liability policy (or policies) with a limit of not less than $5,000,000 per occurrence, naming the User, DOE and the City of New York as additional insureds with coverage at least as broad as provided by ISO Form CG 20 26. Prior to and as a

condition to any event, the User shall provide certificate(s) of insurance evidencing such insurance to the principal.

2. Licenses/permits from the Department of Health and Mental Hygiene (with respect to serving of food) and the Department of Consumer Affairs (with respect to rides) must be presented to the ISC at the time of application.

3. The User is responsible for ensuring that any equipment brought onto school property is erected in accordance with law and its design, and that full consideration has been given to equipment weight load, height and clearance limitations.

4. No rides or equipment will be permitted that require the excavation or penetration of the ground surface to secure any such equipment or rides.

C. Flea Markets (see **Chancellor's Regulation A-650** which sets forth the conditions under which flea markets and certain other flea market-type programs may be initiated and conducted on DOE property).

1. Regardless of the flea market's duration, all monies raised as a result of a flea market operation **must be for**

the primary purpose of raising funds to benefit the educational, social and cultural programs at the respective school.

2. The Parent Association/PTA (sponsoring organization) must secure an Extended Use Permit approved by the Principal and Custodial Entity of the concerned school in order to use the school during extended hours. The permit process is the same for flea markets as it would be for any other User wishing to use DOE schools when they are not in session. Applicable opening and space fees for the event must be affixed to the approved permit and forwarded to the ISC which oversees the business operations of the school at which the event will be held.
3. The user will be required to obtain adequate security to ensure the safety of those attending the flea market and the integrity of school property.

4. The User shall maintain and pay all premiums on a Commercial General Liability Insurance Policy with a coverage limit not less than $1,000,000 per occurrence and an excess or umbrella liability policy of not less than $3,000,000 per occurrence. Such policies shall list the DOE and the City of New York, including their respective officials and employees, as additional insureds

with coverage at least as broad as provided by Insurance Services Office (ISO) Form CG 20 26. Prior to and as a condition to any event, the User shall provide certificate(s) of insurance evidencing such insurance to the principal.

D. Contact Sports Instruction or Activities

1. The sponsoring organization for any contact sports instruction or activities shall maintain and pay all premiums on a Commercial General Liability insurance policy with a limit of not less than $1,000,000 per occurrence and an excess or umbrella liability policy of not less than $3,000,000 per occurrence. Such policies shall list the DOE and the City of New York, including their respective officials and employees, as additional insureds with coverage at least as broad as provided by Insurance Services Office (ISO) Form CG 20 26. Prior to and as a condition to any event, the User shall provide certificate(s) of insurance evidencing such insurance to the principal.

E. The DOE reserves the right to require additional types, levels, or terms of insurance as it deems appropriate for any of the events or activities set forth in XIII.A.-D. above.

XIV. INQUIRIES

Inquiries pertaining to this regulation should be addressed to the ISC that oversees the business operations of the concerned school. All paperwork pertaining to Extended Use Permits for Children's First Network Schools is handled by the geographical ISC. Please click on the following link to access CONTACT INFORMATION for each of the ISCs.

ISC Contact Information

New York Education Law § 414
Use of Schoolhouse and Grounds
Effective: June 30, 2009

1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all portions thereof, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for such other public purposes as are herein provided; except, however, in the city of New York each community school board shall be authorized to prohibit any use of schoolhouses and school grounds within its district which would otherwise be permitted under the provisions of this section. Such regulations shall provide for the safety and security of the pupils and shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes:

(a) For the purpose of instruction in any branch of education, learning or the arts.

(b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

(c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public. Civic meetings shall include, but not be limited to, meetings of parent associations and parent-teacher associations.

(d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firefighters or volunteer ambulance workers.

(e) For polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no meetings sponsored by political organizations shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the

board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

(f) For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civic forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be non-exclusive and open to the general public.

(g) For classes of instruction for mentally retarded minors operated by a private organization approved by the commissioner of education.

(h) For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school.

(i) To provide child care services during non-school hours, or to provide child care services during school hours for the children of pupils attending the schools of the district and, if there is additional space available, for children of employees of the district, and, if there is further additional space available, the Cobleskill-Richmondville school district shall provide child care services for children ages three and four who need child care assistance due to lack of sufficient child care spaces. Such determination shall be made by each district's board of education, provided that the cost of such care shall not be a school district charge but shall be paid by the person responsible for the support of such child; the local social services district as authorized by law; or by any other public or private voluntary source or any combination thereof.

(j) For licensed school-based health, dental or mental health clinics. (i) For the purposes of this subdivision, the term "licensed school-based health, dental or mental health clinic" means a clinic that is located in a school facility of a school district or board of cooperative educational services, is operated by an entity other than the school district or board of cooperative educational services and will provide health, dental or mental health services during school hours and/or non-school hours to school-age and preschool children, and that is: (1) a health clinic approved under the provisions of chapter one hundred ninety-eight of the laws of nineteen

hundred seventy-eight; or (2) another school-based health or dental clinic licensed by the department of health pursuant to article twenty-eight of the public health law; or (3) a school-based mental health clinic licensed or approved by the office of mental health pursuant to article thirty-one of the mental hygiene law; or (4) a school-based mental health clinic licensed by the office of mental retardation and developmental disabilities pursuant to article sixteen of the mental hygiene law.

(ii) Health professionals who provide services in licensed school-based health, dental or mental health clinics shall be duly licensed pursuant to the provisions of title eight of this chapter unless otherwise exempted by law and shall be authorized to provide such services to the extent permitted by their respective practice acts.

(iii) Except where otherwise authorized by law, the cost of providing health, dental or mental health services shall not be a charge upon the school district or board of cooperative educational services, and shall be paid from federal, state or other local funds available for such purpose. Building space used for such a clinic shall be excluded from the rated capacity of the school building for the purpose of computing building aid pursuant to subdivision six of section thirty-six hundred two of this chapter or aid pursuant to subdivision five of section nineteen hundred fifty of this chapter.

(iv) Nothing in this paragraph shall be construed to justify a cause of action for damages against a school district or a board of cooperative educational services

by reason of acts of negligence or misconduct by a school-based health, dental or mental health clinic or such clinic's officers or employees.

(k) For graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed.

The board of education in the city of New York may delegate the authority to judge the appropriateness for uses other than school purposes to community school boards.

2. The trustees or board of education shall determine the terms and conditions for such use which may include rental at least in an amount sufficient to cover all resulting expenses for the purposes of paragraphs (a), (b), (c), (d), (e), (g), (i), (j) and (k) of subdivision one of this section. Any such use, pursuant to paragraphs (a), (c), (d), (h) and (j) of subdivision one of this section, shall not allow the exclusion of any district child solely because said child is not attending a district school or not attending the district school which is sponsoring such use or on which grounds the use is to occur.

First Amendment
to the
United States Constitution

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.