

No. 06-0725

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

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

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*
SUPPORTING APPELLEES AND URGING AFFIRMANCE

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INTEREST OF THE UNITED STATES

This case presents important questions regarding how Supreme Court precedent concerning viewpoint discrimination should be applied to private religious speech that occurs in a public school during non-school hours and without school endorsement. The United States previously participated as *amicus curiae* in support of Bronx Household of Faith (“Bronx Household”) in this Court

on appeal from the district court's issuance of a preliminary injunction in this case (No. 02-7781). The United States subsequently filed an *amicus curiae* brief in support of Bronx Household in the district court on the parties' cross-motions for summary judgment and Bronx Household's request to convert the preliminary injunction into a permanent injunction. The United States has also participated in numerous cases addressing similar First Amendment issues of equal access for religious speakers, including *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Faith Center Church Evangelistic Ministries v. Glover*, No. 05-16132 (9th Cir., argued Feb. 17, 2006); *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District*, 386 F.3d 514 (3d Cir. 2004); *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery City Public Schools*, 373 F.3d 589 (4th Cir. 2004); and *Donovan v. Punxsutawney Area School Board*, 336 F.3d 211 (3d Cir. 2003).

In addition, the United States has an interest in this Court's analysis because it may affect the scope of the Equal Access Act ("EAA"), 20 U.S.C. 4071-4074. The EAA provides that a "public secondary school" that receives federal funds and provides a "limited open forum" may not "deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious * * * content

of the speech at such meetings.” 20 U.S.C. 4071(a). The United States also enforces Title III of the Civil Rights Act of 1964, which authorizes the Attorney General to seek relief when persons are denied equal use of public facilities on the grounds of race, color, religion, or national origin. 42 U.S.C. 2000b.

STATEMENT OF THE ISSUES

1. Whether appellants engaged in unconstitutional viewpoint discrimination by refusing to allow a religious organization to rent public school facilities for worship during non-school hours on an equal basis with other community organizations renting these facilities for expressive activities.

2. Whether the district court correctly concluded that there is no practical or constitutionally permissible distinction that public officials in charge of limited public fora open to a broad range of expressive activities can make between religious worship and expression from a religious viewpoint.

3. Whether granting equal access to a limited public forum to a religious group seeking to engage in expressive activities on equal terms with other organizations would violate the Establishment Clause.

STATEMENT OF THE CASE

1. Pursuant to New York Education Law § 414(c) (McKinney 2002), a school district or school board may permit school facilities to be used during non-school hours for a broad range of purposes, including “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.” The Board of Education of the City of New York (the “Board”) adopted this purpose as part of its Standard Operating Procedure (SOP) 5.6. The Board also adopted SOP 5.9, which provided that “[n]o outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school,” but groups could discuss “religious material or material which contains a religious viewpoint.”

2. In 1994, Bronx Household, a Christian organization, sought to rent school facilities for its weekly meetings. See *Bronx Household of Faith v. Board of Educ.*, 226 F. Supp. 2d 401, 403 (S.D.N.Y. 2002). Bronx Household’s weekly gatherings include “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. *Id.* at 410. Bronx Household has

explained that the weekly 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.*” *Ibid.* (emphasis in original).

3. Community School District No. 10 (the “School District”) denied Bronx Household’s request, citing the prohibition of religious services on school property. *Bronx Household*, 226 F. Supp. 2d at 403. Bronx Household sued the School District and the Board, asserting violations of the First Amendment, and lost. *Bronx Household of Faith v. Community Sch. Dist. No. 10*, No. 95 Civ. 5501, 1996 WL 700915 (S.D.N.Y. Dec. 5, 1996), *aff’d*, 127 F.3d 207 (2d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998). This Court, by a split vote, affirmed. The majority held that, in a limited public forum, a distinction could be made between religious viewpoints on a secular topic and religious worship and instruction. *Bronx Household*, 127 F.3d at 214-215.

4. In 2001, the Supreme Court decided *Good News Club v. Milford Central School*, 533 U.S. 98. In that case, a Christian youth organization sought permission to hold its weekly meetings on school premises immediately after school on days when school was in session. The Club’s meetings included singing hymns, memorizing scripture, and hearing a Bible lesson. *Id.* at 103. The policy in this case was promulgated pursuant to the same New York statute as the policy

at issue in *Good News Club*. Milford allowed entities to use school property for events that were “social, civic, and recreational,” or that “pertain[] to the welfare of the community.” *Id.* at 102. Milford acknowledged that these categories encompassed programs that address a child’s moral and character development from a religious perspective. *Id.* at 108. The Milford school, however, rejected Good News’ request because it considered the Club’s activities to be “the equivalent of religious worship.” *Ibid.*

The Court held that the Milford school engaged in viewpoint discrimination when it denied permission for the Good News Club to meet on school premises. *Good News Club*, 533 U.S. at 107. The Court rejected the lower court’s characterization of the Club’s activities as “different in kind” because they are “religious in nature.” *Id.* at 110-111. The Court explained that characterizing something as “quintessentially religious” does not mean that it cannot be considered simultaneously a program to teach moral and character development. *Ibid.*

5. In 2001, in the wake of *Good News Club*, Bronx Household again sought permission from the School District to use school property for its Sunday meetings. *Bronx Household*, 226 F. Supp. 2d at 409. The School District,

however, again rejected Bronx Household's request, claiming that the meetings constituted religious worship, which remained a prohibited activity. *Ibid.*

6. Bronx Household and two pastors subsequently sued the School District and the Board, alleging violations of the Free Exercise, Free Speech, Free Assembly, and Establishment Clauses of the First Amendment; the Fourteenth Amendment; and several provisions of the New York Constitution. *Bronx Household*, 226 F. Supp. 2d at 402-403. They also sought a preliminary injunction to enjoin the School District from denying Bronx Household's application to rent space for the church's weekly meetings. *Id.* at 403.

7. a. The district court issued a preliminary injunction in favor of Bronx Household. The district court first held that, regardless of whether certain of Bronx Household's activities during their Sunday meetings might be cabined into a category of "mere religious worship" if examined in isolation, the church's other proposed activities "are clearly consistent with the type of activities previously permitted in the forum and expressly permitted by the School District[]." *Bronx Household*, 226 F. Supp. 2d at 413-414. The district court found that many of the church's proposed activities – such as teaching moral values, singing, socializing, eating, and organizing charitable activities serving members of the community – fell squarely within the purpose of the forum. *Ibid.*

b. Next, the district court rejected the Board's effort to label Bronx Household's core religious activities as a separate, excludable category of "worship" without considering the nature of their component parts, noting that the Supreme Court in *Good News Club* stressed that "what matters is the substance of the club's activities." *Bronx Household*, 226 F. Supp. 2d at 415-416 (quoting *Good News Club*, 533 U.S. at 112 n.4). The district court quoted the Supreme Court's observation in *Widmar v. Vincent*, 454 U.S. 263 (1981), that "[t]here 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.'" *Bronx Household*, 226 F. Supp. 2d at 416 n.9 (quoting *Widmar*, 454 U.S. at 270 n.6).

c. The district court held that, even assuming *arguendo* that there were discernable categories of worship and non-worship, attempting to distinguish "religious content from religious viewpoint where morals, values and the welfare of the community are concerned" would be futile. *Bronx Household*, 226 F. Supp. 2d at 418. Moreover, the court held that "the government may not, consistent with the First Amendment, engage in dissecting speech to determine whether it constitutes worship." *Id.* at 423.

d. Finally, the district court concluded that Bronx Household “was substantially likely to succeed in demonstrating that permitting them to hold their Sunday morning meetings at [the school] would not violate the Establishment Clause.” *Bronx Household*, 226 F. Supp. 2d at 425-426. The district court cited several factors indicating the absence of governmental endorsement of or entanglement with Bronx Household’s religious activities: the meetings would occur during non-school hours when students would not be present; the meetings would be open to the public; and the program would not be endorsed by the school district. *Ibid.* The district court found that allowing Bronx Household “to hold [its] Sunday morning meetings ‘would ensure neutrality, not threaten it,’ because [Bronx Household is] ‘seek[ing] nothing more than to be treated neutrally and given access to speak about the same topics as are other groups.’” *Id.* at 426 (quoting *Good News Club*, 533 U.S. at 114).

8. a. This Court affirmed the issuance of the preliminary injunction, holding:

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.

See *Bronx Household of Faith v. Board of Educ.*, 331 F.3d 342, 354 (2d Cir.

2003). This Court held that, because the Board permitted other groups to teach morals and character development on school property, there was “a substantial likelihood that [Bronx Household] would be able to demonstrate that the [Board] cannot bar the church’s proposed activities without engaging in unconstitutional viewpoint discrimination.” *Ibid.*

b. This Court also upheld the district court’s ruling that Bronx Household was substantially likely to succeed in demonstrating that the appellants do not have a valid Establishment Clause interest in denying Bronx Household’s application. This Court noted that, “[i]n 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.” *Bronx Household*, 331 F.3d at 356.

c. Although this Court agreed that Bronx Household’s activities “[we]re not simply religious worship divorced from any teaching of moral values or other activities permitted in the forum,” this Court “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.” *Bronx Household*, 331 F.3d at 355-356. This Court noted the “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 seriously undermined but not explicitly rejected in *Good News Club*.” *Id.* at 355.

9. Thereafter, Bronx Household applied for, and was granted, permission to use P.S. 15 to hold its weekly meeting. On March 23, 2005, the Board announced that it was modifying SOP 5.11¹ to provide:

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

¹ SOP 5.9 was renumbered 5.11.

other clubs for students that are sponsored by outside organizations.

Bronx Household of Faith v. Board of Educ., 400 F. Supp. 2d 581, 588 (S.D.N.Y. 2005). On August 17, 2005, the Board notified Bronx Household by letter that the church's use of the school for its weekly meeting was prohibited under revised SOP 5.11. *Id.* at 588. The Board explained in its letter that it was "not currently enforcing revised [SOP] 5.11 * * * because of the preliminary injunction Order that was entered in this case," but noted that if it should prevail in the litigation, "then any future application by plaintiffs to hold their worship services at P.S. 15 or any other school will be denied." *Ibid.*

The parties filed cross-motions for summary judgment, and Bronx Household moved to convert the preliminary injunction into a permanent injunction. The Board contended that modified SOP 5.11 was a permissible speaker-based regulation that was viewpoint neutral. The Board also maintained that it must deny Bronx Household use of school facilities to avoid violating the Establishment Clause.

a. The district court held that the implementation of revised SOP 5.11 constituted viewpoint discrimination. *Bronx Household*, 400 F. Supp. 2d at 591-592. The court found that Bronx Household was not engaged in "mere religious

worship, divorced from any teaching of moral values.” *Id.* at 592 (citing *Good News Club*, 533 U.S. at 112 n.4). Rather, according to the court, Bronx Household seeks “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.” *Ibid.* Moreover, the district court rejected the Board’s assertion that Bronx Household could be excluded from the forum because it termed its meetings “services,” finding this argument was precluded by *Good News Club*. *Ibid.*

b. In addition, the district court ruled that allowing Bronx Household to use the facilities would not violate the Establishment Clause under the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). See *Bronx Household*, 400 F. Supp. 2d at 592-599. The court found that the Board’s policy is neutral toward religion because it encourages “social, civic, recreational, and entertainment activities” that have a secular purpose. *Id.* at 593. The court also concluded that opening the forum to Bronx Household on the same terms as other groups would not have the primary effect of advancing or inhibiting religion, but would preserve neutrality. Moreover, reasonable time, place, and manner restrictions could remedy any concerns regarding conduct in the forum. *Id.* at 597-598. And, finally, the court held that enforcement of modified SOP 5.11 would

lead to excessive government entanglement with religion because it would require government actors to analyze and parse religious doctrine. *Id.* at 598-599.

SUMMARY OF ARGUMENT

The facts presented here are analogous in all material respects to *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). Consistent with the Court’s analysis in *Good News Club*, the district court correctly held that the Board engaged in unconstitutional viewpoint discrimination. See Section I.A, *infra*. Bronx Household’s weekly meetings, in which it engages in singing, sermons and lessons, prayer and worship activities, socializing, and coordination of charitable activities, fall well within the forum’s category of “social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community.” N.Y. Educ. Law § 414(1)(c) (McKinney 2002). Including elements that are unique to religion, such as prayer or communion, does not negate Bronx Household’s conformance to the broad criteria for the limited forum created by the Board. Cf. *Good News Club*, 533 U.S. at 112 n.4. Thus, the Board’s refusal to rent to Bronx Household constitutes impermissible viewpoint discrimination. Cf. *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-394 (1993). See Section I.B, *infra*.

Moreover, the district court correctly concluded that it cannot practically, and may not constitutionally, distinguish between religious worship and religious viewpoint in analyzing access to a broadly defined limited public forum, such as the one at issue here. See Section II, *infra*. The Supreme Court has recognized that no intelligible distinction can be made between singing, teaching, and reading in general, and those same activities when used for worship. *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981). Even if such a distinction could be made, the process would necessarily drag forum administrators and courts into a degree of parsing religious practice and doctrine that would violate the non-entanglement principle of the Establishment Clause, *ibid.*, as well as the free speech protections of the First Amendment, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845 (1995).

Finally, allowing Bronx Household to rent school property on equal terms with other organizations engaging in expressive activities would not, as defendants contend, violate the Establishment Clause. See Section III, *infra*. To the contrary, permitting access on an equal basis would in fact preserve the neutrality toward religion required by the Establishment Clause. See *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985) (Establishment Clause “requir[es] the government to maintain a course of neutrality among religions, and

between religion and nonreligion”). Permitting Bronx Household access also avoids impermissibly entangling the state in religion by foreclosing attempts to discern which elements of Bronx Household’s activities can be deemed “pure worship” and which can be deemed “religious speech.” See *Widmar*, 454 U.S. at 269 n.6.

ARGUMENT

I

THE BOARD ENGAGED IN UNCONSTITUTIONAL VIEWPOINT DISCRIMINATION BY DENYING BRONX HOUSEHOLD EQUAL ACCESS TO THE SCHOOL

The Board engaged in unconstitutional viewpoint discrimination by denying Bronx Household the same opportunity to promote its activities that other groups enjoy. Restrictions on private speech must be viewpoint neutral. In all relevant respects, Bronx Household’s meetings did not differ from the meetings of other groups that the Board permitted to use the school. Rather, the Board denied Bronx Household use of the school solely because of the religious perspective of its activities. The Board, therefore, engaged in unconstitutional viewpoint discrimination in violation of Bronx Household’s First Amendment rights.

A. *The Board Must Permit Use Of The School In A Viewpoint Neutral Manner*

The Board may restrict access to schools only if the restrictions are viewpoint neutral. “It is axiomatic that the government may not regulate speech based on * * * the message it conveys.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (citing *Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1972)). The Supreme Court has long held that even in purely non-public fora, the government may not engage in viewpoint discrimination: “Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.” *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-393 (1993) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985)); see also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-107 (2001) (requiring viewpoint neutrality in a limited public forum); *Rosenberger*, 515 U.S. at 829 (“The 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.”). Because it is clear that the Board has created a limited public forum, see *Bronx Household of Faith v. Board of Educ.*, 400 F. Supp. 2d 581, 590-591 (S.D.N.Y.

2005), the Board’s restrictions on the use of school facilities must be viewpoint neutral.

B. Excluding Bronx Household Constitutes Viewpoint Discrimination

The Board engaged in viewpoint discrimination by excluding Bronx Household from renting school facilities. The Board created and operated a forum that enabled groups to engage in “social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community.” See *Bronx Household*, 400 F. Supp. 2d at 590-591. In practice, this policy is as broad as it sounds. Pursuant to this policy, thousands of permits have been granted to diverse groups, including sports leagues, Legionnaire Greys, Boy and Girl Scouts, community associations, and a college for holding English instruction. See *id.* at 596 (“9,804 non-government, non-construction contractor permits were issued for use of school property in the 2003-2004 school year.”); see also *Bronx Household of Faith v. Board of Educ.*, 331 F.3d 342, 348 (2d Cir. 2003); *Bronx Household of Faith v. Board of Educ.*, 226 F. Supp. 2d 401, 417 (S.D.N.Y. 2002).

Bronx Household easily meets the “speaker identity” and “subject matter” requirements for the forum that the Board created. See *Cornelius*, 473 U.S. at 806. First, it is undisputed that Bronx Household is a member of the class that the

School District permits to use the school. Second, Bronx Household satisfies the SOP's criteria of engaging in social or civic activities because it engages in

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. * * * We read the Bible and the pastors teach from it. * * * [W]e have a light fellowship meal, * * * meet new people, [and] talk to one another[.] * * * 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.*

Bronx Household, 226 F. Supp. 2d at 410 (emphasis in original). These activities are clearly social, civic, and recreational endeavors. Because the Board has previously allowed other groups to use the school for social, civic, and recreational purposes, the specific activities described by Bronx Household are indistinguishable from those the Board has permitted other users, save for the fact that Bronx Household engages in its activities from a religious viewpoint and holds "religious services" that SOP 5.11 prohibits. By denying Bronx Household's request to use the school simply because some of its topics for discussion or activities are religious, which the Board seeks to reduce to

“worship,” the Board engaged in precisely the type of viewpoint discrimination held unconstitutional in *Good News Club*.²

In *Good News Club*, a local Good News Club chapter sought permission to hold its weekly meetings on school grounds after school hours. As in the instant case, the school district’s community use policy permitted school property to be used for a broad range of activities, such as “social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community.” 533 U.S. at 102. The school district rejected the Club’s request because it considered its activities to be religious in nature. *Id.* at 108. The Supreme Court held that the school district engaged in unconstitutional viewpoint discrimination when it denied the Club’s request because the Club sought to address a topic clearly within the bounds of the forum. *Id.* at 107-108. The Court explained 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 112; see also *Rosenberger*, 515 U.S. at 831

² The Board argues (Br. 31, 43-45) that the record since the preliminary injunction was granted has changed. The district court correctly rejected this argument, stating that while “[t]he record is larger, * * * much of the material submitted is speculative” and “irrelevant.” *Bronx Household of Faith v. Board of Educ.*, 400 F. Supp. 2d 581, 589 (S.D.N.Y. 2005). As the district court correctly recognized, “the record appears to be substantially the same as it was at the preliminary injunction stage.” *Id.* at 590.

(holding that a public university could not deny funding to student publication presenting religious viewpoints); *Lamb's Chapel*, 508 U.S. at 386 (ruling that a public school opening facilities after hours to “social, civic and recreational meetings * * * and other uses pertaining to the welfare of the community” could not prohibit groups wishing to present a film series on child rearing and family values from a Christian perspective).

Here, the Board unquestionably permits other groups to engage in “social, civic and recreational entertainments” under the SOP. Just as in *Good News Club*, the Board may not discriminate against Bronx Household merely because it engages in such activities from a religious perspective.³

³ The Board also argues (Br. 36 n.6), based on *Widmar v. Vincent*, 454 U.S. 263 (1981), that modified SOP 5.11 is constitutional because it draws a distinction between student religious speech and non-student religious speech. See *Widmar*, 454 U.S. at 268 n.5 (“We have not held, for example, that a campus must make all of its facilities available to students and nonstudents alike.”). The district court correctly rejected this contention. See *Bronx Household*, 400 F. Supp. 2d at 599-601. Modified SOP 5.11 does not permissibly differentiate between student groups and non-student groups. Rather, student groups are allowed to use school facilities for both religious and non-religious activities. Non-student groups, however, are allowed to use school facilities only for non-religious purposes. This is precisely the type of viewpoint discrimination between similarly situated non-student groups that *Good News Club* forbids.

II

THERE IS NO PRACTICAL OR CONSTITUTIONALLY PERMISSIBLE BASIS TO DISTINGUISH WORSHIP FROM RELIGIOUS VIEWPOINTS IN A BROADLY DEFINED FORUM

The Board argues that prohibiting groups to engage in worship is a permissible restriction. According to the Board, “[r]eligious worship services are distinct activities that have ‘no real secular analogue’ and can be readily distinguished from other activities permitted in the limited public forum of public schools without engaging in viewpoint discrimination.” Br. 39. The Board argues, therefore, that worship can be parsed and separated from other activities, such as teaching morals and character development. Thus, the Board “seeks to reinstitute a policy that would prevent any congregation from using a public school for its worship services.” Br. 35-36. In this connection, the Board makes much of the fact that Bronx Household refers to its meetings as “worship” or “services.” Br. 36-38.

The district court correctly rejected the Board’s argument that Bronx Household’s “activities * * * fall within a separate category of speech,” that can be “divorced from any teaching of moral values,” and correctly concluded that it could not classify Bronx Household’s activities as “a separate category of speech” constituting “mere religious worship.” *Bronx Household of Faith v. Board of*

Educ., 400 F. Supp. 2d 581, 592 (S.D.N.Y. 2005) (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 n.4 (2001)). At the same time, even if Bronx Household's expressive activities are "worship," exclusion on that basis would be impermissible viewpoint discrimination.

The Board's efforts to cabin worship into a *sui generis* category of expression should be rejected. *Good News Club* addressed the difficulties of distinguishing between religious worship as a subject matter and worship as expression of a religious viewpoint. The Court explained that something that is "quintessentially religious" or "decidedly religious in nature" can nonetheless express a viewpoint, 533 U.S. at 111, observing that the "Club's activities do not constitute mere religious worship, divorced from any teaching of moral values," *id.* at 112 n.4. Also, worship could "be characterized properly as the teaching of morals and character development from a particular viewpoint." *Id.* at 111. The prayer, Bible readings, and Bible games in which the Club engaged expressed a viewpoint about "morals and character." *Ibid.*

The *Good News Club* dissent found relevant the fact that the Club's meetings might be best described as "an evangelical service of worship" and thus impermissible. 533 U.S. at 138 (Souter, J., dissenting). In response, the majority explained that "[r]egardless of the label * * *, what matters is the substance of the

Club’s activities,” and found exclusion of the meetings to be viewpoint discrimination. *Id.* at 112 n.4. Thus, Bronx Household’s reference to its meetings as “worship” or “services” is irrelevant.

The Supreme Court repudiated the contention that the government may properly distinguish between “purely religious worship” and “religious speech” in *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981).⁴ *Widmar* observed that attempting to recognize such distinctions lacks “intelligible content.” *Ibid.* Finding no principled distinction for the courts to draw, and believing that any such hypothetical distinction would impermissibly entangle the government in religious affairs, *Widmar* concluded that there is no 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.’” *Ibid.*

Applying *Good News Club*, this Court could “find no principled basis upon which to distinguish the activities set out by the Supreme Court in *Good News*

⁴ The standard applied for an open forum in *Widmar v. Vincent*, 454 U.S. 263, 270 (1981) – whether the regulation is “necessary to serve a compelling state interest” and is “narrowly drawn” to achieve that objective – is more stringent than that applicable to the limited forum at issue here, but that distinction has no consequence for the issue of whether worship is distinguishable from a religious viewpoint.

Club from the activities that the Bronx Household of Faith has proposed.” *Bronx Household of Faith v. Board of Educ.*, 331 F.3d 342, 354 (2d Cir. 2003).

Accordingly, this Court declined to parse out as a separate, excludable category those elements of the meetings that could be called worship, and held that, under *Good News Club*, the meetings could not be excluded. This Court noted that drawing lines between “religious worship” and “religious speech” was probably untenable after *Good News Club*.

The Board’s argument (Br. 39) that “[r]eligious worship services are distinct activities that have ‘no secular analogue’ and can be readily distinguished from other activities permitted in * * * public schools” necessarily fails in light of *Good News Club*. That Bronx Household engages in distinct activities for which it would use the school is irrelevant to the constitutionality of banning “religious worship services.” Rather, the relevant question is whether Bronx Household’s meeting can be “characterized properly” as a social, civic, or recreational meeting from a particular viewpoint. It clearly can be.

Furthermore, the premise on which the Board’s argument rests is faulty. The assumptions animating the Board’s argument are that Bronx Household’s worship service was devoid of social, civic, or recreational value and, more generally, that a worship service could never meet the criteria of the limited public

forum it has created in the public schools. Yet religious worship services do meet the purposes established by the Board for this forum. Sermons, homilies, or messages, which are part of the worship services of most faiths, are plainly communicative. Communal worship activities such as songs and prayers also are expressions among believers. Even those aspects of religious practice most readily susceptible to being dismissed as “mere worship,” such as hymns, liturgical prayers, or a ritual such as communion, communicate specific messages among participants and to observers about the participants’ world view. As the Fifth Circuit has observed:

The assembly of those bound by common beliefs and observances not only serves to create a sense of community among the members through the shared expression of their beliefs, it also communicates to outsiders the church’s identity as a group devoted to a common ideal. By group worship, each worshipper communicates to outsiders the identity of the group and his own identity as a member of it, a form of self-expression.

Islamic Ctr. of Miss., Inc. v. City of Starkville, 840 F.2d 293, 300 (5th Cir. 1988).

Worship more generally has characteristics that are unique, certainly, but that is also true of religion itself. The Supreme Court in *Good News Club*, 533 U.S. at 111-112, rejected the notion that religion’s uniqueness lent itself to treatment as a separate subject rather than as a viewpoint. It noted that religious instruction or

prayer, while “quintessentially religious” or “decidedly religious in nature,” can nonetheless express a viewpoint. *Id.* at 111. In fact, the Supreme Court cited Judge Jacobs’ dissenting opinion in *Good News Club, ibid.*, which explained concisely how religious devotional acts such as prayer and Bible study can be an expression of viewpoint rather than a separate or distinct subject:

[R]eligious answers * * * 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.

Good News Club v. Milford Cent. Sch., 202 F.3d 502, 514 (2d Cir. 2000) (Jacobs, J., dissenting). While the “worship” or “services” portion of Bronx Household’s program may well be “quintessentially religious” or even “decidedly religious in nature,” it also can “be characterized properly” as a social or civic meeting. See *Good News Club*, 533 U.S. at 111. Consequently, the “worship” component is speech protected by the First Amendment.

III

PERMITTING BRONX HOUSEHOLD TO USE THE SCHOOL ON EQUAL TERMS WITH OTHER GROUPS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

The Board’s contention that it discriminated against Bronx Household to avoid an Establishment Clause violation is without merit. First, the Supreme

Court has never held that a State's interest in avoiding an Establishment Clause violation justifies viewpoint discrimination. "We have said that a state interest in avoiding an Establishment Clause violation may be characterized as compelling, and therefore may justify *content-based* discrimination. However, it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify *viewpoint discrimination*." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112-113 (2001) (internal quotation marks and citation omitted).

Moreover, it is clear that granting equal access here would not in fact violate the Establishment Clause. Permitting access on an equal basis in fact preserves the neutrality toward religion required by the Constitution. *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."); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985) (holding that the Establishment Clause "requir[es] the government to maintain a course of neutrality among religions, and between religion and nonreligion").

A reasonable observer of Bronx Household's being permitted to rent school facilities on equal terms with other groups, "aware of the history and context of the community and forum," would not perceive an endorsement of religion here.

See *Good News Club*, 533 U.S. at 119 (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-780 (1995) (O'Connor, J., concurring)).

Declining to discriminate against churches, in a program under which thousands of diverse community groups are allowed to rent school facilities after hours, could not be perceived by the reasonable observer as an endorsement of religion. This conclusion is bolstered by the following facts: the school does not endorse the meetings; the meetings take place when school is not in session; and school employees are not present at the meetings in their official capacities. Moreover, the point is driven home by the fact, as the district court noted, that “not only does the Board not endorse Bronx Household’s activities, but it has actively opposed them for close to a decade.” *Bronx Household of Faith v. Board of Educ.*, 400 F. Supp. 2d 581, 594 (S.D.N.Y. 2005). No reasonable observer, aware of this history and context, would believe that the Board was in any way favoring religious groups or giving them any sort of preference. The reasonable observer would know that quite the opposite was true.

The Board argues (Br. 45-49), however, that allowing Bronx Household to hold its religious meetings in a public school gives “a message of endorsement,” because “religious worship services have * * * dominated the limited public forum at the schools where they have taken place.” The district court properly

rejected this domination-of-the-forum argument as meritless, in light of the fact that 9,804 permits were granted to community organizations to use school facilities in the 2003-2004 school year, and only 23 congregations were regularly holding worship services in schools during the 2004-2005 school year. *Bronx Household*, 400 F. Supp. 2d at 596. Likewise, the complaint that churches use the forum for long periods of time is without merit. See Br. 58 (complaining that one church uses forum for eight hours on Sundays). If the problem is overuse of a school by one group, this can be remedied by viewpoint-neutral restrictions on how many hours a group can meet on a given day. The answer is not discrimination against a particular kind of speech.

The district court likewise properly rejected the Board's argument that Christian groups rent facilities more than others because schools typically are more readily available on Sundays, and this would give the impression of endorsement of Christianity. But there is nothing to indicate that the reasonable observer would view the forum as having been designed by the Board to result in more favorable access for Christian groups over non-Christian ones. Rather, a reasonable observer would recognize that few school events are held on Sundays. "[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, 319-320 (1980). Here, the Board has a neutral policy that allows organizations, secular and religious, to apply to use school property. The Board certainly cannot believe that it has gerrymandered its system to favor religion. And the reasonable observer would know that this forum is open to a wide variety of groups that use school facilities at a wide variety of times based on availability. That certain potential beneficiaries may be in a better position to take advantage of a neutral benefit program is irrelevant to the constitutional analysis. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 658 (2002) (fact that 46 of 56 private schools participating in voucher program were religious, and 96% of voucher students were attending religious schools, did not render neutral program unconstitutional).

The Board's reliance on *Tilton v. Richardson*, 403 U.S. 672 (1971), is particularly misplaced. Br. 66. In *Tilton*, *id.* at 683, the Supreme Court held that a federally subsidized building could not be subsequently converted to religious use. Here, as in *Widmar*, Bronx Household benefits equally with secular organizations from general access to City buildings.

The Board also argues (Br. 54-55) that school children are impressionable and will perceive endorsement and that some community members have "been confused and perceived the school as identified with the church." *Good News*

Club held that the government may not employ the “heckler’s veto” to squelch unpopular speech or exclude it from the forum, nor may the government employ a “modified heckler’s veto” to silence speech because of the alleged impressionability of children. 533 U.S. at 119. Thus, Bronx Household’s activities cannot “be proscribed on the basis of what the youngest members of the audience might misperceive.” *Ibid.* And as the Court noted in *Good News Club*, if one were to look at the perceptions of children, a child would just as easily see defendants as disfavoring religious organizations if thousands of community groups are allowed to rent school facilities but religious groups are excluded. *Id.* at 118.

Finally, allowing the Board to enforce its no-worship policy and attempt to discern which elements of a religious group’s activities are “purely religious worship” and which are “religious speech” would create an excessive entanglement of church and state that the Establishment Clause forbids. See *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981). This is precisely the sort of religious line-drawing in which courts are loathe to engage. See *id.* at 269-270 n.6 (If a distinction were made between “worship” and religious perspective, a public entity, and ultimately the courts, would be required 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.”); see also *Bronx Household of Faith v. Board of Educ.*, 331 F.3d 342, 355 (2d Cir. 2003).

Thus, far from establishing religion, permitting equal access to Bronx Household’s speech preserves the neutrality toward religion that is at the heart of the Establishment Clause, and prevents the danger of government parsing of religion that the Establishment Clause long has been held to prohibit.

CONCLUSION

The order of the district court granting a permanent injunction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND ANTI-VIRUS STATUS

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I also certify that I have scanned for viruses the PDF version of this Brief that will be submitted in this case as an e-mail attachment to brief@ca2.uscourts.gov and that no viruses were detected. The antivirus detector used was Trend Micro Office Scan.

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CERTIFICATE OF SERVICE

I certify that on July 17, 2006, two copies of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* were served by Federal Express, overnight delivery, on the following counsel of record:

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