

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

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT  
3

4 August Term 2006  
5 (Argued: September 28, 2006 Decided: July 2, 2007)  
6 Docket No. 06-0725-cv

7 -----x  
8 THE BRONX HOUSEHOLD OF FAITH, ROBERT HALL, AND JACK  
9 ROBERTS,

10  
11 Plaintiffs-Appellees,

12  
13 -- v. --

14  
15 BOARD OF EDUCATION OF THE CITY OF NEW YORK and  
16 COMMUNITY SCHOOL DISTRICT NO. 10,

17  
18 Defendants-Appellants.

19  
20 -----x  
21  
22 B e f o r e : WALKER, LEVAL, and CALABRESI, Circuit Judges.

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

25 VACATED and REMANDED.

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

33  
34 JANE L. GORDON, Senior Counsel,  
35 Corporation Counsel of the City of  
36 New York (Michael A. Cardozo,  
37 Corporation Counsel, Edward F.X.  
38 Hart, Lisa Grumet, and Janice Casey  
39 Silverberg, on the brief), New York  
40 NY, for Defendants-Appellants.  
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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:

39           The Bronx Household of Faith, a Christian church, has  
40 applied to use New York City school facilities for Sunday worship  
41 services. In 2001, the Board of Education of the City of New  
42 York denied Bronx Household's application, relying on Standard  
43 Operating Procedure Manual (SOP) § 5.11, its rule then in effect

1 governing the use of school facilities by outside groups for  
2 "social, civic, [or] recreational meetings, . . . and other uses  
3 pertaining to the welfare of the community." New York Educ. L. §  
4 414(1)(c). The District Court for the Southern District of New  
5 York (Loretta A. Preska, Judge) first preliminarily enjoined the  
6 City's enforcement of SOP § 5.11, concluding that the City could  
7 not exclude Bronx Household. This court affirmed the preliminary  
8 injunction. The district court then entered a permanent  
9 injunction barring the City from enforcing a revision of SOP §  
10 5.11. ("Revised SOP § 5.11"). (Judges Walker and Calabresi  
11 believe the revision to be the current version of SOP § 5.11,  
12 while Judge Leval questions whether the revision has been  
13 formally adopted.)<sup>1</sup>

14 We hereby vacate the permanent injunction, although we reach  
15 that conclusion in rather circuitous fashion. Judge Calabresi  
16 would hold that this dispute is ripe for adjudication and would  
17 vacate the injunction because he concludes that Revised SOP §  
18 5.11, while a restriction on the content of speech permitted on  
19 school property, is viewpoint-neutral. Judge Walker agrees that  
20 the dispute is ripe for adjudication but would affirm the  
21 injunction because he concludes that Revised SOP § 5.11 is  
22 viewpoint-discriminatory. Judge Leval expresses no opinion on  
23 the merits, but votes to vacate the injunction because he

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1 <sup>1</sup> Judges Calabresi and Leval describe the remaining salient  
2 facts in their concurring opinions.

1 concludes that the dispute is not ripe for adjudication.

2 Our disparate views of this case leave us without a  
3 rationale to which a majority of the court agrees. While two  
4 judges who disagree on the merits believe the dispute is ripe for  
5 adjudication, the court cannot decide the merits of the case  
6 without the vote of the third judge, who disagrees as to  
7 ripeness. Judge Leval agrees that the dispute over Revised SOP §  
8 5.11 would indisputably become ripe if the City were to deny  
9 Bronx Household permission to use school facilities in reliance  
10 on the terms of that rule.<sup>2</sup>

11 In vacating the judgment, we remand the action to the  
12 district court for all purposes. We have every reason to believe  
13 that both parties hope to bring this protracted litigation to an  
14 end by obtaining a decision on the merits. The City is free to  
15 adopt Revised SOP § 5.11 (if it has not already done so), and  
16 then require that Bronx Household apply to use school buildings  
17 pursuant to that rule. In the event Bronx Household does so, and  
18 the City denies the application, Bronx Household may seek review  
19 of that denial in the district court on an expedited basis.  
20 Either party's appeal from any judgment of the district court

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

1 will be referred to this panel. If the parties desire a speedy  
2 resolution of their dispute, we believe all this can be  
3 accomplished with little delay; indeed, we direct the parties to  
4 advise us should they file another appeal and invite the parties,  
5 should they wish to, otherwise to apprise us of subsequent  
6 developments, in either case by directing a letter to the Clerk  
7 of Court.

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

12

1 CALABRESI, *Circuit Judge*:

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

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

21 **I. BACKGROUND**

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24 The relevant facts are not in dispute. The conflict between  
25 these parties began in 1994, when the School District denied

1 plaintiffs' request to rent space in the Anne Cross Mersereau  
2 Middle School ("M.S. 206B") for Sunday morning meetings. Bronx  
3 Household's weekly meetings would have included the "singing of  
4 Christian hymns and songs, prayer, fellowship with other church  
5 members and Biblical preaching and teaching, communion, sharing of  
6 testimonies" and a "fellowship meal" that allows attendees to talk  
7 and provide "mutual help and comfort to" one another. (First  
8 Affidavit of Robert Hall at 1).

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

21 In 1994, the School District enforced the Board's Standard  
22 Operating Procedures Manual (SOP) which, at the time, included a  
23 provision barring outside organizations from conducting "religious  
24 services or religious instruction on school premises after school,"

1     though it allowed groups to "discuss[] religious material or  
2     material which contains a religious viewpoint." SOP § 5.9.  
3     Plaintiffs brought an action against defendants to compel the  
4     School District to grant a permit for Bronx Household's weekly use  
5     of the school facilities, but the district court granted  
6     defendants' motion for summary judgment, and dismissed the suit.  
7     *Bronx Household of Faith v. Community Sch. Dist. No. 10*, No. 95  
8     Civ. 5501, 1996 WL 700915 (S.D.N.Y. Dec. 5, 1996). We affirmed. 127  
9     F.3d 207 (2d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998)  
10    [hereinafter *Bronx Household I*].

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

19           The Supreme Court, however, reversed our holding in that case.  
20    533 U.S. 98 (2001). The Court found that the Good News Club was  
21    seeking "to address a subject otherwise permitted [in the school],  
22    the teaching of morals and character, from a religious standpoint."  
23    533 U.S. at 109. The High Court did not dispute the validity of  
24    Justice Souter's description of the Club's activities as including

1 elements of worship, from the opening and closing of meetings with  
2 prayer, to activities such as "the challenge," where already  
3 "saved" children would ask God for strength, and "the invitation,"  
4 during which the teacher would "invite" the "unsaved" children to  
5 "receive" Jesus as their "Savior from sin." *Id.* at 137-38 (Souter,  
6 J., dissenting). Nevertheless concluding that the Good News Club's  
7 activities were not "mere religious worship, divorced from any  
8 teaching of moral values," *id.* at 112 n.4, the Court declared: "We  
9 disagree that something that is 'quintessentially religious' or  
10 'decidedly religious in nature' cannot also be characterized  
11 properly as the teaching of morals and character development from  
12 a particular viewpoint," *id.* at 111. On this basis, and given that  
13 other types of moral and character development teaching were  
14 permitted "after school," the Court condemned Milford's exclusion  
15 of the Good News Club as viewpoint discrimination. *Id.* at 102, 108-  
16 109. It further held that while it is "not clear" whether a state  
17 interest in avoiding an Establishment Clause violation could  
18 justify viewpoint discrimination, "[w]e need not . . . confront the  
19 issue in this case, because we conclude the school has no valid  
20 Establishment Clause interest." *Id.* at 113.

21 After the Supreme Court's decision in *Good News Club*, Bronx  
22 Household in 2001 again applied for and was again denied a permit  
23 to use District No. 10's middle school for weekly Sunday meetings.  
24 The grounds of this denial remained the Board's SOP provision

1 prohibiting any "outside organization or group" from conducting  
2 "religious services or religious instruction on school premises  
3 after school." SOP § 5.11 (the section was previously numbered 5.09  
4 in *Bronx Household I*). Bronx Household brought a new action against  
5 the defendants, and this time the district court, following the  
6 Supreme Court's ruling in *Good News Club*, preliminarily enjoined  
7 the School District from denying the permit on the basis of SOP §  
8 5.11 and the religious nature of the church's weekly meetings. 226  
9 F. Supp. 2d 401 (S.D.N.Y. 2002).<sup>1</sup> A divided panel of our court  
10 affirmed: "We find no principled basis upon which to distinguish  
11 the activities set out by the Supreme Court in *Good News Club* from  
12 the activities that the Bronx Household of Faith has proposed for  
13 its Sunday meetings at Middle School 206B." 331 F.3d 342, 354 (2d  
14 Cir. 2003) [hereinafter *Bronx Household II*].

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

18 Like the Good News Club meetings, the Sunday morning meetings  
19 of the church combine preaching and teaching with such  
20 "quintessentially religious" elements as prayer, the singing  
21 of songs, and communion. The church's Sunday morning meetings

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1 <sup>1</sup> The action was initially brought under the First Amendment, the  
2 Equal Protection Clause, and Sections 3, 8, and 11 of Article I of  
3 the New York Constitution. Since the district court granted the  
4 injunction requested by plaintiffs on the First Amendment free  
5 speech ground without addressing the remaining claims, 226 F. Supp.  
6 2d 401, 426-27 (S.D.N.Y. 2002), plaintiffs have not pursued the  
7 alternative claims and they are not before us in the instant  
8 appeal.

1 also encompass secular elements, for instance a fellowship  
2 meal during which church members may talk about their problems  
3 and needs.

4 *Id.*

5 Notably, in *Bronx Household II*, we specified that “[o]ur  
6 ruling is confined to the district court’s finding that the  
7 activities plaintiffs have proposed for their Sunday meetings are  
8 *not simply religious worship*, divorced from any teaching of moral  
9 values or other activities permitted in the forum.” *Id.* (emphasis  
10 added). We thus left unresolved the instant appeal’s central  
11 question:

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

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

25 Bronx Household thereafter applied for, and was granted,  
26 permission to use P.S. 15 in Bronx, New York, on Sundays from  
27 10:00am to 2:00pm. Bronx Household has used the school facilities

1 since August 2002, with attendance on a given Sunday morning  
2 reaching approximately 85-100 people. The church's Sunday meeting  
3 activities in the school facilities include "singing songs and  
4 hymns; teaching from the Bible; sharing testimonies from people in  
5 attendance; socializing; eating; engaging in prayer; and  
6 communion." 400 F. Supp. 2d 581, 592 (S.D.N.Y. 2005).

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

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

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

20 Plaintiffs' use of P.S. 15 for the Bronx Household of  
21 Faith's regular worship services is prohibited under the  
22 revised section 5.11. Defendants are not currently  
23 enforcing the revised section 5.11 . . . because of the  
24 preliminary injunction Order that was entered in this  
25 case. Should defendants prevail in this motion for  
26 summary judgment and the preliminary injunction Order be  
27 vacated, then any future application by plaintiffs to  
28 hold their worship services at P.S. 15 or any other  
29 school will be denied.

30 400 F. Supp. 2d at 588.

31 In March 2005, the parties cross-moved for summary judgment.  
32 Bronx Household moved to convert the July 2002 preliminary

1 injunction into a permanent injunction, contending the revised SOP  
2 § 5.11 is unconstitutional for the same reason the enjoined SOP  
3 provision was held to be unconstitutional. The district court  
4 granted plaintiffs' motion for summary judgment, denied defendants'  
5 cross-motion for summary judgment, and permanently enjoined the  
6 Board from enforcing SOP § 5.11 against appellees.

7 On appeal, defendants argue that: (1) their categorical  
8 exclusion of worship services as an after-hours use of school  
9 facilities does not constitute viewpoint discrimination; and (2)  
10 even if they are found to have discriminated on the basis of  
11 viewpoint, such discrimination was justified to avoid violations of  
12 the Establishment Clause. In response, plaintiffs acknowledge that  
13 "[f]rom the particular theological perspective of the pastors, . . .  
14 . these activities done at the Sunday morning meeting [are]  
15 collectively a 'worship service.'" (Brief of Appellees at 10). But  
16 they contend that worship is protected like any other religious  
17 speech, and that under *Good News Club* the state discriminates on  
18 the basis of viewpoint when it excludes worship services from  
19 school facilities. Additionally, plaintiffs argue that the state  
20 does not possess a sufficiently overriding interest in avoiding an  
21 Establishment Clause violation to justify viewpoint discrimination  
22 against Bronx Household.



1  
2 § 5.11, there is also specific evidence in the record that  
3 defendants have already done so. See, e.g., Statement of Attorney  
4 for the Board ("It is a policy that has been approved at the  
5 highest levels of the Department of Education. The only reason that  
6 we have not implemented it at this time or applied it to the  
7 plaintiffs in this case is because of the court's preliminary  
8 injunction."); Letter from Lisa Grumet to Jordan Lorence and Joseph  
9 Infranco (Aug. 17, 2005), 400 F. Supp. 2d 581, 588 (S.D.N.Y. 2005)  
10 ("The use of P.S. 15 for . . . regular worship services is  
11 prohibited under the revised section 5.11. . . . Should defendants  
12 prevail in this motion for summary judgment and the preliminary  
13 injunction Order be vacated, then any future application by  
14 plaintiffs to hold their worship services at P.S. 15 or any other  
15 school will be denied."). In deciding to make the injunction  
16 permanent and applying it directly to worship services, the court  
17 below must be taken to have found that the new SOP § 5.11 was, in  
18 fact, adopted, and I cannot say that this fact-finding was clearly  
19 erroneous.

20 Judge Leval relies, as he must, on the Supreme Court's leading  
21 decisions on ripeness, including *Abbott Laboratories v. Gardner*,  
22 387 U.S. 136 (1967), *overruled on other grounds*, *Califano v.*  
23 *Sanders*, 430 U.S. 99 (1977). That case permitted, at a  
24 constitutional level and at a prudential level, judicial  
25 consideration of an agency regulation prior to its enforcement, in  
26 part because the impact of the regulation on the plaintiffs was  
27 "sufficiently direct and immediate." *Id.* at 152. In this case,  
28 there is one unmistakable "direct and immediate" consequence for  
29 the parties; the case has been up and down the courts for years and  
30 no resolution as to the rights of the Board or Bronx Household is,  
31 as yet, forthcoming. At the prudential level, I do not believe we  
32 should ignore that very practical consequence.

33 Moreover, I am not convinced that there are not more  
34 traditionally legal consequences as well. If we simply vacate the  
35 permanent injunction without reaching the merits, as Judge Leval's  
36 opinion would do, we leave in place the preliminary injunction  
37 based on the old SOP § 5.11. That injunction correctly, in light of  
38 *Good News Club*, prohibited the Board from excluding Bronx  
39 Household's use of school premises for conduct that included  
40 "religious instruction," but it did more. It barred the Board from  
41 denying plaintiffs' application to rent space in the school "for  
42 morning meetings that include *religious worship* . . ." (emphasis  
43 added). That, by itself, more than minimally hampers the Board in  
44 seeking to enforce the revised SOP § 5.11. I believe that this  
45 comfortably meets the constitutional ripeness requirements of  
46 *Abbott* and its progeny, and together with the effects of long delay  
47 in this case, weighs heavily on the issue of prudential ripeness.

I fully agree that we should take very seriously our

## Standard of Review

### A.

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 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

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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 is 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.

1 court "must evaluate each party's motion on its own merits, taking  
2 care in each instance to draw all reasonable inferences against the  
3 party whose motion is under consideration." *Hotel Employees & Rest.*  
4 *Employees Union, Local 100 v. City of New York Dep't of Parks &*  
5 *Recreation*, 311 F.3d 534, 543 (2d Cir. 2002) (quoting *Heublein,*  
6 *Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993)).

#### **Applicable Level of Constitutional Scrutiny**

##### **B.**

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

18 In traditional public fora - streets, parks, and places that  
19 "by long tradition . . . have been devoted to assembly and debate,"  
20 *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-  
21 46 (1983) - speakers can be excluded only if the exclusion is  
22 "necessary to serve a compelling state interest and the exclusion  
23 is narrowly drawn to achieve that interest." *Cornelius*, 473 U.S. at  
24 800.

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

7           The Court has also recognized a third category, the limited  
8 public forum. A limited public forum is created when the government  
9 designates "a place or channel of communication for use by the  
10 public at large for assembly and speech, for use by certain  
11 speakers, or for the discussion of certain subjects." *Id.* at 802.  
12 In the limited public forum, an entire class of speakers or  
13 subjects may be excluded according to "reasonable, viewpoint-  
14 neutral rules governing the *content* of speech allowed." *Peck*, 426  
15 F.3d at 626. But, once the government "allows expressive activities  
16 of a certain genre, it may not selectively deny access for other  
17 activities of that genre." *Travis v. Owego-Apalachin Sch. Dist.*,  
18 927 F.2d 688, 692 (2d Cir. 1991); *see also Rosenberger v. Rector &*  
19 *Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("[T]he  
20 State must respect the lawful boundaries it has itself set. The  
21 state may not exclude speech where its distinction is not  
22 reasonable in light of the purpose served by the forum, nor may it  
23 discriminate against speech on the basis of its viewpoint.")  
24 (internal quotation marks and citations omitted).

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

7           In *Bronx Household I*, we held that defendants' school  
8 facilities constituted a limited public forum and, consequently,  
9 that speech could be barred only through restrictions that were  
10 viewpoint neutral and reasonably related to the limited purposes  
11 of the forum. 127 F.3d at 211-214. *Bronx Household II* did not  
12 revisit this finding.<sup>3</sup> We remain bound by our finding that the  
13 school in the case at bar is a limited public forum. There is  
14 nothing in the record that requires us to reconsider that holding.  
15 And *Good News Club* in no way calls our reasoning on this point into  
16 question. 533 U.S. at 107; *id.* at 136 n.1 (Souter, J.,  
17 dissenting).<sup>4</sup>

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1           <sup>3</sup> Even prior to *Bronx Household's* suits, we had repeatedly found  
2 that New York State, in its statute authorizing the use of school  
3 facilities, intended to create only a limited public forum. *Deeper*  
4 *Life Christian Fellowship v. Sobol*, 948 F.2d 79, 83-84 (2d Cir.  
5 2001) (citing *Tretley v. Bd. of Ed.*, 65 A.D.2d 1 (N.Y. App. Div.  
6 1978)); see also *Cornelius*, 473 U.S. at 802; *Lamb's Chapel v.*  
7 *Center Moriches Union Free School District*, 508 U.S. 384, 390  
8 (1993) ("There is no question that the [School] District, like the  
9 private owner of property, may legally preserve the property under  
10 its control for the use to which it is dedicated.").

1           <sup>4</sup> It bears observing that, in constituting this particular limited  
2 public forum, defendants excluded in their entirety several other  
3 classes of speakers and subjects apart from those at issue in the

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

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

13           515 U.S. at 829-30 (emphasis added).

14           It is, of course, not always easy to "draw[] a precise line of  
15 demarcation" between "what amounts to a subject matter unto itself,  
16 and what, by contrast, is best characterized as a *standpoint* from  
17 which a subject matter is approached." *Peck*, 426 F.3d at 630  
18 (citing *Rosenberger*, 515 U.S. at 831). Nevertheless, the  
19 distinction is essential to the Court's balance between a required  
20 protection of speech and an essential protection of the  
21 government's ability to define the bounds of a limited forum it  
22 chooses to open. And, as the Court has written unequivocally, the  
23 State may be justified "in reserving [its forum] for certain groups

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1           instant case. Among those excluded were electoral candidates'  
2 "political events, activities or meetings," SOP § 5.7, and any  
3 "commercial purposes, except for flea market operations." SOP §  
4 5.10. As a result, any redefinition of the nature of the school  
5 forum before us would necessarily trigger searching scrutiny of the  
6 Board's exclusion from school facilities of political and  
7 commercial activities as well as the worship services involved in  
8 the current appeal.

1 or for the discussion of certain topics." *Rosenberger*, 515 U.S. at  
2 829. It follows that we may uphold defendants' exclusion of worship  
3 services from their limited public forum, but that we may only do  
4 so if we find that SOP § 5.11 is a "reasonable, *viewpoint-neutral*  
5 rule[] governing the *content* of speech allowed." *Peck*, 426 F.3d at  
6 626 (first emphasis added) (citing *Hotel Employees & Rest.*  
7 *Employees Union Local 100*, 311 F.3d at 545-6); see also *New York*  
8 *Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 128 (2d Cir.  
9 1998).

### 11 C. Viewpoint Neutrality

12  
13 In the end, I conclude that the barring of worship services  
14 from defendants' school facilities is a content-based restriction  
15 and does not constitute viewpoint discrimination. In reaching this  
16 conclusion, I first examine how the Court has defined viewpoint  
17 discrimination, and then analyze the restriction before us.

#### 18 1. Defining Discrimination on the Basis of Viewpoint

19  
20  
21 In a limited public forum, speech addressing an otherwise  
22 permitted subject may not be restricted on the basis of its  
23 viewpoint, and this concept applies directly to protect *religious*  
24 approaches to the subject that is being discussed. This core  
25 principle of the Supreme Court's religious discrimination  
26 jurisprudence derives from three key decisions: *Lamb's Chapel v.*

1 *Center Moriches Union Free School District*, 508 U.S. 384 (1993),  
2 *Rosenberger v. Rector and Visitors of the University of Virginia*,  
3 515 U.S. 819 (1995), and *Good News Club v. Milford Central School*,  
4 533 U.S. 98 (2001).

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

16 There is no suggestion . . . that a lecture or film about  
17 child rearing and family values would not be a use for social  
18 or civic purposes otherwise permitted . . . . That subject  
19 matter is not one that the District has placed off limits to  
20 any and all speakers.

21 *Id.*

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

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

8 515 U.S. at 831. Once again, the Court found it essential that  
9 "[t]he prohibited perspective, not the general subject matter,  
10 resulted in the [University's] refusal to make . . . payments." *Id.*

11 Finally, in *Good News Club* the Court affirmed the principle  
12 that "speech discussing otherwise permissible subjects cannot be  
13 excluded from a limited public forum on the ground that the subject  
14 is discussed from a religious viewpoint." 533 U.S. at 112. The *Good*  
15 *News Club* had applied to use the Milford District's school  
16 facilities for meetings that included "singing songs, hearing a  
17 Bible lesson and memorizing scripture," 533 U.S. at 103, with "the  
18 purported purpose . . . to instruct children in moral values from  
19 a Christian perspective." 202 F.3d 502, 504 (2d Cir. 2000). The  
20 Club characterized itself as a youth organization that aids  
21 children's moral and spiritual development through the use of Bible  
22 stories to teach such "values as obedience or resisting jealousy."  
23 *Id.* at 509. The Club described these and its other activities as  
24 follows:

25 The Club opens its session with Ms. Fournier taking  
26 attendance. As she calls a child's name, if the child recites  
27 a Bible verse the child receives a treat. After attendance,  
28 the Club sings songs. Next[,] Club members engage in games  
29 that involve, *inter alia*, learning Bible verses. Ms. Fournier

1       then relates a Bible story and explains how it applies to Club  
2       members' lives. The Club closes with prayer. Finally, Ms.  
3       Fournier distributes treats and the Bible verses for  
4       memorization.

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

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

18      The only apparent difference between the activity of Lamb's  
19      Chapel and the activities of the Good News Club is that the  
20      Club chooses to teach moral lessons from a Christian  
21      perspective through live storytelling and prayer, whereas  
22      Lamb's Chapel taught lessons through films. This distinction  
23      is inconsequential. Both modes of speech use a religious  
24      viewpoint.

25      533 U.S. at 109-10. Significantly, the Court held that even if the  
26      Club's activities were "quintessentially religious" or "decidedly  
27      religious in nature," they could still be characterized properly  
28      as the teaching of morals and character development: "What matters

1 for purposes of the Free Speech Clause is that we can see no  
2 logical difference in kind between the invocation of Christianity  
3 by the Club and the invocation of teamwork, loyalty, or patriotism  
4 by other associations *to provide a foundation for their lessons.*"  
5 *Id.* at 111 (emphasis added).

## 6 **2. The Category of Worship Services**

7 What, then, is worship? Is it an approach to or a way of  
8 considering an otherwise permitted subject of discussion, or is it  
9 a unique subject? Defendants argue that, while a film series on  
10 childrearing, a student newspaper, and instruction on moral  
11 development "no doubt dealt with . . . subject[s] otherwise  
12 permissible," *Lamb's Chapel*, 508 U.S. at 394, worship is not simply  
13 another standpoint on a secular subject. Worship is the *sui generis*  
14 subject "that the District has placed off limits to any and all  
15 speakers," regardless of their perspective. *Id.* at 393.<sup>5</sup> I agree.

---

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

1           Indeed, the *Good News Club* Court itself recognized this  
2 subject matter, worship, as falling outside the boundary of its  
3 viewpoint discrimination jurisprudence. In finding that the Club's  
4 religious instruction was just one viewpoint among many on moral  
5 character and development, the Court emphasized the distinction  
6 between this instructional "viewpoint" and the separate category  
7 of "mere religious worship, divorced from any teaching of moral  
8 values." 533 U.S. at 112 n.4. And the Court's majority specified  
9 that the Second Circuit had not characterized the Club's activities  
10 as "religious worship." *Id.* It was for this reason that - while  
11 acknowledging that the Club's activities would include prayer and  
12 be of a "quintessentially religious" nature - the Court found no  
13 basis for considering the group's "use of religion as something  
14 other than a viewpoint merely because of any evangelical message  
15 it conveys." *Id.* By contrast, the record in the case before us  
16 makes clear that Bronx Household's use of religion was expressly  
17 for worship *in itself*, and not as a form of discussion of or  
18 approach to other topics.<sup>6</sup>

---

1           <sup>6</sup> Justice Souter, in dissent, argued that the Good News Club's  
2 activities constituted "an evangelical service of worship." 533  
3 U.S. at 138. Plaintiffs suggest that, because the Court  
4 acknowledged Justice Souter's conclusion and determined that  
5 "[r]egardless of the label . . . what matters is the substance of  
6 the Club's activities," *id.* at 112 n.4, the High Court must have  
7 deemed "worship services" to be a viewpoint on an otherwise  
8 permitted subject. This argument fails, however, because the  
9 majority did no more than validate Justice Souter's recitation of  
10 the Club's activities, not his label of them as a worship service.  
11 Indeed, the Court expressly stated that these activities did not

1 In applying for a permit to use school facilities, Bronx  
2 Household's pastor described the proposed activities with three  
3 words: "Christian worship service." (EBT Transcript of Robert Hall  
4 (Jan. 24, 2005)). Despite subsequent changes in plaintiffs' account  
5 of these activities, Pastor Hall repeatedly confirmed that  
6 "Christian worship service" is an "accurate description" of that  
7 for which Bronx Household requested permission to use school  
8 facilities. *Id.*<sup>7</sup> Specifically, Bronx Household called its meetings  
9 a "church service" and enumerated the activities engaged in as  
10 including the "singing of Christian hymn and songs, prayer,  
11 fellowship with other church members, Biblical preaching and  
12 teaching, communion, sharing of testimonies and social fellowship  
13 among the church members." (First Affidavit of Robert Hall).  
14 Plaintiff described these many "component activities that go to  
15 make up a worship service," as follows:

16 In our church service, we seek to give honor and praise to  
17 our Lord and Savior Jesus Christ *in everything that we do. To*

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1 "constitute mere religious worship, divorced from any teaching of  
2 moral values." *Id.*

1 <sup>7</sup> Defendants note that in subsequent permit applications,  
2 plaintiffs listed only the component activities of the Sunday  
3 meetings and did so in order to avoid the term "worship." Pastor  
4 Hall stated: "As a tactical move, we decided beforehand to avoid  
5 using the dreaded 'W' word for (shudder) worship. From their point  
6 of view, the school rents it building to groups involved in  
7 community, civic, and social activity. But worship, according to  
8 them, is a uniquely religious activity for which there is no  
9 'secular analog.'" Given Pastor Hall's clear record statement of  
10 what the facilities were to be used for, I need not, and do not,  
11 consider whether defendants' description of plaintiffs' later  
12 permit applications as mere "litigation strategy" is correct.

1        *that end* we sing songs and hymns of praise to our Lord. We  
2        read the Bible and the pastors teach from it because it tells  
3        us about God, what He wants us to do and how we should live  
4        our lives. We celebrate the Lord's Supper (communion) each  
5        Sunday . . . .

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

9        On appeal to us, however, plaintiffs and their amici argue  
10       that the activities in worship services amount only to the  
11       expression of a viewpoint on the discussions of social, civic, and  
12       community welfare subjects as to which "thousands of permits have  
13       been granted [by defendants] to diverse groups, including sports  
14       leagues, Legionnaire Greys, Boy and Girl Scouts, community  
15       associations, and a college for holding English instruction." In  
16       doing this, plaintiffs challenge, in three ways, the  
17       characterization of worship as a unique subject. First, they claim  
18       that the activities composing their worship services are the same  
19       as those involved in the religious instruction protected as a  
20       *viewpoint* in *Good News Club*. Second, plaintiffs argue the church's  
21       worship services "parallel" the ceremonies and rituals conducted by  
22       other groups who are granted access to defendants' schools. In this  
23       respect, they claim their "worship" services stand in the same  
24       relationship to these permitted rituals as the moral development  
25       lessons taught by the Boy Scouts stood, according to the *Good News*  
26       *Club* Court, to the lessons in moral development taught from a

1 religious perspective by the Good News Club. Third, plaintiffs  
2 contend, based on Supreme Court precedent, that there can be no  
3 intelligible content to the distinction between worship and other  
4 religious speech. I believe all three arguments are unavailing.

5 (i)

6 In *Good News Club* the Court held that the religious  
7 instruction under consideration expressed a protected viewpoint on  
8 the permitted subjects of instruction, i.e., character and moral  
9 development, and only on these. The Court specifically concluded  
10 that Milford had interpreted "its policy to permit discussions of  
11 subjects such as child rearing, and of the 'development of  
12 character and morals.'" 533 U.S. at 108; see also *id.* (holding  
13 that, according its "Community Use Policy" establishing the limited  
14 forum, "there is no question that teaching morals and character  
15 development to children is a permissible purpose under Milford's  
16 policy"). And the Court's reasoning confirmed that the boundary of  
17 its ruling must be defined by the otherwise permitted subject  
18 matter at stake. See, e.g., 533 U.S. at 111 ("*W*hen the subject  
19 matter is morals and character, it is quixotic to attempt a  
20 distinction between religious viewpoints and religious subject  
21 matters.") (quoting 202 F.3d at 512 (Jacobs, J., dissenting)  
22 (emphasis added)). In the case at bar, by contrast, the *subject*,  
23 "worship," is not a viewpoint on a "subject matter[, ] morals and

1 character," *id.*; the subject is not a lecture or film about  
2 childrearing or family values; and the subject is not a variety of  
3 topics for journalistic exploration that the defendants permitted,  
4 except when they are undertaken from a religious perspective.

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

12       To be sure, some of the same activities that were part of the  
13 religious instruction validated in *Good News Club* are included in  
14 the worship services that Bronx Household seeks to conduct. The  
15 record confirms that the church's proposed activities included the  
16 singing of Christian hymns and songs along with Biblical preaching  
17 and teaching. But the *Good News Club* Court sanctioned such  
18 activities, of a "quintessentially religious nature," only because  
19 they could "also be characterized properly as" the viewpoint from  
20 which students were instructed in moral and character development.  
21 533 U.S. at 111. The worship services before us today cannot be  
22 properly so characterized. For, as Pastor Hall acknowledged, even  
23 though the church may "do the same things that a Bible study group  
24 does," significant differences separate the subject of worship

1 services from moral instruction given from a religious viewpoint:  
2 "The Bible study club would not administer the sacraments of  
3 baptism and the Lord's supper. That would be a big difference."

4 (ii)

5 Worship services, moreover, are not in any sense simply the  
6 religious analogue of ceremonies and rituals conducted by other  
7 associations that are allowed to use school facilities. Indeed,  
8 holding that *worship* is only an agglomeration of rites would be a  
9 judicial finding on the nature of worship that would not only be  
10 grievously wrong, but also deeply insulting to persons of faith. As  
11 one such person, I find the notion that worship is the same as  
12 rituals and instruction to be completely at odds with my  
13 fundamental beliefs. Prayer and worship services are not religious  
14 viewpoints on the subjects addressed in Boy Scouts rituals or in  
15 Elks Club ceremonies. Worship is adoration, not ritual; and any  
16 other characterization of it is both profoundly demeaning and  
17 false.

18 Not surprisingly, therefore, Pastor Hall's own testimony  
19 belies plaintiffs' claim that they seek to conduct only the same  
20 viewpoint-expressive activities as those of other groups discussing  
21 permitted subjects. Hall wrote and distributed an article to church  
22 members pointedly distinguishing the church from such other clubs  
23 or associations. Unlike an "Ecclesiastical club" or a "political  
24 club," Pastor Hall explained, "the church [i]s a covenant

1 community"; the church is "not a group of people who have a common  
2 interest in the same way that stamp collecting and coin collecting  
3 bring people together." And Hall explicitly contrasted his group's  
4 meetings with those of the Boy Scouts whose rituals - flag  
5 ceremonies, the Pledge of Allegiance, and the Scout Oath - "might  
6 be a parallel, but [are] different": "We engage in the teaching and  
7 preaching of the word of God. We administer the sacraments of  
8 baptism and the Lord's supper. Those would be the differences. We  
9 sing hymns. We sing Christian songs. We pray."

10 One cannot read what Pastor Hall is saying - or for that  
11 matter virtually any religious description of worship -  
12 sympathetically, without concluding that to *worship* is not only  
13 more than engaging in rituals, but that it is categorically  
14 different. In other words, it would be absurd to characterize the  
15 Scouts as worshipping the teachings of Lord Baden-Powell, the  
16 founder of the Scouts movement, simply because Scout ceremonies and  
17 rituals ascribe worth to his message. What the Scouts are doing and  
18 what worshippers do, are categorically different!

19 (iii)

20 Plaintiffs base their final argument - that there is no  
21 difference between worship and other forms of religious speech -  
22 on the Supreme Court's ruling in *Widmar v. Vincent*, 454 U.S. 263  
23 (1981). *Widmar* held that worship, like all other religious

1 expression, is protected under the Free Speech Clause of the First  
2 Amendment. Of course it is. The *Widmar* majority rejected the claim  
3 of the Justices in "dissent . . . that 'religious worship' is not  
4 speech generally protected by the 'free speech' guarantee," 454  
5 U.S. at 269 n.6, and rightly so. But that is not the issue before  
6 us.

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

### 21 **3. Must Worship be Religious?**

22 The bulk of this opinion has been written on the premise that  
23 worship is always a religious matter. But I am not sure there  
24 cannot be *secular* as well as *religious* worship. When people speak

1 of "worshipping" mammon, sex, or art, are they simply speaking  
2 metaphorically, or are they expressing a relationship of adoration  
3 that is the secular equivalent of religious worship and is of a  
4 different order from participating in ritual or ceremony? While the  
5 answer to that question seems to me to be anything but clear, in  
6 the end a resolution does not matter for this decision.

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

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

## Reasonableness of Content Discrimination

1 D.

2  
3 Content discrimination, even in a limited public forum, must  
4 be reasonable in light of the purposes of the forum to be  
5 constitutionally permitted. *Perry Educ. Ass'n*, 460 U.S. at 49.  
6 Given our prior holdings, the Board's exclusion of worship services  
7 from school facilities meets this requirement.

8 In *Bronx Household I*, this court stated:

9 We think that it is reasonable in this case for a state and a  
10 school district to adopt legislation and regulations denying  
11 a church permission to use school premises for regular  
12 religious worship. We think that it is reasonable for state  
13 legislators and school authorities to avoid the identification  
14 of a middle school with a particular church. We think that it  
15 is reasonable for these authorities to consider the effect  
16 upon the minds of middle school children of designating their  
17 school as a church. And we think that it is a proper state  
18 function to decide the extent to which church and school  
19 should be separated in the context of the use of school  
20 premises for regular church services. Education, after all, is  
21 a particularly important state function, and the use of school  
22 premises is properly a matter of particular state concern.  
23 Finally, it is certainly not unreasonable to assume that  
24 church services can be undertaken in some place of public  
25 assembly other than a public middle school in New York City.

26 127 F.3d at 214. We construed the purposes of the "school" limited  
27 public forum in the same way in *Deeper Life Christian Fellowship v.*  
28 *Board of Education of the City of New York*, 852 F.2d 676, 680 (2d  
29 Cir. 1988); see also *Deeper Life Christian Fellowship v. Sobol*  
30 [*Deeper Life II*], 948 F.2d 79, 83 (2d Cir. 1991) ("We follow our  
31 prior opinion in *Deeper Life I* in holding that under § 414, 'access  
32 to the school property is permitted only where it serves the

1 interests of the public in general, rather than that of sectarian  
2 groups . . . .'" ).

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

8 This argument is foreclosed by precedent. In *Bronx Household*  
9 *of Faith*, we stated that "it is a proper state function to  
10 decide the extent to which church and school should be  
11 separated in the context of the use of school premises."  
12 Furthermore, "it is reasonable for state legislators and  
13 school authorities to avoid the identification of a . . .  
14 school with a particular church."

15 202 F.3d at 509 (quoting *Bronx Household I*, 127 F.3d at 214)  
16 (internal citation omitted).

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

---

1 <sup>8</sup> Moreover, the record discloses several grounds on which  
2 defendants' exclusion of worship services, if only content-based,  
3 can reasonably rest. First, defendants pointed to the concern that  
4 "[b]ecause most activities that occur in schools during nonschool  
5 hours are, in fact, sponsored by the school, . . . children are  
6 unlikely to understand that weekly worship services are not  
7 sponsored or supported by the school." (Brief of Petitioners at  
8 18); see also Declaration of Carmen Farina (testifying to  
9 children's confusion about the church's relationship with the

1  
2 school district after the preliminary injunction compelled access);  
3 Declaration of Thomas Goodkind (same); Declaration of Veronica  
4 Najjar (same). Deputy Chancellor Fiorina testified that "[a]  
5 congregation's presence in a school may be particularly confusing  
6 for children":

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

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

28 Finally, it was reasonable for the Board to determine not to  
29 open the use of its limited forum to a class of speech which, in  
30 practice, could only be engaged by some but not all religions.  
31 Defendants point out that "certain denominations and congregations  
32 are shut out of the forum because their day of worship is not  
33 Sunday." (Reply Brief of Petitioners at 20). Schools are schools,  
34 and are in session during all weekdays. Traditionally, and without  
35 any view towards discriminating between one religion and another,  
36 many school activities also take place on Saturdays. We need not  
37 here concern ourselves with the historical reasons why the school  
38 week is such as it is and the possible link to Christianity of that  
39 schedule. That long has been settled. *See, e.g., Gallagher v. Crown*  
40 *Kosher Super Market of Mass.*, 366 U.S. 617 (1961); *Two Guys from*  
41 *Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961). As a  
42 result, school facilities are only limitedly available during the  
43 week or even on Saturday. That means that if the facilities are to  
44 be used for worship, which in almost all religions takes place most  
45 intensely on a particular day of the week, permission to use school  
46 facilities for worship must, as a practical matter, favor Christian  
over other - especially Jewish and Muslim - religious

1 **III. CONCLUSION**

2  
3 I would hold that defendants' exclusion of worship services  
4 is viewpoint neutral. Further, seen only as a content-based  
5 restriction, I would find that the exclusion is reasonable in light  
6 of the purposes of the limited public forum involved. Given the  
7 positions taken by the other members of this panel, however, my  
8 disposition is limited to holding that the district court's  
9 permanent injunction and grant of summary judgment are VACATED, and  
the case is REMANDED for further developments.

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1 organizations. We need not decide here whether this lack of  
2 neutrality among religions would implicate a potential violation of  
3 the Establishment Clause that would be sufficiently overriding as  
4 to permit discrimination on the basis of viewpoint. For the  
5 question now before us is not *viewpoint* discrimination, but simply  
6 the existence of a reasonable justification for *content*-based  
7 rules. And defendants' desire to avoid seeming to favor some  
8 religions is a reasonable ground for limiting this forum only to  
9 speech that does not include the category "worship."

1 LEVAL, *Circuit Judge*:

2 This appeal is brought by the defendants, the Board of  
3 Education of the City of New York ("the Board") and Community  
4 School District No. 10 ("the School District") (collectively, "the  
5 City" or "the City defendants"), from a permanent injunction  
6 entered by the District Court for the Southern District of New York  
7 (Preska, J.). The injunction bars the City from enforcing a newly  
8 proposed Standard Operating Procedure § 5.11 ("Proposed SOP  
9 § 5.11") so as to exclude the plaintiff, Bronx Household of Faith  
10 ("Bronx Household"), from using a City-owned school building for  
11 Sunday church services. Proposed SOP § 5.11 would prohibit the use  
12 of New York City public schools for "religious worship services"  
13 or as a "house of worship." The district court, relying on the  
14 Supreme Court's ruling in *Good News Club v. Milford Central School*,  
15 533 U.S. 98 (2001), found that the City's enforcement of Proposed  
16 SOP § 5.11 to deny Bronx Household permission to use school  
17 facilities for its services would violate the First Amendment.

18 In ruling on the City defendants' appeal from the judgment,  
19 our court divides three ways. Judge Walker would affirm, finding  
20 that the district court was correct in enjoining enforcement of  
21 Proposed SOP § 5.11. Judge Calabresi would vacate the judgment,  
22 finding it to be in error. I would also vacate the judgment but  
23 for a different reason, expressing no opinion whether the judgment  
24 was based on a correct or incorrect perception of the substantive

1 standards of the First Amendment. In my view, the judgment should  
2 be vacated because there was no ripe dispute between the parties  
3 involving the constitutionality of Proposed SOP § 5.11 which the  
4 court could appropriately adjudicate.

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

1 Household. Indeed, it may never be adopted.

2 There was no present controversy between the parties involving  
3 application of the new standard. The question whether the City  
4 might constitutionally exclude Bronx Household in reliance on  
5 Proposed SOP § 5.11 was speculative and hypothetical. In fact,  
6 notwithstanding the City's prediction of how it would rule on an  
7 application which had never been made, there is sufficient  
8 difference between the new standard and the old rule upon which the  
9 City previously denied Bronx Household's application as to leave  
10 substantial uncertainty as to how such an application might play  
11 out.

12 Especially in view of the undesirability of rushing into  
13 unnecessary constitutional adjudications, the sensitive  
14 constitutional question of whether Proposed SOP § 5.11 violates the  
15 First Amendment would be better adjudicated by a court after the  
16 rule has been adopted and an administrative proceeding has  
17 explicitly confronted and ruled on its applicability to the  
18 activities of Bronx Household. No party would suffer any  
19 meaningful harm if the court deferred adjudication until such time.  
20 In my view, the question whether the City could, consistent with  
21 the First Amendment, exclude Bronx Household from using school  
22 property under authority of Proposed SOP § 5.11 was therefore  
23 unripe for adjudication. Accordingly, I vote to vacate the  
24 judgment. See *National Park Hospitality Ass'n v. Dep't of*

1 *Interior*, 538 U.S. 803, 808 (2003) (“[T]he question of ripeness may  
2 be considered on a court’s own motion.”).

3  
4 **BACKGROUND**

5 New York Education Law § 414 authorizes local school boards  
6 to permit the use of school facilities by outside groups for, among  
7 other activities, “social, civic and recreational meetings and  
8 entertainments, and other uses pertaining to the welfare of the  
9 community,” as long as such meetings are “non-exclusive” and “open  
10 to the general public.” New York Educ. L. § 414(1)(c). Pursuant  
11 to this law, the Board of Education promulgated a written policy  
12 permitting the use of school facilities by outside groups for these  
13 “social, civic and recreational” meetings. Standard Operating  
14 Procedure § 5.6.2. The written policy also included Standard  
15 Operating Procedure (“SOP”) § 5.9, which prohibited the use of  
16 school property for “religious services or religious instruction  
17 on school premises after school.”<sup>1</sup> *Bronx Household of Faith v.*

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1 <sup>1</sup> SOP § 5.9 provided:  
2

3 No outside organization or group may be allowed to  
4 conduct religious services or religious instruction on  
5 school premises after school. However, the use of  
6 school premises by outside organizations or groups  
7 after school for the purpose[] of discussing religious  
8 material or material which contains a religious  
9 viewpoint or for distributing such material is  
10 permissible.  
11

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

1 *Community School District No. 10*, 127 F.3d 207, 210 (2d Cir. 1997)  
2 (*"Bronx Household I"*).

3 Bronx Household describes itself as an "urban church whose  
4 primary purpose is to bring the Gospel of Jesus Christ to the  
5 streets of New York." See *The Bronx Household of Faith*,  
6 <http://www.bhof.org/bhof1.html> (last visited June 22, 2007). The  
7 current dispute between Bronx Household and the City began in 1994,  
8 when Bronx Household applied to use space in a middle school  
9 located in Community School District Number 10 for its Sunday  
10 morning meetings. *Bronx Household I*, 127 F.3d at 211; *Bronx*  
11 *Household of Faith v. Board of Education*, 331 F.3d 342, 345 (2d  
12 Cir. 2003) (*"Bronx Household II"*). Concluding that the activities  
13 described in Bronx Household's application would constitute  
14 "religious services or religious instruction" and would therefore  
15 violate § SOP 5.9, the City denied Bronx Household's application.  
16 *Bronx Household I*, 127 F.3d at 211.

17 Bronx Household brought suit to challenge the denial. The  
18 district court found no First Amendment violation and thus granted  
19 summary judgment in favor of the Board and School District. *Bronx*  
20 *Household of Faith v. Community School Dist. No. 10*, No. 95 Civ.  
21 5501, 1996 WL 700915, at \*6 (S.D.N.Y. Dec. 5, 1996). On appeal,  
22 we affirmed the judgment. *Bronx Household I*, 127 F.3d at 217. We  
23 found that the Board and School District had created a limited  
24 public forum by opening school facilities only to certain types of

1 speakers and subjects, and that the exclusion of religious services  
2 and religious instruction was viewpoint neutral and reasonable in  
3 light of the purposes served by the forum. *Id.* at 211-15; see also  
4 *id.* at 215 (“[R]eligious worship services may well be considered  
5 the ultimate in speech from a religious viewpoint in an open forum.  
6 But the question is whether a distinction can be drawn between it  
7 and other forms of speech from a religious viewpoint that District  
8 # 10 has elected to allow in the limited forum of a public middle  
9 school. We think it can.”).

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

15 In *Good News Club*, the Supreme Court ruled that it was  
16 unconstitutional for another school district in the State of New  
17 York to exclude from its facilities a “private Christian  
18 organization for children ages 6 to 12” which had requested  
19 permission to use the school during afterschool hours to sing  
20 songs, read Bible lessons, memorize scripture, and pray. 533 U.S.  
21 at 103. Milford Central School had enacted a “community use  
22 policy” similar to the City’s Standard Operating Procedures,  
23 whereby school facilities could be used for “social, civic and  
24 recreational meetings and entertainment events, and other uses

1 pertaining to the welfare of the community, provided that such uses  
2 shall be nonexclusive and shall be opened to the general public,"  
3 but could not be used "by any individual or organization for  
4 religious purposes," which school district officials interpreted  
5 as prohibiting "religious worship" or "religious instruction." *Id.*  
6 at 103-04 (quotation marks omitted). Noting that "any group that  
7 'promote[s] the moral and character development of children' is  
8 eligible [under Milford's policies] to use the school building,"  
9 and that "the [Good News] Club teaches morals and character  
10 development to children," albeit from "a religious standpoint," the  
11 Court concluded that exclusion of the Good News Club from school  
12 facilities was unconstitutional viewpoint discrimination, *id.* at  
13 108-10 (first alteration in original).

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

1 F.3d at 354.

2 Bronx Household then moved in the district court for summary  
3 judgment to convert the preliminary injunction into a permanent  
4 ruling. The City cross-moved for summary judgment in its favor.  
5 Up to this point, all adjudications had been with reference to SOP  
6 § 5.9, renumbered as SOP § 5.11 (in other words, Old SOP § 5.11).  
7 The City, however, wrote to the district court advising that the  
8 City "seek[s] to implement a policy with language that varies from  
9 the policy language that has been preliminarily enjoined." The  
10 City explained that in contrast with the old rule, which prohibited  
11 use of school property for "religious services or religious  
12 instruction," the Proposed SOP § 5.11 would prohibit use of school  
13 property for "religious worship services, or otherwise using a  
14 school as a house of worship."<sup>2</sup> The City told the court that with  
15 respect to the motions for summary judgment, the City would be  
16 defending the new policy. The district court expressed doubt  
17 whether, given Article III's limitations on federal court

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1 <sup>2</sup> Proposed SOP § 5.11 provides:  
2

3 No permit shall be granted for the purpose of holding  
4 religious worship services, or otherwise using a school  
5 as a house of worship. Permits may be granted to  
6 religious clubs for students that are sponsored by  
7 outside organizations and otherwise satisfy the  
8 requirements of this chapter on the same basis that  
9 they are granted to other clubs for students that are  
10 sponsored by outside organizations.  
11

12 *Bronx Household of Faith v. Board of Educ. of City of New York*,  
13 400 F. Supp. 2d 581, 588 (S.D.N.Y. 2005).

1 jurisdiction, it could properly rule on the constitutionality of  
2 a proposed SOP, which had not been invoked against Bronx Household.  
3 Seeking to allay the court's doubts, the City explained in a  
4 letter:

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

10  
11 *Bronx Household of Faith v. Board of Educ. of City of New York*  
12 (*"Bronx Household III"*), 400 F. Supp. 2d 581, 588 (S.D.N.Y. 2005)  
13 (quoting the City's letter of August 17, 2005).<sup>3</sup> The district  
14 court was thereby persuaded that it was presented with a  
15 justiciable controversy involving the application of Proposed SOP  
16 § 5.11. The court then granted summary judgment in favor of Bronx  
17 Household, permanently enjoining the City from enforcing the  
18 proposed SOP against Bronx Household. *Id.* at 601. The City  
19 defendants then brought this appeal.

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1       <sup>3</sup> The letter stated:  
2

3       Plaintiffs' use of P.S. 15 for the Bronx Household of  
4       Faith's regular worship services is prohibited under  
5       the revised section 5.11. Defendants are not currently  
6       enforcing the revised section 5.11 (or advising the  
7       field of this change) because of the preliminary  
8       injunction Order that was entered in this case. Should  
9       defendants prevail in their motion for summary judgment  
10      and the preliminary injunction Order be vacated, then  
11      any future application by plaintiffs to hold their  
12      worship services at P.S. 15 or any other school will be  
13      denied.  
14

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



1 is "particular [and] concrete," and whether it results "direct[ly]"  
2 from the defendant's actions, *United States v. Richardson*, 418 U.S.  
3 166, 179-80 (1974) (quotation marks omitted). "It is an  
4 established principle that to entitle a private individual to  
5 invoke the judicial power [of the United States courts] to  
6 determine the validity of executive or legislative action he must  
7 show that he has sustained or is immediately in danger of  
8 sustaining a direct injury as the result of that action and it is  
9 not sufficient that he has merely a general interest common to all  
10 members of the public." *Id.* at 177-78 (quoting *Ex parte Levitt*, 302  
11 U.S. 633, 634 (1937) (quotation marks omitted)).

12 Ripeness overlaps in some respects with standing, "most  
13 notably in the shared requirement that the [plaintiff's] injury be  
14 imminent rather than conjectural or hypothetical," *Brooklyn Legal*  
15 *Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 225 (2d Cir.  
16 2006), and courts at times use either term to refer to this  
17 requirement. Nonetheless, the central concerns of ripeness  
18 doctrine are somewhat distinct from standing. Standing, in its  
19 "fundamental aspect," "focuses on the party seeking to get his  
20 complaint before a federal court" and whether that party suffers  
21 a sufficiently direct and concrete injury to be heard in complaint.  
22 *Flast*, 392 U.S. at 99. By contrast, the fundamental concern of  
23 ripeness is whether *at the time* of the litigation the issues in the  
24 case are "'fit' for judicial decision." *National Park Hospitality*

1 *Ass'n v. Dep't of the Interior*, 538 U.S. 803, 814 (2003) (Stevens,  
2 *J.*, concurring); see also *Regional Rail Reorganization Act Cases*,  
3 419 U.S. 102, 140 (1974) ("ripeness is peculiarly a question of  
4 timing"). The concept of ripeness assumes that the relationship  
5 between the parties might at some point ripen into an injury  
6 sufficiently direct and realized to satisfy the requirements of  
7 Article III standing. It recognizes, however, that some disputes  
8 mature in stages, going through preliminary phases during which the  
9 injury is as yet but a speculative possibility, too remote or  
10 hypothetical to warrant present submission to a federal court.  
11 Such a dispute is considered as yet "unripe" for adjudication.

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

1           In its leading case on these concerns, *Abbott Laboratories v.*  
2 *Gardner*, the Supreme Court explained that the "basic rationale" of  
3 the doctrine of ripeness is to "prevent the courts, through  
4 avoidance of premature adjudication, from entangling themselves in  
5 abstract disagreements" and to prevent "judicial interference"  
6 until the effects of a defendant's actions are "felt in a concrete  
7 way" by the plaintiffs. *Abbott*, 387 U.S. 136, 148-49 (1967),  
8 *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99  
9 (1977). As outlined in *Abbott*, the ripeness inquiry generally  
10 requires a federal court to consider "the fitness of the issues for  
11 judicial decision and the hardship to the parties of withholding  
12 court consideration." *Id.* at 149.

13           The plaintiffs in *Abbott*, who were proprietary pharmaceutical  
14 manufacturers, brought a challenge to a Food and Drug  
15 Administration regulation which required that each time a  
16 proprietary drug's brand name appeared on a label, the generic name  
17 had to be given as well. *Id.* at 138. The regulations, which were  
18 already in effect when the plaintiffs brought suit but had not been  
19 enforced against the plaintiffs in any way, carried heavy potential  
20 criminal and civil sanctions for violations. *Id.* at 151-52. The  
21 Court found that the claim was ripe for adjudication. It noted  
22 that the question presented was a "purely legal one," the  
23 regulation constituted "final agency action" within the meaning of  
24 the Administrative Procedures Act, *id.* at 149 (quotation marks

1 omitted), and the impact of the regulations on the plaintiffs was  
2 "sufficiently direct and immediate as to render the issue  
3 appropriate for judicial review," *id.* at 152. In particular, the  
4 Court noted that the regulation's mere existence put the plaintiffs  
5 "in a dilemma" - they had to either comply with the regulations,  
6 incurring substantial economic costs to alter their labeling in a  
7 manner likely to harm their sales, or risk severe sanctions. *Id.*  
8 For more or less the same reasons, the Court found that the  
9 plaintiffs had standing to sue. *Id.* at 154.

10 On the same day, the Supreme Court dismissed a companion case,  
11 *Toilet Goods Association v. Gardner*, 387 U.S. 158 (1967), which  
12 illustrates the flip-side of the coin. The plaintiffs, a group of  
13 cosmetics manufacturers, challenged an FDA regulation which  
14 required the plaintiffs to grant the agency access to inspect their  
15 manufacturing facilities, processes, and formulae. *Id.* at 161.  
16 The FDA had as yet made no demand under the regulations for access  
17 to the plaintiffs' facilities. A number of questions of  
18 application remained unresolved, including what enforcement  
19 problems the FDA had encountered that would justify such  
20 inspections, the reasons that the FDA Commissioner might give to  
21 justify a particular order of inspection, and the safeguards the  
22 agency would devise to protect trade secrets. *Id.* at 163-64. The  
23 Court dismissed the case as unripe, explaining: "We believe that  
24 judicial appraisal of these factors is likely to stand on a much

1 surer footing in the context of a specific application of this  
2 regulation than could be the case in the framework of the  
3 generalized challenge made here." *Id.* at 164. Of special  
4 importance, the Court noted the lack of "hardship" to the parties  
5 from postponing judicial review until "more light may be thrown on  
6 the Commissioner's statutory and practical justifications for the  
7 regulation": "This is not a situation in which primary conduct is  
8 affected . . . . [N]o advance action is required . . . [and] no  
9 irremediable adverse consequences flow from requiring a later  
10 challenge." *Id.* at 164.

11 In *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993),  
12 a class of alien plaintiffs challenged certain Immigration and  
13 Naturalization Service regulations which had raised barriers to an  
14 undocumented alien's ability to obtain authorization for permanent  
15 residency. The Court found the issues presented to be unripe (at  
16 least as to some plaintiffs) largely because the regulations at  
17 issue, as in *Toilet Goods*, "impose[d] no penalties for violating  
18 any newly imposed restriction," but rather "limit[ed] access to a  
19 benefit . . . not automatically bestowed on eligible aliens." *Id.*  
20 at 58 (emphasis added). In other words, a plaintiff's claim was  
21 unripe unless the alien had taken all possible steps to gain access  
22 to the immigration benefit, and had been denied the benefit on  
23 account of the disputed regulation. *Id.* at 59.

24 Particularly illustrative is *National Park Hospitality Ass'n*

1 *v. Department of the Interior*, 538 U.S. 803 (2003). The plaintiff,  
2 an association of concessioners doing business in national parks,  
3 sought pre-enforcement review of whether a National Park Service  
4 regulation could exclude concession contracts from the protective  
5 reach of the Contract Disputes Act of 1978. *Id.* at 804-05. The  
6 Court concluded that the plaintiff's claims were not yet ripe. As  
7 in *Toilet Goods*, the Court noted the lack of hardship to the  
8 parties from delaying review, given that the regulation does not  
9 "command anyone to do anything or to refrain from doing anything,"  
10 does not "grant, withhold, or modify any formal legal license,  
11 power, or authority," does not "subject anyone to any civil or  
12 criminal liability," and creates "no legal rights or obligations."  
13 *Id.* at 809 (quoting *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S.  
14 726, 733 (1998) (quotation marks omitted)). The Court also found  
15 the issue unfit for judicial review, given the parties' explicit  
16 or implicit acknowledgment that different types of concession  
17 contracts might present different legal questions. *Id.* at 812.  
18 As a result, the Court found that "further factual development  
19 would 'significantly advance our ability to deal with the legal  
20 issues presented,'" and therefore adjudication should "await a  
21 concrete dispute about a particular concession contract." *Id.*  
22 (quoting *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438  
23 U.S. 59, 82 (1978)).

24 The concurring and dissenting Justices in *National Park* agreed

1 with the framework of the majority's ripeness analysis, while  
2 disagreeing with some of the majority's conclusions. The  
3 concurring opinion would have found that the case was ripe for  
4 review but that the plaintiff lacked standing. See *National Park*,  
5 538 U.S. at 814-17 (Stevens, *J.*, concurring). Justice Breyer's  
6 dissenting opinion would have found that the dispute satisfied both  
7 standing and ripeness requirements. In his view, the challenged  
8 regulation "causes a present injury" that is "immediate" and  
9 "concrete," in the form of higher contract implementation costs  
10 which force concessioners bidding for government contracts to pay  
11 more to obtain a contract than they believe it is worth. *Id.* at  
12 818-19 (Breyer, *J.*, dissenting).

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

1 dispute has further ripened to produce a more palpable injury.  
2 See, e.g., *Simmonds v. I.N.S.*, 326 F.3d 351, 358, 361 (2d Cir.  
3 2003) (finding that plaintiff's claims "surely present a live case  
4 or controversy," but dismissing the petition on the grounds of  
5 prudential unripeness). Although in many cases courts fail to  
6 employ a strict taxonomy distinguishing constitutional from  
7 prudential considerations, see, e.g., *National Park*, 538 U.S. at  
8 808 (noting simply that ripeness doctrine derives from Article III  
9 and from prudential considerations), other courts have  
10 distinguished "prudential unripeness" from "constitutional  
11 unripeness," see *Simmonds*, 326 F.3d at 357.<sup>4</sup>

1 <sup>4</sup> In *Simmonds* we explained these two aspects of ripeness as  
2 follows:

3  
4 These two forms of ripeness are not coextensive in  
5 purpose. Constitutional ripeness is a doctrine that,  
6 like standing, is a limitation on the power of the  
7 judiciary. It prevents courts from declaring the  
8 meaning of the law in a vacuum and from constructing  
9 generalized legal rules unless the resolution of an  
10 actual dispute requires it. But when a court  
11 declares that a case is not prudentially ripe, it  
12 means that the case will be *better* decided later and  
13 that the parties will not have constitutional rights  
14 undermined by the delay. It does not mean that the  
15 case is not a real or concrete dispute affecting  
16 cognizable current concerns of the parties within the  
17 meaning of Article III. Of course, in deciding  
18 whether "better" means later, the court must consider  
19 the likelihood that some of the parties will be made  
20 worse off on account of the delay. But that, and its  
21 degree, is just one - albeit important - factor the  
22 court must consider. Prudential ripeness is, then, a  
23 tool that courts may use to enhance the accuracy of  
24 their decisions and to avoid becoming embroiled in  
25 adjudications that may later turn out to be  
26 unnecessary or may require premature examination of,

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

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1           especially, constitutional issues that time may make  
2 easier or less controversial.  
3

4 *Simmonds*, 326 F.3d at 357. It is unclear to me why the *Simmonds*  
5 Court believed that prudential ripeness requires that the parties  
6 "will not have constitutional rights undermined by the delay."  
7 In my view, the undermining of any rights, and not only  
8 constitutional rights, argues against a finding of unripeness.  
9

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

## 16

## 17 **II. Adjudication of Proposed SOP § 5.11**

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

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

2           To start with two obvious propositions: (1) There is without  
3 question a ripe controversy between the parties involving the  
4 application of Old SOP § 5.11 to bar Bronx Household from using  
5 school property. The fact, however, that one controversy between  
6 the parties is ripe for adjudication does not mean that all  
7 disputes between the parties present ripe questions. Without  
8 doubt the district court could properly have entered a final  
9 judgment on the constitutionality of Old SOP § 5.11. It is the  
10 adjudication of the constitutionality of the new proposed SOP that  
11 is problematic. (2) Had Proposed SOP § 5.11 been invoked by the  
12 City as the basis for denying Bronx Household use of school  
13 property, Bronx Household would have standing to challenge its  
14 constitutionality, and the dispute would be ripe for adjudication.  
15 This, however, has not happened. In fact, it appears the proposed  
16 SOP has not even been adopted, and that the City is awaiting the  
17 court's judgment on its constitutionality before adopting it.

18           Not only has the City never relied on Proposed SOP § 5.11 to  
19 deny Bronx Household's application, but Bronx Household has never  
20 even applied to use school property under the standards of  
21 Proposed SOP § 5.11. Bronx Household has been excluded under the  
22 standards of the predecessor SOP and has obtained a preliminary  
23 injunction granting it provisional access to school property on  
24 the basis of the probable unconstitutionality of that SOP. At

1 present Bronx Household is therefore not being excluded from the  
2 schools at all, much less by reason of the proposed SOP.

3 I recognize that a regulation can cause harm to a covered  
4 entity even without being enforced. Thus in *Abbott* the Supreme  
5 Court found that the FDA's labeling regulation caused actual harm  
6 to covered drug manufacturers even without being enforced, because  
7 the manufacturer was required either to adopt a disadvantageous  
8 change in its labeling practices or risk incurring serious  
9 penalties and liabilities. See *Abbott*, 387 U.S. at 153 ("[W]here  
10 a regulation requires an immediate and significant change in the  
11 plaintiffs' conduct of their affairs with serious penalties  
12 attached to noncompliance, access to the courts . . . must be  
13 permitted . . . ."); see also *AT&T Corp. v. Iowa Utilities Bd.*,  
14 525 U.S. 366, 386 (1999) ("When . . . there is no immediate effect  
15 on the plaintiff's primary conduct, federal courts normally do not  
16 entertain pre-enforcement challenges . . . ."); *Texas v. United*  
17 *States*, 523 U.S. 296, 301 (1998) (no "hardship" because plaintiff  
18 "is not required to engage in, or to refrain from, any conduct").  
19 And in *National Park*, the majority and the dissent disagreed over  
20 whether the obligation on would-be concessioners to increase their  
21 bids in anticipation of increased operating costs resulting from  
22 the questioned regulation caused sufficient injury to confer  
23 ripeness on the concessioners' challenge to the regulation.

24 Here, the City's proposed adoption of a new SOP causes no

1 such harm to Bronx Household. Even if the proposed SOP had been  
2 adopted, Bronx Household would not be obligated by it to amend its  
3 practices in any way. The provision would not command Bronx  
4 Household to do anything or to refrain from doing anything, nor  
5 would it grant, withhold, or modify any legal license, power, or  
6 authority, nor would it subject Bronx Household to civil or  
7 criminal liability. See *National Park*, 538 U.S. at 809. The  
8 proposed SOP would merely create a possibility that at some future  
9 time, it may cause Bronx Household to be excluded from use of the  
10 schools - at which time Bronx Household could challenge its  
11 constitutionality. See *Simmonds*, 326 F.3d at 360 ("The mere  
12 possibility of future injury, unless it is the cause of some  
13 present detriment, does not constitute hardship.").

14  
15 **B. Lack of Harm to Either Party from Delay**

16 Among the factors courts examine to determine ripeness is  
17 whether *either* party to the dispute would be harmed by delaying  
18 adjudication until the dispute ripens. I think it clear that  
19 neither party would be harmed by delay in adjudicating the  
20 constitutionality of Proposed SOP § 5.11. Bronx Household  
21 continues to be protected by the preliminary injunction, and there  
22 is no impediment to the entry of final judgment relating to the  
23 SOP that was actually enforced against it (Old SOP § 5.11). The  
24 City will suffer no harm if adjudication of the constitutionality

1 of Proposed SOP § 5.11 awaits such time as it is actually adopted  
2 and invoked. The parties may find it convenient to get this  
3 resolved now. But loss of such convenience is not sufficient harm  
4 to make a hypothetical future dispute ripe for immediate  
5 adjudication.

6 In a deviation from the conventional pattern, it is the  
7 governmental entity sponsoring the regulation, rather than the  
8 person potentially affected, that has asked that the lawfulness of  
9 the regulation be immediately adjudicated. However, the City is  
10 not barred from vindicating its governmental interest by adopting  
11 and enforcing the proposed standard against Bronx Household. The  
12 preliminary injunction, which was in effect when the parties  
13 cross-moved for summary judgment, barred the City from excluding  
14 Bronx Household *under the old rule*. It did not purport to bar the  
15 City from adopting or enforcing different standards.<sup>5</sup>

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1 <sup>5</sup> The preliminary injunction barred the defendant "from  
2 enforcing the [Old SOP § 5.11] so as to deny plaintiffs'  
3 application." It contained no suggestion that the City was  
4 barred from adopting or enforcing a new, different standard.  
5 The Order stated:  
6

7 It is hereby ordered, adjudged and decreed that, for  
8 the reasons set forth in the Opinion dated June 26,  
9 2002, defendants are hereby enjoined from enforcing the  
10 New York City Board of Education's Standard Operating  
11 Procedure § 5.11 [Old SOP § 5.11] so as to deny  
12 plaintiffs' application to rent space in a public  
13 school operated by the Board of Education for morning  
14 meetings that include religious worship or the  
15 application of any similarly-situated individual or  
16 entity.  
17

18 (Although this has little or no bearing on the present

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

8           By asking the court to rule on the constitutionality of a  
9 policy that had neither been enforced nor even adopted, the City  
10 was essentially asking for an advisory ruling on courses of action  
11 it had contemplated but not taken. The City was asking the court:

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1           dispute, I question the appropriateness of the district  
2 court's grant of injunctive relief barring the City not only  
3 from denying the application of the plaintiffs, but also  
4 from denying the application of "any similarly-situated  
5 individual or entity." Assuming such an order may be  
6 proper in some circumstances (even absent class  
7 certification), *cf. Galvan v. Levine*, 490 F.2d 1255, 1261  
8 (2d Cir. 1973), I believe it was not appropriate in this  
9 case, at least without the court also giving a reasonably  
10 precise definition of the meaning of "similarly-situated."  
11 There are many grounds upon which the City might reject  
12 another entity's permit application, which might raise  
13 altogether different issues than those involved in Bronx  
14 Household's case. A defendant ought not to be subjected to  
15 the risk of contempt without a reasonably clear delineation  
16 of the circumstances in which the defendant is forbidden to  
17 act.)  
18

1           <sup>6</sup> In the unlikely event that the district court would have  
2 advised the City that the court would regard such action as a  
3 violation of the injunction, the City would then have been armed  
4 with an argument supporting ripeness to adjudicate the  
5 constitutionality of the new SOP, as the City would then have  
6 been harmed by denial of the opportunity to enforce the new  
7 standard pending final adjudication of the constitutionality of  
8 the old.

1 if the City adopts the proposed SOP, and if Bronx Household  
2 applies to use school space under that new provision, and if the  
3 City denies that permit application on the grounds that Bronx  
4 Household plans to use the school space for "worship," would that  
5 denial be constitutional? To answer would be to give an advisory  
6 opinion on a hypothetical question.

### 7 8 **C. Fitness For Adjudication**

9 The circumstances that have led courts to find that issues  
10 are unfit for adjudication are present here. The proposed SOP,  
11 focusing on the exclusion of "worship," has played no role in the  
12 exclusion of Bronx Household from use of the school facilities.  
13 Furthermore, adjudication of the constitutionality of the new SOP  
14 would be illuminated by the resolution of questions that will  
15 inevitably come into play if and when the City enforces the  
16 proposed SOP upon Bronx Household's application. See *Toilet*  
17 *Goods*, 387 U.S. at 164. In *Toilet Goods, Reno, and National Park*,  
18 the Supreme Court determined that adjudication of the legal  
19 question was unripe in part because the adjudication would benefit  
20 from having the "factual components fleshed out" by "some concrete  
21 actions applying the regulation." *National Park*, 538 U.S. at 808  
22 (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891  
23 (1990) (quotation marks omitted)).

24 The same considerations apply here. It is impossible to know

1 at this stage exactly how the process of Bronx Household's  
2 application and the City's ruling will play out when so much  
3 remains uncertain. For starters, how will Bronx Household  
4 describe its proposed activities in an application designed to  
5 secure admission under this policy focused on worship? One cannot  
6 assume that a new application seeking approval under the new SOP  
7 will be formulated in the same terms as Bronx Household's previous  
8 applications, which were addressed to different standards. The  
9 term "worship," which did not appear in the old SOP but is central  
10 to the new one, is of uncertain meaning. I recognize that, when  
11 worship was not determinative, Bronx Household described the  
12 activities for which it sought permission as "worship." It will  
13 not necessarily continue to do so when seeking admission under a  
14 rule which explicitly excludes "worship." In any event, what will  
15 matter on a new application is not whether *Bronx Household*  
16 considers its activities to be "worship," but whether its  
17 activities are "worship" *within the meaning of the City's new SOP*.  
18 It is uncertain how the City will interpret its new criterion.  
19 Will the City formulate guidelines to help determine what does and  
20 what does not constitute forbidden worship? How will the City  
21 define the term in passing on applications?

22 After the Supreme Court's decision in *Good News Club*, the  
23 constitutional significance of "worship" is far from clear. In a  
24 footnote responding to Justice Souter's observation in dissent

1 that the Good News Club's activities added up to "an evangelical  
2 service of worship," the majority asserted that the activities "do  
3 not constitute *mere religious worship*, divorced from any teaching  
4 of moral values." *Good News Club*, 533 U.S. at 112 n.4 (emphasis  
5 added); see also *id.* at 138 (Souter, *J.*, dissenting). Later in  
6 the same footnote, the Court acknowledged Justice Souter's  
7 characterization of the Club's activities as "worship," but  
8 responded simply that "[r]egardless of the label Justice Souter  
9 wishes to use, what matters is the substance of the Club's  
10 activities . . . ." *Id.* at 112 n.4.

11 The Court's insistence that Good News Club's activities did  
12 not constitute "mere worship" seems to indicate that the Court  
13 attaches constitutional significance to whether "worship" was  
14 involved, and may even suggest, as Judge Calabresi notes, that the  
15 Supreme Court will ultimately conclude that worship may be  
16 excluded, while associated teaching of moral values may not. See  
17 Calabresi Op., *supra* at **26**. Otherwise, there would be little point  
18 in distinguishing the Club's activities from "mere worship." On  
19 the other hand, the Court's dismissal of Justice Souter's  
20 characterization of the activities as "worship" as essentially  
21 irrelevant may suggest it is constitutionally irrelevant whether  
22 an applicant to use public school facilities intends to conduct  
23 worship services. Cf. Walker Op., *post* at **93**.

24 When and if the City faces Bronx Household's application to

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

16 Because the central question in the dispute is one of  
17 constitutionality, the importance of the conclusion that the  
18 present dispute is not yet fit for adjudication is heightened by  
19 the general rule counseling against deciding *constitutional*  
20 questions unnecessarily. This court has been asked to adjudicate  
21 a significant and delicate question of constitutional law, whose  
22 outlines are by no means clearly dictated by prior authority; the  
23 answer may turn in part on how the City interprets and enforces  
24 its policy. This is exactly the type of question the court should

1 not reach out to decide prematurely, when many factors which may  
2 influence the analysis are as yet undeveloped. As the Supreme  
3 Court noted in *Spector Motor Service*:

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

11  
12 *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944)  
13 (citations omitted). In the present case the constitutional  
14 question may be substantially altered - or even mooted entirely -  
15 by whether the City ever enforces Proposed SOP § 5.11 and, if so,  
16 the manner in which enforcement proceeds.

17 It would in no way answer these ripeness concerns to say  
18 that, because the constitutionality of the City's Proposed SOP  
19 will need to be decided soon, we might as well decide it now  
20 rather than make the parties wait. There are at least two strong  
21 responses to any such argument. For starters, the question  
22 whether Proposed SOP § 5.11 embodies prohibited viewpoint  
23 discrimination (as the district court found) may never be  
24 presented to the court. Second, and more important, the ripeness  
25 doctrine assumes that the question may well need to be decided in  
26 the future, but nonetheless avoids premature decision based on the  
27 belief that the adjudication will be better informed and wiser if  
28 it occurs when the dispute has crystallized, thus bringing its

1 latencies to the surface. I discuss these two considerations  
2 below.

3 Courts that have dismissed on the grounds of unripeness have  
4 noted that, as the dispute among the parties advances, the unripe  
5 issue may become moot and thus may never be presented to a court,  
6 or alternatively may be presented in a much altered form. See  
7 *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433  
8 F.3d 1199, 1217 (9th Cir. 2006) (en banc) (three-judge plurality  
9 opinion) (finding the case unripe because, in part, "[w]e are . .  
10 . uncertain about whether, or in what form, [the] question might  
11 be presented to us"); *Simmonds v. I.N.S.*, 326 F.3d 351, 357 (2d  
12 Cir. 2003) (Calabresi, J.) ("Prudential ripeness is . . . a tool  
13 that courts may use . . . to avoid becoming embroiled in  
14 adjudications that may later turn out to be unnecessary or may  
15 require premature examination of, especially, constitutional  
16 issues that time may make easier or less controversial."). In  
17 this case as well, there is a significant possibility that the  
18 constitutional issue which the district court undertook to  
19 determine will be mooted by future events, and either will never  
20 be presented for adjudication or will be presented in a  
21 substantially different form. Notwithstanding the City's facile  
22 prediction that it would deny Bronx Household's future  
23 applications under the proposed SOP, there are many other  
24 reasonable possibilities. Among them: The City's administration,

1 whose composition inevitably will change over time, might adopt a  
2 different approach. The City might become persuaded - perhaps by  
3 subsequent rulings of the Supreme Court or other courts - that it  
4 cannot constitutionally exclude worship, and might therefore  
5 decide not to adopt the proposed SOP, or it might grant Bronx  
6 Household's application notwithstanding the SOP. The City might  
7 grant Bronx Household's application in part, allowing it to use  
8 school facilities for some of its projected activities - those the  
9 City recognizes are protected by *Good News Club* - but specifying  
10 that others - those which the City views as "worship" and beyond  
11 the protection of *Good News Club* - are not permissible. The free  
12 speech concerns underlying the district court's decision might  
13 also be mooted if the City concluded that, in practice, any  
14 attempt to enforce Proposed SOP § 5.11 would violate the  
15 *Establishment Clause* of the First Amendment, because of church-  
16 state entanglement resulting from the City's need to distinguish  
17 "worship" from other religious activities. See *Widmar v. Vincent*,  
18 454 U.S. 263, 272 n.11 (1981) ("We agree . . . that the University  
19 would risk greater 'entanglement' by attempting to enforce its  
20 exclusion of 'religious worship' and 'religious speech.'"); *Bronx*  
21 *Household III*, 400 F. Supp. 2d at 598 (merely identifying  
22 "religious worship services" fosters "an excessive government  
23 entanglement with religion"); see Walker Op., post at 95. Or, as  
24 noted above, for any of a number of reasons, Bronx Household might

1 never reapply.

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

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

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

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

17 The fact that the proposed provision has never been applied  
18 against Bronx Household and may never be applied as the basis for  
19 excluding the group from school facilities counsels strongly in  
20 favor of finding the question of its constitutionality unfit for  
21 judicial review. *See Simmonds*, 326 F.3d at 359 (fitness analysis  
22 "is concerned with whether the issues sought to be adjudicated are  
23 contingent on future events or may never occur" (quoting *Isaacs v.*  
24 *Bowen*, 865 F.2d 468, 478 (2d Cir.1989) (quotation marks omitted));

1 *Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Env'tl.*  
2 *Conservation*, 79 F.3d 1298, 1305 (2d Cir. 1996) ("The [ripeness]  
3 doctrine prevents the premature adjudication of issues that may  
4 never arise."). Refraining from decision on issues that may never  
5 materialize is particularly important where the underlying issue,  
6 as here, is of constitutional import. See *Lyng v. Northwest*  
7 *Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A  
8 fundamental and longstanding principle of judicial restraint  
9 requires that courts avoid reaching constitutional questions in  
10 advance of the necessity of deciding them.").

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

1 Household and the City regarding the new proposed SOP are a matter  
2 of speculation.

3 A finding that Bronx Household's meetings are not open to the  
4 public or that it refuses sacraments based on whether the person  
5 professes the Christian faith might also present a different  
6 constitutional issue. The Supreme Court found in *Lamb's Chapel v.*  
7 *Center Moriches Union Free School District*, 508 U.S. 384 (1993),  
8 that the school did not violate the Establishment Clause by  
9 permitting religious groups to use school facilities because the  
10 activity "would not have been during school hours, would not have  
11 been sponsored by the school, and would have been open to the  
12 public, not just to church members. The District property had  
13 repeatedly been used by a wide variety of organizations. Under  
14 these circumstances . . . there would have been no realistic  
15 danger that the community would think that the District was  
16 endorsing religion . . . ." *Id.* at 395 (emphasis added). Again,  
17 in *Capitol Square Review and Advisory Board v. Pinette*, a  
18 plurality of the Court repeated these sentiments: To permit  
19 "access by a religious group in *Lamb's Chapel*, it was sufficient  
20 that the group's activity was not in fact government sponsored,  
21 that *the event was open to the public*, and that the benefit of the  
22 facilities was shared by various organizations." 515 U.S. 753,  
23 767 (1995) (plurality opinion) (emphasis added). Finally, in *Good*  
24 *News Club* the Court rejected the defendant's Establishment Clause

1 defense by noting: "As in *Lamb's Chapel*, the Club's meetings were  
2 held after school hours, not sponsored by the school, and open to  
3 any student who obtained parental consent, not just to Club  
4 members." 533 U.S. at 113 (emphasis added); cf. *id.* at 144  
5 (Souter, J., dissenting) (permitting Good News Club to meet on  
6 school property might result in an Establishment Clause violation,  
7 in part because "[t]he club is open solely to elementary students  
8 (not the entire community, as in *Lamb's Chapel*)").

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

23 In any event, the possibility that the City's response to an  
24 application under the proposed SOP might be affected by such

1 considerations, such that the provision will never be applied in  
2 the manner currently anticipated by the parties (if at all),  
3 argues against the fitness of the question for present  
4 adjudication. Courts do not rush to adjudicate unripe disputes,  
5 especially those involving constitutional questions, because  
6 judgments on important questions will be better informed and  
7 sounder if they await the time when the dispute has crystallized  
8 and a party has suffered harm.<sup>8</sup>

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

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

26 Judge Calabresi seems to concede that this revision of the  
27 SOP has caused no harm to Bronx Household; at least he makes no  
28 argument to the contrary. He argues that ripeness may be found  
29 on two bases: first, that a finding of unripeness would further  
30 delay the ultimate resolution of the dispute, and second, that  
31 the City should be entitled to get a ruling on the  
32 constitutionality of the revision, even before applying it,

1  
2 because the City might have believed that the terms of the  
3 preliminary injunction prohibited the City from enforcing it.

4 As for the delay, there are two answers. First, the delay  
5 necessary to await a true ripe conflict over the revised SOP  
6 need not have been lengthy. Had the district court declined to  
7 adjudicate the constitutionality of the revised SOP until the  
8 City invoked it to exclude Bronx Household, and the parties  
9 desired speedy resolution, the resulting delay would have been  
10 extremely brief. If, instead of trying to convince the court to  
11 adjudicate the constitutionality of a rule that had never been  
12 enforced, the City had advised the court that it was adopting a  
13 different standard, and invited Bronx Household to apply under  
14 the new standard, Bronx Household could then have promptly  
15 submitted an application, and the City could have promptly  
16 ruled. The parties could then have cross-moved for summary  
17 judgment. Any delay in the court's ruling until a true  
18 adversity developed between the parties over a new standard thus  
19 need not have exceeded a few weeks. Second, and more  
20 important, resultant delay of adjudication is ordinarily not the  
21 kind of harm that renders an unripe claim ripe. Delay is an  
22 *inevitable* consequence whenever a court declines to adjudicate a  
23 question by reason of unripeness. In several cases discussed in  
24 the body of this opinion, the Supreme Court and this court have  
25 declined to adjudicate because of the unripeness of the  
26 question, notwithstanding that the refusal to adjudicate would  
27 cause the parties delay in securing an answer to the question.  
28 If such delay conferred ripeness, no case would ever be unripe  
29 for adjudication.

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

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

1  
2 **CONCLUSION**

3 The district court should not have entertained and  
4 adjudicated the question whether the City may constitutionally  
5 exclude Bronx Household from access to City school facilities  
6 under the provisions of Proposed SOP § 5.11. The question was not  
7 ripe for adjudication. It is unnecessary to determine whether  
8 this was prudential unripeness, constitutional unripeness, or  
9 both. The question was at least prudentially unripe. The court  
10 should have declined to jump ahead to make this premature  
11 adjudication. I therefore vote to vacate the judgment.  
12

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

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

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

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

10 While I agree with Judge Calabresi that this dispute is ripe  
11 for adjudication, and join his opinion in that limited respect  
12 without reservation,<sup>2</sup> I cannot agree that SOP § 5.11 is viewpoint  
13 neutral. Indeed, after comparing the purposes of Bronx

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1 <sup>1</sup> What is termed "Revised" SOP § 5.11 in the court's per  
2 curiam opinion, I call simply SOP § 5.11.  
3

1 <sup>2</sup> I agree with Judge Leval that we should not reach out to  
2 decide unnecessary constitutional questions. The Board,  
3 however, has repeatedly and implacably sought to exclude  
4 religious viewpoints -- whether out of the mistaken belief that  
5 such exclusion is necessary to comply with the Establishment  
6 Clause or due to some hostility to religious groups. Indeed,  
7 this marks the third time that a New York school board has  
8 denied religious groups access to school property. Under these  
9 circumstances, and in light of the fact that I believe the Board  
10 has adopted SOP § 5.11, I think we owe the litigants a duty to  
11 decide this dispute now; the alternative would permit the Board  
12 to rely on the in terrorem effect of SOP § 5.11 to prevent Bronx  
13 Household from pursuing its principal goal -- the establishment  
14 of a community of believers -- as Bronx Household would need to  
15 account at every turn for the possibility that at any moment it  
16 might be forced to resume its peripatetic search for a building  
17 wherein to house its worshipers. Cf. Abbott Labs. v. Gardner,  
18 387 U.S. 136, 152 (1967).

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

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

24 Judge Calabresi's approach is fatally defective in two

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

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

1 decision to vacate the permanent injunction.

2 **I. Bronx Household's Free Speech Claim**

3 **A. The Board's Viewpoint Discrimination**

4 Despite the two flaws in Judge Calabresi's approach, I begin  
5 with three points on which he and I are in agreement. I agree  
6 that in a limited public forum, the government may exclude all  
7 entities except those "entities of similar character" to those it  
8 has chosen to include, Perry Educ. Ass'n v. Perry Local Educators'  
9 Ass'n, 460 U.S. 37, 48 (1983), as long as any such exclusion is  
10 not a facade for covert viewpoint discrimination, Cornelius v.  
11 NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 812 (1985).  
12 Indeed, we have concluded, a limited public forum is (1) a sub-set  
13 of the designated public forum as to "expressive activities of  
14 [the] genre" the government has chosen to permit on its property,  
15 Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir.  
16 1991), and (2) a sub-set of the nonpublic forum as to all other  
17 expressive activities. See also Arkansas Educ. Television Comm'n  
18 v. Forbes, 523 U.S. 666, 677 (1998) (holding that if the  
19 government excludes "a speaker who falls within the class to which  
20 a designated public forum is made generally available" its  
21 decision is subject to strict scrutiny). I also agree that we  
22 must be careful not to articulate a standard that would simply  
23 require that "any public school opened for civic meetings . . .  
24 [be] open[] for use as a church, synagogue, or mosque." Good News

1 Club, 533 U.S. at 139 (Souter, J., dissenting). And, finally, I  
2 agree that courts should not analyze the "substance" of proposed  
3 expressive activity as the district court did in this case. See  
4 Bronx Household of Faith v. Bd. of Educ. (Bronx Household III),  
5 400 F. Supp. 2d 581, 591 (S.D.N.Y. 2005) (describing Bronx  
6 Household's proposed activity as "singing songs and hymns;  
7 teaching from the Bible."). By deconstructing religious worship  
8 into components, the district court denigrates it.<sup>3</sup>

9 Judge Calabresi and I part ways, however, in how we propose  
10 to ascertain whether the Board is just excluding an entity  
11 dissimilar to those it has already chosen to permit on its  
12 premises or whether it is engaging in unlawful viewpoint  
13 discrimination. I would compare the purposes of Bronx Household's  
14 proposed expressive activity to the purposes for which the Board  
15 has created its limited public forum and, if the fit is close,  
16 inquire searchingly of the government's motives. This accords  
17 with the various cases Judge Calabresi cites in his opinion, but

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1 <sup>3</sup> The district court's approach is also impractical, for if  
2 worship is merely the singing of hymns and reading from the  
3 Bible, the singing of hymns might be considered simply a  
4 vibration of the vocal chords; finally, the district court's  
5 approach seems in tension with the Supreme Court's decision in  
6 Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 109, 111  
7 (1943) ("[T]he mere fact that the religious literature is 'sold'  
8 by itinerant preachers rather than 'donated' does not transform  
9 evangelism into a commercial enterprise."). I note in passing  
10 that for these same reasons I fail to see how the Board could  
11 grant Bronx Household's putative future application in part  
12 while denying it in part. Cf. Leval Op., supra at 70.

1 barely analyzes. The Good News Club Court, for instance,  
2 emphasized purpose. Compare Good News Club, 533 U.S. at 108  
3 (“Milford has opened its limited public forum to activities that  
4 serve a variety of purposes . . . .”) (emphasis added), and id.  
5 (“[T]here is no question that teaching morals and character  
6 development to children is a permissible purpose under Milford’s  
7 policy . . . .”), and id. at 109 (discussing “the [Lamb’s Chapel]  
8 films’ purpose”), with id. at 131 (Stevens, J., dissenting)  
9 (distinguishing discussion of “political issues from meetings  
10 whose principal purpose is to recruit new members to join a  
11 political organization”) (emphasis added).<sup>4</sup> And our court has  
12 often deemed analysis of the parties’ purposes essential to  
13 resolution of limited public forum cases. See Deeper Life  
14 Christian Fellowship, Inc. v. Bd. of Educ., 852 F.2d 676, 680 (2d  
15 Cir. 1988) (government’s purpose relevant to determining whether  
16 property is public forum or nonpublic forum); Knolls Action  
17 Project v. Knolls Atomic Power Lab., 771 F.2d 46, 50 (2d Cir.  
18 1985) (ostensible subject-matter restriction “impermissible [if]  
19 it was motivated [in fact] by a dislike of the content of  
20 [plaintiff]’s message”).

21 More importantly, whether Bronx Household’s proposed

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1 <sup>4</sup> See also Rosenberger v. Rector & Visitors of the Univ. of  
2 Virginia, 515 U.S. 819, 829 (1995); id. at 846 (O’Connor, J.,  
3 concurring) (“This insistence on government neutrality toward  
4 religion explains why we have held that schools may not  
5 discriminate against religious groups by denying them equal  
6 access to facilities that the schools make available to all.”).

1 expressive activity constitutes "worship" can only be discerned by  
2 inquiring of that activity's purpose. See Welsh v. United States,  
3 398 U.S. 333, 339 (1970) (accepting the subjectivity of "religious  
4 belief" and abjuring any objective definition of the term); United  
5 States v. Seeger, 380 U.S. 163 (1965) (same); cf. Murdock, 319  
6 U.S. at 109 (noting evangelical purpose to sale of religious  
7 literature).

8 Under the approach most faithful to Supreme Court precedent,  
9 whether Pastor Hall chooses to label Bronx Household's proposed  
10 expressive activity a "worship service" is not determinative; we  
11 must independently examine the purpose of that activity. Compare  
12 McCreary County v. ACLU, 125 S. Ct. 2722, 2732 (2005) (discerning  
13 hidden religious purpose) with N. Pac. Union Conference Ass'n of  
14 the Seventh-Day Adventists v. Clark County, 118 Wash. App. 22, 28-  
15 29 (2003) (discussing whether "education" should be considered "'a  
16 vital part of the Church's worship program'" for tax purposes).  
17 Defendants' purpose in opening school property to the public is to  
18 improve "school-community relations in ways that can enhance  
19 community support for the school." Cahill Decl. ¶ 14; Farina  
20 Decl. at ¶ 9 (noting that the Board wishes to "expand enrichment  
21 opportunities for children and to enhance community support for  
22 the schools") (emphasis added). Simply put, defendants wish to  
23 foster a community in their geographic vicinity in ways that will  
24 inure to their benefit. Upon review of the record, Bronx

1 Household's proposed expressive activity fits within this  
2 paradigm. Bronx Household's essential purpose is the development  
3 of a community of believers, which has as its anticipated result  
4 increased community support for the school. See 1st Hall Dep. at  
5 19, 20, 38, 46.

6 Because the fit between the government's purpose in opening  
7 the forum and the purpose of Bronx Household's proposed expressive  
8 activity is sufficiently close, more searching scrutiny of the  
9 government's motives is required. Cf. Peck ex rel. Peck v.  
10 Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 631 (2d Cir. 2005)  
11 (Calabresi, J.) (postulating hostility to religion from teacher's  
12 conduct). The Board's avowed purpose in enforcing the regulation  
13 in this case, see Bronx Household III, 400 F. Supp. 2d at 599  
14 (noting that "[t]he Board is quite candid in acknowledging its  
15 intent to 'reinstitute a policy that would prevent any  
16 congregation from using a public school for its worship  
17 services'"), and its long-standing hostility to religious groups,  
18 leads ineluctably to the conclusion that the Board, in fact, has  
19 undertaken to exclude a particular viewpoint from its property.

20 I acknowledge Judge Calabresi's concern that New York's  
21 schools not resemble St. Patrick's Cathedral. However, analysis  
22 of the parties' purposes does not raise that concern; it leaves  
23 the Board ample room to regulate the use of its property.<sup>5</sup> As the

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1 <sup>5</sup> Moreover, because the Board has a compelling interest in  
2 avoiding Establishment Clause violations, it can exclude

1 Supreme Court explained in Good News Club, the government "may be  
2 justified 'in reserving [a forum] for certain groups.'" 533 U.S.  
3 at 106 (emphasis added); Perry, 460 U.S. at 49 ("We believe it is  
4 more accurate to characterize the access policy as based on the  
5 status of the respective unions . . . .") (emphasis added). The  
6 Board thus remains free to distinguish between outside speakers  
7 and student-sponsored groups (as indeed the text of SOP § 5.11  
8 hints it may). Cf. Bronx Household III, 400 F. Supp. 2d at 600  
9 n.18 (noting that the Board could "amend the SOPs to create a  
10 neutral distinction based on the speaker"). Moreover, the Board  
11 may also impose reasonable time, place or manner restrictions on  
12 Bronx Household.

13 **B. Two Flaws in Judge Calabresi's Reasoning**

14 Judge Calabresi's conclusion that "defendants' exclusion of  
15 worship services is viewpoint neutral," Calabresi Op., supra at  
16 **38**, is grounded not upon a comparison of the purposes of the  
17 activities allowed and the purpose of Bronx Household's proposed  
18 activity, but upon a comparison between the expression already  
19 permitted on school premises and "worship." Compare Calabresi  
20 Op., supra at **31** (comparing worship services to "Boy Scouts  
21 rituals or . . . Elks Club ceremonies" and finding substantial  
22 differences) with Good News Club, 533 U.S. at 111 (finding few

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1 religious groups whose presence would convey to the public the  
2 message that the government endorses religion (or a particular  
3 religion). Cf. Lamb's Chapel, 508 U.S. at 394-395.

1 differences between Good News Club's proposed activity and Boy  
2 Scouts rituals). After he pronounces worship sui generis, Judge  
3 Calabresi not surprisingly finds that "worship" is not included  
4 within the set of expressive activity hitherto permitted by the  
5 Board. This will not do. In order to determine whether an  
6 element is within a set, a court should both define the set, see  
7 Child Evangelism Fellowship of New Jersey Inc. v. Stafford  
8 Township Sch. Dist., 386 F.3d 514, 527 (3d Cir. 2004) (discussing  
9 the limited public forum's limits), and analyze the element, to  
10 discern whether it has the attributes required for admission to  
11 the set, see Goulart v. Meadows, 345 F.3d 239, 252 (4th Cir. 2003)  
12 (explaining the importance of identifying "which of . . . various  
13 indicia of similarity is the relevant one"). See generally Nix v.  
14 Hedden, 149 U.S. 304 (1893) (determining whether tomatoes should  
15 be classified as "fruit" or "vegetable" by first defining "fruit"  
16 and "vegetable" and then analyzing "tomatoes"). Yet Judge  
17 Calabresi defines neither the set -- the "limits" of the limited  
18 public forum -- nor the element -- "worship." His comparison is  
19 therefore susceptible to reductio ad absurdum, as both the scope  
20 of the set and the nature of its prospective member remain  
21 substantially unknown.<sup>6</sup>

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

1           (1) Judge Calabresi does not define the limits of the  
2           limited public forum.  
3

4           The first flaw in Judge Calabresi's analysis lies with his  
5 delimitation of the limited public forum. He says that we are  
6 bound by our decision in Bronx Household of Faith v. Community  
7 School District No. 10 (Bronx Household I), 127 F.3d 207, 211-14  
8 (2d Cir. 1997), that the school has created a limited public  
9 forum. But the character of a forum is defined by its uses and  
10 the uses to which it is put change over time. See Paulsen v.  
11 County of Nassau, 925 F.2d 65, 69 (2d Cir. 1991); cf. Grayned v.  
12 City of Rockford, 408 U.S. 104, 116 (1972) (stating that "[t]he  
13 crucial question is whether the manner of expression [that the  
14 petitioner wishes to engage in] is basically incompatible with the  
15 normal activity of a particular place at a particular time")  
16 (emphasis added). Therefore, while his implicit assumption that  
17 the character of the forum has not changed may be correct, he  
18 cannot reach this conclusion by simple judicial say-so; such a  
19 conclusion must be based on a factual inquiry into the forum's  
20 current uses, not those of a decade ago.

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

1 opinion is silent.<sup>7</sup>

2 <sup>7</sup> I hold no illusion that defining the limits of a limited  
3 public forum is an easy task. For instance, Cornelius instructs  
4 that we should consider the government's intent. 473 U.S. at  
5 802; see, e.g., Deeper Life, 852 F.2d at 680; Calash v. City of  
6 Bridgeport, 788 F.2d 80, 83 (2d Cir. 1986). But how to  
7 distinguish a change of mind -- which the government, like any  
8 property owner, is assuredly permitted, see, e.g., Perry, 460  
9 U.S. at 46 -- from viewpoint hostility? Compare Knolls, 771  
10 F.2d at 49-50 ("In the instant case, therefore, whatever  
11 previous use has been allowed does not foreclose KAPL from  
12 asserting its rights at this time.") (emphasis added) with  
13 Robert C. Post, Between Management and Governance: The History  
14 and Theory of the Public Forum, 34 UCLA L. Rev. 1713, 1756 ("If  
15 the reach of the forum is determined by the intent of the  
16 government, and if the exclusion of the plaintiff is the best  
17 evidence of that intent, then the plaintiff loses in every  
18 case."), and with New York Magazine v. Metro. Transp. Auth., 136  
19 F.3d 123, 129-30 (2d Cir. 1998). On the other hand, if we fix  
20 the definition of the forum at the time the government first  
21 permits members of the public to use its property for  
22 expression, how do we account for the inherently contingent  
23 nature of a property's taxonomy? See ISKON, 505 U.S. at 698  
24 (Kennedy, J., concurring) (arguing that if "expressive activity  
25 would be appropriate and compatible with [a property], the  
26 property is a public forum"); see also Lebron v. Nat'l R.R.  
27 Passenger Corp., 69 F.3d 650, 655-56 (2d Cir. 1995); supra  
28 (discussing Grayned).

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

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

1           (2) Judge Calabresi does not define worship.

2           Judge Calabresi's reasoning has a second flaw: It posits that  
3 judges can define "worship." He assumes that worship is  
4 distinguishable from activities that are plainly within the  
5 forum's limits: These include gathering for the purpose of gaining  
6 religious instruction, engaging in Bible study, and, if it be the  
7 disposition of the participant in such activities, feeling the  
8 deity's presence. Indeed, to some men and women of faith,  
9 political activism, proselytizing, or even education,<sup>8</sup> amount to  
10 worship.<sup>9</sup> How can one quarrel with Justice Souter's classification  
11 of Good News Club's after-school Bible study program, permitted by

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1           <sup>8</sup> Cf. DeBoer v. Village of Oak Park, 267 F.3d 558, 568 (7th  
2 Cir. 2001) ("In adopting the philosophical and theological  
3 position that prayer . . . can never be 'civic,' the Village has  
4 discriminated . . . ."); Lassonde v. Pleasanton Unified Sch.  
5 Dist., 320 F.3d 979, 984 (9th Cir. 2003) (suggesting that  
6 "proselytizing, no less than prayer, is [worship]") (internal  
7 quotation marks omitted); Seventh-Day Adventists, 118 Wash. App.  
8 at 28-29 ("[T]he Church maintains that worship must be broadly  
9 defined to include missionary work, education, charitable  
10 giving, communication, publication, and planning and growth  
11 activities because these are 'a vital part of the Church's  
12 worship program.'").

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

1 the Court, as "worship," 533 U.S. at 138 (Souter, J., dissenting)?  
2 Of course, because the concept of worship is so ephemeral and  
3 inherently subjective, Judge Calabresi is able to indulge his  
4 preference that worship be defined not by what it is, but by what  
5 it is not. And what worship is not, in his view (and convenient  
6 for his purposes), is anything that the Board has already  
7 permitted to occur in the forum. Yet the fact is that none of us,  
8 who are judges, are competent to offer a legal definition of  
9 religious worship.<sup>10</sup>

10 Even assuming that judges could define "worship," Judge  
11 Calabresi does not explain how he would do so -- perhaps he knows  
12 it when he sees it?<sup>11</sup> Cf. Jacobellis v. Ohio, 378 U.S. 184, 197

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1 <sup>10</sup> I do not suggest that "worship" is not possible to define  
2 -- just that it is impossible for a court to define. Were  
3 worship truly legally indistinguishable from activities carried  
4 on from a 'religious perspective,' laws like the Equal  
5 Participation of Faith-Based Organizations, 69 Fed. Register  
6 41,712 (July 9, 2004) (codified at 24 C.F.R. § 5.109)  
7 (prohibiting only "inherently religious activities" and defining  
8 the term to include worship, religious instruction, or  
9 proselytism), might well be unconstitutional.

10 <sup>11</sup> On this score, I find Judge Calabresi's treatment of  
1 Widmar v. Vincent singularly unpersuasive. Widmar counsels that  
2 we should decline to establish a line which, when crossed,  
3 transforms the "'singing [of] hymns, reading scripture, and  
4 teaching biblical principles,'" . . . [into] unprotected  
5 'worship.'" See Widmar, 454 U.S. 263, 270 n.5 (1981) (internal  
6 citation omitted). But Judge Calabresi simply dismisses Widmar  
7 with the cursory explanation that "Widmar . . . did not conclude  
8 that the exclusion of worship constituted viewpoint  
9 discrimination." Calabresi Op., supra at 33. He ignores the  
10 question actually posed, and deemed unanswerable, by the Widmar  
11 Court: What is worship?  
12  
13

1 (1964) (Stewart, J., concurring). Judge Calabresi suggests that  
2 one may worship "mammon, sex, or art." Calabresi Op., supra at  
3 **34**. Perhaps he means to concede that the term can connote simple  
4 reverence for something or someone (like "Tiger Woods" or, in  
5 earlier eras, "Frank Sinatra," "Rita Hayworth," or "The Beatles").  
6 See Webster's Third International Dictionary 2637 (1981) (defining  
7 worship as "to regard with respect, honor, or devotion"). Or  
8 perhaps he means something different; but if so, there is no hint  
9 to art history professors everywhere as to how they might turn  
10 their classrooms into houses of worship -- surely a useful feat!  
11 In short, Judge Calabresi speaks with an obliquity of which any  
12 prophet would be proud.

13 Judge Calabresi's various attempts to avoid defining  
14 "worship" are unavailing.<sup>12</sup> First, Judge Calabresi suggests that  
15 "Good News Club itself recognized this subject matter, worship, as  
16 falling outside the boundary of its viewpoint discrimination  
17 jurisprudence." Calabresi Op., supra at **26**. Good News Club did  
18 nothing of the sort. The Court simply declined to reach the  
19 question presented by this case, which, while not necessary to  
20 that case, is to this one, see Good News Club, 533 U.S. at 112 n.4  
21 ("[W]e conclude that the Club's activities do not constitute mere

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

1 religious worship, divorced from any teaching of moral values."),  
2 as Judge Calabresi recognizes elsewhere in his opinion, when it  
3 suits him, see Calabresi Op., supra at 11 (noting that "the  
4 instant appeal's central question" was "unresolved").

5 Second, Judge Calabresi relies heavily on Pastor Robert  
6 Hall's admission that Bronx Household wishes to conduct worship  
7 services on school premises. But if we accept plaintiffs' self-  
8 description, we should accept their self-definition. And Pastor  
9 Hall defines worship as the ascription of "worth to a variety of  
10 values and skills," 1st Hall Dep. at 41-42 (discussing  
11 'worshiping' a sunset or work of art); Bronx Household of Faith v.  
12 Bd. of Educ. (Bronx Household II), 226 F. Supp. 2d 401, 424  
13 (S.D.N.Y. 2002), not much different in kind from the dictionary  
14 definition, supra, "to regard with respect, honor, or devotion."  
15 If that is to be the operative definition of "worship," Bronx  
16 Household is surely correct that the Board permits other community  
17 groups that "ascribe worth to a value or skill" -- i.e., "worship"  
18 -- to use their facilities. Cf. id. ("[T]he Semanonans Stickball  
19 players . . . would likely join plaintiffs in worshiping David  
20 Wells' pitching prowess.").<sup>13</sup>

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1 <sup>13</sup> Judge Calabresi notes that Pastor Hall distinguished  
2 worship from Boy Scouts meetings. But he quotes selectively  
3 from Pastor Hall's deposition; Pastor Hall also explicitly  
4 explains that "[w]e will ascribe worship or praise to David  
5 Wells when he almost pitched a second no-hitter. . . . We will  
6 praise a sunset. We will also praise a work of art. We will  
7 ascribe worth and value to something that we find valuable." 1st  
8 Hall Dep. at 41-42. Reading Pastor Hall's deposition

1           Moreover, and more fundamentally, Judge Calabresi, while he  
2 dismisses Bronx Household's as applied challenge to SOP § 5.11,  
3 does not reckon with its facial challenge to the rule. Compl. at  
4 6; cf. Faith Ctr. Church Evangelistic Ministries v. Glover, 462  
5 F.3d 1194, 1219 (9th Cir. 2006) (Tallman, J., dissenting) ("Faith  
6 Center also brought a facial challenge to the policy."). Bronx  
7 Household's facial challenge to SOP § 5.11 implicates the rights  
8 of other religious groups, which might not "make [the] nice  
9 admission" that they wish to engage in "worship." Id.

10           Finally, any attempt to define worship places Judge Calabresi  
11 upon the horns of a dilemma. Either he clarifies the meaning of  
12 "worship," and risks entangling the judiciary in religious  
13 controversy in violation of the First Amendment, or he delegates  
14 the task of flouting the Establishment Clause to the Board, which  
15 will no doubt have to "interpret religious doctrine or defer to  
16 the interpretations of religious officials" in order to keep  
17 worship, and worship alone, out of its schools. Commack Self-  
18 Service Kosher Meats v. Weiss, 294 F.3d 415, 427 (2d Cir. 2002);  
19 see also Glover, 462 F.3d at 1220 (Tallman, J., dissenting); cf.  
20 Good News Club, 533 U.S. at 127 (Scalia, J., concurring).

## 21 **II. The Board's Establishment Clause Defense**

22           Judge Calabresi does not consider whether the Board can show

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1 "sympathetically," I cannot but conclude that his definition of  
2 worship is broader than the (unarticulated) definition upon  
3 which Judge Calabresi relies.

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

11 The endorsement test -- which the Supreme Court now uses to  
12 identify Establishment Clause violations -- asks whether "an  
13 objective observer, acquainted with the text, legislative history,  
14 and implementation of the [challenged law or policy], would  
15 perceive it as a state endorsement" of religion. Santa Fe Indep.  
16 Sch. Dist. v. Bd., 530 U.S. 290, 308 (2000). The Board argues --  
17 and Judge Calabresi obliquely suggests -- that permitting Bronx  
18 Household the use of school property on Sundays amounts to  
19 government endorsement of religion in two ways: (1) It suggests  
20 that the state favors religion over non-religion; and (2) Because  
21 Bronx Household uses school premises on a more frequent basis than  
22 other religious groups, it suggests that the state favors  
23 Christianity over Judaism, Islam, or other faiths. Neither  
24 argument has merit.

1 As we recognized in Deeper Life, "the semblance of official  
2 support is less evident where a school building is used at night  
3 . . . by religious organizations, under a program that grants  
4 access to all charitable groups.'" 852 F.2d at 681 (citing Brandon  
5 v. Bd. of Educ., 635 F.2d 971, 978-79 (2d Cir. 1980)); see also  
6 Lamb's Chapel, 508 U.S. at 395 (noting that meetings were not  
7 "during school hours . . . [or] sponsored by the school . . . [and  
8 are] open to the public, not just church members"). Just so,  
9 Bronx Household does not meet during school hours, and its  
10 meetings are open to all. See 1st Hall Dep. at 30 ("Our services  
11 are always open to the public.").<sup>14</sup> Nor do religious groups  
12 dominate the forum. See Bronx Household III, 400 Supp. 2d at 596;  
13 cf. Widmar, 454 U.S. at 275. Under these circumstances, there is  
14 no likelihood that "an adult who, taking full account of the  
15 policy's text, history, and implementation, do[ing] so mindful .  
16 . . [of the particular perspective of] impressionable  
17 schoolchildren," Skoros, 437 F.3d at 23, would understand Bronx  
18 Household's use of school premises to reflect the government's

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1 <sup>14</sup> While it is of course true that a Muslim might not be  
2 welcome at Bronx Household's worship service, 2d Hall Dep. at  
3 39, it is beyond cavil that the Boy Scouts -- a group the Board  
4 readily permits on school property -- also exclude those who  
5 refuse to adopt their core beliefs, see Boy Scouts of America v.  
6 Dale, 530 U.S. 640 (2000). Thus, I do not see how the Board  
7 could deny Bronx Household's putative future application on this  
8 ground without also denying applications from, among others, the  
9 Boy Scouts. Cf. Leval Op., supra at 71-72.

1 preference for religion over non-religion.<sup>15</sup>

2 I also disagree that the reasonable observer is likely to  
3 believe the government favors Christianity over other faiths  
4 because, due to the vagaries of the school calendar, the forum is  
5 available on Sundays - when Christians worship - and not on  
6 Saturdays or Fridays - which are holy to Jews and Muslims. As the  
7 Supreme Court explained in Zelman v. Simmons-Harris, 536 U.S. 639  
8 (2002), and Good News Club, an Establishment Clause violation does  
9 not result from either private choice or happenstance. Zelman,  
10 536 U.S. at 652; Good News Club 533 U.S. at 119 n.9; see also  
11 Harris v. McRae, 448 U.S. 297, 319 (1980) (“[I]t does not follow  
12 that a statute violates the Establishment Clause because it  
13 happens to coincide or harmonize with the tenets of some or all  
14 religions.”) (internal quotation marks omitted).

15 To the extent the Board is troubled by Bronx Household’s use  
16 of its property, it is free to impose different reasonable time,  
17 place or manner restrictions. Ward v. Rock Against Racism, 491  
18 U.S. 781, 790 (1989).

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1 <sup>15</sup> Indeed, this case seems the precise opposite of Van Orden  
2 v. Perry. In Van Orden, Justice Breyer noted that “the short  
3 (and stormy) history of the courthouse Commandments’ displays  
4 demonstrates the substantially religious objectives of those who  
5 mounted them.” Van Orden, 125 S.Ct. 2854, 2871 (2005) (Breyer,  
6 J., concurring). Here, the decade-long (and equally stormy)  
7 history of the Board’s dispute with Bronx Household is  
8 compelling evidence that the Board lacks a religious objective.

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