UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

UNITED STATES' MEMORANDUM OF LAW AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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The United States respectfully submits this memorandum of law in support of Plaintiffs' Motion For Summary Judgment.[1]

INTEREST OF THE UNITED STATES

This case presents important questions of how Supreme Court precedent concerning viewpoint discrimination should be applied to religious speech in a limited public forum open to a wide range of expressive activities. The United States previously filed a brief as amicus curiae in this case, in support of plaintiffs in the Second Circuit, pursuant to Federal Rule of Appellate Procedure 29(a).

In addition to this case, the United States has participated in other cases addressing this issue, including *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384

[1] The United States has filed a motion for leave to submit this brief as amicus curiae, to which both parties have consented. *See* Declaration of David J. Kennedy, May 17, 2005.

(1993). The United States also has an interest, and has participated, in cases raising Establishment Clause issues of the type presented here because it is the proprietor of public property, including government-operated schools. In addition, the United States has an interest in this Court's analysis because it may affect the scope of the Equal Access Act ("EAA"), 20 U.S.C. §§ 4071-4074. The EAA provides that a "public secondary school" that receives federal funds and provides a "limited open forum" may not "deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious . . . content of the speech at such meetings." 20 U.S.C. § 4071(a). Student groups engaging in Bible study, prayers, and similar activities that might be classified as "worship" are protected by the EAA. *Westside Community Bd. of Educ.* v. *Mergens*, 496 U.S. 226, 232 (1990). A modified ruling by this Court holding that "worship" is a separate category of speech that may be treated differently by school officials could impact students' rights under the EAA. *See Hsu* v. *Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 857 (2d Cir.) (the EAA "creates an analog" to the First Amendment, and cases interpreting the First Amendment are "interpretative tools for understanding the Act"), *cert. denied*, 519 U.S. 1040 (1996).

The United States also is charged with enforcing Title III of the Civil Rights Act of 1964, which authorizes the Attorney General to seek relief when persons are denied equal use of public facilities on the grounds of race, color, religion, or national origin. 42 U.S.C. § 2000b. Moreover, the United States is authorized under Title IX of the Civil Rights Act of 1964 to intervene in cases alleging violations of the Equal Protection Clause that are of general public importance. *See* 42 U.S.C. § 2000h.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Pursuant to Section 414 of the New York Education Law, a school district or local school board may permit the use of school facilities during non-school hours for a wide variety of purposes, including:

> holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.

N.Y. Educ. Law § 414(1)(c) (McKinney 2005).

Community School District No. 10 adopted this standard as part of its Standard Operating Procedures ("SOP"). The district's SOP, however, added a prohibition against the use of school property for "religious services or religious instruction," while permitting organizations to use school facilities to "discuss[] religious material or material which contains a religious viewpoint or for distributing such material." *Bronx Household of Faith* v. *Board of Educ. (Bronx II)*, 226 F. Supp. 2d 401, 403 (S.D.N.Y. 2002).

In 1995, Bronx Household of Faith ("Bronx Household"), a Christian organization, sought permission from the school district to use school facilities for its weekly meetings. *Bronx II*, 226 F. Supp. 2d at 403. The school district denied the request, citing its prohibition of religious services on school property. *Id.* Bronx Household sued the school district and the City[2] asserting violations of the First Amendment, and lost. *Bronx Household of Faith* v. *Community Sch. Dist. No. 10*, No. 95 Civ. 5501 (LAP), 1996 WL 700915 (S.D.N.Y. Dec. 5, 1996). This Court held that the school district had created a limited public forum and had applied reasonable regulations that prioritized

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[2] For ease of reference, the United States refers to defendants collectively as the "City."

access to the school. 1996 WL 700915, at *6. The Second Circuit, by a split vote, affirmed. *See Bronx Household of Faith* v. *Community Sch. Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997) (*Bronx I*), *cert. denied*, 523 U.S. 1074 (1998). The majority held that in a limited public forum a legitimate distinction could be made between religious viewpoints on a secular topic and religious worship and instruction. The majority concluded that Bronx Household's proposed use was worship and, thus, was properly barred. *Bronx I*, 127 F.3d at 214-15.

Bronx Household's weekly gatherings include "singing of Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion, sharing of testimonies," and a "fellowship meal" that allows attendees to talk and provide "mutual help and comfort to" one another. *Bronx II*, 226 F. Supp. 2d at 410. Bronx Household explained that its weekly meeting "is the indispensable integration point for our church. *It provides the theological framework to engage in activities that benefit the welfare of the community.*" *Id.* Bronx Household's support for members of the community have included helping indigent residents through counseling and financial assistance, and helping Cambodian refugees in the community. *Id.* These outreach efforts are coordinated at the weekly meetings. *Id.*

In June 2001, the Supreme Court issued its opinion in *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001). In *Good News Club*, the Club, a Christian youth organization, sought permission to hold its weekly meetings on school premises after hours. The Club's meetings included singing hymns, prayer, memorizing scripture, and Bible lessons. *Id.* at 103. The policy in this case was promulgated pursuant to the same New York statute as the policy at issue in *Good News Club*. And, as here, Milford's implementation of the policy opened school property to a broad range of activities: schools were open, among other things, to "social, civic and recreational

meetings and entertainment events, and other uses pertaining to the welfare of the community." *Id.* at 102 (paraphrasing statute). Milford acknowledged that these categories encompassed programs that address a child's moral and character development from a religious perspective. *Id.* at 108. The Milford school rejected the Club's request, however, because it considered the Club's activities to be "the equivalent of religious instruction." *Id.* (quoting *Good News Club* v. *Milford Cent. Sch.*, 202 F.3d 502, 507 (2d Cir. 2000)).

The Supreme Court held that Milford engaged in viewpoint discrimination when it denied the Good News Club permission because the Club sought to address a topic clearly within the bounds of the forum – the moral and character development of children – but from a religious perspective. *Good News Club*, 533 U.S. at 107. The Court considered the school district's refusal to allow the Club to meet on its property akin to the viewpoint discrimination in *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). The Court rejected the lower court's characterization of the Club's activities as "different in kind" because they were "religious in nature." *Good News Club*, 533 U.S. at 110-11. The Court explained that characterizing something as "quintessentially religious" does not mean that it cannot simultaneously be considered a secular program to teach moral and character development. *Id.* at 111. "Religion is the viewpoint from which ideas [we]re conveyed" by the Good News Club. *Id.* at 112 n.4. The Court also found that the Club's activities were not "mere religious worship, divorced from any teaching of moral values." *Id.*

In 2001, Bronx Household again sought permission from School District No. 10 to rent school property for its Sunday meetings and asserted that, in light of the Supreme Court's decision

in *Good News Club*, the school could no longer refuse to rent its facilities to them. *Bronx II*, 226 F. Supp. 2d at 409. The school again denied Bronx Household's request, however, claiming that the meetings constituted religious worship, which remained a prohibited activity under the terms of the SOP. *Id.* Bronx Household and two pastors sued the Board of Education of the City of New York and the school district alleging violations of the Free Exercise, Free Speech, Free Assembly, and Establishment Clauses of the First Amendment; the Fourteenth Amendment; and several provisions of the New York Constitution. *Bronx II*, 226 F. Supp. 2d at 402-03. Plaintiffs also sought a preliminary injunction to enjoin the defendants' denial of permission to Bronx Household to rent the school property for its weekly meetings. *Id.* at 403.

This Court held that *Good News Club* warranted reconsideration of its holding in *Bronx I*. *See Bronx II*, 226 F. Supp. 2d at 412 ("Because there has been a change in the law, another look at the situation is justified."). Addressing the merits, this Court concluded that Bronx Household established a likelihood of success in proving a violation of its free speech rights based on the principles set forth in *Good News Club*. *Id.* at 413-14. While noting that certain aspects of plaintiffs' services were "quintessentially religious," this Court determined that many aspects of Bronx Household's meetings also were "clearly consistent with the type of activities . . . expressly permitted by the School District[ ]." *Id.* at 414. Teaching moral values, recreational activities, and organizing charitable activities to serve the community fall squarely within the purposes of the limited public forum: providing space for "holding social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community." *Id.* at 414-15.

This Court also rejected the City's effort to label Bronx Household's activities as a separate, excludable category of "worship," without considering all of the program's elements, or what the

Court stressed as the "'substance of the Club's activities.'" *Bronx II*, 226 F. Supp. 2d at 416 (quoting *Good News Club*, 533 U.S. at 112 n.4). Moreover, this Court rejected the City's claim that *Good News Club* was inapplicable because Bronx Household proposed to engage in religious worship, and that worship, marked by "ceremony and ritual," was substantively different from the permissible uses of the school. *Id.* at 416. Again citing *Good News Club*, this Court held that activities "quintessentially religious" are not "different in kind" from permissible activities. This Court also noted that other groups permitted to use the school's facilities engaged in "ceremony" or "rituals," including the Boy Scouts, who conduct "formal opening [and] . . . closing ceremon[ies]," and the Legionnaire Greys Program, whose members wear uniforms, salute higher ranked officers, and have a "ceremonial flag presentation." *Id.* at 416-17.

Assuming that Bronx Household's proposed activities could in fact be cabined into a separate category of activity called "worship," this Court considered whether worship could be barred without such exclusion constituting viewpoint discrimination. *Bronx II*, 226 F. Supp. 2d at 417-25. While the Supreme Court in *Good News Club* was not "squarely presented" with this issue, this Court observed that Supreme Court precedent "reveals the Court's increasing difficulty in distinguishing religious content from religious viewpoint where morals, values and the welfare of the community are concerned." *Id.* at 418. After a careful review of several Supreme Court opinions, and substantial reliance on Judge Jacobs' dissent in *Good News Club*, this Court concluded that no rational means existed to distinguish "religious worship" as a category of content from religious viewpoints in a limited public forum open to a wide range of activities. *Id.* at 418-25.

Finally, this Court concluded that plaintiffs had shown a substantial likelihood of demonstrating that the City's rental of school facilities to Bronx Household would not violate the Establishment Clause. *Bronx II*, 226 F. Supp. 2d at 426. The Court cited several factors indicating the absence of governmental endorsement of, or entanglement with, Bronx Household's religious activities: plaintiffs seek only to be treated the same as other groups; they would be meeting only during non-school hours when students would not be present; the program is not endorsed by the school district; employees would not attend Bronx Household's meetings; and the meetings would be open to the public. *Id.* Moreover, the Court observed that excluding plaintiffs exhibited state hostility toward religion rather than the neutrality required by the Establishment Clause, and that allowing them to rent the space "'would ensure neutrality, not threaten it.'" *Id.* (quoting *Good News Club*, 533 U.S. at 114).

The Second Circuit reviewed this Court's grant of a preliminary injunction for an abuse of discretion and affirmed. *Bronx Household of Faith* v. *Board of Educ.* (*Bronx III*), 331 F.3d 342, 348, 354 (2d Cir. 2003). The Second Circuit held that this Court did not abuse its discretion in determining that plaintiffs established a likelihood of success given the "candid acknowledgment of the factual parallels between the activities described in *Good News Club* and the activities at issue in the present litigation." *Id.* at 354. The Second Circuit noted that the Good News Club's activities, as described by Justice Souter and accepted by the majority, were "consistent with 'an evangelical service of worship.'" *Id.* at 354 (quoting *Good News Club*, 533 U.S. at 138 (Souter, J., dissenting)). Like the service in Good News Club, the court affirmed that Bronx Household's service combined the "essentially religious" with secular elements, which is consistent with the City's permissible uses of its facilities. *Id.* at 354.

The Second Circuit further noted that its holding in *Bronx I* that a distinction could be drawn between religious worship and other religious speech was "seriously undermined but not explicitly rejected in *Good News Club*." *Bronx III*, 331 F.3d at 355. The court added that it need not review the district court's finding that religious worship could not be distinguished from other religious speech because it was affirming this Court's ruling on other grounds.

Again noting the factual similarities between this case and *Good News Club*, the Second Circuit also affirmed, at the current stage of the litigation, this Court's ruling that the defendants did not have a valid Establishment Clause claim to justify exclusion of Bronx Household. *Bronx III*, 331 F.3d at 356.

ARGUMENT

POINT I

THE CITY'S PROPOSED POLICY MODIFICATION TO EXCLUDE RELIGIOUS SERMONS AND SERVICES IS NOT CONSTITUTIONALLY PERMISSIBLE

A. *The City's Proposed Policy Modification*

The City proposes to modify Standard Operating Procedures Manual Section 5.11 as follows:

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

Defendants' Statement of Material Facts Pursuant to Local Rule 56.1 ("Defs. 56.1 Stat.") ¶ 35. The City explained that,

> [u]nder this policy language, if an outside organization sought to use school premises for a religious club for students, DOE would consider the permit application on the same basis as any other application for any other outside club for students. However, permits would not be granted to congregations for religious worship services.

Defs. 56.1 Stat. ¶ 35.

The City contends (Br. 8-10)[3] that its proposed policy change to exclude religious sermons or services meets the standard of reasonableness for a limited public forum and, therefore, permissibly bars Bronx Household from future use of its schools and warrants dissolution of the preliminary injunction.[4] The City's continued efforts to distinguish religious services and religious teachings and other activities remain misguided. As this Court has already held, no such distinction can be imposed constitutionally. *Bronx II*, 226 F. Supp. 2d at 416-26. This ruling should not be modified.

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[3] "Br. __" refers to the page number of that party's Memorandum of Law or Brief in Support of Summary Judgment. "Opp. Br. __" refers to the page number of Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment.

[4] This Court and the Second Circuit specifically have held that the City created a limited public forum in allowing certain entities to use school premises after school hours for certain purposes. *See Bronx Household of Faith* v. *Community Sch. Dist. No. 10*, No. 95 Civ. 5501 (LAP), 1996 WL 700915 (S.D.N.Y. Dec. 5, 1996), *aff'd*, 127 F.3d 207, 211 (2d Cir. 1997) (*Bronx I*), *cert. denied*, 523 U.S. 1074 (1998); *Bronx Household of Faith* v. *Board of Educ.* (*Bronx II*), 226 F. Supp. 2d 401, 413 (S.D.N.Y. 2002). As a limited public forum, the City may only impose restrictions that are "reasonable in light of the purpose[s] served by the forum and are viewpoint neutral." *Bronx I*, 127 F.3d at 211-12 (quoting *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985)).

The United States notes that plaintiffs alternatively assert (Br. 18-19) that the City created a designated forum and, therefore, must justify any restrictions based on strict scrutiny. Without addressing this assertion, the United States assesses plaintiffs' claims from the more restrictive perspective of a limited public forum, and concludes that the City's proposal is constitutionally flawed.

B. *There Is No Clear Distinction Between Worship and Religious Teaching*

The City argues (Br. 10) that "worship" or a "service" is an activity with unique characteristics, distinguished from religious teaching, where the public has a "common[] underst[anding]," and with no secular equivalent, such activity is appropriately excluded. To support this argument, the City relies (Br. 10) on plaintiffs' recent descriptions of their own activities as "'component activities' that go to make up their worship service." Defs. 56.1 Stat. ¶ 48. This description, however, is not substantively different from Bronx Household's prior description of its weekly meeting, as including "the singing of Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion, sharing of testimonies and social fellowship among church members." *Bronx II*, 226 F. Supp. 2d at 410. Thus, there is no basis to change this Court's conclusion that Bronx Household's activities fall within the broad spectrum of activities that pertain to the public welfare.

The City's efforts to cabin "worship" into a *sui generis* category of expression that is readily excludable from a forum open to a wide range of activities should be rejected. First, its semantic argument is easily dismissed. Justice Souter, in his dissent in *Good News Club*, found relevance in the fact that the Club's activities might be best described as "an evangelical service of worship." *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 138 (2001). The Court's majority in *Good News Club* accepted Justice Souter's description "of the club's activities [as] accurate," yet added that these activities "do not constitute mere religious worship, divorced from any teaching of moral values." 533 U.S. at 112 n.4. The majority added, "[r]egardless of the label . . . , what matters is the substance of the Club's activities." *Id.*

In addition, government decision makers cannot so readily distinguish religious activities

from other ones. The City's assertion (Br. 10) that there is a common understanding of what constitutes "worship" is not correct. No litmus test can be applied to determine when "worship" ends and when religious teaching or instruction begins. For example, a sermon could be called either worship, religious teaching, or both. Worship more generally has characteristics that are unique, certainly, but that is also true of religion itself. The Supreme Court in *Good News Club*, 533 U.S. at 111-12, was quite clear in rejecting the notion that religion's uniqueness lent itself to treatment as a separate subject rather than as a viewpoint. It noted that religious instruction or prayer, while "quintessentially religious" or "decidedly religious in nature," can nonetheless express a viewpoint. *Id.* at 111. In fact, the Supreme Court cited Judge Jacobs' dissenting opinion in *Good News Club*, *id.*, upon which this Court also relied extensively. Judge Jacobs explained concisely how religious devotional acts such as prayer and Bible study can be an expression of viewpoint rather than a separate or distinct subject:

> [R]eligious answers . . . tend to be couched in overtly religious terms and to implicate religious devotions, but that is because the sectarian viewpoint is an expression of religious insight, confidence or faith – not because the religious viewpoint is a change of subject.

Good News Club v. *Milford Cent. Sch.*, 202 F.3d 502, 514 (2d Cir. 2000). Indeed, even those aspects of religious practice most readily susceptible to being dismissed as "mere worship," such as a liturgical prayer or a ritual such as communion, communicate specific messages among participants and to observers about the participants' world view.

The notion that worship is a distinct, readily excludable category of speech also was rejected by the Supreme Court in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). In that case, the University of Missouri had permitted numerous student organizations to use its facilities, but denied access to

Cornerstone, a Christian group that held meetings that "included prayer, hymns, Bible commentary, and discussion of religious views and experiences." *Id.* at 265 n.2. The Court held that the university's ban on Cornerstone's use of university facilities for "religious worship" or "religious teaching" violated the group's First Amendment rights to free speech and association, and that the university engaged in an impermissible "content-based discrimination against . . . religious speech." *Id.* at 276; *see id.* at 273 n.13. The Court explicitly rejected the dissent's distinction between "worship" and other forms of religion-related speech. *Id.* at 269-70 n.6. The Court concluded that there is no "intelligible content" or basis to determine when "'singing hymns, reading scripture, and teaching biblical principles,' . . . cease to be 'singing, teaching, and reading,'– all apparently forms of 'speech,' despite their religious subject matter – and become unprotected 'worship.'" *Id.*

The attempted distinction assumes a formalistic definition of worship that does not transfer to actual experience. While the format of religious worship, tradition, and services varies greatly among religions, a viewpoint is expressed in both free-form or informal services, as well as more ritualistic and liturgical services. *Widmar*, 454 U.S. at 269-70 n.6. For example, expression of viewpoints and teaching on a variety of subjects is readily apparent in homilies or sermons. In addition, a ritual that is part of worship each week or the saying of a prayer learned by rote is an expression by adherents of their viewpoints on the sources and substance of truth and meaning.

Not only does the cabining of worship into a separate, excludable category of speech fail to recognize the ways in which such an undertaking constitutes viewpoint discrimination, but it also authorizes government actors to scrutinize and dissect religious practice and doctrine. This is not merely impracticable, but also requires a degree of involvement in religious matters that itself violates the Free Speech and Establishment Clauses of the Constitution. *See Widmar*, 454 U.S. at

269-70. In *Widmar*, after observing that the distinction between religious worship and protected religious speech lacked "intelligible content," the Court stated that even were such a distinction possible, it would violate the non-entanglement prong of the Establishment Clause:

> [m]erely to draw the distinction would require the university – and ultimately the courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.

Id. at 269-70 n.6; *see also Good News Club*, 533 U.S. at 127 (Scalia, J., concurring) (even if "courts (and other government officials) were competent, applying the distinction would require state monitoring of private, religious speech with a degree of pervasiveness that we have previously found unacceptable."); *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819, 845-46 (1995).[5] As Justice Souter explained in his concurring opinion in *Lee* v. *Weisman*, 505 U.S. 577 (1992), "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible," than "comparative theology." *Id.* at 616-17.

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[5] In *Rosenberger*, the Court concluded that the University's denial of funding for a student-run Christian public policy magazine constituted viewpoint discrimination. The Court held that government actors parsing religious expression implicated both the Free Speech Clause and the Establishment Clause:

> [t]he viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.

515 U.S. at 845-46.

Thus, not only is the City's proposal unworkable, but it also does not comply with the First Amendment. There is no reasoned basis to modify this Court's earlier ruling that the City's exclusion of religious worship from its otherwise extremely broad access policy violates the First Amendment. The City's policy would entangle state actors with religion by requiring them "to dissect and categorize the substance of plaintiffs' speech during their four-hour meeting and determine, *inter alia*, 'when "singing hymns, reading scripture, and teaching biblical principles" cease to be "singing, teaching, and reading" . . . and become unprotected "worship."' *Bronx II*, 226 F. Supp. 2d at 424 (quoting *Widmar*, 454 U.S. at 269-70 n.6). The City's proposal thus perpetuates its discrimination against the plaintiffs based on their viewpoint.

POINT II

PERMITTING BRONX HOUSEHOLD TO CONTINUE TO RENT SCHOOL FACILITIES ON EQUAL TERMS WITH OTHERS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

The City argues (Br. 14) that new evidence supports its claim that, to avoid a violation of the Establishment Clause, the City must bar Bronx Household and other organizations from conducting religious sermons on school property. The facts presented here, however, demonstrate that the case is controlled by *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001). Thus, these "new" circumstances do not warrant any change in this Court's preliminary injunction, but rather support issuance of a permanent injunction in favor of plaintiffs.

A. *Continuing Bronx Household's Access to City Schools Ensures Neutrality, Rather Than Hostility, Toward Religion*

Permitting Bronx Household to rent school facilities on equal terms with others would not violate the Establishment Clause. To the contrary, "a denial of the right of free speech . . . would

risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845-46 (1995).

In three cases, the Supreme Court has examined situations in which government officials denied religious groups access to government facilities on Establishment Clause grounds, and has held that a policy of equal, content-neutral access does not violate the Establishment Clause. In *Widmar* v. *Vincent*, 454 U.S. 263, 273-75 (1981), the Court held that there was no Establishment Clause violation in providing equal access to religious speakers because an open forum does not confer "any imprimatur of state approval" on any of the organizations taking advantage of the policy and because the forum was open to a broad range of organizations. Similarly, in *Lamb's Chapel* v. *Center Moriches Union Free School District*, the Court found that "the posited fears of an Establishment Clause violation [we]re unfounded" because:

> [t]he showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar,* there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.

508 U.S. 384, 395 (1993). Most recently, in *Good News Club*, the Court left open the question whether Establishment Clause concerns can ever justify viewpoint discrimination against religious speech. *See Good News Club*, 533 U.S. at 113.

In any event, as in *Good News Club*, *id.*, this issue need not be decided because the City has "no valid Establishment Clause interest" here. In *Good News Club*, the Court held that the "Club's activities are materially indistinguishable from those in *Lamb's Chapel* and *Widmar*" and rejected

the defendant's reliance on the Establishment Clause as grounds to deny access to the Club. The Court countered that the "implication that granting access to the Club would do damage to the neutrality principle defies logic" because "allowing the Club to speak on school grounds would ensure neutrality, not threaten it." *Id.* at 114.

As with the plaintiffs in *Lamb's Chapel* and *Good News Club*, Bronx Household seeks access to public school facilities after school hours pursuant to a policy that permits access by a broad range of organizations for a wide range of activities. This Court previously held that Bronx Household's use is fully consistent with the City's grant of access for activities that, among other things, pertain to the welfare of the community. *Bronx Household of Faith* v. *Board of Educ.* (*Bronx II*), 226 F. Supp. 2d 401, 414 (S.D.N.Y. 2002). Contrary to the City's contention (Br. 8-9), Bronx Household representatives' descriptions of their "worship" activities does not alter the analysis or conclusion. *See* Defs. 56.1 Stat. ¶¶ 47-50. Bronx Household's description of its weekly services in the second round of litigation, *see Bronx II*, 226 F. Supp. 2d at 410, is virtually the same as its description now. *See* Plaintiffs' Local Rule 56.1 Statement of Material Facts ("Pls. 56.1 Stat.") ¶¶ 43-44. Moreover, the United States notes that plaintiffs describe other users' activities at City schools that include ceremony and teaching of moral values, although not from a religious perspective. *See, e.g.*, Pls. 56.1 Stat. ¶¶ 24-25, 29, 31, 35-36. Thus, Bronx Household's activities, which combine worship and moral teachings, still conform with the City's allowance for activities that pertain to the welfare of the community.

Moreover, nothing in allowing equal access lends an imprimatur of state approval or endorsement of Bronx Household's activities, or otherwise sends a message that the State has departed from the required "course of neutrality among religions, and between religion and

nonreligion." *Grand Rapids* v. *Ball*, 473 U.S. 373, 382 (1985), *overruled on other grounds*, *Agostini* v. *Felton*, 521 U.S. 203 (1997). The City's contention (Br. 18-21) that parents and children will view the regular weekend or after-hours use of school facilities by Bronx Household or other religious groups as an "endorsement" by the City misapprehends the relevant inquiry. In *Good News Club*, the Supreme Court instructed that "[w]e cannot operate . . . under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club's religious activity." *Good News Club*, 533 U.S. at 119. A State endorses religion when it "sends a message to nonadherents that they are outsiders, . . . and an accompanying message to adherents that they are insiders[.]" *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). To evaluate a State's actions, courts ask "whether an objective observer, acquainted with the text, . . . history, and implementation of the [policy], would perceive it as a state endorsement of" religion. *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 308 (2000); *see Zelman* v. *Simmons-Harris*, 536 U.S. 639, 655 (2002) ("the reasonable observer in the endorsement inquiry must be deemed aware of the 'history and context' underlying a challenged program") (quoting *Good News Club*, 533 U.S. at 119).

Thus, the informed, reasonable observer would not see any endorsement in treating Bronx Household the same as the Boy Scouts or any other groups using school facilities to teach, among other things, moral values. An informed, reasonable observer would be aware of the City's policy, history, and practice of granting access to school facilities to a panoply of users and, therefore, would not presume the City's endorsement of any of the facilities' users. *See Santa Fe*, 530 U.S. at 308. Indeed, to the contrary, a reasonable observer might very well "perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum." *Good News Club*, 533 U.S.

at 118. Rather than suggesting any endorsement of religion, treating Bronx Household equally would preserve neutrality.

The City argues (Br. 20) that the relevant observers are not merely the children who attend school, as it was in *Good News Club*, but all adults and children who are in the vicinity of each school. Expanding the audience, however, does not strengthen the City's case. The informed, reasonable observer, whether child or adult, student, parent, or neighbor, remains one who is familiar with the City's policies and practice. *See Santa Fe*, 530 U.S. at 308. There is no merit to the City's assertion that adults and children in the schools' neighborhoods will assume the City's endorsement of each entity that holds a function in a school because of that group's mere presence at a school on weekends or after hours. That organizations serving children may meet on school premises at the same time as Bronx Household, and some children might thereby become aware of the religious nature of Bronx Household's activities, does not in any way change the Establishment Clause analysis. *See Good News Club*, 533 U.S. at 115 ("we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present"). Allowing equal access does not violate the Establishment Clause, but ensures the neutrality that it requires.[6]

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[6] We note that the City's proposed policy recognizes its statutory obligation to permit student groups sponsored by outside religious organizations to conduct meetings on school property in the same manner as any other student group. *See* 20 U.S.C. §§ 4071-4074; Defs. 56.1 Stat. ¶ 35. As the name suggests, under the Equal Access Act, a secondary school must permit equal access to all student groups to meet on school premises during noninstructional time without regard to, among other things, the "religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. § 4071(a); *see Westside Community Bd. of Educ.* v. *Mergens*, 496 U.S. 226, 241 (1990) ("Congress clearly sought to prohibit schools from

B. *Bronx Household Does Not Receive a Direct, Material Benefit That Violates the Establishment Clause*

The City also contends (Br. 26-29), incorrectly, that Bronx Household's access to school property for worship services constitutes a direct, material benefit from the City that violates the Establishment Clause. First, the City's reliance on *Tilton* v. *Richardson*, 403 U.S. 672 (1971), is misplaced. In *Tilton*, *id.* at 683, the Supreme Court held that a federally subsidized building could not be subsequently converted to religious use, a far cry from the facts of this case, because such action would unconstitutionally advance religion. In *Widmar*, 454 U.S. at 272-73 & n.12, the Court rejected an argument identical to the City's, and held that *Tilton* could not be read "so broadly" to bar the use of state funds to "provide or maintain buildings for use by religious organizations." The Court noted that "nothing in *Tilton* suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussions." *Id.* Here, as in *Widmar*, Bronx Household benefits equally with secular organizations from general access to City buildings. The use of the City's space is "merely [an] 'incidental' benefit[] [and] does not violate the prohibition against the 'primary advancement' of religion." *Id.* at 273 (quoting *Committee for Public Educ.* v. *Nyquist*, 413 U.S. 756, 771 (1973)).

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discriminating on the basis of the content of a student group's speech, and that obligation is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups."). Notwithstanding its statutory obligation to allow such meetings, there is no principled reason to permit a religious worship meeting conducted by students on weekdays after school, yet bar an identical meeting on weekends when hosted by Bronx Household. Just as an informed, objective observer would not perceive the City's endorsement of the student religious group based on, among other things, the statutory obligation to grant access, an informed observer would be cognizant of the City's broad policy and practice on permitting use, and its constitutional obligation to do so in a neutral manner.

Similarly, that the City chooses to charge for only certain costs, rather than seek reimbursement for all operating expenses for the schools after hours, does not constitute material aid that violates the Establishment Clause. *See Rosenberger*, 515 U.S. at 842-43. The same charges are imposed, and benefits given, to all users of the City's schools. As the Supreme Court explained, the issue is not whether the government expends resources in some form, as that is always the case, and not all aid is unconstitutional. *Id.* at 842 ("It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises.").

C. *Bronx Household and Other Religious Organizations' Use of School Facilities Does Not Establish Domination by One Religion, Or a Lack of Neutrality Among Religions*

The City's assertion (Br. 22-23) that Bronx Household and other religious groups "dominate" the use of school property on weekends is exaggerated. Their presence does not reflect a lack of neutrality, or otherwise violate the Establishment Clause.

According to the City (Opp. Br. 16) 9,804 non-government, non-construction contractor permits were issued for use of school property in the 2003-2004 school year. By comparison, in the 2004-2005 school year, approximately "23 congregations held regular worship services in public schools." Defs. 56.1 Stat. ¶ 57.[7] Only 13 congregations have held services in a school for more than one year, and three, including Bronx Household, have had worship services for over two years on Sundays. Defs. 56.1 Stat. ¶ 58. In comparison, as of February 2005 for the 2004-2005 school

[7] Comparable data for each school year was not identified by either party in its initial Statement of Facts.

year, "school sponsored" activities occur in approximately 300 school buildings on Sunday, 450 buildings on Friday night, and 800 school buildings on Saturdays. Defs. 56.1 Stat. ¶ 7.[8]

Quite simply, the data reflecting Bronx Household's use, even as compared to all non-construction, non-government users, can hardly be deemed dominant. And even if a religious organization such as Bronx Household were considered the "dominant" user at one location, that is "irrelevant" to establishing a First Amendment violation. *See Zelman*, 536 U.S. at 658 ("we have recently found it irrelevant even to the constitutionality of a direct aid program that a vast majority of program benefits went to religious schools") (citing *Agostini*, 521 U.S. at 229).

This Court should also reject the City's claim (Br. 16-18) that access to its facilities unconstitutionally favors Christian groups over Muslim or Jewish groups since school buildings are more available for use on Sundays (when Christian groups hold services), than on Saturdays (when Jewish groups hold services), and never on Friday afternoon (when Muslim groups hold services). "[I]t does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'" *Harris* v. *McRae*, 448 U.S. 297, 319-20 (1980). The Establishment Clause "requir[es] the government to maintain a course of neutrality among religions, and between religion and nonreligion." *Grand Rapids*, 473 U.S. at 382; *see also Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."). Here, the City has a neutral policy that allows organizations, secular and religious, to apply to use school property.

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[8] The City identified three "categories" of activities or sponsors for non-school hour functions: 1) school or student initiated activities; 2) private organizations with contracts with the city; and 3) activities by other private entities. Defs. 56.1 Stat. ¶ 10.

The City certainly cannot believe that it itself has gerrymandered its system to favor religion. That certain potential beneficiaries who happen to be religious may be in a position where they are more willing to take advantage of a neutral benefit program is irrelevant to the constitutional analysis. *See Zelman*, 536 U.S. at 655, 658 (fact that 46 of 56 private schools participating in voucher program were religious, and 96% of voucher students were attending religious schools, did not render neutral program unconstitutional). The City's claims that religious meetings are dominating the forum and that the City is favoring Christian groups in allowing equal access are therefore without merit.

D. *Additional Factors Cited by the City Do Not Support Modification of the Preliminary Injunction*

Other facts asserted by the City do not warrant any modification of the preliminary injunction. First, the City contends (Br. 19) that City-required disclaimers are ineffective as applied to speakers like the plaintiffs, since they may, in addition to printed materials containing disclaimers, speak orally to citizens about their activities. But this complaint could be made about any secular event as well, where participants invite friends and talk about their activities. In any event, since disclaimers are not constitutionally required, the City's arguments are misplaced.

In addition, the City's enforcement of the disclaimer notification and other administrative requirements imposed on all users is not excessive entanglement nor does it require "monitor[ing] [of] the congregation's religious activit[ies]." (Br. 24.) Oversight or implementation of these ministerial tasks, including collection of payment for the use of facilities, is an arms-length, administrative task that has no bearing on the substance of Bronx Household's religious activities at the school, and would not constitute excessive entanglement with the group's religious practices.

Such "administrative cooperation" falls far short of the "onerous burdens on religious institutions" that could result in a finding of excessive entanglement. *See Agostini*, 521 U.S. at 233-34.

Moreover, there is no basis to the City's assertion (Defs. 56.1 Stat. ¶ 52, Br. 21) that a child or teacher's attendance at a Bronx Household event, after hours, changes the calculus on whether the preliminary injunction should remain. As the Court made clear in *Good News Club*, 533 U.S. at 115, a child's attendance is dependent on their parents' permission. The same is true here. Moreover, the City cannot restrict its employees, including teachers at the same location where Bronx Household meets, from participating in after-school, religious activities at that location. *See Wigg* v. *Sioux Falls Sch. Dist. 49-5*, 382 F.3d 807, 814-15 (8th Cir. 2004) (teacher's participation in private, after school religious activity on school property does not constitute state action that violates the Establishment Clause to warrant school's restriction of such activity).

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion For Summary Judgment should be granted, the preliminary injunction made permanent, and Defendants' Motion For Summary Judgment should be denied.

Respectfully submitted,

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