No. 11-386

In the
Supreme Court of the United States

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

Petitioners,

-against-

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

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

The individual petitioners and their religious congregation, the Bronx Household of Faith, seek continued access to use P.S. 15, a New York City public elementary school, as their house of worship in order to conduct their weekly worship services. Other than P.S. 15, Bronx Household of Faith has no other house of worship; under the injunction imposed by the District Court in this matter, the congregation has held weekly worship services in P.S. 15 since 2002 (A3584, ¶5).[1]

The issue presented is whether New York City may, as a matter of policy, preclude worship services from its public schools, a limited public forum. This issue was never reached by the Court in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) or by any of the factually distinguishable decisions of the courts of appeal petitioners contend raise a conflict for the Court's review.

This record, moreover, substantiates the many profoundly troubling Establishment Clause issues that have arisen since congregations have begun holding worship services in the City's public schools under the District Court's injunction. These concerns include neutrality, impermissible

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[1] Unless otherwise indicated, parenthetical references refer to pages in the Joint Appendix in the Court of Appeals.

endorsement, entanglement, and subsidy issues that are illustrated by actual events occurring during the course of this litigation.

In ruling that respondents may deny petitioners' application to hold religious worship services at P.S. 15, the Court of Appeals properly determined, based on the factual record before it, that the Department is not required to allow religious worship services in the limited public forum created in its public schools, and that its policy is justified by substantial Establishment Clause concerns. Moreover, since it is undisputed that petitioners seek to hold religious worship services in the public school (A3601), this case does not raise the broader issue of where to draw a principled line between worship and other types of religious speech.

Based on these facts, there is no reason for the Court to grant *certiorari* review.

STATEMENT OF THE CASE

A. The Department's policy.[2]

The Department makes significant efforts to provide educational, recreational, cultural and other programs in City schools for school children and their families during the hours when school is

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[2] The New York City Board of Education is now referred to as the New York City Department of Education.

not in session, including weekends (A289, ¶2; A290, ¶5). Toward that end, "the primary use of school premises must be for Department programs and activities" (App.367a). Most activities during non-school hours are sponsored by the school, the Department, student-initiated activities, or activities by private organizations that have Department contracts or school partnerships (A290, ¶4). After those needs are met, permits are allowed to be granted to community, youth and adult group activities (App.368a).

The Department permits community organizations to use schools primarily to maximize educational, cultural, artistic and recreational opportunities for children and their parents, and also to build strong school-community relations that can enhance community support for the school (A292, ¶¶13-14). When schools are used after hours for that purpose, they must also be "non-exclusive" and "open to the general public" (A293, ¶18; App.368a). That is also a requirement under State law (App.421a). Permits cannot be granted for private events (such as weddings), partisan political events, and for-profit activities, and no individual may be excluded on the basis of race, religion, or any other impermissibly discriminatory reason (A293, ¶18; App.369a; 371a; 386a).

Although a previous version of the Department's policy prohibited the use of school property for "religious instruction," following the Court's decision in *Good News Club*, the

Department amended and then renumbered the provision. Standard Operating Procedure § 5.11 now states (App.371a):

> 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.

Outside organizations that meet in schools are not charged rent; they pay a fee to partially cover labor costs and the cost of cleaning rooms after they are used (A49-50). They are not charged for electricity, heating, or air conditioning (A50, ¶9).[3]

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[3] Throughout this litigation, the Department's written policy regarding the extended use of school buildings had been contained in its Standard Operating Procedures ("SOP") Manual. In March 2010 it became a Chancellor's Regulation, but for the purposes of consistency, this brief references the SOP provisions. No changes have been made to the challenged provision.

B. Weekly worship services at P.S. 15.

Pursuant to the preliminary and permanent injunctions in this case, petitioners have been holding weekly worship services at P.S. 15 in the Bronx, New York, every Sunday since 2002 (A16, ¶1; A454; A580). During this time, petitioners have not held weekly worship services anywhere else (A456-457). Petitioners agree that the term "meetings," as originally used in their complaint (A343-346) refers to and describes the "Christian worship services" identified in its permit applications (A499; A3583, ¶2; 3585).

Petitioners have been trying to build their own church building, but have been unable to raise the necessary funds (A457-458). *See also* http://www.bhof.org/building08.html (last accessed Oct. 11, 2011). Therefore, petitioners seek to hold their worship services at P.S. 15, at least until their building is complete (A462).

According to petitioners, the format of their worship service is similar to worship services held by other congregations (A509). Petitioners have also stated that worship is different from ascribing worth to secular activities, such as baseball (A512). According to Pastor Hall, the Church and its worship services are different from what a club or the Boy Scouts do, because the Church engages in the "teaching and preaching of the word of God. We administer the sacraments of baptism and the Lord's supper . . . We sing hymns. We sing

Christian songs. We pray" (A420-421). The Church is different from groups that share an interest in stamp or coin collecting, and different from a political club (A423). According to Pastor Hall, the Church is also different from a bible study group, because the Church administers the sacraments and engages in "fellowship," meaning there is a "formal" commitment in the congregation to one another (A424).

C. Worship services in other NYC public schools.

To implement the preliminary and permanent injunctions, the Department has advised school officials to grant any permit applications for worship services on the same basis as other activities, provided that school space is available (A294, ¶24; A309, ¶2). In the 2004-2005 school year, and as a direct result of this litigation, at least 23 congregations held what they described as regular "worship" or regular "services" in New York City public schools (A34, ¶57). As of April 2005, the date of respondents' summary judgment motion in the District Court, 13 of those congregations held regular worship services in the same school for more than one year (A34, ¶58). Three, including petitioners, had held worship services in the same school for more than two years (*Id.*).

Of those 23 congregations, 22 held services on Sundays (A35, ¶59). Eleven of those schools

(including the one petitioners use) had school-sponsored academic programs in the school building on Saturdays, meaning, for all practical purposes, that space was not available for other congregations to hold their weekly worship services in the building (*Id.*). At least one of those schools was required to deny a similar request by another congregation to hold Saturday morning services, because it could not be accommodated due to school-sponsored instructional programs in the school building at that time, prompting the organization to question whether the school was favoring one religion over another (*Id.*; A849, ¶15).

The Department's experience is that most congregations have their regular worship services in the largest rooms in the school, and in some cases, they use many school facilities (A698, ¶7; A847, ¶7). Many congregations have regularly reserved school buildings for five or more hours on the same day (A35, ¶62). Several congregations reserve school space for most of the day on Sunday (*Id.;* A698, ¶7). Some hold regular worship services more than once a week (A36, ¶63).

In some schools, regular worship services are the only outside activities that use school space during non-school hours (A40-41, ¶68a-f; A846, ¶5). In other schools, children's activities take place at the same time as a congregation's regular worship services (A41-42, ¶69a-f).

These congregations use various methods to advertise their worship services in schools. At least two congregations have distributed materials to children who attend the schools where they hold services (A701, ¶12; A330, ¶6; 721, ¶¶3, 10-21). Those incidents resulted in complaints from parents to the Department officials about proselytizing activities (A330, ¶6; A727, ¶25; A701, ¶12).

Congregations, including petitioners, advertise the address of their worship services by referring specifically to the particular public school, using signs, flyers, media advertisements, the internet, and informal conversations with the public (A329, ¶3; A697, ¶4; A776; A832; A697-698, ¶¶5-6; A706-708; A713-714, ¶¶3-7; (A731-732, ¶¶2-3, 5; A737-739, ¶¶2, 4-7; 745-749). Some congregations have members stand at the school doors greeting people or distributing literature for the services (A714, ¶7; A847, ¶8). In one school day encounter, congregants gave middle school children free hot chocolate, introducing themselves as the church that meets in their school, and inviting the children to services (A36, ¶64b). In another, church-imprinted balloons and proselytizing materials were brought to a PTA back-to-school party at the elementary school where the church held its services (A36, ¶64a).

D. Congregations' dependence on their host schools.

Congregations that have their regular worship services in New York City public schools have shown they become entirely dependent on the school for their existence. Petitioners have had no other house of worship for nine years. When another congregation had its permit mistakenly revoked, the congregation told Department officials that the congregation had invested significant funds in advertising and equipment, and did not have the time or money to find a new location for its worship services (A741).

At least two congregations publicly expressed a long-term interest in having their services in public schools (A826-827). One congregation even installed a satellite dish on a school's roof without first obtaining approval of school officials and took steps to install a high-speed internet connection, advising the Department that this was a matter of "public prayer" at the church (A847-848, ¶¶6-12; A275, ¶4). The Department was forced to direct that congregation to remove the satellite dish.

The evidence also shows that more congregations are likely to seek to hold their regular worship services in New York City public schools. Petitioners acknowledge the preliminary injunction provided a new "venue for new churches to meet" (A527) and that school space is an

attractive option for new congregations because it is less expensive than renting commercial real estate (A542).

E. How the City's school buildings are ordinarily used.

During the first half of the 2004-05 school year, more than 800 of the City's 1197 school buildings were reserved for school-sponsored activities on one or more Saturdays, meaning they were unavailable for congregations that worship on that day of the week (A18, ¶7; A238, ¶3). During that time period, more than 450 school buildings were reserved for school-sponsored activities on Fridays, after school, or in the evening, meaning that they were also unavailable for congregations that worship at those times (A18, ¶7). During that same time period, fewer than 300 school buildings were reserved for school-sponsored activities on Sundays, meaning that most schools were available for congregations that worship on Sundays (*Id.*).

Many City public schools have weekday after-school instructional programs, particularly for students who are struggling academically. Many of these schools are open for instruction six days a week instead of five (A238, ¶¶2-3). For example, the Department offers a Saturday program for children at risk of not being promoted from fifth to sixth grade that was offered to more than 15,000 students in 119 school buildings (*Id.*, at ¶¶3-7).

Those schools are unavailable to congregations who worship on Saturday.

In the first half of the 2004-05 school year, almost 600 school buildings were reserved on one or more Saturdays for instructional or test administration activities of this nature. In contrast, approximately 22 schools were reserved for these activities on Sundays (A19, ¶13; A241, ¶11).

F. The Department's concerns.

The role of the school has expanded beyond the school day, as most now have after-school and weekend programs for children (A313, ¶12). Families with children attending public school view the neighborhood school as "their" school, and as a place that is welcoming for all children and their families (A313, ¶12). The Department is concerned that some children or their families may feel less welcome at their school if they identify the school with a particular religion or congregation (A309, ¶12).

Because most activities that occur in schools during non-school hours are, in fact, sponsored by the school, or by organizations that have a partnership with the school or a contract to provide after-school programs, children are unlikely to understand that weekly worship services are not sponsored or supported by the school (A315, ¶18; 330, ¶7; A700, ¶10). A congregation's use of a school for its worship services may be particularly

confusing for children. Children -- especially younger children -- are very impressionable and vulnerable; they think in absolutes, and they are likely to misconstrue a congregation's use of their school for its worship services as their beliefs being sponsored or supported by the school (A315, ¶18; A330, ¶7; A700, ¶10).

The Department has received complaints from parents and other community members who have expressed concern about worship services taking place in public school buildings in their neighborhoods. Some community members have perceived the school as identified with the specific congregation that is holding worship services there (A699-70, ¶¶9, 11, 13; A727, ¶25; A330, ¶7; A713, ¶6; A732, ¶4; A737, ¶2).

Significantly, petitioners attribute special significance to holding worship services in a public school building (A517-519). They have stated publicly that the "church is God's method of evangelism, and that's why meeting in the schools is so important" (A557). Petitioners believe that the school is "God's house" (A544). Pastor Roberts has publicly prayed for there to be a church in every school in New York City (A522-523).

Given the City's ethnic, cultural, and religious diversity, the Department seeks to avoid being perceived as endorsing or sponsoring any particular religion or congregation (A310, ¶4). And as indicated above, schools are not equally

available for worship services for all religions (*Id.*). The Department or school officials may be perceived and, in fact, have been perceived, as favoring one religion over another (*Id.*).

The Department is also concerned that school officials will become involved in religious matters when supervising how congregations use schools for weekly worship services (A310, ¶¶4, 10-30). The Department's experience thus far shows that issues arise about how congregations use school facilities for their services and how they advertise them.

The Department is also concerned that allowing schools to serve as houses of worship provides a benefit for some congregations but not others. No outside organization is permitted to use school facilities for worship services when school is in session. Thus, if a Muslim congregation sought to use a school for Friday midday services, the request would have to be denied. Also, schools are more available on Sundays than on any other day of the week (A317, ¶24; A241, ¶12), and that favors congregations that worship on that day of the week.

THE DECISION BELOW

The Majority Opinion.

In reversing the District Court's permanent injunction, the Second Circuit adhered to all the earlier decisions in this case that found that P.S. 15

is a limited public forum. App.11a.. The Court then reasoned that a category of speakers or expressive activities may be excluded from a limited public forum on the basis of reasonable, content-neutral rules so long as there is no viewpoint discrimination. App.12a.

The Court recognized that SOP §5.11 permits "free expression of a religious point of view" and that the provision only "bars a type of activity" – the conduct of worship services – but does not discriminate against any point of view. App.13a. The Court found that to permit the conduct of a "religious worship service" would have the effect of "placing centrally, and perhaps even of establishing, the religion in the school." App.14a.

As a result, the Court found that SOP §5.11 is "in no way incompatible with" this Court's decisions in *Good New Club*, *Lamb's Chapel v. Center Moriches Union Free School*, 508 U.S. 384 (1993), and *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). App. 18a – 19a. That is because in those cases, unlike here, the policies at issue "categorically excluded expressions of religious content." App.19a-20a

The Court then determined that SOP §5.11 is reasonable in light of the purpose served by the forum, because the Department "has a strong basis to believe that allowing the conduct of religious worship services in schools would give rise to a

sufficient appearance of endorsement to constitute a violation of the Establishment Clause." App.21a.

Applying the test under *Lemon v. Kurtzmann*, 403 U.S. 602 (1971), the Court found that, when worship services are performed in a public school, a church "has made the school the place for the performance of its rites, and might well appear to have *established* itself there. The place has, at least for a time, become the church (emphasis in original)." App.23a.

The Court then found the Department's concern, that it would be substantially subsidizing congregations by opening its doors to religious worship services, to be reasonable. App.23a. That is because the Department only charges permitees for security and for part of the custodial fee but it "foots a major portion of the costs of the operation of a church." App.23a-24a. Consequently, the Court determined, it "is reasonable for the Board to fear that allowing schools to be converted into churches, at public expense and in public buildings, might 'foster an excessive government entanglement with religion' that advances religion" (internal citation omitted." App. 24a.

Additionally, the Court determined that the Department "could also reasonably worry that the regular, long-term conversion of schools into state-subsidized churches on Sundays would violate the Establishment Clause by reason of public perception of endorsement." App.24a. It found that

the concern has been "vindicated' by the experience in the schools since the preliminary injunction was granted, including the growth in the number of congregations using public schools as their regular place for worship services. App.25a. Pointing to the record evidence regarding how congregations have been using school buildings for their worship services, the Court found that the congregations dominate the space and that 'some schools effectively become churches." *Id*.

The Court then found that the greater availability of school buildings on Sundays "results in an unintended bias in favor of Christian religions" because the buildings are generally unavailable on the days Jews and Muslims worship. App.26a-27a. That, the Court found, "contributes to a perception of public schools as Christian churches, but not synagogues or mosques." App.27a.

Finally, the Court found, petitioners' worship services "are not open on uniform terms to the general public." App.27a. The "deliberate exclusion" petitioners practice "aggravates the potential Establishment Clause problems" the Department seeks to avoid. App.27a.

The Dissent.

In dissenting, Judge Walker agreed that P.S. 15 is a limited public forum (App.51a), but found that petitioners' worship services "fit easily within

the purposes of" what he described as a "broadly available forum." App.49a. As a result, Judge Walker found §5.11 to be impermissible viewpoint discrimination that is unsupported by a compelling state interest. *Id.* Additionally, Judge Walker characterized the Department's Establishment Clause concerns as "insubstantial." *Id.*

Recognizing that the Department is not required to allow every kind of speech in a limited public forum, Judge Walker nevertheless found that the exclusion was based on petitioners' "religious message" and therefore constitutes viewpoint discrimination. App.53a. Criticizing the majority for offering what he described as a "self-styled definition of 'religious worship services,'" Judge Walker found that "religious services" and "worship" have been "target[ed] for exclusion," because the Department is "otherwise unconcerned with comparable ceremonial speech occurring on school premises," such as a Boy Scout merit badge service. App.56a; 59a.

Judge Walker was also critical of the distinction the majority drew between "the conduct of an event" and "the protected viewpoints expressed during the event," because, Judge Walker found, "the conduct of 'services' is the protected expressive activity of the sort recognized in Good News Club" (emphasis in original). App.57a. Ultimately, Judge Walker reasoned, trying to distinguish between worship and other forms of protected speech is "irrelevant, because,

quoting *Good News Club*, "what matters is the substance of the [group's] activities." App.58a.

Judge Walker rejected the Department's Establishment Clause concerns on the ground that "a private party cannot transform the government's neutral action into an Establishment Clause violation. The Board's fear of being perceived as establishing a religion is therefore not reasonable." App. 63a. In Judge Walker's view, the mere use by a congregation of a public school for weekly worship services "does not in itself raise a legitimate concern that the government has acted in contravention of the Establishment Clause" (emphasis in original). App.66a. According to Judge Walker, petitioners' worship services do not transform P.S. 15, because the use occurs during non-school hours, is not sponsored by the school, occurs in a forum otherwise available to a wide range of activities, and is open to the public. App.68a.

According to Judge Walker, the fact that some religious denominations use school premises more often than others "does not give rise to a legitimate perception that the Board grants permits to particular denominations to the exclusion of others." App.71a, n.9. Additionally, Judge Walker disagreed that allowing petitioners to use the school as its house of worship amounted to "the unlawful provision of direct aid to a religious group." App. 73a.

REASONS FOR DENYING THE WRIT

Petitioners seek review primarily on the ground that the Court of Appeals' decision distinguishes worship from other forms of speech, creating a conflict with *Good News Club*, and other decisions of the courts of appeals (Pet., at 19). SOP §5.11. does not distinguish on the basis of viewpoint, however, and instead focuses on worship services, a category of expressive conduct. Petitioners themselves define their conduct as worship services, and there is therefore no broader issue involving *Good News Club* or the need to draw a principled line between worship and other types of speech.

Additionally, the Court of Appeals correctly relied on an extensive record of the difficult Establishment Clause issues that have arisen since the District Court's injunctions to find that the Department's concerns justify the challenged policy. A growing number of congregations use school buildings as their *de facto* houses of worship. Schools are also unavailable on a neutral basis for all faiths, and there is a substantial subsidy issue when they are used as houses of worship. The Department's concern about impermissible endorsement issues is vividly demonstrated by the many signs congregations attach to schools indicating the building is a house of worship (A834-43), by the Department's need to closely monitor the congregations' worship-related actions, and by being forced to choose, as between competing

applications, who to allow to hold worship services at the same school (A848-850).

I. THERE IS NO CONFLICT WITH THE COURT'S DECISION IN *GOOD NEWS CLUB*.

According to petitioners, in *Good News Club*, the Court held that the exclusion of "religious worship" from a limited public forum constitutes unconstitutional viewpoint discrimination (Pet., at 19). *Good News Club*, however, concerned an after-school Bible study club, one of many operating simultaneously on school premises, and its exclusion "on the basis of its religious perspective," 533 U.S., at 108. The Court did not find the after-school club was holding worship services. 533 U.S., at 112, n.4.

Rather, in *Good News Club*, the Court found that the school district had engaged in viewpoint discrimination when it refused to allow a Christian after-school club that offered a religious perspective on moral and character development when the facilities were available to other after-school groups that promoted the moral and character development of children. 533 U.S., at 108. The focus, therefore, was on whether some other group had been permitted to engage in the same kind of speech activity from a perspective other than the prohibited one. 533 U.S., at 112.

It was, moreover, critical that the Club's activities were virtually indistinguishable from the type of film on family values at issue in *Lamb's Chapel* and the student publication in *Rosenberger*. *Id.* at 109-110. That is why the *Good News* Court drew a distinction between the club's activities and "mere religious worship, divorced from any teaching of moral values." *Id*. at 112, n.4.[4]

Thus, the Court of Appeals correctly determined that, in contrast to *Good News Club*, SOP §5.11 does not categorically exclude expressions of religious content and there is no restraint on the free expression of any point of view (App.19a-20a). Rather, the exclusion applies only to the conduct of worship services but not to the expression of religious views associated with it (App.20a). Moreover, because SOP §5.11 allows the use of school facilities by religious clubs for students that are sponsored by outside organizations "on the same basis as other clubs for students sponsored by outside organizations," *id,* it does not run afoul of *Good New Club*.

Although petitioners again argue that "there is no intelligible way, for First Amendment purposes, to distinguish between 'religious speech'

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[4] Thus, to the extent petitioners urge that *Good News Club* addressed, and implicitly found unconstitutional, the language in SOP 5.11 regarding worship services (Pet., at 19), they are wrong.

and 'religious worship'" (Pet., at 22), they repeatedly draw that distinction themselves (A512; A420-421; A423-424). Thus, petitioners' own characterization of their activity not only meaningfully distinguishes it from the after-school club in *Good News Club*, but it also presents no broader issue for this Court's consideration. Petitioners would prefer that this Court "evaluate the substantive component parts" in order for their activity to appear less like a worship service and more like a Bible study class (Pet., at 23; 24-25), but that ignores the significance of their own representations that they are engaging in worship services and how their worship services differ from other activities.

Moreover, there certainly is a common understanding of religious worship services among Americans (A631-645) that belies petitioners' contention that there can be no "intelligible" or "constitutional" distinction drawn. This Court, moreover, routinely uses the terms "worship services," "religious worship," and "religious services" in its decisions without defining, but nevertheless still clearly distinguishing, the activity from other forms of speech. *See e.g. Sossamon v. Texas,* 131 S. Ct. 1651, 1657 (2011)(discussing an amended policy that "now permits inmates to attend scheduled worship services in the chapel subject to certain safety precautions"); *Cutter v. Wilkinson*, 544 U.S. 709, 721 (2005)("Ohio already facilitates religious services for mainstream faiths. The State provides

chaplains, allows inmates to possess religious items, and permits assembly for worship"): *Employment Div. v. Smith*, 494 U.S. 872, 884-85 (1990) ("The 'exercise of religion' often involves not only belief and profession but the performance of [or abstention from] physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation."); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)("The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances"); *Hernandez v. Commissioner*, 490 U.S. 680, 709 (1989)(O'Connor and Scalia, *dissenting*)(referring to Christian "worship services" and "worship services" for Jewish High Holy Days).

Nor is there any genuine dispute between the parties that religious worship is protected under the First Amendment (Pet., at 22). That important constitutional principle alone, however, does not open up a limited public forum for every purpose. Certainly, it does not mean a New York City school must become a congregation's permanent and only house of worship. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 799-800 (1985)("Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type

of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.").

The facts of this case, therefore, take it outside the concerns raised by *Good News Club*.

II. THERE ALSO IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL.

As petitioners are obliged to concede (Pet., at 25), the Court of Appeals' decision poses no conflict, and is in complete harmony, with the Ninth Circuit's decision in *Faith Center Church Evangelistic Ministries v. Glover*, 480 F.3d 891 (9th Cir. 2007), *cert. den.,* 552 U.S. (2007), involving "pure" religious worship services in a limited public forum. Petitioners instead attempt to create a conflict, when none exists, with decisions from the Fourth, Seventh, and Tenth Circuits (Pet., at 25). Those cases, however, all concern viewpoint discrimination in public forums, rather than a content neutral provision in the limited public forum at issue here. And unlike here, there was no issue of neutrality in the practical application of the regulation.

Badger Catholic v. Walsh, 620 F.3d 775 (7th Cir. 2010), *cert. den.*, 131 S.Ct. 1604 (2011)(Pet., at 27), concerns a university public forum and a student group that conducted otherwise permitted activities (counseling) from a religious orientation

that included prayer. In *Badger*, the fact that the university, and not the student group, was attempting to define the activity as "worship" was particularly significant. *id*., at 777, as was the fact that it was a public forum. *Id*., at 780.

It was also central to the Court's analysis that, because the University funds counseling, leadership training, tutoring and other activities from a secular perspective, it cannot refuse to fund these same activities conducted by Badger Catholic solely because the activities might include religious modes of speech. 620 F.3d, at 781. Badger Catholic never requested funds for religious worship, however. Quite the opposite: it readily conceded, in opposing the university's petition for a writ of *certiorari*, that worship services were not "at issue" (Badger Brief in Opp., at 23).

In *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703 (4th Cir. 1994), *cert. den.,* 511 U.S. 1143 (1994), on which petitioners also misguidedly rely (Pet., at 27), the Court of Appeals struck down a local regulation that imposed on religious organizations a progressive rate to use county schools. The school was concededly a public forum, and that played a critical analytical role in the decision. 17 F.3d, at 706. Additionally, unlike here, there was no question raised regarding neutrality of the forum, no evidence presented of perceived endorsement or domination of the forum, and only "mere speculation" about whether domination would occur

sometime in the future. *Id.*, at 708-709. Finally, unlike here, there was no question of an impermissible subsidy, because the school's fee schedule reimbursed the school for all expenses incurred. *Id.*

Petitioners point to a third decision – *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), *cert. den.,* 519 U.S. 949 (1996) – as creating a conflict (Pet., at 28). That case also concerned the exhibition of a film at a municipal senior center, which was a designated public forum. 84 F.3d, at 1277-78. The facts of that case are significantly distinguishable: it did not concern worship services, required the kind of line drawing to define permissible content absent here, and involved impermissible viewpoint discrimination. *Id.*, at 1279 ("Any prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint").

The application of regulation to a traditional public forum "differs markedly" from analysis applicable to a limited public forum. *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2986, n.14 (2010). These cases, resting as they do on a different factual and analytical basis, pose no issue for the Court's review.

III. P.S. 15 IS A CLASSIC EXAMPLE OF A LIMITED PUBLIC FORUM, AND THERE IS NO NEED FOR THIS COURT TO GRANT THE PETITION IN ORDER TO REVISIT THIS ISSUE.

As demonstrated above, the Department prioritizes the after-hours use of public schools. To reserve the schools for educational purposes, the primary use must be for Department programs and activities (App.367a). Most activities during non-school hours supplement the school's curriculum goals (A290, ¶4). Permits are allowed to be granted to community, youth and adult group activities only once those priority needs are met (App.368a). And even then, broad classes of activities are not permitted, and all community events must be open to the public (App.369a; 371a; 386a).

Petitioners, ignoring the foregoing, nevertheless rely on this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), and other designated public forum cases, to urge the Court to grant *certiorari* in order to revisit the forum designation here (Pet., at 29-34). In doing so, they urge that where, as here, a forum is open to "all speech pertaining to the welfare of the community," that must necessarily, under all circumstances, create a designated public forum (Pet., at 29).

Significantly, *Faith Center* is once again on point. The case concerned a limited public forum that permitted "meetings, programs or activities of

educational, cultural or community interest" sponsored by non-profits, civic organizations, for-profits, schools and government organizations. 480 F.3d, at 909. Thus, the Ninth Circuit is in accord with the Second Circuit that a policy with a broad purpose "is not dispositive of an intent to create a public forum by designation." *Id.*, at 909.

Moreover, in *Good News Club*, the Court did not disturb the Second Circuit's conclusion that the State of New York had created a limited public forum when it made its public schools available for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community." *Good News Club*, 533 U.S., at 102, 106 (internal quotation marks omitted). Indeed, New York's public schools have consistently been deemed to be limited public forums. *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 626 (2d Cir. 2005)(specifically identifying a public school as "a place not traditionally open to public assembly and debate"); *Full Gospel Tabernacle v. Community Sch. Dist. 27*, 979 F. Supp. 214, 220 (S.D.N.Y. 1997), *aff'd.*, 164 F.3d 829 (2d Cir.)(*per curia*), *cert. den.*, 527 U.S. 1036 (1999); *Deeper Life Christian Fellowship v. Sobo*l, 948 F.2d 79, 83-84 (2d Cir. 1991).

That same finding of fact is also reflected in every decision rendered in this litigation. *Bronx Household of Faith v. Community Sch. Dist. No. 10*, 1996 U.S. Dist. Lexis 18044, 17-18 (S.D.N.Y. Dec. 5, 1996)("Examining the SOP, New York Education

Law § 414, the past practices and the intent of the School District, I find that the School District has created a limited public forum, and not a public forum"); *Bronx Household of Faith v. Community Sch. District No. 10*, 127 F.3d 207 (2d Cir. 1997). *cert. den.*, 523 U.S. 1064 (1998) (The school's policy "is characteristic of a limited forum, for it represents the exercise of the power to restrict a public forum to certain speakers and to certain subjects. It would seem to go without saying that certain types of speech may be prohibited in public schools, even after school hours. M.S. 206B simply is not a place that has been devoted to general, unrestricted public assembly by long tradition or by policy or practice"); *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 226 F. Supp. 2d 401, 413 (S.D.N.Y. 2002) (granting preliminary injunction but denying reconsideration and adhering to prior holding that public school was a limited public forum), *aff'd*, 331 F.3d 342 (2d Cir. 2003); *Bronx Household of Faith v. Bd. of Educ.,* 492 F.3d 89, 97-98 (2d Cir. 2007)(Calabrese, J., *concurring*)("We remain bound by our finding that the school in the case at bar is a limited public forum. There is nothing in the record that requires us to reconsider that holding"); *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 650 F.3d 30 (2d Cir. 2011)("P.S. 15 is a limited public forum").

Thus, while petitioners suggest *Good News Club* left open this question and the Court should grant *certiorari* to resolve it (Pet., at 29), petitioners have repeatedly failed, throughout this

very long litigation, to ever identify any good reason to support a different finding.

Petitioners also refer to the "vast variety of speakers" permitted in the forum (Pet., at 30) but mischaracterize the broad limitations the Department imposes on permitted speakers and activities, characterizing them as just a "small sliver" of exclusions (Pet., at 32). The forum, however, is not just unavailable for religious worship services, but it is also unavailable for all commercial speech, all partisan political speech, all personal celebrations such as weddings, and all events not open to the public (App.369a; 371a; 386a). That is one of the defining characteristics of a limited public forum. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009)(government may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects and may impose restrictions on speech that are reasonable and viewpoint-neutral); *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n,* 460 U.S. 37, 47 (1983)(no indication school mailboxes are open for use by the general public; "We can only conclude that the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. This type of selective access does not transform government property into a public forum").

The Department's intent, as well as its policy and practice, show that the forum is simply not

available to "all comers" and is instead reserved for specific purposes governed by specific standards and procedures (349a-419a; A290, ¶4; A292, ¶13; A292-293). *Cornelius,* 473 U.S., at 803 ("We will not find that a public forum has been created in the face of clear evidence of a contrary intent . . . nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity"); *Perry,* 460 U.S., at 55 ("on government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used").

In *Widmar*, upon which appellants so heavily rely, the Court found that a university had created a forum generally open for use by student groups. 454 U.S., at 267. Accordingly, the Court applied the strictest standard of review -- a compelling state interest and a regulation narrowly drawn to achieve that end -- and found the university did not meet that standard. A public university is much different from a public elementary school, however, as the Court has long acknowledged. *Id.*, at 267 n.5; *Christian Legal Society v. Martinez*, 130 S.Ct., at 2978 ("In a series of decisions, this Court has emphasized that the First Amendment generally precludes public *universities* from denying student organizations access to school-sponsored forums because of the groups' viewpoints")(emphasis added).

Petitioners also urge that this Court should revisit the forum designation because, in *Lamb's Chapel*, 508 U.S., at 391, the Court, in *dicta*, mused that a similar argument involving another school district had "considerable force" (Pet., at 30-31). That does not necessarily mean, however, that the argument has similar "considerable force" here or even that it should be reviewed by this Court now. *Bronx Household of Faith I,* 127 F.3d, at 207. Forum analysis, at its core, is a fact-intensive analysis. *Cornelius*, 473 U.S., at 802 ("the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. . . The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent").

Petitioners' attempt to create a *certiorari*-worthy issue by reference to four wholly unrelated and fact-specific cases (Pet., 33-34) is therefore misguided and does not merit review by the Court.

IV. THE DEPARTMENT'S INTEREST IN AVOIDING ESTABLISHMENT CLAUSE VIOLATIONS – AS DOCUMENTED IN THE RECORD – IS COMPELLING, AND IT JUSTIFIES THE POLICY HERE.

For nine years now, P.S. 15 has served as the petitioners' exclusive house of worship (A3584, ¶5). What began as a single congregation quickly grew to 23 congregations in the 2004-2005 school year, with at least 13 of those congregations holding worship services in the same school for more than one year (A34, ¶¶57-58). That number has since increased exponentially.[5]

These congregations use the media to advertise the public school location of their services to the public (A326; A333; A747; A755; A773; A781; A832). They attach signage to public school buildings to alert the public that their services take place inside the school building (A834; A837; A840; A843). Their websites identify schools as the location of their worship services (A477-479; A783). Some have directly approached and recruited school children where their worship services are held (A701, ¶12; A330, ¶6; 721, ¶¶3, 10-21).

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[5] Approximately 160 congregations were granted 756 permits for worship services in New York City public schools during the 2010-2011 school year. There have been approximately 300 more permits granted just since the beginning of the current school year.

Petitioners' characterization of the foregoing unrebutted evidence in the record as "unsubstantiated concern" with Establishment Clause issues (Pet., at 35) simply ignores what has happened here: public schools have become the regular, and exclusive, house of worship for petitioners and many others. The unrebutted factual basis for the Department's concern is well-founded, genuine, and documented in the record.

Petitioners take issue with the Court of Appeals' determination, after applying the test in *Lemon v. Kurtzman*, 403 U.S. 602, that the Department has "a strong basis to believe" that allowing religious worship services in schools "would give rise to a sufficient appearance of endorsement to constitute a violation of the Establishment Clause," arguing that nothing less than an actual Establishment Clause violation can justify the Department's policy (Pet., at 35-36). In *Widmar,* however, the Court recognized that an interest in avoiding a violation of the Establishment Clause "may be characterized as compelling." 454 U.S. at 271. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995)("There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech").

Petitioners simply ignore that they have held their weekly worship services at P.S. 15, and no place else, since 2002. Every week the school is, at

least for a time, their church. Moreover, the Department is "substantially subsidizing" Bronx Household and all other congregations because they are directly provided a building to use for their worship services at a cost well below market rate. As the Court of Appeals recognized, "It is reasonable for the Board to fear that allowing schools to be converted into churches, at public expense and in public buildings, might 'foster an excessive government entanglement with religion' that advances religion" (App.23a-24a).

The fear, however, is more than theoretical. Congregations that use the City's public schools for their worship services have become dependent on these school buildings because they have no other house of worship (A741). They behave as if they own the building, which then requires the Department to intervene (A847-848, ¶¶6-12; A275, ¶4).

Because all permitted community activities must be open to the public, the Department is also placed in the uncomfortable and possibly unconstitutional position of enforcing that provision, potentially in conflict with core religious beliefs and associational rights of congregations whose worship services are held in its public schools. *Cf.*, *Christian Legal Society v. Martinez*, 130 S.Ct., at 2977 (the Court holding that Christian student group's objection to university's "accept-all-comers" policy "has no constitutional right to state subvention of its selectivity"); *Roberts v. United*

States Jaycees, 468 U.S. 609, 623 (1984)("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate").[6]

Relying on the Court's decision in *Pleasant Grove City v. Summum*, the Court of Appeals also properly recognized that "the regular, long-term conversion of schools into state-subsidized churches on Sundays would violate the Establishment Clause by reason of public perception of endorsement" (App24a-25a). That "concern has been vindicated by the experience in the schools in the seven years since the district court granted the preliminary injunction," and not just because petitioners have held worship services at P.S. 15, and nowhere else, every Sunday since 2002 (App.25a). The Court recognized the clear trend in the growth of congregations using public school

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[6] While petitioners maintain that their worship services are open to the public (Pet., at 10), allowing guests or auditors is "hardly the equivalent to accepting all comers as full-fledged participants." *Christian Legal Society v. Martinez*, 130 S. Ct., at 2989. As is their constitutional right, petitioners exclude from full participation in worship services persons not baptized, as well as those who have been excommunicated or those who advocate the Islamic faith (App.27a).

buildings as their regular place for worship services, and their domination of the forum when they do so (*Id*.). "The possibility of perceived endorsement is made particularly acute by the fact that P.S. 15 and other schools used by churches are attended by young and impressionable students, who might easily mistake the consequences of a neutral policy for endorsement" (*Id*., at 25a-26a).

Finally, the Court properly recognized the record evidence that showed that City's school facilities "are principally available for public use on Sundays" and that "results in an unintended bias in favor of Christian religions, which prescribe Sunday as the principal day for worship services. Jews and Muslims generally cannot use school facilities for their services because the facilities are often unavailable on the days that their religions principally prescribe for services" (App. 261-27a).

The foregoing significantly distinguishes this case from the precedents petitioners now rely on (Pet., at 35), as the Court of Appeals correctly determined (App. 28a-29a). As a result, "the use of P.S. 15 and other schools for Sunday worship services is more likely to promote a perception of endorsement than the uses in those cases" (App. 31a). SOP §15.11 is narrowly drawn "to exclude a core activity in the establishment of religion – worship services – and thereby avoid the perceived transformation of school buildings into churches" (App. 32a).

That result is not foreclosed by *Rosenberger*, as petitioners urge (Pet., at 38). In *Rosenberger*, the Court expressly recognized that "It is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse." 515 U.S., at 844. That is precisely what is occurring here.

Nor does *Good News Club* dispose of this issue (Pet., at 38). Although the Court stated that it has "never extended our Establishment Clause jurisprudence to foreclose private religious conduct during non-school hours merely because it takes place on school premises where elementary school children may be present," 533 U.S., at 115, this record demonstrates much more than that.

Rather, this record demonstrates that the Establishment Clause is offended in multiple ways: by bestowing substantial, direct public aid on predominantly Christian congregations while other non-Christian congregations are effectively shut out of the forum; by creating excessive entanglement for the Department; and by communicating religious endorsement to school children and their families. The Department is fully justified in trying to avoid those violations with a content-based rule that treats all congregations and their religious worship services alike. *Cf. Hernandez v. Commissioner*, 490 U.S., at 696-697 ("routine regulatory interaction which involves no inquiries into religious doctrine . . . and no 'detailed monitoring and close administrative

contact' between secular and religious bodies . . . does not itself violate the nonentaglement command")(internal citations omitted).

Because the Department is not able to enforce its neutral policy, New York City has experienced the establishment of weekly worship services and houses of worship in its public schools, which in practice prefers certain religions over others and provides substantial subsidies to those who benefit from that inequity. That goes to the very core of what the Establishment Clause is supposed to avoid, as the Court of Appeals correctly recognized.

V. PETITIONERS' FREE EXERCISE CLAUSE CLAIM ALSO DOES NOT JUSTIFY GRANTING THE PETITION.

Finally, petitioners ask the Court to grant the petition to review a Free Exercise Cause claim, describing SOP §5.11 "rank discrimination." That does not, however, pose an issue worthy of the Court's review.

The First Amendment prohibits the enactment of any law "prohibiting the free exercise" of religion. "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Hernandez v. Commissioner*, 490 U.S., at 699.

In support of their claim, petitioners principally rely on *Lukumi Babalu Aye v. Hialeah* (Pet., at 39), a case involving animal sacrifice. The Court found that the challenged ordinances were not neutral but rather had as their object the suppression of a central element of the Santeria religion. 508 U.S. at 542. The Court also found that the ordinances were not of general applicability, *see id.*, at 545-46, and could not survive strict scrutiny, *see id.*, at 546-47.

SOP §5.11, however, does not bar any particular religious practice and does not interfere with the free exercise of religion by singling out a particular religion or imposing any disabilities on the basis of religion. *Smith*, 494 U.S. 872, 878-882 (Free Exercise clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct). Petitioners remain free to practice their religion and conduct their worship services, just as they did before using P.S. 15 for that purpose.[7]

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[7] Petitioners are simply wrong when they suggest the policy excludes use for "religious purposes" (Pet., at 40), because that is not what SOP ¶5.11 states and is not how the provision is applied.

This case does not implicate any question of what worship "is" or "is not," and does not require any line drawing, either by the Department or the Court. Rather, petitioners have squarely defined their activity as religious worship services and have thus removed that issue from contention. Moreover, denying permits for worship services does not implicate impermissible viewpoint discrimination, particularly where, as here, others types of religious speech are undeniably permitted. SOP ¶5.11 does not reflect an official judgment about the substance of any worship services and it does not preclude uses by congregations on the basis of their convictions. In light of the purpose of the forum -- to promote educational and enrichment opportunities for children, and enhance school-community relations -- and the Department's concerns about having any school identified with a particular religion or congregation, SOP §5.11 is reasonable as well as viewpoint neutral.

This record also demonstrates how the Establishment Clause is offended in multiple ways: by bestowing substantial, direct public aid on predominantly Christian congregations while other non-Christian congregations are effectively shut out of the forum; by creating excessive entanglement for the Department; and by communicating religious endorsement to school children and their families. The Court of Appeals correctly paid "due decent respect," *Christian Legal Society v. Martinez*, 130 S. Ct., at 2989, to the

Department's well-documented Establishment Clause concerns.

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, 15 (1947). Indeed, the establishment of a house of worship in a public school goes to the very core of what the Establishment Clause is supposed to avoid, as this record demonstrates.

Nothing about the Court of Appeals' holding, resting on a specific factual predicate, warrants *certiorari* review.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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Respectfully submitted,

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