No. 11-386

IN THE

Supreme Court of the United States

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

v.

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 *AMICI CURIAE* OF COUNCIL OF CHURCHES OF THE CITY OF NEW YORK, BROOKLYN COUNCIL OF CHURCHES, QUEENS FEDERATION OF CHURCHES, AMERICAN BAPTIST CHURCHES OF METROPOLITAN NEW YORK, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, ANGLICAN CHURCH IN NORTH AMERICA, NATIONAL ASSOCIATION OF EVANGELICALS, AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITIONERS

KIMBERLEE WOOD COLBY
CENTER FOR LAW & RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY
8001 Braddock Road
Springfield, Va. 22151
(703) 642-1070

FREDERICK W. CLAYBROOK, JR.
Counsel of Record
CROWELL & MORING, LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500
RClaybrook@crowell.com

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICI CURIAE* [1]

The **Council of Churches of the City of New York**, organized in 1895, is the oldest continuing council of churches in the United States. It is an ecumenical coalition of the major representative religious organizations representing Protestant, Anglican, and Orthodox Christian denominations having ministry in the City of New York. It is governed by a Board of Directors comprised of the bishop or equivalent officer of each local diocese, association, synod, presbytery, conference, or district of its member denominations and of the president and executive officer of the local councils of churches serving in each of the boroughs of the City of New York. The leadership represented by the Council is aware that congregations often have need to use non-owned space for worship when organizing or when undergoing renovation or replacement of their own place of worship. It regards the policy of the New York City Board of Education as evidencing a hostility toward religion and religious worship which is inconsistent with First Amendment purposes.

The **Brooklyn Council of Churches** continues the work begun in 1829 by the Brooklyn Church and Mission Federation. It is governed by a Board of

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[1] Pursuant to Rule 37.2(a), counsel for *amici* gave to all parties' counsel of record timely notice of the intent to file this brief *amici curiae* in support of petitioners and received the written consent of the parties' counsel of record. Pursuant to Rule 37.6, counsel for a party neither authored, in whole or in part, this brief, nor made a monetary contribution intended to fund the preparation or submission of the brief. No person other than the *amici curiae,* their members, or their counsel made such a monetary contribution.

Managers elected by delegates from its member churches in Brooklyn representing the broad diversity of the Christian community in the Borough of Brooklyn, City of New York. Many of these churches meet the needs of their surrounding communities by housing mentoring programs, community meetings, the homeless, day care centers, food pantries, and soup kitchens. With nearly 1,900 congregations in Brooklyn, some will often have need to rent space temporarily because of damage to their sanctuary or because of a dramatic growth in attendance from neighborhood development and renewal. A church may request the use of public school facilities to meet these temporary needs. The Brooklyn Council of Churches regards the decision below as discriminatory and hostile to religious congregations by denying them access to public school facilities which are otherwise unused at the time.

The **Queens Federation of Churches** was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of an equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry. The Federation has appeared as *amicus curiae* previously in a variety of actions for the purpose of defending religious liberty, and it and its member congregations are vitally concerned for the protection of the principle and practice of religious liberty as manifest in the present action. The Federation has assisted congregations in Queens which have been affected by the Department of Education's discriminatory policy.

The **American Baptist Churches of Metropolitan New York** is a Region of the American Baptist Churches in the USA, a non-profit religious organization of Baptist Churches and Mission Societies, and is composed of 192 Baptist churches located within the five counties comprising New York City (Bronx, Kings, New York, Queens, and Richmond), as well as Nassau, Suffolk, and Westchester. The majority of its member churches are within New York City. Religious freedom is a core belief among Baptists. Efforts to suppress or deny the free expression of religious beliefs and practices by governmental entities have been and are a source of great concern. Further, the density of New York City, with its stringent land use regulations and extraordinarily high construction costs, creates burdens on houses of worship to find and construct places of worship. Weekend use of public school facilities offers relief to worshiping communities' need for space when disasters such as fires or floods strike, as well as for congregations needing space while trying to find or construct a permanent facility. In the past, several of its congregations have been permitted to rent public school facilities on the weekends when there has been fire damage and ongoing renovations to their permanent facilities. This has been in keeping with the public schools' policy to make space available for community organizations. This ruling to ban houses of worship from the use of public school facilities on the weekends is discriminatory, violates free speech, and prohibits freedom of religious expression.

The **National Council of the Churches of Christ in the USA**, also known as the National

Council of Churches, is a community of 35 Protestant, Anglican, Orthodox, historic African American and Living Peace member faith groups which include 45 million persons in more than 100,000 local congregations in communities across the nation. Its positions on public issues are taken on the basis of policies developed by its General Assembly. The National Council of Churches is an active defender of religious liberty. It is concerned that congregations of its member and other Christian communions, as well as congregations of other faiths, be able to use public facilities on the same basis as other nonprofit organizations and associations and not be denied access by a creative misuse of the Establishment Clause.

The **General Conference of Seventh-day Adventists** is the highest administrative level of the Seventh-day Adventist church and represents nearly 59,000 congregations with more than 16 million members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,000 congregations with more than one million members. The church has congregations in all fifty states. The Seventh-day Adventist Church has a strong interest in maintaining the freedom of its members to meet in public places.

The **Ethics & Religious Liberty Commission** ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 44,000 churches and 16.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and

ethics. Religious freedom is an indispensable, bedrock value for SBC churches. The Constitution's guarantee of equal access to public meeting space within their region of ministry is crucial to the ability of SBC churches and other religious organizations to fulfill their divine mandate.

The **Anglican Church in North America** ("ACNA") unites some 100,000 Anglicans in nearly 1,000 congregations across the United States and Canada into a single Church. It is a Province-information in the global Anglican Communion. The Anglican Church in North America was initiated at the request of the Global Anglican Future Conference (GAFCon) in June 2008 and formally recognized by the GAFCon Primates—leaders of Anglican Churches representing 70 percent of the active Anglicans globally—in April 2009. The ACNA is determined by the help of God to hold and maintain the doctrine, discipline, and worship of Christ as the Anglican Way has received them. The ACNA is also determined to defend the inalienable human right to the free exercise of religion as given by God and embodied in the First Amendment to the United States Constitution. The ACNA is quickly growing, through efforts such as its "Anglican 1000" initiative, to rapidly catalyze the planting of Anglican congregations and communities of faith across North America, and it strongly supports the right of equal access to public facilities for religious worship.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries, and inde-

pendent churches. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that religious freedom is God-given and that the government does not create such freedom, but is charged to protect it. NAE is grateful for the American legal tradition safeguarding religious freedom and believes that this jurisprudential heritage should be maintained in this case.

The **Christian Legal Society** ("Society") is a nonprofit, interdenominational association of Christian attorneys, law students, and law professors with chapters in nearly every state and at numerous law schools. For three decades, the Society's legal advocacy division, the Center for Law & Religious Freedom ("Center") has worked to protect religious citizens' right to be free from discriminatory treatment of their religious expression. The Center assisted in drafting the original version of the Equal Access Act, 20 U.S.C. §§ 4071 *et seq.*, passed by Congress in 1984 to protect the right of students to meet for religious speech on public secondary school campuses. *See* 128 Cong. Rec. 11784-85 (1982). In numerous cases in the federal courts, the Center has represented students and community groups who have been excluded from public facilities because their speech is religious.

ARGUMENT

As copious case law and a drive around practically any community on a weekend attest, religious organizations across this country frequently use public spaces for their services and other meetings. This case presents but one example and raises these important issues:

1. Is a religious worship service protected speech under the First Amendment?
2. Can government officials distinguish between speech that is religious worship and speech that is religious but not worship without becoming unconstitutionally entangled?
3. Is a law that expressly prohibits religious services in a public space consistent with the First Amendment's proscription of any law prohibiting the free exercise of religion?

This Court should grant the petition because the Second Circuit's majority opinion misreads the First Amendment and this Court's clear precedents and threatens the vibrant exercise of religion as practiced extensively throughout this country, especially by smaller, less affluent congregations.

I. Because Use of Schools and Other Public Spaces for Religious Services Is Widespread, Certiorari Should Be Granted

The majority opinion of the Court of Appeals gives state and local governments the ability to prevent religious organizations from conducting "religious worship services" in a space generally made available for other community organizations for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community." *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 33 (2d Cir. 2011). This is inconsistent with historical practice and threatens the accommodation of religious observance still common in our country.

Public facilities have been made available on a nondiscriminatory basis from the outset of our nation's history, including the House of Representa-

tives, where Presidents Jefferson and Madison attended services, and the first Treasury Building, where several denominations conducted church services. *See* Library of Congress Online Exhibition: Religion and the Founding of the American Republic, *available at* http://www.loc.gov/exhibits/religion. On the other end of the social spectrum, African-American congregants in the North in pre-Civil War times were ostracized by white congregations, and, because they often could not afford their own church buildings, they, too, resorted to public buildings for religious services. *See* Craig D. Townsend, *Faith in Their Own Color: Black Episcopalians in Antebellum New York City* ch. 5 (2005).

The need of smaller, less affluent congregations to use public facilities is still present today. While most publicity goes to the "mega-churches," the average size of a Christian congregation in the United States is less than 100, and many smaller congregations cannot afford to own their own property. U.S. Congregational Life Survey, *available at* http://www.uscongregations.org/challenges.htm (last visited Sept. 23, 2011). Thus, they frequently use public properties, for free or by rental, to conduct their meetings and services.

The statistics regarding American religious practice demonstrate the evident need for access to such public spaces. Forty-three percent of American adults report that they attend regular religious services on a typical weekend. The Barna Group (2007), *available at* http://www.barna.org/barna-update (last visited Oct. 26, 2011). Yet, 50% of all U.S. congregations contain only 10% of the total number of worshipers in a given week. U.S. Congregational Life Survey (April 2001), *available at* http://www.uscong

regations.org/challenges.htm (last visited Sept. 23, 2011). Thus, while almost half of all Americans attend church in a given week, half of those participants belong to small congregations, and many participate in small weekday religious groups. Such small congregations and religious groups inevitably have fewer resources available to them. Affordable, temporary access to public places may be the only option for such organizations to gather and practice their respective faiths.

To understand the importance of public spaces for religious groups, this Court need look no farther than nearby Montgomery County, Maryland, and Fairfax County, Virginia, which have two of the largest school districts in the country. Pursuant to information requests (with responses, on file with counsel for *Amici*), in Montgomery County in fiscal year 2011 almost 250 different religious groups utilized the public schools. In Fairfax County, 75 religious organizations have used school property so far in 2011. These religious groups form a collage of the religious spectrum, from Amazing Grace AME Zion Church to the Islamic Weekend School to Buddha's Light International to Kehila Chadasha to Our Lady of Vietnam Parish to St. Luke Serbian Orthodox Church to Baha'i Faith Community to Sai Samsthen to Hindu Lotus Temple. Thirty-six of the groups in Montgomery County (15%) are Hispanic.

The same is true in New York City (as demonstrated by the *Amici*) and throughout the country, from east to west and north to south. Recent requests yielded the following information as to the prevalence of usage of school facilities by religious organizations of all stripes, most often for worship services: (a) in Broward County (Ft. Lauderdale),

392 use school facilities, including Jewish, Muslim, Buddhist, and Spiritist groups; (b) in Houston, 30 do, including a Muslim group; (c) in Miami, 70 do, including Jewish and Jehovah's Witnesses groups; (d) in Las Vegas, 55 do, including Mormons and Jehovah's Witnesses; and (e) in Tampa, 74 groups do, including multiple Hindu and Jehovah's Witnesses groups.

That religious organizations frequently use schools and other public facilities is reflected in this Court's own case law. *E.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (religious club to host Bible lessons and singing after school); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (church to show religious-oriented film series in evenings); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990) (religious student group to meet on school premises for prayer and Bible discussion); *Widmar v. Vincent*, 454 U.S. 263 (1981) (religious student group to meet on university campus for worship and religious discussion).

It is also amply demonstrated by congressional findings and enactments. For instance, the legislative history of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") reflects religious organizations' widespread need for access to facilities, such as in the following excerpt: "In a *significant number of communities*, land use regulation makes it difficult or impossible to build, buy or *rent space* for a new house of worship, whether large or small." Cong. Rec. S7777 (daily ed. July 27, 2000) (Melissa Rogers, then-General Counsel, Baptist Jt. Comm. on Pub. Affairs (July 14, 2000)) (emphasis added). RLUIPA was enacted because "[c]hurches and synagogues cannot function without a physical space adequate to their needs and consistent with

their theological requirements. *The right to* build, buy, or *rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes*." 132 Cong. Rec. S7774 (daily ed. July 27, 2000) (Jt. Stmt. of Sens. Hatch and Kennedy on RLUIPA, Ex. 1) (emphasis added). Congress found RLUIPA necessary in part because congregations have difficulty building their own facilities: "Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways." *Id*. at S7777.

Case law from across the country reinforces both that the use of public space by religious organizations has been widespread for many years[2] and that this

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[2] *See generally* C.T. Foster, *Use of Public School Premises for Religious Purposes During Nonschool Time*, 79 A.L.R.2d 1148 (2007) (collecting cases); *see, e.g*., *DeBoer v. Village of Oak Park*, 267 F.3d 558 (7th Cir. 2001) (use of town hall for National Day of Prayer event); *Culbertson v. Oakridge Sch. Dist. No. 76*, 258 F.3d 1061 (9th Cir. 2001) (religious group to hold Bible classes at public school); *Fairfax Covenant Church v. Fairfax Cnty. Sch. Bd*., 17 F.3d 703 (4th Cir. 1994) (church group renting public school for worship and Bible study); *Good News/Good Sports Club v. Sch. Dist.*, 28 F.3d 1501 (8th Cir. 1994) (religious club using school); *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5*, 941 F.2d 45 (1st Cir. 1991) (church to rent space at public school for Christmas dinner with prayer and religious teaching); *Gregoire v. Centennial Sch. Dist*., 907 F.2d 1366 (3d Cir. 1990) (religious group to rent public school auditorium for performance by gospel preacher); *Concerned Women for Am., Inc. v. Lafayette Cnty*, 883 F.2d 32 (5th Cir. 1989) (women's prayer group to use public library for prayer meeting); *Salinas v. Sch. Dist.*, 751 F.2d 288 (8th Cir. 1984) (religious group to

Court should resolve this important issue. Indeed, all the judges below noted that this issue is worthy of this Court's attention. 650 F.3d at 45, 51; *id*. at 64 (Walker, J., dissenting).

In short, both history and case law reflect the widespread use of schools and other public property for religious uses. That practice continues today, as reflected by the current data from school districts from around the country. The issues presented by this case touch citizens across the country. The

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hold educational film series at public school); *Liberty Christian Ctr., Inc. v. Bd. of Educ.*, 8 F. Supp. 2d 176 (N.D.N.Y. 1998) (religious group to hold worship services in public school cafeteria); *Saratoga Bible Training Inst., Inc. v. Schuylerville Cent. Sch. Dist*., 18 F. Supp. 2d 178 (N.D.N.Y. 1998) (religious group to hold Bible lecture in school auditorium); *Full Gospel Tabernacle v. Cmty. Sch. Dist. 27*, 979 F. Supp. 214 (S.D.N.Y. 1997) (church to hold Sunday worship at public school); *Wallace v. Washoe Cnty. Sch. Dist*., 818 F. Supp. 1346 (D. Nev. 1991) (church to hold Sunday worship services at public school); *Country Hills Christian Church v. Unified Sch. Dist. No. 512*, 560 F. Supp. 1207 (D. Kan. 1983) (religious group to hold worship services at public school); *Hunt v. Bd. of Educ.*, 321 F. Supp. 1263 (S.D. W. Va. 1971) (religious student group to hold prayer meetings at public school); *O'Hara v. Sch. Bd.*, 432 So. 2d 1356 (Fla. Dist. Ct. App. 2d Dist. 1983) (church to hold religious services at public school); *Resnick v. E. Brunswick Twp. Bd. of Educ*., 77 N.J. 88, 389 A.2d 944 (1978) (religious group to hold services at public school); *Keegan v. Univ. of Del.*, 349 A.2d 14 (Del. 1975) (religious group to hold services in state university dorms); *Pratt v. Ariz. Bd. of Regents*, 110 Ariz. 466, 520 P.2d 514 (1974) (religious group to hold services in state university stadium); *McKnight v. Bd. of Pub. Educ*., 365 Pa. 422, 76 A.2d 207 (1950) (religious group to hold services at public school); *Greisinger v. Grand Rapids Bd. of Educ*., 88 Ohio App. 364, 100 N.E.2d 294 (1949) (religious group to hold religious themed lectures at public school).

Second Circuit's decision threatens to impose a substantial burden on religious congregations.

II. Because the Board's Policy Violates the Free Speech Clause, Certiorari Should Be Granted

The majority below tried to define worship services simply as an "event," not speech. This attempt fails from the get-go, as all basic types of speech can also be labeled as "events." Certainly, religious services, from the sermon to singing to prayer, are replete with speech. This is not surprising, as religious services are communal and involve communication. The only thing that materially distinguishes religious services from other types of meetings is that the speech is predominantly religious in nature. But it is still speech.

In fact, the Scriptures of the three major religions in this country, Christianity, Judaism, and Islam, all enjoin their adherents to *speak* to each other and to a Divine Being in worship services through prayer, praise, and song:

> *They devoted themselves to the apostles' teaching and to the fellowship, to the breaking of bread and to prayer.* (Acts 2:42 (New Int'l Version).)
>
> * * *
>
> *Raise a shout for the Lord, all the earth; worship the Lord in gladness; come into His presence with shouts of joy. . . . Enter His gates with praise, His courts with acclamation. Praise Him! Bless His name! . . . Sing to the Lord a new song, His praises in the congregation of the faithful.* (Ps. 100:1-2, 4; 149:1b (Jewish Pub. Soc'y 1999).)

* * *

> *Those who are near to the Lord, disdain not to do Him worship: They celebrate His praises, and bow down before Him. . . . But celebrate the praises of thy Lord, and be of those who prostrate themselves in adoration.* (Qur'an, Sura 7:206, 15:98 (http://www.islamiBoard.com/mosque/surai.htm).)

Sermons, prayers, chants, and singing all involve speech. Putting such speech in the context of a "religious worship service" does not make it any less "speech." Indeed, the majority's event/speech distinction for religious worship services runs directly counter to this Court's observation in *Fowler v. Rhode Island*, 345 U.S. 67 (1953), that "[c]hurch services normally entail not only singing, prayer, and other devotionals but preaching as well." *Id.* at 69.

The fact that symbolic actions practiced in services of all the major religions can be described as "events" does not alter the analysis. For instance, in Christianity, baptism and the Eucharist (or "Lord's Supper") could perhaps be defined as the quintessential experiences of the worship service. But even these practices cannot be divorced from speech. An individual is not baptized by taking a walk in the rain, and one does not celebrate the Lord's Supper by snacking on wine and wafers. Similarly, bowing towards Mecca is directly associated with prayer, and Seder rituals are entwined with spoken messages passed down through the centuries. The words spoken are central to the physical practices performed in these various religions. These events are surrounded by speech and given their significance by speech.

But even if sacramental or other acts in a religious service are viewed in isolation, they are still protected "speech" expressions. It would be odd, indeed, if participating in religious sacraments were not given at least as much protection under the Free Speech Clause as is nude dancing or burning the flag. *See Barnes v. Glen Theatre, Inc*., 501 U.S. 560 (1991) (nude dancing is expressive conduct afforded some First Amendment protection); *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning is protected "speech"); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503 (1969) (wearing black arm bands); *Brown v. Louisiana,* 383 U.S. 131 (1966) (silent sit-in at public library room).

III. Because the Decision Reflects Basic Misunderstandings of the Establishment Clause, Certiorari Should Be Granted

The panel majority found that "the Board has a strong basis for concern that permitting use of a public school for the conduct of religious worship services would violate the Establishment Clause." 650 F.3d at 40. This reflects a dangerous misreading of that clause in several respects.

First, far from protecting against an Establishment Clause violation, the undertaking required by the policy itself violates both the Free Speech and the Establishment Clauses. Officials in applying the policy must attempt to distinguish "religious worship services" from other religious activities, such as Bible instruction, that fall short of "services." This is exactly the type of line-drawing that this Court in *Fowler* struck down as discriminatory under the Establishment Clause because different sects define worship services differently. 345 U.S. at 69. Neither does the Free Speech Clause allow distinctions due to

content, but that is exactly the differentiation which the policy requires. *Widmar*, 454 U.S. at 273 (public university could not discriminate against religious group based on the content of its speech); *Healy v. James*, 408 U.S. 169, 187 (1972) (public university president could not deny political group official recognition because he disagreed with the content of its speech).

Second, the real Establishment Clause concern here is entanglement. It is not a permissible judicial exercise to attempt to parse what is "religious services" content and what is not. This Court has already observed that different sects define "worship services" differently from each other, *Fowler*, 345 U.S. at 69-70, and has already found that distinguishing "worship" from other speech is an "impossible" task. *Widmar*, 454 U.S. at 272 n.11; *see also id.* at 271 n.9 (distinction is "judicially unmanageable"). "Merely to draw the distinction [between religious worship and religious speech] . . . would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.* at 269 n.6 (citation omitted). "[I]t is no business of courts to say what is a religious practice or activity for one group is not religion under the protection of the First Amendment." *Fowler*, 345 U.S. at 70. The Board policy creates exactly what *Widmar* prohibits, a "continuing need to monitor group meetings to ensure compliance with the rule." 454 U.S. at 272 n.11.

Third, and fundamentally, in finding an Establishment Clause concern about the perception of endorsement by allowing use of public facilities, 650 F.3d at 42-43, the Second Circuit missed the critical distinction, often emphasized by this Court, between *private* speech and *state-sponsored* speech. For fifty years,

litigants have brought to this Court a steady flow of cases concerning religious speech in the public schools. And, for fifty years, this Court has decided those cases with remarkable consistency. Without a single exception in all that time, this Court's school cases are explained by the "'crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 324 (2000), quoting *Mergens*, 496 U.S. at 250 (plurality opinion). *Accord Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 833-34 (1995) (collecting cases).

In our system, religion is left wholly to private choice. Citizens may freely debate, practice, and implement their religious beliefs, but government may not take sides in that debate. *Lee v. Weisman*, 505 U.S. 577, 589-92 (1992). Government's duty is to protect both religious and secular speech and to remain neutral between the two. In places where government permits expression of a diverse range of views, it has neither the duty nor the authority to exclude religious speakers. This is the rule in public schools. *Good News Club*; *Lamb's Chapel*; *Mergens*. It is the rule in higher education. *Rosenberger*, 515 U.S. at 833-34; *Widmar*, 454 U.S. at 276. It is the rule on other government property. *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753 (1995); *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Fowler*; *Kunz v. New York,* 340 U.S. 290 (1951); *Niemotko v. Maryland*, 340 U.S. 268 (1951). The Supreme Court has never found an exception to this rule in *any* context.

Fourth, no legitimate endorsement concern is present when the Board makes its facilities open, as it does, to all religions and sects on a nondiscriminatory basis. The fact that more churches than mosques and synagogues use school facilities reflects simple demographics, not endorsement. New York City has a large majority of Democratic Party registrants. But if the Board's allowance of political parties to meet on school premises results in the Democratic Party using them more often than any other party, that would not "establish" it as the city's party of choice. No more does allowing religious groups equal access to school facilities "establish" the demographically strongest local group—whether Jewish, Mormon, Christian, or other—as the city favorite. The majority's analysis puts the nondiscrimination principle in conflict with the Establishment Clause, which only regulates the conduct of the *state*. The Religion Clauses should be read in harmony, not in opposition. *See* Carl H. Esbeck, *"Play in the Joints Between the Religion Clauses" and Other Supreme Court Catachreses*, 34 Hofstra L. Rev. 1331, 1333-36 (2006); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2207 (2003); Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 Minn. L. Rev. 1047, 1088 (1996). The idea that providing religious organizations evenhanded access to government facilities raises Establishment Clause concerns was surely put to rest by *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 8 (1993):

> Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide

> benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Accord Rosenberger, 515 U.S. at 839, 842; *Mergens*, 496 U.S. at 252; *Widmar*, 454 U.S. at 269.

Fifth, if there were potential confusion generated by nondiscriminatory rental of school facilities for religious worship services, the solution is not to censor the religious speech and thereby punish those attempting to exercise their constitutional rights. As the Court instructed in *Good News Club*, falsely "perceived" Establishment Clause violations cannot trump actual speech and free exercise violations. 533 U.S. at 119; *id.* at 120-21 (Scalia, J., concurring). If there is perceived confusion, the solution is for the schools to make a simple disclaimer and, if desired, to use it as a teaching tool to instruct students and the public about our Nation's First Amendment freedoms. *See Hedges v. Wauconda Cmty. Sch. Dist.*, 9 F.3d 1295, 1299-1300 (7th Cir. 1993) ("Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether the . . . schools can teach anything at all.")

Sixth, the speech/event distinction of the majority has no validity in the Establishment Clause context, for that clause covers both religious words and practices. As Justice Brennan stated, "The Establishment Clause does not license government to treat religion and those who teach *or practice* it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978)

(Brennan, J., concurring); *see generally* Richard W. Garnett, *Religion, Division and the First Amendment*, 94 Geo. L.J. 1667 (2006).

IV. Because Singling Out Religious Practice Violates the Free Exercise Clause, Certiorari Should Be Granted

All concede that religious worship entails the exercise of religion. Thus, at the most elementary level, the Board's policy violates the proscription that a government "make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. 1. As this Court observed in *Smith*, the "exercise of religion" includes such actions as "assembling with others for a worship service, participating in sacramental use of bread and wine, [and] proselytizing" — the very actions the Board has prohibited here. *Emp't Div., Dep't Human Res. v. Smith*, 494 U.S. 872, 877-88 (1990).

The Board's policy is not one that feigns neutrality on its face, hiding its real purpose to restrict religious exercise. The Board's policy openly and notoriously singles out "religious worship services" for exclusion from the public space that is otherwise available for social and civic functions. It is hard to imagine a starker example of a law prohibiting the free exercise of religion, because that is exactly and expressly what this policy does.

In *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), this Court considered a local ordinance that, on its face, only prohibited cruelty to animals, but was designed to prohibit a small sect's religious practice. This Court looked behind the face of the ordinance to find it an unconstitutional infringement of the free exercise of

religion. *Id.* at 534, 545-46. If the ordinance in *Lukumi* needed redress by this Court, how much more so does this Board policy. It is express, and it targets the full panoply of religious worship services. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue . . . prohibits conduct because it is undertaken for religious reasons." *Id.* at 532. Like in *Lukumi*, the Court must intervene to protect small congregations whose free exercise rights would otherwise be abridged. *See also Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002) (unconstitutional to enforce ordinance banning posting on power poles only against lechis posted by Orthodox Jews; no speech involved); *Fraternal Order of Police Newark Lodge No. 12 v. Newark*, 170 F.3d 359 (3d Cir. 1999) (unconstitutional to deny exemption for religious reasons from regulation banning police from having beards when granted for medical reasons); *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998) (unconstitutional to prohibit special education services only at religious schools).

The open discrimination toward religious worship reflected in the Board's policy is expressly forbidden by the Free Exercise Clause. By adding its imprimatur, the Second Circuit sets a dangerous precedent that threatens to impede religious practice throughout this country, especially among smaller, less affluent congregations.

CONCLUSION

The Second Circuit's decision has the potential for great mischief throughout both that circuit and this country. It allows the government to prohibit the free exercise of religion and to discriminate against religious speech as if it were disfavored, rather than expressly protected, under our Constitution. At a minimum, it requires courts to entangle themselves in distinguishing between "religious worship services" and other religious speech and to discriminate among sects' own definitions of "worship services." This Court should grant the petition.

Respectfully submitted,

KIMBERLEE WOOD COLBY
CENTER FOR LAW & RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY
8001 Braddock Road
Springfield, Va. 22151
(703) 642-1070

FREDERICK W. CLAYBROOK, JR.
Counsel of Record
CROWELL & MORING, LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500
RClaybrook@crowell.com

Counsel for Amici Curiae

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