NO. 11-386

In the Supreme Court of the United States

THE BRONX HOUSEHOLD OF FAITH, et al.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. Respondents Do Not Refute the Existence of a Conflict Between this Case, *Good News Club*, and Three Circuits on the Issue of Excluding Religious Worship Services from a Generally Open Forum. 2

II. This Court Should Grant Certiorari to Correct the Conflict Between this Case and *Widmar*, and to Resolve a Circuit Conflict Over this Court's Forum Doctrine. 4

III. This Court's Review Is Needed to Reverse the Second Circuit's Conclusion that Mere Concern of an Establishment Clause Violation Justifies the Exclusion of Religious Speakers from a Generally Open Forum. 7

IV. This Case Presents a Straightforward Violation of the Free Exercise Clause that the Second Circuit Ignored. 12

CONCLUSION 13

TABLE OF AUTHORITIES

Cases:

Badger Catholic v. Walsh,
620 F.3d 775 (7th Cir. 2010), ...4

Board of Education of Westside Community Schools v. Mergens,
496 U.S. 226 (1990) 7

Capitol Square Review & Advisory Board v. Pinette,
515 U.S. 753 (1995) 7

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 12

Church on the Rock v. City of Albuquerque,
84 F.3d 1273 (10th Cir. 1996) 4

Concerned Women for America v. Lafayette County,
83 F.2d 32 (5th Cir. 1989) 6

Employment Division v. Smith,
494 U.S. 872 (1990) 12

Faith Center Church Evangelistic Ministries v. Glover,
480 F.3d 891 (9th Cir. 2007) 6

Fairfax Covenant Church v. Fairfax County School Board,
17 F.3d 703 (4th Cir. 1994) 4, 6

Good News Club v. Milford Central School,
533 U.S. 98 (2001) 2, 3, 5, 7, 8, 12

Grace Bible Fellowship v. Maine School Administrative District No. 5,
941 F.2d 45 (1st Cir. 1991).....6

Gregoire v. Centennial School District,
907 F.2d 1366 (3d Cir. 1990).....6

Lamb's Chapel v. Center Moriches Union Free School District,
508 U.S. 384 (1993) 5, 7

Rosenberger v. Rector & Visitors of the University of Virginia,
515 U.S. 819 (1995) .....7 ,9

Salazar v. Buono,
130 S.Ct. 1803 (2010) 8

Widmar v. Vincent,
454 U.S. 263 (1981) 3, 6, 7, 10

Zelman v. Simmons-Harris,
536 U.S. 639 (2002).....7

Zobrest v. Catalina Foothills School District,
509 U.S. 1 (1993).....10

Statutes:

New York Education Law §414 5

INTRODUCTION

Rather than defending the Second Circuit's unprecedented departures from settled First Amendment law, Respondents instead rely principally on recounting facts they deplore. They urge that certain churches' isolated conduct and the potential for dismay of a few citizens together serve to show Petitioners' forum use violates the Establishment Clause. Yet the facts they describe about private conduct are not relevant to whether the government has established a religion in its neutral speech forum. For example, simply because certain forum-using churches have in the past advertised their forum activities or invited public participation – as many community groups do, and are allowed to do – the Board is not thereby guilty of a violation of the Establishment Clause. And churches, who constitute less than 2% of forum users, do not "dominate" the forum; moreover, voluntary private decisions to participate in a generally open speech forum are not attributable to the government in any event. Nor is the Board subsidizing religion by allowing churches access to the forum on the same terms offered to all other forum users.

Even if the presence and conduct of church forum users were to create sincere concern of an Establishment Clause violation in the minds of Respondents, that subjective and unfounded worry does not authorize them to exclude such religious speakers from their neutral forum.

While Respondents avoid confronting the issue, the Second Circuit's decision validates a

discriminatory exclusion of religious speakers from an open forum simply because their speech is described as "worship" – a label this Court has twice ruled has no relevance for First Amendment purposes.

The Second Circuit's decision is in direct conflict with *Good News Club*, *Widmar*, and the decisions of several sister circuits, and it further fails to account for the requirements of the Free Exercise Clause, which the policy facially violates. This Court should grant the petition in full.

ARGUMENT

I. Respondents Do Not Refute the Existence of a Conflict Between this Case, *Good News Club*, and Three Circuits on the Issue of Excluding Religious Worship Services from a Generally Open Forum.

Respondents fail to address the question presented, mischaracterize *Good News Club*, do not explain why religious worship and religious speech may be treated differently, and overlook a significant conflict among the circuits.

In holding that the exclusion of "quintessentially" religious speech, such as worship, from a limited public forum constitutes viewpoint discrimination, *Good News Club v. Milford Central School* focused on the component parts of the Bible club's proposed activity, rather than the theological label the club used to describe its activity. 533 U.S. 98, 111-12 (2001); *see id.* at 112 n.4 (noting that "[r]egardless" of theological labels, "what matters is the substance of the Club's activities"). By contrast, Respondents assert that the Second Circuit correctly

examined only the Church's label used generally to describe its speech and concluded that SOP §5.11 excludes only "religious worship services," not "the expression of religious views associated with it." Opp.21. So, as Respondents' argument goes, a potential user of the forum may engage in "[p]rayer, religious instruction, expression of devotion to God, and the singing of hymns," App.13a, but not a "worship service." But banning a "worship service" necessarily bans the speech that constitutes it. The Second Circuit therefore repudiated *Good News Club*'s holding that the government violates the prohibition on viewpoint discrimination when it excludes an otherwise valid use of the forum because the speaker uses a religious mode of communication.

Respondents also fail to justify treating differently religious worship and speech from a religious perspective in a neutral speech forum. Opp.20-24. This Court has twice rejected such a distinction. *See Good News Club*, 533 U.S. at 111 (finding "no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons"); *Widmar v. Vincent*, 454 U.S. 263, 271 n.9 (1981) (noting the distinction between religious speech and religious worship "lacks a foundation in either the Constitution or in our cases, and … is judicially unmanageable"). Yet the Second Circuit embraced that illegitimate partition, and denied religious speakers an equal right to speak when they label their gathering a "worship service."

Finally, Respondents fail to refute that there is a significant circuit conflict between the Second and

Ninth Circuits on one hand, and the Fourth, Seventh, and Tenth Circuits on the other. Opp.24-26. Contrary to Respondents' claim, worship was squarely at issue in the cases before the latter three circuits. *See Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 777 (7th Cir. 2010) ("The University won't pay for three categories of speech: worship, proselytizing, and religious instruction."); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, (10th Cir. 1996) ("City policy prohibited the use of Senior Centers 'for sectarian instruction or as a place for religious worship'"); *Fairfax Covenant Church v. Fairfax Cnty. Sch. Bd.*, 17 F.3d 703, 705 (4th Cir. 1994) (renting school facilities for Sunday worship). These circuits struck down bans on worship, while the Second and Ninth did not.[1]

The Second Circuit's decision upholding Respondents' policy stands in direct conflict with *Good News Club* and the decisions of three other circuits. Certiorari is needed to correct this conflict.

II. This Court Should Grant Certiorari to Correct the Conflict Between this Case and *Widmar*, and to Resolve a Circuit Conflict Over this Court's Forum Doctrine.

This case presents an ideal vehicle to resolve whether the government creates a designated public forum by opening a forum to all speech pertaining to the welfare of the community. Respondents misstate

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[1] Respondents misread *Fairfax Covenant Church*. The Fourth Circuit rejected the school's neutrality and subsidy arguments because churches received only 50 of the 8,500 permits issued by the school, and the school charged rent to defray its costs. 17 F.3d at 708. The same is true here.

the controlling law, which has not rendered a decision on the classification of this forum, and mischaracterize the facts to avoid the Second Circuit's obvious conflict with *Widmar* and four other circuits.

This Court has specifically left open the question of whether N.Y. Educ. Law §414 (which is the basis for SOP §5.11) creates a designated or limited public forum. *See Good News Club*, 533 U.S. at 106 ("Because the parties have agreed that [the school] created a limited public forum … we need not resolve the issue here."); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 391 (1993) (declining to rule on the forum question because the policy was unconstitutional regardless of the forum designation, but noting that the argument that §414(1)(c) creates a designated public forum has "considerable force"). Moreover, regardless of what the Second Circuit has found – and many of Respondents' citations do not support a limited public forum finding – this Court deferred resolution of the forum designation. This case presents an opportunity to squarely address that question.

Because the forum question remains open, Respondents describe their forum as narrow by focusing on *government* speech that occurs within it. Opp.27. But that is not the forum. The forum is the Board opening its facilities to private users for "social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community." App.368a. And tens of thousands of speakers have taken advantage of it. Pet.7-10.

The Second Circuit's finding that the Board created a limited public forum is contrary to *Widmar*. Both this case and *Widmar* involve generally open speech forums that the public could use for private speech, except for religious worship. 454 U.S. at 267-68. The fact that *Widmar* involved a university, rather than a school as in this case, makes no constitutional difference. In fact, *Widmar* was more limited in a sense because it was open only to student groups. Here, the forum is open to all community groups.

Three decades after *Widmar*, the circuits are deeply divided over this Court's forum analysis. On strikingly similar facts, the Second and Ninth Circuits have agreed that a generally open forum is a limited public forum, App.11a; *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 908-09 (9th Cir. 2007), but the First, Third, Fourth, and Fifth Circuits have ruled that such a forum is a designated public forum, *Grace Bible Fellowship v. Maine Sch. Admin. Dist.*, 941 F.2d 45, 48 (1st Cir. 1991) (opening facilities broadly to community uses created designated public forum); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1378 (3d Cir. 1990) (permitting civic groups, cultural activities, adult education classes, and labor unions created designated public forum); *Fairfax Covenant Church*, 17 F.3d at 704 (permitting meetings by cultural, civic, and educational groups created designated public forum); *Concerned Women for Am. v. Lafayette Cnty.*, 883 F.2d 32, 33-34 (5th Cir. 1989) (permitting meetings of a "civic, cultural or educational character" created public forum).

This Court should grant review and clarify that when the government creates a generally open forum for private speech it creates a designated public forum that is subject to strict scrutiny.

III. This Court's Review Is Needed to Reverse the Second Circuit's Conclusion that Mere Concern of an Establishment Clause Violation Justifies the Exclusion of Religious Speakers from a Generally Open Forum.

Respondents offer no persuasive reason to deny review of the Petition on the Establishment Clause question. Contrary to an unbroken line of this Court's precedent, the Second Circuit held that the government's mere *concern* about an unsubstantiated Establishment Clause violation justifies excluding religious speakers from a neutral speech forum. This Court has rejected that notion no less than seven times before. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (2002); *Good News Club*, 533 U.S. at 119; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 762-770 (1995); *Lamb's Chapel*, 508 U.S. at 395; *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 253 (1990); *Widmar*, 454 U.S. at 276.

Respondents are not even willing to fully embrace the Second Circuit's radical innovation. They argue that they are concerned about public perception of endorsement, subsidizing religious speech, and entanglement with religion. Opp.33-38. But this Court has repeatedly rejected those

arguments in the context of neutral speech forums. And their endorsement arguments rely entirely on their imputation to "observers" of misimpressions that Respondents acknowledge to be false. *Cf. Salazar v. Buono*, 130 S.Ct. 1803, 1820 (2010) ("the objective observer … knows all of the pertinent facts and circumstances").

This case does not present any danger of public perception of endorsement, especially in light of Respondents' fifteen-year crusade to exclude churches from their forum open to a vast array of other groups. In fact, Respondents completely miss the constitutional point by complaining about private groups placing temporary signs outside the schools to announce their meetings, meeting weekly in the buildings, or reserving the main auditorium in a building. Respondents' policies permit such uses.[2] As the District Court correctly found, "any appearance of endorsement can be minimized with neutral time, place, and manner restrictions, for example, regulating use of banners or signs outside of the school, requiring Board permission for permanent installation of equipment or alteration of buildings, or enforcing disclaimer requirements." App.207a.

Nor is there any merit to Respondents' concern that young children will perceive endorsement. *See Good News Club*, 533 U.S. at 119 ("We decline to employ Establishment Clause jurisprudence using a

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[2] Respondents complain that church websites describe Board facilities as the locations for their meetings. But all users may list school locations as their meeting places. And Respondents examples of "recruitment" involved churches talking to students off campus. A701 ¶12, 723-24.

modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive.").

In addition, Respondents erroneously assert that churches dominate the forum and the forum availability is "biased" towards Christian churches. Opp.33, 37. In 2004-2005, only 23 churches used space in the Board's 1,197 facilities. A34. Even if each of those churches met in a separate school, 98% of the facilities had no church user. That is hardly forum domination.[3] Nor is there any "disparate impact" or "bias," Opp.37, in favor of Christian churches.[4] In 2004-2005, Respondents issued approximately 2,717 Friday permits, 7,450 Saturday permits, and 2,168 Sunday permits. A58-234. Of these, 13 religious groups used the facilities on Friday, 44 on Saturday, and 151 on Sunday. *Id.*; *cf.* App.70a-71a. And on each of these days, the religious groups included Buddhists, Christians,

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[3] Respondents claim that "160 congregations" received "756" permits to use the Board's facilities in 2010-2011. Opp.33 n.5. Those statistics are nowhere in the record, and thus not subject to corroboration or contextual examination. Respondents' claim woefully lacks context, as many of these uses could be churches or synagogues using the facilities for church basketball leagues or after-school study programs for students. A1511, 1521, 1876 ¶38. Moreover, when one considers that there are nearly 10,000 uses of Respondents' facilities annually, 756 does not suggest any "domination." A1864 ¶c.

[4] Respondents' admission that the bias is "unintended" shows that there is no Establishment Clause problem because the government is not preferring religion. *Rosenberger*, 515 U.S. at 845-46.

Jews, Jehovah's Witnesses, Hindus, and Muslims.[5] The Board has not favored one religion over another, or religion in general.

Nor are Respondents "subsidizing" the Church by allowing it to meet in their facilities at below market rate for an extended period. All users of the forum pay the same rates for their permits based on a uniform schedule that applies to all private organization. A49-50. Any "subsidy" that the Board offers applies to everyone. And if the Board thinks this rate too low, it has the freedom to increase it. But it does not have the freedom to discriminate against religious speakers based on viewpoint. Yet under the Board's theory of the Establishment Clause, a fire department should let a church building burn to the ground for fear of "subsidizing" it with city water. That is obviously "absurd." *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *see also Widmar*, 454 U.S. at 274-75 ("If the Establishment Clause barred the extension of general benefits to religious groups, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.") (internal quotation marks omitted).

Finally, Respondents do not entangle themselves with religion by enforcing the SOP's requirement that users be "open to the public." Respondents

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[5] Respondents wrongly assert that the forum is biased because the facilities are often unavailable during the week, or on Fridays and Saturdays. But that unavailability means that *no* group, religious or otherwise, can access the forum during that time. Bias would ensue if the Board permitted Christians to use the facilities on Fridays, but not Muslims. That is not this case.

never denied the Church's permit on that basis, and the record shows that the Church is open to the public in the same way as other users. A417; App.225a. The commonsense understanding of being "open to the public" means that anyone can attend the event, not that any attendee can commandeer the microphone and take over the meeting, or force oneself into membership of the group.[6] In fact, the Board has the entanglement problem backwards: to exclude religious worship services, it must scrutinize each program to ensure it does not contain the forbidden expression.

All told, Respondents fail to articulate any persuasive reason why this Court should not grant review to settle that mere fear of an Establishment Clause violation, rather than an actual violation, does not permit the government to exclude "religious worship services" from a generally open forum for private speech. Indeed, the very form of Respondents' arguments concedes this point: they contend their policy is justified because the Church's forum use *does violate* the Establishment Clause – not because the Board fears a violation that may not in fact be actual.

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[6] Many users of the Board's facilities require membership. For example, the Boy Scouts and Legionnaire Grey Cadets have specific membership requirements that youth must meet to join and participate, labor unions require members to pay dues and meet other requirements, and the LSAT preparatory classes require payment of a fee before one may participate.

IV. This Case Presents a Straightforward Violation of the Free Exercise Clause that the Second Circuit Ignored.

If the Free Exercise Clause means anything, it means that "a law targeting religious beliefs as such is never permissible," and that when the "object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). A law lacks neutrality "if it *refers to a religious practice* without a secular meaning discernable from the language or context." *Id.* (emphasis added).

Respondents erroneously assert that SOP §5.11 "does not bar any particular religious practice." Opp.40. But the actual language of §5.11 is not neutral because it specifically bans "religious worship services" from the Board's facilities, and a worship service is clearly a religious practice. *See Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990) ("'exercise of religion' often involves not only belief and profession but the performance of … physical acts: assembling with others for a worship service").

Respondents offer no compelling interest that justifies excluding religious worship services from their forum. They simply refer to their Establishment Clause *concerns*, but those concerns are factually meritless and legally irrelevant apart from an *actual* violation of the Establishment Clause. Respondents are not establishing any state church – they are operating a neutral forum, in which private entities engage in private speech. *See Good News Club*, 533 U.S. at 114.

The Second Circuit violated this Court's precedent in upholding the Board's policy under the Free Exercise Clause. This Court should grant review to correct this rank discrimination.

CONCLUSION

This Court should grant the petition in full.

Respectfully submitted,

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