NO. _____

# 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*

## PETITION FOR A WRIT OF CERTIORARI


JORDAN W. LORENCE
*Counsel of Record*
GARY S. MCCALEB
JOSEPH P. INFRANCO
JEFFREY A. SHAFER
ALLIANCE DEFENSE FUND
801 G Street NW, Suite 509
Washington, DC 20001
(202) 393-8690
jlorence@telladf.org

DAVID A. CORTMAN
ALLIANCE DEFENSE FUND
1000 Hurricane Shoals Rd.
Suite D-600
Lawrenceville, GA 30043
(770) 339-0774

DAVID J. HACKER
HEATHER GEBELIN HACKER
ALLIANCE DEFENSE FUND
101 Parkshore Drive
Suite 100
Folsom, CA 95630
(916) 932-2850

*Counsel for Petitioners*

## QUESTIONS PRESENTED

The New York City Department of Education allows community groups to meet in public schools during non-school hours for any expression "pertaining to the welfare of the community," yet excludes "religious worship services." A sharply divided panel of the Second Circuit affirmed the application of the exclusion to the Bronx Household of Faith, notwithstanding this Court's decision in *Good News Club v. Milford Central School,* which found it "quite clear" that application of a previous version of the same policy to prohibit religious worship amounted to "viewpoint discrimination."

The following questions warrant review:

1. Whether the government engages in viewpoint discrimination when it excludes expression that is in all other respects permitted in the forum because it is labeled a "religious worship service."

2. Whether the government creates a designated public forum by opening its facilities broadly to any expression "pertaining to the welfare of the community," so that it must justify the content-based exclusion of religious expression by a compelling state interest.

3. Whether government *concern* about violating the Establishment Clause, and not an *actual* violation of that Clause, justifies the exclusion of private religious expression from a generally open forum.

4. Whether the government policy expressly excluding "religious worship services" from this forum violates the Free Exercise Clause.

## PARTIES TO THE PROCEEDING

Petitioners are the Bronx Household of Faith and its two pastors, Robert Hall and Jack Roberts.

Respondents are the Board of Education of the City of New York and Community School District No. 10. During the litigation below, the Board of Education of the City of New York was renamed the New York City Department of Education.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Bronx Household of Faith is a private, nonprofit New York corporation, exempt from taxation under 26 U.S.C. §501(c)(3). It does not have parent companies and is not publicly held.

Petitioners Robert Hall and Jack Roberts are individual persons.

## TABLE OF CONTENTS

## APPENDIX TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:**

***Statutes*:**

## INTRODUCTION

The Second Circuit's decision sets forth an unprecedented dichotomy of First Amendment law – the only difference between an allowable expressive use and a forbidden expressive use in this case is a theological one: does the expression constitute a "worship service"? This is not a constitutional criterion for excluding speech. Private speakers may gather for a meeting that contains singing, prayer, preaching and ceremony, but if the private group labels its meeting a "religious worship service," it is suddenly forbidden. The ruling below is but the latest in a line of Second Circuit decisions (the preceding three having been reversed by this Court) refusing to give religious expression the same protection as other speech under the First Amendment.

For the last nine years, the District Court's injunction in this case, which was based on this Court's decision in *Good News Club*, has allowed religious groups to meet in New York City public schools on the same terms and conditions as other community groups. After the Board of Education changed the wording of its policy from excluding "religious services" to excluding "religious worship services," however, the panel majority allowed the City of New York to exclude the Bronx Household of Faith from what is an expansively open public forum: available for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community."

In view of the accumulated force of this Court's decisions in *Widmar*, *Mergens*, *Lamb's Chapel*,

*Rosenberger*, *Pinette*, *Good News Club*,[1] and others, it should be clear that private religious speakers should not be excluded from a neutrally available speech forum. The panel majority evaded the foregoing line of this Court's cases, and puzzlingly found that the Board's "worship service" prohibition merely forbids an "event," not the speech that occurs during the event.

The panel further offered the startling innovation that the government may censor religious speech from a generally available forum when it claims a substantial *worry* about Establishment Clause compliance, even if the Establishment Clause does not in fact require the exclusion. The panel majority wrote that "the Board 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. But in *Good News Club*, this Court held "that the school has no valid Establishment Clause interest" in preventing a private Christian club from engaging in worship. 533 U.S. at 113.

As a result, the Church now faces expulsion from the forum it has used for nine years on equal terms with other community groups.

---

[1] *Widmar v. Vincent*, 454 U.S. 263 (1981); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Capitol Square Review & Adv. Bd. v. Pinette*, 515 U.S. 753 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

## DECISIONS BELOW

The first opinion of the United States District Court for the Southern District of New York, granting Petitioners' motion for preliminary injunction, is reported at 226 F. Supp. 2d 401 and reprinted in App.276a-336a. The first opinion of the United States Court of Appeals for the Second Circuit, affirming the preliminary injunction, is reported at 331 F.3d 342 and reprinted in App.216a-275a.

The second opinion of the District Court, granting Petitioners' motion for summary judgment, is reported in 400 F. Supp. 2d 581 and reprinted at App.176a-215a. The second opinion of the Court of Appeals, vacating the judgment of the District Court, is reported at 492 F.3d 89 and reprinted in App.78a-175a.

The third opinion of the District Court, granting Petitioners' motion for summary judgment, is unreported but is reprinted in App.76a-77a. The third opinion of the Court of Appeals, vacating the judgment of the District Court, is reported at -- F.3d ---, 2011 WL 2150974 and reprinted in App.1a-75a.

## STATEMENT OF JURISDICTION

The Court of Appeals issued an opinion on June 2, 2011, and denied a timely petition for rehearing en banc on July 27, 2011. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

## PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The text of the First Amendment to the United States Constitution is set forth in App.426a. New York Education Law §414 (McKinney 2011), the statutory basis invoked for the government policy under review, is reprinted in App.420a-425a.

Respondents' Standard Operating Procedure §5.11 is the policy under review and is reprinted in App.371a.

## STATEMENT OF THE CASE

For fifteen years, through two lawsuits, Bronx Household of Faith ("Church") has fought for equal access to a forum that the New York City Board of Education (now Department of Education) ("Board") has opened generally to any expression "pertaining to the welfare of the community." For fifteen years, the Board has attempted to exclude the Church. While the procedural history is lengthy, the material facts are simple and straightforward.

## I. Factual Background

### A. The Board's Open Forum

The Board owns and controls 1,197 individual school facilities. Ct. of Appeals App. ("A") 16-17 ¶3. Pursuant to N.Y. Educ. Law §414(1)(c), the Board created a policy entitled, "Extended Use of School Buildings," in the Board's Standard Operating Procedures Manual ("SOP"). Ct. of Appeals Supplemental App. ("SA") 91 ¶6. SOP §5.6.2 authorizes the use of school facilities for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community." App.368a. The "Board opened its schools to the public for purposes of 'maximiz[ing] educational, cultural, artistic and recreational opportunities for children and parents.'" App.52a.

The policy permits a broad range of community uses of its facilities after school hours. A354-371; *see also* App.294a-295a, 312a-313a, 330a-331a. In one school year alone, the Board approved nearly 10,000 community uses for its facilities. A925-1849; A1864 ¶c. The policy expressly permits the following users: tenant groups, taxpayer associations, drama clubs, merchant associations, senior citizen groups, tax-exempt organizations, youth groups, Scouts, Little League, teen clubs, labor unions, professional societies, and private social service agencies, such as the local "Y"s and settlement houses. SA113; *see also* App.379a-381a.

The Board has placed few limitations on expression in the forum. Those limitations are (1) a prohibition on "commercial purposes," except for

some flea markets,[2] App.371a §5.10; and (2) some limitations on forums for political candidates, App.368a §5.6.4.

The Board allows private groups meeting in the schools to engage in, *inter alia*, secular speech parallel to the components of worship services, including:

- teaching of morals and character development;
- eating meals;
- singing songs; and
- conducting ceremonies and rituals.

SA10 ¶¶5-6, SA19 ¶6, SA21 ¶7, SA44; A1866-68 ¶¶14, 16; App.226a.

But the Board has consistently sought to exclude religious worship from its broad forum. When the litigation began in 2001, Board policy SOP §5.11 stated:

> No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a

[2] Despite this claimed limitation, the Board routinely approves many commercial uses, such as those by Blockbuster, *Law and Order*, Spelling TV, Show Bliss Entertainment, J & R Pizza, Nickelodeon, Morgan Stanley, Amalgamated Life, Bank of New York, and Sex & the City Inc. A1505-1536.

> religious viewpoint or for distributing such material is permissible.

SA109 §5.11; App.6a n.2, 295a.

In July 2007, the Board revised SOP §5.11. A3594-95 ¶¶3-9. The policy now states:

> 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.

App.9a n.4, 371a.

### B. Groups that Meet in the Board's School Facilities

Thousands of different groups and individuals have met in the Board's school facilities for meetings, lectures, concerts, and other expressive activities. In 2000-2001, for instance, the following representatively diverse activities occurred:

- A Bangladeshi cultural function;
- Adult and continuing education;
- College Gardens general shareholder meeting;
- Donegal Ladies and Men Football Club meeting;

- Movie filming by Empire Films;
- Falkons tutorials and mentoring classes;
- Giodano Memorial Fund scholarship committee meeting;
- Hebrew Institute of Riverdale youth basketball program;
- University Heights holiday show and Black History Month observation.

App.226a; A914-15; SA74-75, 83-87. During the 2003-2004 school year, the Board issued 9,804 community organization permits. A925-1849; A1864 ¶c. Many of the permits issued were for multiple uses (i.e., more frequent than one day). A1865 ¶¶11, 13.

In particular, many of the permitted uses entailed, in secular terms, identical expressive uses to those subsumed in the stereotypical "worship service," namely, rituals, recitations, moral instruction, songs, collections, meals, etc. App.16a, 58a-59a.

At least one Girl Scout troop meets regularly in Public School ("P.S.") 15, the same building in which the Church meets. SA32; A1868 ¶17. The Girl Scouts teach character qualities to the girls, such as self esteem, honesty, and how to get along with one another. SA31-32; A1868 ¶18. Girl Scout meetings include singing songs, eating refreshments, paying dues, and rituals of graduation and rededication. SA51-53, 59; A1870-71 ¶¶23-25. Their meetings also include ceremonies of reciting the Pledge of Allegiance, the Girl Scout Promise (which refers to

serving God), and the Girl Scout Law. SA37-38, 40; A1869-70 ¶¶20-22, A1869-70 ¶22.

Boy Scout troops and Cub Scout packs also meet regularly in the Board's schools. SA14 ¶4; A1871 ¶27. The mission of the Boy Scouts is "to prepare young people to make ethical choices over their lifetimes by instilling in them the values of the Scout Oath and the Scout Law." SA13 ¶3; A1872 ¶28. Their meetings include a flag ceremony, recitation of the Pledge of Allegiance, and the Scout Oath or Law (which pledges one's duty to God). SA14 ¶¶3, 6; A1872-73 ¶¶29-30. Their meetings also include a motivational teaching message based on Scouting's values, songs, and induction and promotion ceremonies. SA15 ¶¶8-9; A1873-74 ¶¶31, 34.

The Legionnaire Grey Cadets have met in Middle School 206B in the Bronx. SA9 ¶1. The weekly program is set in a military style environment with uniforms, ranks, formation, and marching. SA9-10 ¶¶3-4, 6. The program teaches character, honesty, integrity, teamwork, American history, and reading. *Id.* The students sing cadences while they march. *Id.* The leader collects food money from the students, who eat a snack on Fridays and a meal on Saturdays. *Id.* ¶5; A1874-75 ¶35. The Legionnaire program includes ceremonies including singing of the National Anthem and honoring the flag and members' personal achievements. SA10 ¶¶4, 6; A1875 ¶¶36-37.

The Mosholu Community Center conducts an after school program every day at P.S. 51 in the Bronx. SA20 ¶1. The program uses counselors to help students with their homework and instruct

them how to interact with each other; includes a ceremony to give awards to children who demonstrate achievement during the week; and uses specific programs to teach the character qualities of generosity, gratefulness, and tolerance of other cultures and traditions. SA20-21 ¶¶4, 6-8; A1876 ¶38.

### C. The Church's Requested Use of the Board's Facilities

The Bronx Household of Faith is an evangelical Christian church that was formed in 1971 and has been meeting in the Bronx for 40 years. SA2 ¶2. Pursuant to the District Court's preliminary and permanent injunctions, the Church has paid a fee to use the Board's facilities since August 2002 similar to other community organizations. App.379a-381a; A24-25 ¶33, 454, 463. The parties agree that the Church's intended use of P.S. 15 for its Sunday meetings falls within the purposes of the forum. App.52a.

The Church meets weekly on Sunday mornings and its meetings are open to the public. A417; App.68a, 225a. Approximately 85-100 people attend on any given Sunday morning. A409. The Sunday meetings are an important part of the Bronx Household of Faith spiritual community. They provide an indispensable integration point and meeting place for the church members and others from the neighborhood to provide for each others' needs and to encourage one another. SA7-8 ¶¶6-9. Church members have provided food, clothing, toys, and money to those in need. *Id.*, A424. They have

provided emotional and social support to help people escape welfare dependence, to lead productive lives, to escape addiction, and to leave a life of crime. *Id.*

The Church's Sunday meetings consist of singing songs and hymns of praise, teaching and preaching from the Bible, sharing testimonies, fellowship, and celebrating the Lord's Supper (communion). SA7-8 ¶¶3-4. Those attending are taught many lessons from the Bible, such as how to live, to love their neighbors as themselves, to defend the weak, to help the poor, and to share their needs and problems. SA7. The pastors summarize these activities at the Sunday morning meeting by the label "worship service." A420; App.223a.

The Church desires to meet in a public school to offer its members an enclosed meeting space large enough to accommodate all who attend its services. A427-28. While the Church hopes to meet in its own facility when the construction is completed, as of now the Board's facilities are its only viable option in the local community. Construction of the new church building is not yet completed due to lack of funds and bureaucratic delays. A427, 429, 432, 457.

## II. Procedural Background

In June 2001, this Court decided *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), which held that the exclusion of religious expression (including worship, prayer, and religious advocacy) from a speech forum violated the First Amendment's prohibition against viewpoint discrimination. The decision identified the Second Circuit's earlier decision on the Board's forum policy in previous

litigation between these same parties as being on the wrong side of the implicated circuit conflict and thus implicitly overruled it. *Id*. at 105-06 (citing *Bronx Houshold of Faith v. Cmty. Sch. Dist. No. 10* ("*Bronx I*"), 127 F.3d 207 (2d Cir. 1997). The *Good News Club* decision prompted the Church to apply again for access to Respondents' speech forum. Respondents denied the request and the Church filed a new lawsuit requesting access to the schools.

### A. *Bronx I*

The Church's litigation with the Board over equal access began more than fifteen years ago. In 1994, the Church sought permission from Community School District No. 10 ("School District") to use one of its school facilities for its Sunday worship services. The School District, pursuant to N.Y. Educ. Law §414, opened its facilities to "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community." The School District denied the Church's request under the version of its facilities use policy that prohibited "religious services or religious instruction." The Church sued, but the District Court held that the policy's provision were "reasonable regulations of expression related to the legitimate government concern of preserving and prioritizing access to the middle school primarily for educational purposes and, secondarily, for nonexclusive public and community activities." *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 1996 WL 700915, *6 (S.D.N.Y. Dec. 5, 1996). The Court of Appeals affirmed and held that the policy was reasonable and viewpoint neutral. *Bronx I*, 127

F.3d 207, *overruled by Good News Club*, 533 U.S. 98. This Court denied certiorari. *Bronx I*, 523 U.S. 1074 (1998).

### B. *Bronx II*

Three years later, when the *Good News Club* decision expressly identified the Second Circuit's *Bronx I* decision as being on the wrong side of the implicated circuit conflict and overruled it, *Good News Club*, 533 U.S. at 105-06, the Church reapplied for permission to use Respondents' facilities. App.293a-294a. The Board again rejected the request based on its policy. Petitioners filed a new lawsuit in the District Court on September 24, 2001. A3. They alleged that Respondents' policy of excluding "religious services or religious instruction" from their broadly open forum violated *Good News Club*. App.298a. Petitioners moved for a preliminary injunction, which the District Court granted on June 26, 2002. App.336a.

The Court of Appeals affirmed on June 6, 2003, acknowledging that the activities described in *Good News Club* were materially indistinguishable from the Church's activities in the present litigation. App.239a.

### C. *Bronx III*

After the preliminary injunction was issued, the Board revised SOP §5.11 to forbid "religious worship services" instead of "religious services." The parties then filed cross-motions for summary judgment, addressing the terms of the revised SOP §5.11.

On November 16, 2005, the District Court ruled in favor of Petitioners, issued a permanent injunction against enforcement of the revised SOP §5.11, and held that it violated the First Amendment because it discriminated against speech based on viewpoint, excessively entangled the government with religion, and is otherwise not justified by the Establishment Clause. App.192a-210a.

Respondents appealed. The Court of Appeals issued a *per curiam* opinion vacating the permanent injunction and remanding for further proceedings, but without a controlling rationale for so doing. App.80a-83a. Judge Leval believed the merits of the revised policy were not ripe for adjudication, as it was unclear that the Board had adopted the new policy. App.155a. Judge Calabresi thought the case ripe and voted to reverse because he thought the school's exclusionary policy was constitutional. App.117a. Judge Walker dissented, opining that the case was ripe and that §5.11 was unconstitutionally viewpoint-discriminatory. App.156a-157a.

### D. *Bronx IV*

After remand, the Board officially adopted the new policy, and the Church reapplied to meet in P.S. 15. App.10a-11a. The Board denied the request. *Id.* Both parties again moved for summary judgment. *Id.* The District Court issued a permanent injunction against SOP §5.11 on November 1, 2007. App.76a-77a. Respondents appealed.

In a 2-1 decision, the Second Circuit reversed the judgment of the District Court and vacated the permanent injunction. App.2a. Judges Leval and

Calabresi held that Respondents' exclusion of "religious worship services" was not viewpoint discrimination, but was a permissible content-based exclusion from a limited public forum. App.20a.

To distinguish this Court's decision in *Good News Club*, the panel majority professed to find a meaningful distinction between "religious worship" and a "religious worship service," writing:

> Prayer, religious instruction, expression of devotion to God, and the singing of hymns, whether done by a person or a group, do not constitute the conduct of worship services. Those activities are not excluded .... The branch of the rule excluding religious worship services, as we understand it, is designed by the Board to permit use of the school facilities for all of the types of activities considered by the Supreme Court in [*Good News Club*, *Lamb's Chapel* and *Rosenberger*]. The "religious worship services" clause does not purport to prohibit use of the facility by a person or group of persons for "worship." What is prohibited by this clause is solely the conduct of a particular type of event: a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion.

App.13a-14a.

Judge Walker dissented. App.49a-75a. The majority, he stated, "turns its back on the Supreme

Court's holding in *Good News Club,*" App.57a, the terms of which, along with several other cases, make clear that the Board's exclusion of worship from its forum is unconstitutional viewpoint discrimination, App.53a-57a, 61a-63a. He also denied the reasonableness of the Board's Establishment Clause concerns in view of the series of materially indistinguishable cases clearly addressing the matter in dispute, App.63a-73a, and thus, he said, the battle the majority fights "has already been lost," App.65a.

In response, the panel majority offered that "the Supreme Court has neither ruled on the question [of the constitutionality of a policy like the Board's], nor even given any reliable indication of how it would rule." App.44a. The majority lamented that the "Supreme Court's precedents provide no secure guidelines as to how [this case] should be decided. The main lesson that can be derived from them is that they do not supply an answer to the case before us." App.32a.

## REASONS FOR GRANTING THE WRIT

This Court's review is needed to resolve an issue of exceptional and recurring importance, namely whether the government may exclude religious worship services from a broadly open speech forum.[3] After litigation stretching over fifteen years and four separate decisions from the Court of Appeals, the

[3] While the lower court did not find it necessary to address the constitutionality of the "house of worship" prohibition, it is Petitioners' position that it suffers from the same constitutional defects as the ban on "religious worship services."

Second Circuit has ruled that the policy's exclusion of worship services is viewpoint neutral and a reasonable content-based exclusion from a limited public forum. That ruling not only inequitably denies religious speakers access to a speech forum widely open to speech pertaining to the welfare of the community, it conflicts with the decisions of this Court and other circuits in multiple ways.

First, the Second Circuit's decision conflicts directly with this Court's decision in *Good News Club*, which held that the prior version of the same Board policy excluding "quintessentially religious" expression from a limited public forum was unconstitutional viewpoint discrimination. Despite the direct application of *Good News Club* to this case, the panel majority declared that "the Supreme Court has neither ruled on the question [of the constitutionality of a policy like the Board's], nor even given any reliable indication of how it would rule." App.44a. This Court should grant review to provide the apparently necessary clarity. Furthermore, in rejecting *Good News Club*, the Second Circuit aligns itself with the Ninth Circuit, intensifying a circuit conflict with the Fourth, Seventh, and Tenth Circuits over the exclusion of religious worship from an expressive forum.

Second, this court should grant review to answer a question expressly left open in *Good News Club*: whether the Board's policy creates a designated public forum, triggering strict scrutiny of its content-based exclusion of religious worship. *See* 533 U.S. at 106 ("we need not resolve the issue here"). The Second Circuit's ruling on this issue conflicts with this Court's decision in *Widmar*, 454 U.S. 263,

holding that the exclusion of religious worship from a generally open speech forum is an unconstitutional content-based regulation of speech.

Third, the Second Circuit ruled that the Board's mere *concern* about violating the Establishment Clause by permitting the Church to use its facilities – not an *actual* violation of the Establishment Clause – justifies the Board's exclusionary policy. That ruling conflicts with a long line of decisions from this Court holding that the government does not violate the Establishment Clause by allowing religious speakers equal access to a neutrally available speech forum. These cases also refute the panel's novel proposal that subjective worries about a nonexistent legal violation justify censoring speakers who hold (and wish to exercise) real First Amendment rights.

Finally, the Board's policy explicitly cites religion as the reason they are excluding speakers from the forum, which violates the Free Exercise Clause. The Second Circuit completely ignored this important First Amendment restraint that limits the Board's authority to exclude speakers from the forum.

In view of these departures from this Court's precedents and from the decisions of other circuits, this Court should grant review and call an end to the determined attempts to classify religious speech in a way that leaves it uniquely devoid of the First Amendment protections available to speech of other viewpoints.

## I. The Second Circuit's Decision Conflicts with this Court's Decision in *Good News Club* and Magnifies a Conflict Among the Circuits Concerning the Exclusion of Religious Worship from a Generally Open Forum.

This Court held in *Good News Club,* 533 U.S. at 109-10, that the exclusion of religious worship from what was assumed to be a limited public forum was unconstitutional viewpoint discrimination – a ruling required by this Court's "dispositive" decisions in *Lamb's Chapel*, 508 U.S. 384, and *Rosenberger*, 515 U.S. 819. In reaching that conclusion, this Court not only reversed the Second Circuit's decision in *Good News Club,* but also mentioned and implicitly overruled the Second Circuit's decision against this Church in *Bronx I*, which, like the decision at bar, found that the government may exclude religious worship from a limited public forum open to a broad range of speakers. *Good News Club*, 533 U.S. at 105-06.

Despite this, the Second Circuit's most recent decision again rejects this Court's case law to hold that a bar on religious worship is a permissible content-based exclusion from a forum broadly open to private expression. That holding joins the Ninth Circuit's side of a circuit conflict with the Fourth, Seventh, and Tenth Circuits.

### A. The Second Circuit's Decision Conflicts with this Court's Decision in *Good News Club* that the Exclusion of Religious Worship from a Generally Open Speech Forum is Viewpoint Discrimination.

The Second Circuit's conclusion that "religious worship services" may be excluded from a generally open speech forum "turns its back on the Supreme Court's holding in *Good News Club*," App.57a, and is the latest in a line of Second Circuit decisions upholding exclusions of religious expression from public forums – a line of decisions that this Court has uniformly reversed. *See Lamb's Chapel*, 959 F.2d 381 (2d Cir. 1992), *rev'd,* 508 U.S. 384 (1993); *Bronx I*, 127 F.3d 207, *overruled by Good News Club*, 533 U.S. 98; *Good News Club*, 202 F.3d 502 (2d Cir. 2000), *rev'd,* 533 U.S. 98.

This Court's decision in *Good News Club* is important for two reasons: First, it reaffirmed that there is no difference between "quintessentially religious" speech, including worship, and other forms of religious expression; second, it reaffirmed that the exclusion of religious expression, including worship, from the very same forum at issue in this case constitutes impermissible viewpoint discrimination.

*Good News Club* addressed essentially the same policy as the one at issue here, one that opened school facilities to "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community." 533 U.S. at 103. The policy was promulgated under N.Y. Educ. Law §414, the same law authorizing the

Board's generally open forum in this case. The school prohibited the use of its facilities for "religious purposes." *Id.* A Bible club for children requested permission to meet in the school district's facilities to sing songs, hear a Bible lesson, pray, and memorize scripture. The school denied the request because it determined such activities had "religious purposes." *Id.*

In *Good News Club*, the Second Circuit upheld the school's exclusion of religious expression by relying on its previous decision in *Bronx I*. *See Good News Club*, 202 F.3d at 509-10 (citing *Bronx I*, 127 F.3d at 214). The court held that the "characterization of the Club's activities as religious in nature warranted treating the Club's activities as different in kind from other activities permitted by the school." *Id.*

This Court granted certiorari based on the circuit conflict created, in part, by the Second Circuit's decision involving this Church in *Bronx I*. *See Good News Club*, 533 U.S. at 105-06 ("There is a conflict among the Courts of Appeals on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech. Compare ... [*Bronx I*], 127 F.3d 207 (2d Cir. 1997) (concluding that a ban on religious services and instruction in the limited public forum was constitutional) ... We granted certiorari to resolve this conflict.").

This Court rejected the Second Circuit's reasoning in *Bronx I* and held that the exclusion of the Bible club's activities constituted impermissible viewpoint discrimination in a speech forum. *Id.* at

110. This Court "disagree[d] that something that is 'quintessentially religious' or 'decidedly religious in nature' cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint." *Id.* at 111. In fact, there was "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." *Id.* The Court emphasized that the labels used to describe speech are unimportant; what matters is the "substance" of the speech activity. *Id.* at 112 n.4.

*Good News Club* follows *Widmar*, which long ago rejected a distinction between religious worship and religious expression, stating, "[w]e think that the distinction advanced by the dissent [between religious speech and religious worship] lacks a foundation in either the Constitution or in our cases, and that it is judicially unmanageable." 454 U.S. at 271 n.9. This Court even devoted an extensive footnote to explaining three reasons why religious worship and religious speech are both equally protected under the Free Speech Clause. *Id.* at 269 n.6. First, there is no intelligible way, for First Amendment purposes, to distinguish between "religious speech" and "religious worship":

> There is no indication when "singing hymns, reading scripture, and teaching biblical principles," cease to be "singing, teaching and reading" – all apparently forms of "speech," despite their religious subject matter – and become unprotected "worship."

*Id.* (internal citation omitted). Second, to distinguish between "protected" religious speech and "less protected" religious worship would require the government and the courts to entangle themselves in religious groups' affairs in violation of the Establishment Clause. *Id.* Third, there is no good reason to protect "religious speech" and not to protect "religious worship" under the Constitution. *Id.*

The Second Circuit's decision below runs afoul of *Good News Club* by admitting the factual similarities between the cases, App.18a-20a, but then mechanically focusing on the *label,* "worship service," rather than evaluating the substantive component parts of Petitioners' expression – even though this Court explained in *Good News Club*, like it had in *Widmar*, that it is "the substance of the ... activities," not a "label," that is the defining consideration, 533 U.S. at 112 n.4.

The panel majority used the Church's seven word summary jotted on the permit application – "worship services as we have done in the past" – as the justification for excluding the Church from the forum. App.48a n.1. Thus, even though other permitted users of the Board's facilities conducted ceremonies, rituals, meals, ethical teaching, and admonitions of political and religious duties – all expressive activities that are component parts of the Church's Sunday meetings – the panel held that excluding these same activities presented from and with a religious viewpoint was permissible when conducted during a "worship service." App.13a-18a. This makes the case turn on a nominal – rather than substantive – distinction rejected in *Good News Club*

and *Widmar*. The government may not rely on labels – either of its own devising or those that private groups apply to their meetings – to deny otherwise meritorious First Amendment claims.

In both this case and in *Good News Club* the forum was open for the general "welfare of the community," *compare Good News Club*, 533 U.S. at 102 *with* App.5a. (Judge Walker observes that the respective speech forums are "in every material respect identical," App.57a); in both cases the speakers intended to sing, pray, teach about religion, and socialize, *compare* 533 U.S. at 103 *with* App.223a-225a; and in both cases the school disallowed the use of the facilities for religious "worship," *compare* 533 U.S. at 103 *with* App.9a.

According to a previous Second Circuit panel in this case, the speech at issue in *Good News Club* and presented in the Church's Sunday services are indistinguishable for First Amendment purposes. App.239a. But the current panel majority concluded that *Good News Club* does not apply because the Church desires to use the forum for a "worship service," something the panel defines as "the conduct of a particular type of event: a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion." App.14a. That such expression is "quintessentially religious," *Good News Club*, 533 U.S. at 111, however, or "done according to an order prescribed by and under the auspices of an organized religion," App.14a, is irrelevant. There is "no logical difference in kind between the invocation of Christianity by [the

Church in its 'worship services'] and the invocation of teamwork, loyalty, or patriotism by other associations [like the Boy Scouts in its 'Scout meetings'] to provide a foundation for their lessons," *Good News Club*, 533 U.S. at 111.

The Second Circuit draws an unintelligible and unconstitutional distinction between religious worship services and religious expression to justify excluding the former from a forum open to a broad range of uses.

### B. The Circuits Are Divided on Whether the Government May Exclude Religious Worship from a Generally Open Forum.

The Second Circuit's decision aggravates a circuit conflict on the issue of whether the exclusion of religious worship services from a limited public forum constitutes impermissible content and viewpoint discrimination. The Second and Ninth Circuits have upheld such exclusions, while the Fourth, Seventh, and Tenth Circuits have properly struck down such exclusions as either viewpoint discrimination or an unconstitutional content-based exclusion.

The Second Circuit's decision below aligns with the Ninth Circuit's decision in *Faith Center Church Evangelistic Ministries v. Glover*, which held that a public library's policy of opening its facilities to "educational, cultural and community related meetings, programs and activities," but excluding "religious services," was reasonable and viewpoint neutral. 480 F.3d 891, 902-03, 918 (9th Cir. 2007).

As a result, a church was prohibited from using the library's facilities for a "praise and worship" meeting. *Id.* at 903-04. The Ninth Circuit determined the policy was a permissible content-based regulation of speech because "pure religious worship" is not a secular activity that conveys a religious viewpoint on otherwise permissible subject matter. In that court's view, religious worship is not a viewpoint, but a "category of discussion." *Id.* at 915.

In addition, both the Second and Ninth Circuits have found after *Good News Club* that while the component parts of a worship activity must be permitted in the forum, the government can exclude the collective conglomerate of that expression labeled as "worship" (Ninth Circuit) or "worship service" (Second Circuit). *Id.* at 914; App.16a. In both cases, the courts relied on a theological label for the religious expression to justify its exclusion. Such a method leads to anomalous results, as case outcomes then turn on the naming convention employed to designate the speech content, rather than on the substance of the expression itself. Worse, it can turn on how canny one applicant is, compared to another, in labeling *exactly* the same expressive acts and content differently. Also, theological distinctions can lead groups to use different labels for their activities.

In direct conflict with the Second and Ninth Circuits, the Fourth, Seventh, and Tenth Circuits have held that excluding religious worship from either a designated or limited public forum violates the First Amendment.

In *Badger Catholic v. Walsh*, the Seventh Circuit recently held that a public university's exclusion of student-led worship, proselytizing, or religious instruction from a speech forum violated the First Amendment. 620 F.3d 775, 776-77, 781 (7th Cir. 2010), *cert. denied* 131 S.Ct. 1604 (2011). In stark contrast to the Second Circuit's reliance on the label "religious worship service," the Seventh Circuit looked beyond the labels "worship, proselytizing, and religious instruction" used by the students and the university. It instead focused on the substance of the students activities, which were no different than their secular counterparts. *Id*. at 777-79. Like Judge Walker's dissent in this case, App.56a, the Seventh Circuit rejected a distinction between religious worship services and other forms of religious speech:

> Quakers view communal silence as religious devotion, and a discussion leading to consensus as a religious exercise. Adherents to Islam and Buddhism deny that there is any divide between religion and daily life; they see elements of worship in everything a person does.... [A] constitutional rule must be general enough to handle all sorts of religion ....

*Id*. at 781.

In *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703, 704-05 (4th Cir. 1994), the Fourth Circuit declared unconstitutional a school district's policy that required churches conducting worship services to pay more than nonreligious groups renting school buildings for their expression. The school opened its facilities to a "wide array of

private, community, religious, and cultural organizations, both commercial and nonprofit." *Id.* The Fourth Circuit held that the policy was an unconstitutional content-based restriction on speech unjustified by a compelling state interest. *Id.* at 707.

In *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996), the Tenth Circuit ruled that the City of Albuquerque violated the First Amendment by enforcing a policy that excluded "religious worship" and "sectarian instruction" from a designated public forum. The city denied a local church access to a senior center to show a film that encouraged people to convert to the Christian faith. *Id.* at 1277, 1279. The Tenth Circuit ruled that the exclusion of religious advocacy was viewpoint discriminatory. *Id.* at 1279.

Despite this Court's holdings in *Widmar* and *Good News Club* clearly indicating that religious worship services are no different in constitutionally material respects than other forms of expression, the lower courts are divided on whether the exclusion of worship violates the First Amendment. The Court should grant review to unify the circuits and clarify that worship may not be excluded from either a designated or limited public forum otherwise open to speech of that character.

## II. The Second Circuit's Decision Conflicts with this Court's Decision in *Widmar* and Decisions from Other Circuits that the Exclusion of Religious Worship from a Generally Open Government Forum is Content-Based Discrimination.

If the Court does not resolve this case on the basis of viewpoint discrimination, the case presents an ideal vehicle for addressing the issue expressly left open in *Good News Club*: whether opening a forum to all speech pertaining to the welfare of the community creates a designated public forum, triggering strict scrutiny of its exclusion of religious worship services, even if that exclusion is deemed content-based rather than viewpoint-discriminatory. *See* 533 U.S. at 106 ("we need not resolve the issue here").

On this issue, the decision below conflicts with this Court's 8-1 decision in *Widmar*, which held exclusion of religious worship from a generally open forum is impermissible content-based discrimination. The First, Third, Fourth, and Fifth Circuits have followed *Widmar* and held that forums similar to the one at issue in this case are designated public fora in which content-based discrimination is prohibited. The Second Circuit's decision conflicts with *Widmar* and creates a circuit conflict with these other decisions.

In *Widmar*, a public university opened its facilities to students for "political, cultural, educational, social and recreational events," *Chess v. Widmar*, 635 F.2d 1310, 1312 (8th Cir. 1980), but not "for purposes of religious worship or religious

teaching," 454 U.S. at 265. A religious student group desired to use the university's facilities for its meetings, which typically included "prayer, hymns, Bible commentary, and discussion of religious views and experiences." *Id.* at 265 n.2. The university rejected the group's request because these activities were "religious worship." *Id.* at 265. This Court held that the university created a public forum and the exclusion of religious worship from that forum was a content-based exclusion that was not justified by a compelling state interest. *Id.* at 269 n.6 & 277.

In conflict with *Widmar*, the Second Circuit ruled that a forum opened generally for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community" is merely a limited public forum when it excludes one form of speech – religious worship services – and thus that all exclusions (even of speakers whose expression lies within the parameters of the forum) are subject to lesser constitutional scrutiny. App.12a-13a. The Second Circuit conducted no analysis of the forum's broad parameters and the vast variety of speakers permitted in the forum – 10,000 separate uses in one school year alone, including Scouts, board meetings, athletic events, and religious and cultural events.

Contrast that lack of contextual analysis with *Lamb's Chapel*, where this Court strongly suggested that the Second Circuit erred by ruling that N.Y. Educ. Law §414 (and the policy based on that law) created only a limited forum and not a designated public forum. There, as in this case, the school permitted the use of school facilities for "social, civic, and recreational" purposes. 508 U.S. at 391. The

plaintiff church argued that the school's policy created a designated public forum. *Id.* This Court stated that "argument has considerable force" because the facilities are "heavily used by a wide variety of private organizations." *Id.* However, this Court left the forum designation issue for a later day, resolving the case instead on the basis of viewpoint discrimination. *Id.* at 391-92. *Good News Club*, 533 U.S. at 106, also left open the issue of whether the forum was indeed designated, but decided the case assuming the forum was limited based on the parties' agreement. There was no analysis or determination whether the forum was objectively "limited" in terms of First Amendment parameters.

The Church here presents the same forum classification argument that this Court in *Lamb's Chapel* said has "considerable force." Respondents' policy, like the ones in *Lamb's Chapel* and *Good News Club,* permits community groups to meet for "social, civic and recreational" purposes and "other uses pertaining to the welfare of the community." App. 368a. The policy expressly permits a wide variety of uses.[4] App.368a-369a, 379a-381a. By creating such a broad forum, the categories of which clearly encompass the religious speech invidiously excluded from it, Respondents have created a designated public forum.

---

[4] While Respondents' policy purports to exclude commercial uses, Respondents routinely permit many such uses. App.371a; A1505-1536. Even political uses are permitted if all candidates are invited. App.368a. "Religious worship services" are the only categorical exclusion. A3594 ¶3, 3505 ¶5.

The Second Circuit's position, however, is that if there is any exclusion of entrants at all, the forum is limited, and the exclusions are judged by a reasonableness standard. Such circular reasoning guts this Court's forum doctrine. As the Third Circuit has recognized:

> We cannot conclude that, because there is ... exclusionary language in the wording of the revised policy, we are precluded from finding that the school district has created a designated open forum. If this is, indeed, what *Cornelius* requires, there is no longer a place in the law for the concept of the designated open forum; the government may, upon the most tenuous and internally inconsistent grounds, pick and choose those to whom it grants access for purposes of expressive activity simply by framing its access policy to carve out even minute slices of speech which, for one reason or another, it finds objectionable. We do not read either *Perry* or *Cornelius* as sounding the death knell for the designated open forum.

*Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1378 (3d Cir. 1990); s*ee also Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 117-18 (5th Cir. 1992) ("a general policy of open access does not vanish when the government adopts a specific restriction on speech, because the government's policy is indicated by its consistent practice, not each exceptional regulation that departs from the consistent practice"). Excluding a small sliver of private expression from the forum, while broadly allowing

the category of speech to which it belongs, does not create a "limited forum."

The Second Circuit's decision conflicts with the decisions of four other circuits on whether generally open access policies create designated public fora and whether religious exclusions from them are constitutional.

In *Grace Bible Fellowship v. Maine School Administrative District No. 5*, 941 F.2d 45, 48 (1st Cir. 1991) (panel including Breyer, C.J.), the First Circuit held that a school district created a designated public forum when it opened its buildings for meetings by youth groups, community, civic, and service organizations, government agencies, educational programs, and cultural events. The court struck down the district's content-based exclusion of a church that applied to use the facilities to serve a free Christmas meal and to present prayer and religious preaching.

In *Gregoire,* 907 F.2d at 1369, 1372-78, the Third Circuit held that a school district created a designated public forum when it permitted meetings by civic groups, cultural activities, resident service organizations, adult education classes and labor unions, but prohibited "religious services, instruction and/or religious activities." The court found that the district had discriminated based on content when it refused to rent its high school auditorium for a Saturday night evangelistic presentation.

As noted earlier, in *Fairfax Covenant Church*, 17 F.3d 703, the Fourth Circuit held that a school district created a designated public forum by its policy permitting meetings by cultural, civic,

educational, and political groups, and that a requirement that churches pay more rent than nonreligious groups was unconstitutional.

In *Concerned Women for America v. Lafayette County*, 883 F.2d 32, 33-34 (5th Cir. 1989), the Fifth Circuit held that a public library established a designated public forum with its policy permitting meetings of a "civic, cultural or educational character," even though it expressly excluded religious expression. The court found that the policy was an unconstitutional content-based regulation of speech.

This Court should grant review to resolve the conflict in the circuits over whether a generally open speech forum is a designated public forum, and affirm that content-based exclusions are not permitted in such fora absent a compelling state interest. What is open and public in one Circuit should not be crimped and cramped into a crabbed closed forum in another.

## III. The Second Circuit's Decision Conflicts with the Decisions of this Court By Authorizing Censorship of Private Religious Speakers Based Upon Mere Fear of an Unproven Establishment Clause Violation.

The Second Circuit allows the Board's mere concern over the Establishment Clause to justify its actual exclusion of private worship services from its broadly available speech forum. App.21a. The ruling conflicts with myriad decisions of this Court which rejected the notion that the Establishment

Clause authorizes or requires the government to censor private religious expression in a neutral speech forum. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (2002); *Good News Club*, 533 U.S. at 119; *Pinette*, 515 U.S. at 762-770; *Rosenberger*, 515 U.S. at 842; *Lamb's Chapel*, 508 U.S. at 395; *Mergens*, 496 U.S. at 253; *Widmar*, 454 U.S. at 276.[5]

Yet the panel justifies the Board's exclusion of the Church's speech from the forum because of the Board's unsubstantiated *concern* about an Establishment Clause violation – not because an *actual* violation of the Establishment Clause would obtain if the Church were granted forum access. The panel stated:

> In order to determine whether the content restriction for this purpose is reasonable and thus permissible, *we need not decide* whether use of the school for worship services would in fact violate the Establishment Clause, a question as to which reasonable arguments could be made either way, and on which no determinative ruling exists. It is sufficient if 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.

App.21a (emphasis added).

---

[5] The Second Circuit's decision also conflicts with the holdings and analysis of its sister circuits, *see*, *e.g.*, *Badger Catholic*, 620 F.3d at 778-79; *Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 530-34 (3d Cir. 2004); *Church on the Rock*, 84 F.3d at 1280; *Good News/Good Sports Club v. Sch. Dist. of City of Ladue*, 28 F.3d 1501, 1510 (8th Cir. 1994); *Fairfax Covenant Church*, 17 F.3d at 707.

Mere government concern over what would not *in fact* be an Establishment Clause violation has never justified censorship of private speech due to its religious viewpoint. To the contrary, this Court has ruled repeatedly that a wrong (even if sincere) view of the operation of the Establishment Clause is evidence of unconstitutional viewpoint discrimination, not a justification for censoring private speech. *See Good News Club*, 533 U.S. at 120; *Rosenberger*, 515 U.S. at 832. Absent an *actual* Establishment Clause violation, the government's exclusion of private speech *because of its religious viewpoint* (which is what Respondents concede by the very assertion of an Establishment Clause defense) is without legal justification, and thus violates the Free Speech Clause's prohibition on viewpoint discrimination. *See supra* Part I.

As this Court explained in *Widmar*, when the government operates an open speech forum it may not exclude otherwise qualifying private religious speech beyond what the Establishment Clause *actually* forbids, for it is at that line that the speaker's First Amendment rights engage.

> [T]he state interest asserted here – in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution – is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well.

454 U.S. at 276. To exalt unsubstantiated Establishment Clause fears above Free Speech substance would yield a jurisprudence of First

Amendment timidity wholly inconsistent with this Court's many cases vindicating the Free Speech rights of religious speakers. The pertinent issue remains only what the Establishment Clause in fact commands, not what speculating officials might fear.

In this case, moreover, any Establishment fear is meritless. This case concerns *private* religious speech in a forum broadly opened to a wide spectrum of users and uses. The Second Circuit failed to grasp the significance of this important factual distinction and instead relied on irrelevant cases such as *McCreary County v. ACLU*, 545 U.S. 844 (2005), and *County of Allegheny v. ACLU*, 492 U.S. 572 (1989), which involved *government* speech that was religious in nature. This Court has held repeatedly that when a private speaker chooses to espouse a religious viewpoint in a forum of such breadth, the government does not violate the Establishment Clause by permitting him to speak. *Good News Club*, 533 U.S. at 113-14; *Widmar*, 454 U.S. at 273-75.

The Second Circuit also ran afoul of settled precedent in viewing sympathetically the Board's alleged concerns about "subsidizing churches." App.23a-24a. The Second Circuit replicates the very error that the Fourth Circuit made in *Rosenberger*:

> The error made by the Court of Appeals, as well as by the dissent, lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient. If the expenditure of governmental funds is prohibited whenever those funds pay for a

> service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, than *Widmar*, *Mergens* and *Lamb's Chapel* would have to be overruled.

*Rosenberger*, 515 U.S. at 843; *see Fairfax Covenant Church*, 17 F.3d at 708 (rejecting "subsidy" concern if government rents space to churches for same price as other community groups). In-kind benefits neutrally extended to all, including to religious groups using a forum, do not violate, and thus do not justify a concern about violating, the Establishment Clause.

> It does not violate the Establishment Clause for [the government] to grant access to its facilities on a religion-neutral basis to a wide spectrum of [community] groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises.

*Rosenberger*, 515 U.S. at 842 (citing *Widmar*, 454 U.S. at 269; *Mergens*, 496 U.S. at 252).

The Second Circuit also proposed that church usage of the Board's facilities may lead students to conclude that New York has endorsed religion. App.24a-26a. *Good News Club*, however, flatly rejected that notion: "[W]e have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present." 533 U.S. at 115. The Church's use of the Board's facilities on Sunday leads to no more of a perception of state endorsement of religion than the use of the

same facilities by a Bible club after school during the week, *id*. at 119, or by the thousands of other users.

An ill-conceived government concern over violating the Establishment Clause does not justify the exclusion of religious speakers from a generally open forum.

## IV. The Second Circuit's Decision Upholds a Policy that Discriminates on the Basis of Religion in Violation of the Free Exercise Clause.

The Board's policy expressly uses religion as the factor for denying private speakers access to the forum. Yet the Second Circuit ignored this rank religious discrimination. The Board cannot set the parameters of its forum in a way that violates the Free Exercise Clause. When a law "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons" it violates the Free Exercise Clause. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). Thus, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id*. at 533 (citing *Emp't Div. v. Smith*, 494 U.S. 872, 878-79 (1990)); *see Fairfax Covenant Church*, 17 F.3d at 707 (holding school's policy of charging churches more rent than other groups burdened the churches' free exercise of religion).

SOP §5.11 expressly prohibits conduct undertaken for religious reasons: "No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship." App.371a. Moreover, Respondents purposely aimed §5.11 at the practice of religion and have persistently excluded groups intending to use school facilities for religious purposes. Yet Respondents fail to articulate a compelling interest for discriminating against religion in their forum. As discussed previously, their reliance on Establishment Clause arguments is mistaken. Whatever Respondents' authority may be to exclude speakers from a forum, they may not do so in a way that violates the Free Exercise Clause, as they have done here.

## CONCLUSION

This Court should grant review.

Respectfully submitted,

JORDAN W. LORENCE
*Counsel of Record*
GARY S. MCCALEB
JOSEPH P. INFRANCO
JEFFREY A. SHAFER
ALLIANCE DEFENSE FUND
801 G Street NW, Suite 509
Washington, DC 20001
(202) 393-8690
jlorence@telladf.org

DAVID A. CORTMAN
ALLIANCE DEFENSE FUND
1000 Hurricane Shoals Rd.,
Suite D-600
Lawrenceville, Georgia
30043
(770) 339-0774

DAVID J. HACKER
HEATHER GEBELIN HACKER
ALLIANCE DEFENSE FUND
101 Parkshore Drive,
Suite 100
Folsom, California 95630
(916) 932-2850

September 27, 2011