No. 07-5291

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees,

v.

BOARD OF EDUCATION OF THE CITY OF NEW YORK AND
COMMUNITY SCHOOL DISTRICT NO. 10,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE CHRISTIAN LEGAL SOCIETY AS *AMICUS CURIAE*
SUPPORTING APPELLEES AND URGING AFFIRMANCE

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INTEREST OF AMICUS CURIAE[1]

The Christian Legal Society (CLS) is a nonprofit, interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at numerous accredited law schools. CLS's legal advocacy and information division, the Center for Law & Religious Freedom (the

[1] This brief is filed pursuant to Federal Rule of Appellate Procedure 29. The parties consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Center), works for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in state and federal courts throughout this nation.

CLS is interested in this matter because it implicates the freedom of religious citizens to have equal access to public fora, including the after-hours use of public school facilities. The Center has expertise in equal access issues. From 1982 through 1984, the Center provided assistance to members of Congress in their efforts to draft and pass the federal Equal Access Act, 20 U.S.C. §§ 4071-4074 (2008), to protect the right of religious student groups to meet in public secondary school facilities on the same basis as other student groups.

Center staff served as co-counsel for the parties or for *amicus curiae* in many of the leading cases protecting both the constitutional and statutory right of equal access. Center staff served as co-counsel for a party in numerous equal access cases, including most recently the following:

- *Child Evangelism Fellowship of Md. v. Montgomery County Public Schools*, 457 F.3d 376 (4th Cir. 2006) (upholding religious community group's equal access to school district's flier distribution forum);
- *Child Evangelism Fellowship of New Jersey v. Stafford Township Sch. Dist.*, 386 F.3d 514 (3d Cir. 2004) (Alito, J.) (upholding a religious

community group's equal access to channels of communication to give parents information about its activities for children).

Center staff served as co-counsel for *amicus curiae* in numerous equal access cases, including the following:

- *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (free speech requires, and Establishment Clause does not prohibit, equal access for Good News Club meetings on same basis as other community groups are allowed to meet in elementary schools);
- *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819 (1995) (free speech requires, and Establishment Clause does not prohibit, equal access for university student publication to student activities fees funding);
- *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (free speech requires, and Establishment Clause does not prohibit, equal access for church to school auditorium in the evenings to show films on same basis as other community groups);
- *Bd. of Educ. of Westside Cmty. Schools v. Mergens*, 496 U.S. 226 (1990) (Equal Access Act requiring equal access for religious high school student groups does not violate the Establishment Clause);
- *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839 (2d Cir. 1996) (Equal Access Act requires access for high school student religious group).

SUMMARY OF THE ARGUMENT

The Free Exercise Clause presumptively prohibits the use of religion as a factor to exclude speakers from a forum. The Board's policy excludes speakers from the forum by categorically denying any access to speakers, including the Bronx Household of Faith, who engage in religious worship. This policy triggers strict scrutiny for the following reasons. First, the Board's policy facially discriminates against religion, thereby violating the threshold requirement of the Free Exercise Clause under *Employment Division v. Smith*, 494 U.S. 872, 877 (1990); and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993); and is neither neutral nor generally applicable, in violation of the Free Exercise Clause. Second, the policy is underinclusive because it permits student religious speech but excludes religious worship. Third, the policy is invalid because it prohibits an unnecessary amount of religious speech.

The Board's asserted interest in avoiding a violation of the Establishment Clause fails to satisfy strict scrutiny. Contrary to the Board's position, compliance with the Free Exercise Clause's requirement of equal access for religious speakers in a forum is consistent with the Establishment Clause. Thus, the Establishment Clause does not justify the Board's prima facie violation of the Free Exercise Clause.

In upholding the policy, the panel's decision unnecessarily conflicts with Supreme Court precedent requiring equal access for religious community groups to educational facilities in *Widmar v. Vincent*, 454 U.S. 263 (1981); *Mergens*, 496 U.S. 226; *Lamb's Chapel*, 508 U.S. 384; *Rosenberger*, 515 U.S. 819; and *Good News Club*, 533 U.S. 98. As stated above, the panel decision further conflicts with the Supreme Court's Free Exercise Clause decisions in *Smith*, 494 U.S. 872; and *Lukumi*, 508 U.S. 520.

The panel's decision creates direct conflict with the Fourth Circuit Court of Appeals' decision in *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703, 707 (4th Cir. 1994). The Fourth Circuit found that the county's discriminatory practice of charging churches higher rent violated the Free Exercise Clause and was not required by the Establishment Clause. *Id.*

ARGUMENT

I. The Board's use of religion as a factor to exclude the Bronx Household of Faith from the forum triggers strict scrutiny under the Free Exercise Clause.

A. The Free Exercise Clause protects religious speakers in a forum.

The Supreme Court has declared that "the Free Speech *and* Free Exercise Clauses" restrain government's power to exclude religious speakers from speech forums. *Rosenberger*, 515 U.S. at 841 (emphasis added). It is undisputed that the Board created a forum when it opened public school facilities to use by community

organizations for a variety of purposes. The Board's exclusion of the Bronx Household of Faith from the forum is therefore subject to scrutiny under the Free Exercise Clause, not merely the Free Speech Clause. *Id.* As the Third Circuit Court of Appeals stated:

> [G]overnment cannot discriminate between religiously motivated conduct and comparable secularly motivated conduct in a manner that devalues religious reasons for acting . . . not only when a coercive law or regulation prohibits religious conduct, but also when government denies religious adherents access to publicly available . . . property.

Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 169 (3d Cir. 2002) (citing *Rosenberger*, 515 U.S. at 831-35). The Bronx Household of Faith's expression readily falls within the parameters of this forum because its activities pertain to "social, civic, and recreational meetings and entertainment, and other uses pertaining to the welfare of the community." Section 5.6.2 of the New York City Department of Education Standard Operating Procedures Manual (SOP § 5.6.2)[2]

Furthermore, the Supreme Court has stated that "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid *even though the*

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[2] The Board's policies regarding the use of school buildings were recently amended. *See* New York City Department of Education, *Standard Operating Procedures Manual, Extended Use of School Buildings*, http://dfoapps.nycenet.edu/SOP/files/ExtUse.html (last modified Mar. 24, 2008). Although the section numbers of the relevant provisions have been altered, the text of the provisions remains the same. For the sake of consistency with other briefs filed before this Court, *amicus* refers to the provisions as they are referenced by this Court in its July 2007 opinion.

burden may be characterized as being only indirect." *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (quoted in *Storm v. Town of Woodstock*, 944 F.Supp. 139, 144 (N.D.N.Y. 1996)) (emphasis added); *see Speiser v. Randall*, 357 U.S. 513, 526 (1958) (government may not use indirect means to "produce a result which [it] could not command directly"). Therefore, the Bronx Household of Faith need not show that the Board engaged in a direct restriction of its free exercise rights, this Court's previous contrary ruling notwithstanding. *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 216 (2d Cir. 1997) (*Bronx Household of Faith I*) (requiring direct interference under Free Exercise Clause). As the Supreme Court has ruled, the Free Exercise Clause applies to speech forums. *Rosenberger*, 515 U.S. at 841. The Bronx Household of Faith simply seeks equal access to the forum on the same basis as other organizations and, under the Free Exercise Clause, cannot be excluded simply because its speech is religious. *Widmar*, 454 U.S. at 273 n.13 ("This case is different from the cases in which religious groups claim that the denial of facilities *not* available to other groups deprives them of their rights under the Free Exercise Clause." (emphasis in original)) (cited by *Tenafly Eruv Ass'n*, 309 F.3d at 169).

B. The Board's policy facially discriminates against religion and is therefore neither neutral nor generally applicable, thus triggering strict scrutiny.

The Free Exercise Clause forbids government from "impos[ing] special disabilities on the basis of religious views or religious status." *Smith*, 494 U.S. at 877. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. While a "neutral law of general applicability" is presumptively constitutional even if the law incidentally burdens religious practice, "[a] law failing to satisfy these requirements" is subject to strict scrutiny and "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531; *see Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002).

Indeed, as the Supreme Court held in *Lukumi,* the "minimum requirement of neutrality" is "that a law not discriminate on its face." *Lukumi,* 508 U.S. at 533. Section 5.11 of the New York Board of Education Standard Operating Procedures Manual (SOP § 5.11) fails this threshold test and, therefore, violates the Free Exercise Clause. The provision states, "[n]o permit shall be granted for the purpose of holding *religious worship services*, or otherwise using a school as a *house of worship*." SOP § 5.11 (emphasis added). The Supreme Court has stated:

"A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable [sic] from the language or context." *Lukumi*, 508 U.S. at 533. Here, "religious worship services" and "house of worship," in SOP § 5.11 clearly refer to "religious practice" under *Lukumi*, and the Board advances no argument that this law is facially neutral. *See, e.g.*, Br. of Appellants, 36. Thus, this case presents the "extreme" situation "in which a State directly targets a religious practice." *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in judgment). On "those rare occasions on which the government explicitly targets religion (or a particular religion) for disfavored treatment, as is done in this case," the "case is an easy one to decide." *Lukumi*, 508 U.S. at 577-78, 580 (Blackmun, J., joined by O'Connor, J., concurring in judgment).

Even if SOP § 5.11 were facially neutral, "[t]he Free Exercise Clause . . . extends beyond facial discrimination." *Id.* at 534. The Board expressly informed the Bronx Household of Faith that the current version of SOP § 5.11, revised after the lower court's preliminary injunction took effect, would prohibit the Bronx Household of Faith from conducting its worship services in a New York City school. *See Bronx Household of Faith v. Bd. of Educ. of the City of New York*, 492 F.3d 89, 94 (2007) (Calabresi, J., concurring) (*Bronx Household of Faith III*); *see* 400 F.Supp. 2d. 581, 588 (2005) (quoting Letter from Lisa Grumet to Jordan

Lorence and Joseph Infranco (Aug. 17, 2005)), *vacated and remanded by* 492 F.3d at 94.

The requirement of general applicability forbids the government from "impos[ing] burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. The Board's policies are not generally applicable because SOP § 5.11 only excludes religious worship services, thereby allowing all other non-commercial use of school buildings after hours. SOP § 5.11 (excluding only religious worship); *id.* at § 5.10 (forbidding most commercial uses). Indeed, the Board has opened its school buildings to use by a variety of organizations for a variety of purposes, including "'sports leagues, Legionnaire Greys, Boy and Girl Scouts, community associations, and a college for holding English instruction.'" *See Bronx Household of Faith III*, 492 F.3d 89 at 102 (Calabresi, J., concurring) (citation omitted in original). The Board imposes no comparable categorical restriction on secular organizations.

Thus, citing *Widmar* and *Lukumi*, the Fourth Circuit Court of Appeals found that a school board's discriminatory policy of charging churches higher rental rates than other nonprofit organizations for use of school facilities "interferes with or burdens the Church's right to speak and practice religion protected by the Free Exercise Clause." *Fairfax Covenant Church*, 17 F.3d at 707. Applying the requisite strict scrutiny, the Fourth Circuit rejected as implausible the school

board's Establishment Clause defense. *Id.* A panel decision upholding SOP § 5.11 would create an unnecessary but direct conflict with the Fourth Circuit's *Fairfax Covenant* holdings.

C. Since SOP § 5.11 is neither neutral nor generally applicable, the Bronx Household of Faith is not required to show a substantial burden to prevail under the Free Exercise Clause even though such a burden has been placed on the exercise of its religion.

Since SOP § 5.11 is facially discriminatory and therefore neither neutral nor generally applicable, the Bronx Household of Faith need not show that the policy substantially burdens its religious exercise to prevail on its free exercise claim, because "[u]nder *Smith* and *Lukumi* . . . there is no substantial burden requirement when government discriminates against religious conduct. *See Lukumi*, 508 U.S. at 531-47, 113 . . . (finding Free Exercise Clause violation without considering whether a substantial burden on religious freedom existed)." *Tenafly Eruv Ass'n*, 309 F.3d at 170; *Hartmann v. Stone*, 68 F.3d 973, 979 n.4 (6th Cir. 1995) (same). The reason why there is no substantial burden requirement is that "[a]pplying [the substantial] burden test to non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment." *Tenafly Eruv Ass'n*, 309 F.3d at 170 (citing *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-50 (3d Cir. 1994)).

Even if the Bronx Household of Faith were required to show a substantial burden, it would readily satisfy such a requirement. As this Court has stated, "Supreme Court precedents teach that a substantial burden on religious exercise exists when an individual is required to 'choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.'" *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007) (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)). The government is forbidden under the Free Exercise Clause to "put[] undue pressure on the adherents to alter their behavior and to violate their beliefs in order to obtain government benefits, thereby imposing a substantial burden on religious exercise." *Id.* The Board puts undue pressure on the Bronx Household of Faith to alter the speech components of its meetings as the price of admission to the forum -- access that is protected by the Free Exercise Clause. *Rosenberger*, 515 U.S. at 841. The Bronx Household of Faith would clearly enjoy access to the district's facilities if its speech were not labeled by the Board as religious worship services or the use of the facilities as a house of worship. Thus the Board's targeting of religion requires the Bronx Household of Faith to choose between following its religious beliefs and receiving a government benefit in violation of the Free Exercise Clause. *Hobbie v. Unemployment App. Com'n of Fla*, 480 U.S. 136, 140 (1987).

D. The Board's policy is underinclusive because it permits student religious speech but excludes other religious speech.

The Supreme Court has stated that the Free Exercise Clause prohibits "ordinances [that] are underinclusive to a substantial extent with respect to each of the interests that [the government] has asserted," where "it is only conduct motivated by religious conviction that bears the weight of the governmental restrictions." *Lukumi*, 508 U.S. at 547. Given the substantially identical character of religious student speech and speech in "religious worship services," it is impossible to square the Board's exclusion of the Bronx Household of Faith for fear of violating the Establishment Clause with its simultaneous inclusion of religious student groups in the forum. Courts have respected the equal access of religious student groups *and* churches in the speech forum of a school. *Good News Club*, 533 U.S. at 112 (religious student group); *Lamb's Chapel*, 508 U.S. at 394 (church); *Fairfax Covenant Church*, 17 F.3d at 707 (church).

E. The Board's policy is overbroad because it prohibits an unnecessary amount of religious speech.

Government is also forbidden from enacting overbroad policies that "proscribe more religious conduct than is necessary to achieve their stated ends." *Lukumi*, 508 U.S. at 538. Such laws raise the "infer[ence]" that their purpose is "not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Id.* As discussed below, the Establishment

Clause does not require the Board categorically to exclude religious worship services, *see infra* at II., and more nebulous Establishment Clause concerns are insufficient to satisfy strict scrutiny because they run afoul of the Free Exercise Clause as well as the Free Speech Clause. *Widmar*, 454 U.S. at 276 (government may not go beyond Establishment Clause and thereby violate Free Exercise Clause). As Justice O'Connor explained in *Mergens*, "there is a 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." 494 U.S. at 250 (O'Connor, J., plurality op.) (emphasis in original).

For the foregoing reasons, the Board's exclusion of the Bronx Household of Faith is presumptively unconstitutional under the Free Exercise Clause and is therefore subject to strict scrutiny.

II. The Board's policy fails strict scrutiny because compliance with the Free Exercise Clause to provide equal access to a public school for religious worship under *Widmar* is not a violation of the Establishment Clause.

A. There is no plausible fear of an Establishment Clause violation when the government provides equal access to a public school for religious worship.

As discussed above, the Board's exclusion of the Bronx Household of Faith is a presumptive violation of the Free Exercise Clause, thus triggering strict scrutiny of the exclusion and the reasons for it. The Board attempts to defend its

policy by relying solely on an argument that it must exclude the Bronx Household of Faith to avoid violating the Establishment Clause, Br. of Appellants, 42-67, and the Bronx Household of Faith responds point by point to the Board's argument. Br. of Appellees, 33-61. Yet in its purported zeal to comply with the Establishment Clause, the Board violates the Free Exercise Clause.

According to the Supreme Court, "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in *rare cases*." *Lukumi*, 508 U.S. at 546 (emphasis added). The Board's total exclusion of religious worship services and use of facilities as a house of worship is unique and without parallel in any of its policies for other similarly situated uses of the forum. *See, e.g.* Br. of Appellees at 11 (listing "routine" exceptions to Board's prohibition on commercial activity in the forum). As stated above, since the Board has "directly target[ed] a religious practice," *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in judgment), the "case is an easy one to decide." *Lukumi*, 508 U.S. at 577-78, 580 (Blackmun, J., joined by O'Connor, J., concurring in judgment). Furthermore, the Supreme Court has held that the government may not rely on "broadly formulated interests justifying the general applicability of government mandates" but rather must justify its refusal to "grant[] specific exemptions to

particular religious claimants" in order to satisfy strict scrutiny. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006).

The Board relies solely on an argument that the inclusion of the Bronx Household of Faith will violate the Establishment Clause. However, it cites no authority for the proposition that the Establishment Clause *requires* a school to exclude a religious group that otherwise qualifies for participation in its forum. *See generally* Br. of Appellants, 42-67. On the contrary, the Supreme Court has stated, "[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." *Good News Club*, 533 U.S. at 115. Moreover, "[b]ecause the Free Exercise Clause requires neutral treatment of religion, only in a most unusual case could compliance with free exercise norms offend the Establishment Clause." *Tenafly Eruv Ass'n*, 309 F.3d at 177-78 (citing *Smith*, 494 U.S. at 879; *cf. Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring) ("The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion.") (emphasis in original)). This is not the "most unusual case" in which compliance with the Free Exercise Clause creates a violation of the Establishment Clause. *Tenafly Eruv Ass'n*, 309 F.3d at 177-78.

Furthermore, "[a] program that violates the Free Exercise Clause cannot be saved by relying on implausible Establishment Clause concerns." *Hartmann*, 68 F.3d at 979. As the Fourth Circuit stated when upholding equal access to religious groups using school buildings, "[m]ere speculation that a nonexclusive access to a public forum might ripen into a violation of the Establishment Clause, absent any facts suggesting that probability, is not a justification sufficiently compelling to burden free access to the forum." *Fairfax Covenant Church*, 17 F.3d at 708. Government may not "achiev[e] greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution" by going beyond the limits of "the Free Exercise Clause" and "the Free Speech Clause as well." *Widmar*, 454 U.S. at 276. Granting equal access to religious speakers in a forum is thoroughly compatible with the dictates of the Constitution. *Rosenberger*, 515 U.S. at 841.

As the Supreme Court has recognized, providing equal access to religious speakers in a speech forum "respects the critical 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.'" *Rosenberger*, 515 U.S. at 841 (quoting *Mergens*, 496 U.S. at 250 (O'Connor, J., plurality op.)). This Court has also agreed with Justice O'Connor's plurality opinion in *Mergens*, i.e., that equal access for religious speakers does not

create an Establishment Clause violation. *Hsu*, 85 F.3d at 866 (quoting *Mergens*, 496 U.S. at 250 (O'Connor, J., plurality op.)). Where the government "has taken pains to disassociate itself from the private speech" of the forum participants, as the Board has done in this case, there is no Establishment Clause violation. *Rosenberger*, 515 U.S. at 841-42. There is "not a plausible fear" that such speech is attributable to the government nor "that the speech in question is being either endorsed or coerced by the State." *Id.* at 842.

B. Exclusion of the Bronx Household of Faith violates the Establishment Clause because it involves the government in making distinctions between religious organizations and signals hostility towards religion.

Moreover, it is the Board policy's *exclusion* of the Bronx Household of Faith and other organizations engaging in religious worship that violates the Establishment Clause. The Supreme Court has stated that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another," *Larson v. Valente*, 456 U.S. 228, 244 (1982), rejecting the government's attempts to make "explicit and deliberate distinctions between different religious organizations" using criteria wrongly claimed by the government to be "facially neutral." *Id.* at 247, n.23. Similarly, the Board's explicit distinction between the religious speech of student organizations and other community groups allowed access under the policy, and the religious speech, including worship, by the Bronx Household of Faith violates the Establishment

Clause prohibition against the government favoring some religious groups and disfavoring other religious groups. Specifically, the Supreme Court addressed the mirror image of this case when it held unconstitutional a municipal ordinance governing access to a public park that permitted "church services" but prohibited religious "addresses." *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (relying on *Niemotko v. Maryland*, 340 U.S. 268, 272-273 (1951)). The Supreme Court explained, "[t]o call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another." *Fowler*, 345 U.S. at 70.

Furthermore, the Establishment Clause also forbids the government from excluding the Bronx Household of Faith because exclusion violates the Establishment Clause principle of neutrality toward religion, and instead signals hostility against religion. As the Supreme Court stated, "we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum." *Good News Club*, 533 U.S. at 118. Moreover, "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility towards religion." *Mergens*, 496 U.S. at 248 (O'Connor, J., plurality op.). As the Fourth Circuit recognized in

Fairfax Covenant, "Rather than having the effect of remedying the concern about the Establishment Clause, the School Board's policy of rent discrimination against religious organizations moves the School Board into a non-neutral, antireligion corner by burdening free speech and the free exercise of religion." 17 F.3d at 708. Thus, not only is the exclusion of the Bronx Household of Faith *not* required by the Establishment Clause; on the contrary, exclusion is forbidden by the Establishment Clause.

CONCLUSION

The Free Exercise Clause protects a religious community group's right of equal access to educational facilities open to other community groups. Because the Supreme Court has repeatedly held that equal access does not violate the Establishment Clause, appellants have no compelling interest in excluding the Bronx Household of Faith to avoid an Establishment Clause violation. This Court should affirm the District Court's permanent injunction.

RESPECTFULLY SUBMITTED this 31st day of March, 2008.

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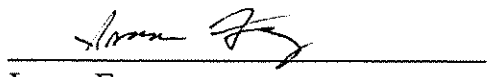

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d), because this brief contains 4,430 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 pt. font.

Dated: March 31, 2008

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ANTI-VIRUS CERTIFICATE

I, Isaac Fong, certify that I have scanned for viruses the PDF version of the *Amicus Curiae*'s Brief that will be submitted in this case as an e-mail attachment to brief@ca2.uscourts.gov and that no viruses were detected. The anti-virus detector used was McAfee VirusScan Enterprise version 8.5.

Dated: March 31, 2008

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