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 FOR THE UNITED STATES AS *AMICUS CURIAE*
SUPPORTING APPELLEES AND URGING AFFIRMANCE

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INTEREST OF THE UNITED STATES

The United States files this brief as *amicus curiae* pursuant to Rule 29(a), Federal Rules of Appellate Procedure. This case presents important questions relating to content and viewpoint discrimination in a limited public forum. The United States participated as *amicus curiae* in the two prior appeals in this case. *Bronx Household of Faith* v. *Board of Educ.*, 331 F.3d 342 (2d Cir. 2003); *Bronx*

Household of Faith v. *Board of Educ.*, 492 F.3d 89 (2d Cir. 2007). The United States also has participated in several other cases addressing these issues, including *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001).

STATEMENT OF THE ISSUE

Whether the district court correctly found that the Board of Education's revised policy excluding religious worship services from its limited public forum was impermissible viewpoint discrimination, where the Board identified no meaningful objective differences between the substance of the excluded religious speech and the permitted religious and nonreligious speech, and where the Board's proffered interest in avoiding an Establishment Clause violation was insubstantial.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

1. Pursuant to New York Education Law § 414(c) (McKinney 2002), a school district or school board may permit school facilities to be used during non-school hours for a broad range of purposes, including "holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community." The Board of Education of the City of New York adopted this purpose as one of its Standard Operating Procedures (SOP). The Board also adopted an SOP that provided "[n]o outside organization or group may be allowed to conduct religious services or religious instruction on school premises after

school," but groups could discuss "religious material or material which contains a religious viewpoint." See *Bronx Household of Faith* v. *Board of Educ.*, 226 F. Supp. 2d 401, 403 (S.D.N.Y. 2002).

2. In 1994, Bronx Household of Faith, a Christian congregation, sought to use school facilities for its Sunday meetings. See *Ibid*. Community School District No. 10 denied Bronx Household's request, relying on the SOP prohibiting religious services. *Id.* at 409. Bronx Household sued the School District and the Board of Education, asserting violations of the First Amendment, and lost. A divided panel of this Court affirmed. *Bronx Household of Faith* v. *Community Sch. Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997) (*Bronx Household I*), cert. denied, 523 U.S. 1074 (1998).

Three years later, this Court, relying on *Bronx Household I*, similarly approved a school's denial of a religious youth organization's request to use a school building after hours to hold its weekly meetings. *Good News Club* v. *Milford Cent. Sch.*, 202 F.3d 502 (2d Cir. 2000). But the Supreme Court reversed. *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001). The group's meetings included activities from a religious perspective that were permitted when done from a nonreligious perspective; the school denied the group access because it considered the group's activities to be "the equivalent of religious worship." *Id.* at

103. The Supreme Court held that this was unconstitutional viewpoint discrimination. *Id*. at 107.

3. In 2001, following the Supreme Court's decision in *Good News Club*, Bronx Household again sought a permit to use school property for its Sunday meetings. *Bronx Household*, 226 F. Supp. 2d at 409. The school district, however, again rejected Bronx Household's request because it considered the meetings to be religious worship prohibited under the Board's SOP. *Ibid*. Bronx Household and two pastors sued the School District and the Board of Education, alleging violations of the Free Exercise, Free Speech, Free Assembly, and Establishment Clauses of the First Amendment; the Fourteenth Amendment; and several provisions of the New York Constitution. *Id.* at 402-403. They also sought a preliminary injunction to enjoin the School District from denying Bronx Household's requested use. *Id*. at 403. For simplicity, we will refer to the defendants collectively as "the Board."

The district court granted Bronx Household's motion for a preliminary injunction. The Board appealed, and a divided panel of this Court affirmed. This Court held: "We find no principled basis upon which to distinguish the activities set out by the Supreme Court in *Good News Club* from the activities that the Bronx Household of Faith has proposed for its Sunday meetings. * * * On these facts, it

cannot be said that the meetings of the Bronx Household of Faith constitute only religious worship, separate and apart from any teaching of moral values." *Bronx Household of Faith* v. *Board of Educ.*, 331 F.3d 342, 354 (2d Cir. 2003) (*Bronx Household II*). This Court therefore held that Bronx Household likely could show that the Board's denial was "unconstitutional viewpoint discrimination." *Ibid.* This Court also affirmed the district court's ruling that Bronx Household was likely to show that the Board's Establishment Clause concerns were insufficient to justify its denial. *Id*. at 356.

Pursuant to the injunction, the Board granted Bronx Household's request to use school property for its Sunday meetings. The Board subsequently decided to revise its SOP to provide that "[n]o permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship." *Bronx Household of Faith* v. *Board of Educ.*, 400 F. Supp. 2d 581, 588 (S.D.N.Y. 2005). The Board notified Bronx Household that its use of the school was prohibited under the revised policy. *Ibid*. The district court held that the revised policy was unconstitutional viewpoint discrimination. *Id*. at 591-592.

4. The Board again appealed, and a divided panel of this Court reversed, but without a majority opinion. *Bronx Household of Faith* v. *Board of Educ.*, 492 F.3d 89 (2d Cir. 2007) (*Bronx Household III*). Judge Calabresi would have reversed the

district court on the merits. Judge Leval would not have reached the merits, but agreed the district court's decision had to be reversed because he concluded the issue decided was not yet ripe for review and might never be. Judge Walker would have affirmed.

After remand, the Bronx Household applied for permission to continue using the school building. Pursuant to its revised policy, the Board denied that application. See Appellants' Br. 6. The district court again granted summary judgment for Bronx Household and issued a permanent injunction, relying on the reasons in its prior order.

SUMMARY OF ARGUMENT

The Board has not shown that its proffered reasons for excluding religious worship services from its otherwise broadly inclusive limited public forum are sufficient to withstand constitutional scrutiny.

1. Religious worship is speech protected by the Free Speech Clause. *Widmar* v. *Vincent*, 454 U.S. 263, 270 (1981). A state actor's content-based restriction on speech is presumptively unlawful, and ordinarily is justified only if the restriction is narrowly tailored to advance a compelling interest. *Davenport* v. *Washington Educ. Ass'n*, 127 S. Ct. 2372, 2381 (2007). This protection against content-based exclusions applies equally to religious speech, including religious

worship. *Widmar*, 454 U.S. at 270.

This severe approach to content-based restrictions is "sometimes attenuated when the government is acting in a capacity other than as regulator" of speech. *Davenport*, 127 S. Ct. at 2381. For example, when the government is acting as the proprietor of property on which it has created a limited public forum it "can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum." *Ibid.* The Board argues that its policy of excluding religious worship services is permissible under this more deferential rule for subject matter discrimination. The district court, however, correctly rejected that argument.

A state actor engages in impermissible viewpoint discrimination when it excludes from a limited public forum speech that is not meaningfully different from speech that it permits, merely because the excluded speech is from a religious perspective. *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 112 (2001). The district court correctly found that Bronx Household's Sunday meetings are entirely consistent with the purposes of the forum. The Board chose to create a broadly inclusive forum for social, civic, and recreational meetings, as well as other uses pertaining to the welfare of the community. *Bronx Household of Faith* v. *Board of Educ.*, 400 F. Supp. 2d 581, 591 (S.D.N.Y 2005). The Board has not shown, or

even argued, that the activities done during Bronx Household's Sunday meetings are meaningfully different from the permitted activities, or that the substance of Bronx Household's activities are, in themselves, inconsistent with the forum. The Board's decision to exclude Bronx Household's meetings because of their religious context is, therefore, impermissible viewpoint discrimination.

2. The Board's arguments that worship is a unique category of speech, and so can be excluded from the forum, are without merit. The Board has not shown that the excluded religious speech is objectively different from the broad range of permitted speech, including other types of religious speech. See *Good News Club*, 533 U.S. at 112. Nor has the Board shown that excluding Bronx Household's meetings because of these subjective differences advances any of the Board's purported purposes or interests. Further, it is not possible or permissible for state actors to create and regulate a category of speech encompassing "religious worship services." Such a category lacks "intelligible content," and it would create an improper entanglement with religion for state actors to try to discern when activities such as singing, reading, and teaching cease being speech on religious subjects, and become instead the separate category of "worship." *Widmar*, 454 U.S. at 270 n.6.

3. The Board argues that even if its exclusion of religious worship services

is viewpoint discrimination, it has a compelling interest in excluding those services to avoid violating the Establishment Clause. The district court correctly rejected this argument. The fundamental requirement of the Establishment Clause is government neutrality toward religion. Permitting churches access to a forum on equal terms with all others complies with that requirement, rather than violates it. See *Good News Club*, 533 U.S. at 114. The district court carefully reviewed each of the Board's numerous arguments in support of its asserted Establishment Clause concerns, and correctly found them to be without merit.

ARGUMENT

THE BOARD'S PROFFERED REASONS FOR EXCLUDING RELIGIOUS WORSHIP SERVICES ARE INSUFFICIENT TO WITHSTAND CONSTITUTIONAL SCRUTINY

At bottom, the Board's argument is simple: Religious worship is a unique category of speech, and the Board's excluding this category from its forum is entirely "reasonable." The flaw in this argument, however, is equally simple: The Supreme Court has rejected it. To the extent worship is different from other speech, excluding it on that basis is permitted only if the policy is narrowly tailored to further a compelling interest. *Widmar* v. *Vincent*, 454 U.S. 263, 270 (1981). A "reasonableness" showing is insufficient. The Board's argument that its exclusion of worship services is permissible subject matter discrimination is also without

merit. The Board has not shown that the substance of the excluded speech is meaningfully different from the permitted speech. That exclusion, therefore, is unconstitutional viewpoint discrimination. *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 112 (2001).

A. The Board's Policy Is Presumptively Unconstitutional Viewpoint Discrimination Because The Board Has Not Shown That There Are Objective Differences Between The Excluded Speech And The Permitted Speech

1. The First Amendment Protects Religious Viewpoints Just As Other Viewpoints

An important initial question in a case raising claims under the First Amendment's Free Speech Clause is which analysis governs the particular claim before the court. The Supreme Court recently discussed some of the different analyses it has applied and the rationales for them. See *Davenport* v. *Washington Educ. Ass'n*, 127 S. Ct. 2372, 2381 (2007). The Court reiterated the important distinction between a government acting as a regulator of the content of speech — when its actions are presumptively unlawful — and a government acting as the proprietor of a limited forum it has chosen to create on its own property — when it has more latitude in deciding which subjects to exclude. The Court reiterated its long-standing rule that "content-based regulations of speech are presumptively invalid," and are subject to strict scrutiny when challenged. *Ibid*. More than 25

years ago, the Supreme Court held that "religious worship and discussion" are "forms of speech and association protected by the First Amendment," and "[i]n order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the [state actor] must therefore satisfy [strict scrutiny]." *Widmar*, 454 U.S. at 269-270.[1]

The Board does not try to justify its policy as a valid regulation of the content of speech. Rather, the Board tries to justify its policy as valid regulation of the "subject matters" permitted in its forum. The Court in *Davenport* explained this type of regulation: "[W]hen the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their *subject matter*, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum." 127 S. Ct. at 2381 (emphasis added). This requirement of viewpoint neutrality is not unique. It is a fundamental principle of the Free Speech Clause that a government may not use

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[1] If the Board's policy were analyzed not as a restriction on the religious content of speech but as one targeting religious conduct, it would similarly be presumptively unlawful. It is a fundamental principle of the Free Exercise Clause that "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." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993) (citation omitted).

control over access to a forum to "discourage one viewpoint and advance another." *Perry Educ. Ass'n* v. *Perry Local Educs. Ass'n*, 460 U.S. 37, 49 (1983); see also *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on * * * the message it conveys."). The Supreme Court has repeatedly held that the requirement of viewpoint neutrality applies to religious viewpoints as well as other viewpoints. See, *e.g.*, *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-393 (1993); *Rosenberger*, 515 U.S. at 829; *Good News Club*, 533 U.S. at 106-107.

The Court has similarly made clear that when a state actor excludes from a limited public forum speech that is not meaningfully different from permitted speech, merely because the excluded speech is approached from a religious perspective, that exclusion is unlawful viewpoint discrimination. *Good News Club*, 533 U.S. at 112; see also *Rosenberger*, 515 U.S. at 831 (public university could not deny funding to student publication presenting religious viewpoints); *Lamb's Chapel*, 508 U.S. at 386 (public school could not deny access to its buildings to a group wishing to present a film series on child rearing and family values merely because the film had a religious perspective).

2. The Substance Of Bronx Household's Meetings Is Consistent With The Purposes Of The Limited Public Forum, And Not Distinguishable From Other Permitted Activities

The district court analyzed in detail the Board's stated purposes for creating its limited public forum. The forum encompasses a broad range of subject matters and speakers. SOP 5.6.2 permits schools to be used "[f]or holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such uses shall be non-exclusive and open to the general public." *Bronx Household*, 400 F. Supp. 2d at 593. Under the Board's policy, "[a]fter Board of Education programs and activities, preference will be given to the use of school premises for community, youth and adult group activities." *Ibid*. The Board created this forum "to expand enrichment opportunities for children and to enhance community support for the schools." *Bronx Household III*, 492 F.3d at 126 (emphasis omitted). The record shows how broadly inclusive the forum is. In one year, 9,804 permits were issued for use of school property by diverse groups, including sports leagues, Legionnaire Greys, Boy Scouts and Girl Scouts, and community associations. *Bronx Household*, 400 F. Supp. 2d at 590-591, 596; see also *Bronx Household II*, 331 F.3d at 348.

Bronx Household thus easily meets the "speaker identity" requirement for the forum. See *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788,

806 (1985) ("speaker may be excluded from a nonpublic forum * * * if he is not a member of the class of speakers for whose especial benefit the forum was created"). Indeed, Bronx Household itself was permitted to use school facilities for activities other than religious worship services. See *Bronx Household I*, 127 F.3d at 211 (noting that in 1994 and 1995, Bronx Household had used school premises twice for sports and games events and once for a banquet). There is thus nothing about Bronx Household itself to which the Board objects. The Board is therefore incorrect in asserting that its exclusion of Bronx Household could be viewed as being based on the identity of the speaker. See Br. 36 n.8. The Board's policy does not exclude congregations that seek to use the school facilities for something other than religious worship services; and the policy excludes anyone, not just a congregation, who seeks to conduct such services.

Bronx Household also meets the "subject identity" requirement for the forum. See *Cornelius*, 473 U.S. at 806 ("speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum"). The Board's policy does not exclude religious subjects generally; indeed, it expressly permits religious clubs for students, even when the club is organized by an outside group. See *Bronx Household*, 400 F. Supp. 2d at 588 (quoting SOP 5.11). Bronx Household's meetings include "singing of

Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion, sharing of testimonies and social fellowship among the church members." *Bronx Household*, 226 F. Supp. 2d at 410. Bronx Household also has Biblical reading and preaching. *Ibid*. It has a fellowship meal and social interaction among members and visitors. *Ibid*. Bronx Household explained that "[t]he Sunday morning meeting is the indispensable integration point for our church. It provides the theological framework to engage in activities that benefit the welfare of the community." *Ibid*. (emphasis omitted).

The Board has not argued that any of those activities are in themselves inconsistent with its forum. Nor has the Board shown that it would exclude those activities but for their being part of a religious worship service. The Board does not argue that Bronx Household's religious worship services do not pertain to the welfare of the community; that they are not open to the public; that they are not group activities; or that they would not increase the support of the surrounding community for a particular neighborhood school.

Indeed, this Court in *Bronx Household II* correctly concluded that, consistent with *Good News Club*, the Board could not use the label "religious worship services" to ignore the substance of Bronx Household's activities. Thus, the Board's exclusion of Bronx Household's meetings is indistinguishable from the

school's impermissible exclusion of the meetings of the religious club in *Good News Club*. See *Bronx Household II*, 331 F.3d at 354 ("We find no principled basis upon which to distinguish the activities set out by the Supreme Court in *Good News Club* from the activities that the Bronx Household of Faith has proposed for its Sunday meetings[.]"). That conclusion is wholly consistent with the Supreme Court's decision. See *Good News Club*, 533 U.S. at 111-112 & n.4 (rejecting the attempt to create a separate category labeled "worship," and finding viewpoint discrimination in the exclusion of a group engaging in religious instruction and prayer because the substance of the activities was within the contours of the broad forum).

3. The Board's Arguments That Religious Worship Services Are Meaningfully Different From Otherwise Permitted Speech Are Erroneous

In an effort to show that its policy is permissible subject matter discrimination, the Board argues that religious worship services are meaningfully different from the permitted categories of speech. The Board's contention, however, is wrong for at least three reasons. First, the differences that the Board identifies are based on the subjective religious perspective of the worshipers, rather than on an objective, viewpoint-neutral basis. Second, even if the identified differences were viewpoint neutral, the Board has not shown that those differences

relate to any purpose or interest the Board purports to advance. And, third, it is impermissible for the Board to attempt to create and police a speech category of "religious worship services," distinct from permitted religious and nonreligious speech.

a. The Board Has Not Identified Any Viewpoint Neutral, Constitutionally Relevant Differences Between The Excluded And The Permitted Speech

Rather than identifying any objective difference between religious worship services and other speech, the Board has identified the subjective religious viewpoint of the worshipers themselves. See, *e.g.*, Br. 37 ("Plaintiffs have also described worshipping God as different from ascribing worth to secular things."); *ibid*. ("Pastor Hall has distinguished the Church from clubs and or associations."); *ibid*. ("Pastor Hall explicitly contrasted his Church's worship services with those of the Boy Scouts."). In the prior appeal, Judge Calabresi similarly relied on Pastor Hall's view of why the congregation's activities were different from objectively similar secular activities. *Bronx Household III*, 492 F.3d at 103 (Calabresi, J., concurring). Judge Calabresi also relied on his own subjective view of why, in his experience as a person of faith, worship is different from secular activities. See, *e.g.*, *ibid.* ("As [a person of faith], I find the notion that worship is the same as rituals and instruction to be completely at odds with my fundamental

beliefs.").

But the question cannot be whether a *believer* perceives differences between his or her own religious and nonreligious activities; the answer to that question would always be "yes." For constitutional purposes, the question must be whether any objective differences between the excluded religious activity and permitted religious or nonreligious activities justify *the government's* excluding that particular religious activity. Cf. *Good News Club*, 533 U.S. at 112; *Rosenberger*, 515 U.S. at 829.

A court analyzing a state's exclusion of women or men from a state program, for example, could not cut off its analysis after simply stating that men and women are considered different, or that particular female plaintiffs considered themselves different in various respects. Surely it would be nonsensical to argue that men and women were different in *no* respects, but the constitutionally relevant question would be whether any objective differences that the state identified justified excluding one sex from its program. See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 535-540 (1996) (rejecting state's justifications for excluding women from state military academy); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 729-731 (1982) (rejecting state's justifications for excluding men from state-run nursing program); cf. *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432,

448-450 (1985) (Court recognized the obvious differences between individuals with intellectual disabilities and those without them, but found those differences were irrelevant to the interests the city purported to advance).

The Board's identification of the congregants' own subjective feelings about worship thus proves too little. It merely states a tautology — worshipers consider worship to be different — and ignores the decisive question whether there are objective differences that justify the Board's exclusion of the worshipers from its forum. This argument, in fact, shows that the Board's policy is viewpoint discrimination: because the worshipers perceive their religious activities to be different, the Board excludes them.

b. The Board Has Not Shown That Excluding Religious Worship Services Advances Its Purported Purposes Or Interests

Even if these identified differences based on the subjective religious perspective of the worshipers were viewpoint neutral, the Board does not explain how excluding worship services based on these differences relates to its purposes in creating the forum, or any other interests it has. The Board in fact says little on appeal about what purposes or interests its policy seeks to advance. The Board simply explains:

> [The Board] permits certain activities in its schools during non-school hours, primarily to supplement schools' educational programs with additional educational, enrichment and recreational activities for children, and to enhance community support for schools. The policy prevents any congregation from using a public school for its worship service, or as a house of worship, and thus prevents the school from being identified with any one congregation in a way that could cause children and others to feel less welcome at the school, and potentially involve school officials in religious matters.

Br. 36 (citation omitted). That brief statement is just a paraphrase of the Board's Establishment Clause argument, which, as we discuss in Section C below, the district court correctly rejected.

As the Board candidly informed the district court, its adoption of the new SOP 5.11 was intended to "reinstitute a policy that would prevent any congregation from using a public school for its worship services." *Bronx Household*, 400 F. Supp. 2d at 599. That is, excluding worship services *was* the Board's purpose in adopting the new SOP, rather than a means to some other end. Such a policy cannot be characterized as defining a limited forum to include only certain speakers or subject matters. As noted above, excluding religious activity *because* it is religious is presumptively unlawful, whether it is analyzed- as discrimination against a religious viewpoint, *Good News Club*, 533 U.S. at 112, discrimination against speech because of its religious content, *Widmar*, 454 U.S. at 270, or even the targeting of religious conduct, *Church of the Lukumi Babalu Aye, Inc.* v. *City of*

Hialeah, 508 U.S. 520, 533 (1993). This proffered purpose is a justification for striking the policy down, not upholding it.

The Board notes (Br. 30) that the Ninth Circuit concluded that excluding religious worship was content rather than viewpoint discrimination. See *Faith Ctr. Church Evangelistic Ministries* v. *Glover*, 480 F.3d 891, 915 (9th Cir.), cert. denied, 128 S. Ct. 143 (2007). Even if the exclusion in that case could be characterized as content discrimination, the Ninth Circuit erred in failing to acknowledge that content-based discrimination is presumptively unlawful and subject to strict scrutiny review. See *Davenport*, 127 S. Ct. at 2381; *Widmar*, 454 U.S. at 270.

Hence the terms "content" and "subject matter" cannot be used interchangeably. Subject matter discrimination is a subset of content discrimination that, as noted above, is permitted in a limited public forum when reasonably related to the purposes of the forum. By contrast, content discrimination generally is presumptively unconstitutional. Thus it is imprecise to conclude that the Board's policy is content discrimination and then to analyze its reasonableness in light of the forum's purposes. Cf. *Bronx Household III*, 492 F.3d at 104 (Calabresi, J., concurring) (identifying exclusion as "content discrimination," but then analyzing whether it was "reasonable in light of the

purposes of the forum"). If the Board's policy were analyzed as content discrimination, it would have to survive strict scrutiny. As we discuss below, the Board has not shown that its policy could do so: it has not shown that the policy is narrowly tailored to further a compelling interest.

c. The Board May Not Create A Separate Category Of "Religious Worship Services" To Exclude Bronx Household's Sunday Meetings

There are also additional flaws in the Board's attempt to rely on supposed differences between religious worship services and other categories of speech. It is not simply that the Board has failed to adequately justify its policy; it has chosen an invalid basis on which to try to differentiate speech. The Supreme Court rejected the contention that government may properly distinguish between "religious worship" and "religious speech." *Widmar*, 454 U.S. at 270 n.6. The Court concluded that attempting to recognize such distinctions lacks "intelligible content." *Ibid*. The Court found no principled distinction for the courts to draw, and believed that any such hypothetical distinction would impermissibly entangle the government in religious affairs. The Court therefore concluded that there is no basis to determine 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.'" *Ibid*. Indeed, religious worship is itself also significantly expressive speech. See *Islamic Ctr. of Miss., Inc.* v. *City of Starkville*, 840 F.2d 293, 300 (5th Cir. 1988) ("By group worship, each worshipper communicates to outsiders the identity of the group and his own identity as a member of it, a form of self-expression.").

The Court in *Good News Club* similarly addressed the difficulties of distinguishing between religious worship as a subject matter and worship as expression of a religious viewpoint. The Court held that speech that is "quintessentially religious" or "decidedly religious in nature" can nonetheless also express a viewpoint, 533 U.S. at 111, observing that the "Club's activities do not constitute mere religious worship, divorced from any teaching of moral values," *id*. at 112 n.4. Also, a meeting that could be characterized as "worship" could also "be characterized properly as the teaching of morals and character development from a particular viewpoint." *Id.* at 111. Indeed, the dissenting Justices relied on the fact that the Club's meetings might be best described as "an evangelical service of worship." *Id*. at 138 (Souter, J., dissenting). The Court, however, reasoned that "[r]egardless of the label, * * * what matters is the substance of the Club's activities." *Id*. at 112 n.4.

The district court thus correctly rejected the Board's argument, finding that

it could not classify Bronx Household's activities as "fall[ing] within a separate category of speech" that can be "divorced from any teaching of moral values" or that is "mere religious worship." *Bronx Household of Faith*, 400 F. Supp. 2d at 592 (quoting *Good News Club*, 533 U.S. at 112 n.4). The relevant question after *Good News Club* is not whether it is possible to articulate some differences between "religious worship" and other categories of speech: the question is whether Bronx Household's meeting can be "characterized properly" as a social, civic, or recreational meeting from a particular viewpoint. See *Good News Club*, 533 U.S. at 111. It clearly can be.[2]

Further, as we discuss below, p. 33, requiring state actors to inquire into the precise nature of a group's religious conduct and decide which religious activities are properly characterized as "worship" and which are not creates significant concerns under the Establishment Clause. The Board, however, seeks to avoid this problem by noting that Bronx Household itself identifies its meetings as "religious

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[2] In *Bronx Household I*, this Court held that, in a limited public forum, a distinction could be made between religious viewpoints on a secular topic and religious worship and instruction. 127 F.3d at 214-215. In *Bronx Household II*, however, this Court recognized that after *Good News Club*, that holding is in doubt. 331 F.3d at 354 (recognizing tension between *Good News Club* and *Bronx Household I*, but finding it unnecessary to resolve issue). Certainly, to the extent the panel in *Bronx Household I* reasoned that religious *instruction* could be distinguished from religious viewpoints on secular topics, that reasoning was overturned by *Good News Club*, see 533 U.S. at 111-112.

worship services." See, *e.g.*, Br. 37 ("According to Pastor Hall, Sunday is the day the congregation gathers for 'corporate worship.'"); Br. 38 ("[T]he Church (like all other congregations holding weekly worship services in public schools) describes its proposed activity as religious worship."). But this reasoning disproves the Board's argument. The Board's need to rely on what the congregation itself calls its meetings to be able to distinguish them from other, permitted religious speech demonstrates the Board's inability to articulate a constitutionally relevant, viewpoint-neutral basis for its policy.

4. This Court's Decision In Bronx Household I *Does Not Control The Issue Of Whether The Board's Policy Is Permissible Subject Matter Discrimination*

On appeal, the Board argues, as Judge Calabresi had concluded, that if the Board's policy excluding religious worship services is viewpoint neutral, this Court would be bound to find that the exclusion was reasonably related to the purposes of the forum under its prior decision in *Bronx Household I*, 127 F.3d at 214. That decision, however, cannot control this issue. As discussed above, the Board has advanced no argument as to why its policy is necessary to preserve the nature of its forum; on the contrary, the district court correctly found that Bronx Household's meetings are fully consistent with the forum.

Moreover, the Court in *Bronx Household I* did not actually address the

question of whether the policy was reasonably related to the purposes of the forum. See 127 F.3d at 214. Indeed, the panel's analysis did not address the Board's purpose in creating its forum, nor did it address why it would be necessary to exclude religious worship to serve those purposes. Rather, the panel appears to have been answering the question of whether the policy was "reasonable" in the abstract, and did so by addressing Establishment Clause concerns.

Moreover, as set forth above, and in particular in Section A.3.c, the *Bronx Household I* panel's viewpoint discrimination analysis has been undercut by *Good News Club*. Additionally, two concerns highlighted by the *Bronx Household I* panel — protecting children from potential confusion and a federalism concern regarding state control of schools, see 127 F.3d at 214 — are at odds with *Good New Club*. This case involves a middle school on a weekend, but in *Good News Club*, the children were even younger, and the activity occurred immediately after school. Nevertheless, the Supreme Court rejected the Establishment Clause concern that the children might be confused as to government sponsorship. See *Good News Club*, 533 U.S. at 113-114. Indeed, the Court emphasized that "even if we were to inquire into the minds of schoolchildren in this case, 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." *Id.* at 118. Similarly, the Supreme Court in *Good News Club* rejected the argument that because some of the organization's activities could be characterized as worship, the school could use its discretion to exclude it from school premises. See *id*. at 111-112. While the local control of schools is an important concern, it is one that must yield to constitutional principles here for the same reasons that it did in *Good News Club*.

B. The Board's Policy Creates Rather Than Avoids Establishment Clause Concerns

The Board argues (Br. 42) that even if its exclusion of religious worship services is viewpoint discrimination, that discrimination is justified by its compelling interest in not violating the Establishment Clause. In *Good News Club*, the Supreme Court noted that it had never found an Establishment Clause concern sufficient to justify viewpoint discrimination. But the Court declined to decide whether such a concern would ever justify viewpoint discrimination, because it found the Establishment Clause concern in that case to be insubstantial. 533 U.S. at 112-113. The district court correctly found the Board's Establishment Clause concerns are also insubstantial. *Bronx Household*, 400 F. Supp. 2d at 592-599. This Court therefore need not decide whether an interest in avoiding an Establishment Clause concern would ever justify viewpoint discrimination. In any

event, the Board has not asserted that its policy of excluding religious worship services is narrowly tailored to further this interest — yet another reason why this Court need not reach this issue.

The Board apparently argues that even if the district court is correct in concluding that the Board's declining to discriminate against religious worship services would not violate the Establishment Clause, it should nevertheless be given "leeway" to decide for itself how much viewpoint discrimination against religion is appropriate to avoid such a violation. See Br. 43 (quoting *Skoros* v. *City of New York*, 437 F.3d 1, 35 (2d Cir. 2006), cert. denied, 127 S. Ct. 1245 (2007)). But *Skoros* is inapposite. In that case, a Christian parent challenged under the Establishment Clause the Board's policy permitting a menorah and a star and crescent in school holiday displays, but prohibiting a creche. *Skoros* involved not a challenge to government restrictions on private speech within a government-sponsored forum, but rather the very different issue of a challenge to the government's "own speech" under the Establishment Clause and Free Exercise Clause. See 437 F.3d at 36. In that context, this Court noted that it "afford[s] the government some leeway *in policing itself* to avoid Establishment Clause issues." *Id.* at 35 (emphasis added). The government stands in an entirely different position when it is restricting individual speech rather than speaking itself. See *Davenport*,

127 S. Ct. at 2381.

The district court thoroughly analyzed the Board's proffered Establishment Clause concerns and correctly found that they are insubstantial. *Bronx Household*, 400 F. Supp. 2d at 592-599. Indeed, permitting religious groups access on an equal basis preserves the neutrality toward religion required by the Establishment Clause. See, *e.g.*, *Good News Club*, 533 U.S. at 114 ("Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, [the school district] faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club."); *Rosenberger*, 515 U.S. at 839 ("[T]he guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.").

The Board nevertheless argues that if it does not discriminate against religious worship services, the failure to discriminate will have the effect of advancing religion, Br. 47-51; that it will afford impermissible "direct aid" to religion, Br. 51-53; that it will suggest favoritism, Br. 53-58; and that it will cause a reasonable observer to perceive endorsement of religion, Br. 58-61. But none of the numerous cases the Board cites supports the novel notion that the Establishment Clause's principle of neutrality requires the Board to impose a

special disability only on religious worship. The Supreme Court has in fact rejected such a notion. See, *e.g.*, *Widmar*, 454 U.S. at 271 (rejecting a university's argument that permitting equal access to its forum for groups that engage in religious worship would violate the Establishment Clause); see also *Rosenberger*, 515 U.S. at 840-841 (rejecting argument that student journal's religious viewpoint created Establishment Clause violation merely because it benefitted from student fees that funded university's general program supporting broad range of student activities).

A reasonable observer of Bronx Household's use of school space on equal terms with other groups, "aware of the history and context of the community and forum," would not perceive an endorsement of religion. See *Good News Club*, 533 U.S. at 119. As the district court noted, "not only does the Board not endorse [Bronx Household]'s activities, but it has actively opposed them for close to a decade." *Bronx Household*, 400 F. Supp. 2d at 594.

The district court likewise properly rejected the Board's argument (Br. 49-51) that by not discriminating against religious worship services it would give the impression of endorsing Christianity, because the schools typically are more available on Sundays. Even if the Board's factual premise is accurate, a reasonable observer would recognize that the availability of the schools on Sunday is merely a

happenstance of the schools' decision to hold few events on Sundays, rather than a result of the Board's endorsing Christianity. See *Harris* v. *McRae*, 448 U.S. 297, 319-320 (1980) ("[I]t does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'"). That certain potential beneficiaries may be in a better position to take advantage of a neutral benefit is irrelevant. See *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 647, 658-659 (2002) (fact that 46 of 56 private schools participating in voucher program were religious, and 96% of voucher students were attending religious schools, did not render neutral program unconstitutional).

The Board further argues (Br. 54-58) that impressionable school children and some adults in the community will wrongly perceive that the Board is endorsing religion. The Court in *Good News Club* rejected these arguments, holding that government may not employ the "heckler's veto" to exclude unpopular speech from the forum; nor may the government employ a "modified heckler's veto" to silence speech because of the impressionability of children. 533 U.S. at 119. Thus, Bronx Household's activities cannot "be proscribed on the basis of what the youngest members of the audience might misperceive." *Ibid*. And the Court noted that a child would just as easily see the school as disfavoring religious organizations if community groups are allowed to use school facilities but religious

groups were excluded. *Id.* at 118.

The Board's argument (Br. 56) that churches will dominate the forum is refuted by the record. In one year, 9,804 permits were granted for groups to use the Board's 1,197 schools, but only 23 of those were to congregations. *Bronx Household*, 400 F. Supp. 2d at 591. Whether one measures the 23 congregations as a fraction of the 9,804 permits or the 1,197 school buildings, that fraction is quite small.

Finally, allowing the Board to enforce its policy excluding religious worship services — and thus to attempt to discern which elements of a religious group's activities are "religious worship" and which are "religious speech" — would itself create an excessive government entanglement with religion. See *Widmar*, 454 U.S. at 272 n.11; see also *id*. at 269-270 n.6; *Bronx Household II*, 331 F.3d at 355.

CONCLUSION

The order of the district court granting a permanent injunction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND ANTI-VIRUS STATUS

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CERTIFICATE OF SERVICE

I certify that on April 1, 2008, two copies of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEES AND URGING AFFIRMANCE were served by Federal Express, overnight delivery, on the following counsel of record:

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