No. 02-7781

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

This case presents important questions of how Supreme Court precedent concerning viewpoint discrimination should be applied to religious speech in a limited public forum open to a wide range of expressive activities. The United States has participated in numerous cases addressing this issue, including *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993). The United States also has an interest, and has participated, in cases raising Establishment Clause issues of the type presented here because it is the proprietor 4of public property, including government-operated schools. Finally, the United

States has an interest in this Court's analysis since it may affect the scope of the Equal Access Act (EAA), 20 U.S.C. 4071-4074. The EAA provides that a "public secondary school" that receives federal funds and has a "limited open forum" may not "deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious * * * content of the speech at such meetings." 20 U.S.C. 4071(a). Student groups engaging in Bible study, prayers, and similar activities that might be classified as "worship" are protected by the EAA. See, *e.g.*, *Board of Educ.* v. *Mergens*, 496 U.S. 226, 232 (1990). A ruling by this Court that "worship" is a separate category of speech that may be treated differently by school officials could impact student's rights under the EAA. See *Hsu* v. *Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 857 (2d Cir.) (the EAA "creates an analog" to the First Amendment, and cases interpreting the First Amendment are "interpretative tools for understanding the Act"), cert. denied, 519 U.S. 1040 (1996).

The United States files this brief as *amicus curiae* pursuant to Fed. R. App. P. 29(a).

STATEMENT OF THE ISSUES

1. Whether defendants engaged in viewpoint discrimination when they barred a religious organization from renting school facilities for weekly meetings, which were to consist of singing, religious instruction, prayer and worship, socializing, and organization of charitable activities, pursuant to a community-use policy permitting "social, civic and recreational meetings and entertainments, and

other uses pertaining to the welfare of the community," but barring "religious services or religious instruction."

2. Whether the district court correctly concluded that there is no practical or constitutionally permissible distinction that public officials in charge of limited public fora open to a broad range of expressive activities can make between religious worship and expression from a religious viewpoint.

3. Whether granting equal access to a group seeking to engage in religious worship in a limited public forum open to a broad range of expressive activities violates the Establishment Clause.

STATEMENT OF THE CASE

1. Pursuant to New York Educ. Law § 414 (McKinney 2002), a school district or local school board may permit school facilities to be used during nonschool hours for a wide variety of purposes, including:

> holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.

N.Y. Educ. Law § 414(1)(c).

County School District No. 10 adopted this standard as part of its Standard Operating Procedures (SOP). The district's SOP, however, adds a prohibition against the use of school property for "religious services or religious instruction," *Bronx Household of Faith* v. *Board of Education (Bronx II)*, No. 01-Civ-8598(LAP), 2002 WL 1377306, at *7 (S.D.N.Y. June 26, 2002), while permitting

organizations to use school facilities to "discuss[] religious material or material which contains a religious viewpoint or for distributing such material." *Ibid*.

2. In 1995, Bronx Household of Faith (Bronx Household), a Christian organization, sought permission from the school district to use school facilities for its weekly meetings. See *id*. at *1. The school denied the request, citing its prohibition of religious services on school property. *Ibid.* Bronx Household sued the school district and the City asserting violations of the First Amendment, and lost. *Bronx Household of Faith* v. *Community Sch. Dist. No. 10 (Bronx I)*, No. 95-Civ-5501(LAP), 1996 WL 700915 (S.D.N.Y. Dec. 5, 1996), aff'd, 127 F.3d 207 (2d Cir. 1997), cert. denied, 523 U.S. 1074 (1998). The district court held that the school district created a limited public forum and applied reasonable regulations that prioritized access to the school. *Ibid.* This court, by a split vote, affirmed. The majority held that in a limited public forum a legitimate distinction could be made between religious viewpoints on a secular topic and religious worship and instruction. The majority concluded that Bronx Household's proposed use was worship and, thus, was barred properly. *Bronx I*, 127 F.3d at 214-215.

3. Bronx Household's weekly gatherings include "singing of Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion, sharing of testimonies," and a "fellowship meal" that allows attendees to talk and provide "mutual help and comfort to" one another. *Bronx II*, 2002 WL 1377306, at *8. Bronx Household explained that its weekly 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 in original). Bronx Household's support for members of the community have included helping indigent residents through counseling and financial assistance, and helping Cambodian refugees in the community. *Ibid*. These outreach efforts are coordinated at the weekly meetings. *Ibid*.

4. In June 2001, the Supreme Court issued its opinion in *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001). In *Good News Club*, the Club, a Christian youth organization, sought permission to hold its weekly meetings on school premises after hours. The Club's meetings included singing hymns, prayer, memorizing scripture, and Bible lessons. *Id*. at 103. The New York statute at issue here was also the focus in *Good News Club*. And as with the defendants, Milford's implementation policies opened school property to a broad range of activities: schools were open, *inter alia*, to "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community." *Id.* at 102. Milford acknowledged that these categories encompassed programs that address a child's moral and character development from a religious perspective. *Id*. at 108. The Milford school, however, rejected the Club's request because it considered its activities to be "the equivalent of religious worship." *Ibid*. The Supreme Court held that Milford engaged in viewpoint discrimination when it denied permission for the Good News Club since the Club sought to address a topic clearly within the bounds of the forum - the moral and character development of

children - but from a religious perspective. *Id*. at 107. The Court considered the school district's refusal to allow the Club permission to meet on its property akin to the viewpoint discrimination in *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). The Court rejected the lower court's characterization of the Club's activities as "different in kind" because they were "religious in nature." *Good News Club*, 533 U.S. at 110-111. The Court explained that characterizing something as "quintessentially religious" does not mean that it cannot be considered simultaneously a secular program to teach moral and character development. *Id*. at 111. "[R]eligion is the viewpoint from which ideas [we]re conveyed" by the Good News Club. *Id*. at 112 n.4. The Court also found that the Club's activities were not "mere religious worship, divorced from any teaching of moral values." *Ibid*.

5. In 2001, Bronx Household again sought permission from School District No. 10 to rent school property for its Sunday meetings and asserted that, in light of the Supreme Court's decision in *Good News Club*, the school could no longer refuse to rent them its facilities. *Bronx II*, 2002 WL 1377306, at *8. The school, however, again denied Bronx Household's request, claiming that the meetings constituted religious worship, which remained a prohibited activity under the terms of the SOP.

6. Bronx Household and two pastors sued the Board of Education of the City of New York and the school district 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 *1. Plaintiffs also sought a preliminary injunction to enjoin the defendants' denial of permission to Bronx Household to rent the school property for its weekly meetings. *Ibid*.

7.a. First, the district court (Loretta A. Preska, J.) stated that the standard for "mandatory injunctive relief" is greater than that for an injunction that maintains the status quo. *Id*. at *9. Plaintiffs "'must demonstrate a clear or substantial likelihood of success on the merits, or that it will suffer extreme or very serious damage if denied preliminary relief.'" *Ibid*. (citation omitted). Second, while noting that the Second Circuit has not held consistently that irreparable harm can be presumed when a First Amendment complaint is alleged, the court followed the "great majority of recent cases" that so held. *Ibid*.; see *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (loss of First Amendment freedom for short period of time constitutes irreparable injury).

b. The district court held that *Good News Club* warranted the court's reconsideration of its holding in *Bronx I*. See *Bronx II*, 2002 WL 1377306, at *10 ("Because there has been a change in the law, another look at the situation is justified."). Addressing the merits, the district court concluded that Bronx Household established a likelihood of success in proving a violation of its free

speech rights based on the principles set forth in *Good News Club*. *Id*. at *11. While noting that certain aspects of plaintiffs' services were "quintessentially religious," the district court determined that many aspects of Bronx Household's meetings were "clearly consistent with the type of activities expressly permitted by the School District[ ]." *Ibid*. Teaching moral values, socializing, and organizing charitable activities to serve the community, the court held, fall squarely within the purpose of the forum for providing space for "holding social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community." *Ibid*.

c. The district court also rejected defendants' effort to "label" Bronx Household's activities as a separate, excludable category of "worship," without considering all of the program's elements, or what the court stressed as the "substance of the Club's activities." *Id*. at *12 (quoting *Good News Club*, 533 U.S. at 112 n.4). Moreover, the district court rejected the defendants' claim that *Good News Club* was inapplicable since Bronx Household proposed to engage in religious worship, and that worship, marked by "ceremony and ritual," was substantively different from the permissible uses of the school. *Id*. at *12-13. Again citing *Good News Club*, the court held that activities "quintessentially religious" are not "different in kind" from permissible activities. The court also noted that other groups permitted to use the school's facilities engaged in "ceremony" or "rituals," including the Boy Scouts, who conduct "formal opening [and] * * * closing ceremon[ies]," and the Legionnaire Greys Program, whose

members wear uniforms, salute higher ranked officers, and have a "ceremonial flag presentation." *Id*. at *13.

d. The district court then addressed, assuming that Bronx Household's proposed activities could in fact be cabined into a separate category of activity called "worship," whether worship could be barred from a broad forum as an excludable category of content without such exclusion constituting viewpoint discrimination. *Id*. at *14. The district court noted that while the Court in *Good News Club* was not "squarely presented" with this issue, Court precedent "reveals the Court's increasing difficulty in distinguishing religious content from religious viewpoint where morals, values and the welfare of the community are concerned." *Ibid*. After a lengthy review of several Supreme Court opinions, and substantial reliance on Judge Jacobs' dissent in the Second Circuit's opinion in *Good News Club*, the district court concluded that there is no rational means to distinguish "religious worship" as a category of content from religious viewpoints in a limited public forum open to a wide range of activities. *Id.* at *14-19. The court also held that "dissecting speech to determine whether it constitutes worship" would conflict with the Supreme Court's statement in *Rosenberger*, that "[w]henever public officials . . . evaluate private speech 'to discern [its] underlying philosophic assumptions respecting religious theory and belief,' the result is 'a denial of the right of free speech.'" *Id.* at *19 (quoting *Rosenberger,* 515 U.S. at 845).

e. Finally, the district court concluded that plaintiffs had shown a substantial likelihood of demonstrating that defendants' rental of school facilities to them

would not violate the Establishment Clause. *Bronx Household II*, 2002 WL 1377306 at *21. The court cited several factors indicating the absence of governmental endorsement of or entanglement with Bronx Household's religious activities: plaintiffs only seek to be treated the same as other groups, they would be meeting during non-school hours when students would not be present, the program is not endorsed by the school district, employees would not attend Bronx Household's meetings, and the meetings would be open to the public. *Ibid.* "In short, it can hardly be said that plaintiffs' proposed meeting would so dominate [the school] that children would perceive endorsement by the School District of a particular religion." *Ibid.* Moreover, the court observed that excluding plaintiffs exhibited state hostility toward religion rather than the neutrality required by the Establishment Clause, and that allowing them to rent the space "would ensure neutrality, not threaten it." *Ibid.* (quoting *Good News Club*, 533 U.S. at 114).

SUMMARY OF ARGUMENT

The facts presented here are analogous in all material respects to those before the Court in *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001). Consistent with the Court's analysis in *Good News Club*, the district court correctly held that Bronx Household established a likelihood of success in proving that the school district violated its free speech rights. Bronx Household's weekly meetings, in which they engage in singing, sermons and lessons, prayer and worship activities, socializing, and coordination of charitable activities, fall well within the permissible category of "social, civic and recreational meetings and

entertainments, and other uses pertaining to the welfare of the community." N.Y. Educ. Law § 414(1)(c). The inclusion of elements that are unique to religion, such as prayer or communion, does not negate Bronx Household's conformance to the broad criteria for the limited forum created by defendants. Cf. *Good News Club*, 533 U.S. at 112 n.4. Thus, defendants' refusal to rent to Bronx Household constitutes impermissible viewpoint discrimination against Bronx Household. Cf. *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-394 (1993).

Moreover, the court correctly concluded that it cannot practically, and may not constitutionally, distinguish between religious worship and religious viewpoint in analyzing access to a broadly defined limited public forum such as the one here. *Bronx Household of Faith* v. *Board of Educ. (Bronx II)*, No. 01-Civ-8598(LAP), 2002 WL 1377306, at *19 (S.D.N.Y. June 26, 2002). The Supreme Court has recognized that there is no intelligible distinction that can be made between singing, teaching and reading in general, and those same activities when used for worship. *Widmar* v. *Vincent*, 454 U.S. 263, 269 n.6 (1981). Even if such a distinction could be made, the process would necessarily drag forum administrators and courts into a degree of parsing religious practice and doctrine that would violate the non-entanglement principle of the Establishment Clause, *ibid.*, as well as the free speech protections of the First Amendment. See *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845 (1995).

Finally, allowing Bronx Household to rent school property on equal terms with other organizations engaging in expressive activities would not, as defendants contend, violate the Establishment Clause. To the contrary, permitting access on an equal basis would in fact preserve the neutrality toward religion required by the Establishment Clause. See *School Dist. of Grand Rapids* v. *Ball*, 473 U.S. 373, 382 (1985) (Establishment Clause "requir[es] the government to maintain a course of neutrality among religions, and between religion and nonreligion.").

ARGUMENT

I

BRONX HOUSEHOLD'S ACTIVITIES FALL EASILY WITHIN THE BROAD CONTOURS OF THE SCHOOL'S FACILITY USE POLICY AND ITS EXCLUSION IS, THUS, VIEWPOINT DISCRIMINATION

In New York City, private organizations may rent school property for "social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community," and even may "discuss[ ] religious material or material which contains a viewpoint or * * * distribut[e] such material." *Bronx Household of Faith* v. *Board of Educ. (Bronx II)*, No. 01-Civ-8598(LAP), 2002 WL 1377306, at *7 (S.D.N.Y. June 26, 2002); N.Y. Educ. Law § 414 (McKinney 2002). However, they are forbidden from engaging in "religious services or religious instruction." *Bronx II*, 2002 WL 1377306, at *7. Consistent with *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001), the district court properly concluded that Bronx Household's activities fell within the broad category of permitted uses and, therefore, that they have shown a likelihood of

success in proving that their exclusion for proposing to engage in "religious services or instruction" violated the Free Speech Clause. *Bronx II*, 2002 WL 1377306, at *20.

In *Good News Club*, the Court considered the application of a broadly worded community-use policy that was virtually identical to the one at issue here: Milford permitted residents to use school facilities for holding "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community," but barred use of school premises "for religious purposes." 533 U.S. at 102-103. Similarly, the Court in *Good News Club* reviewed access for the Club's proposed use, the elements of which were nearly identical to the elements of Bronx Household's proposed use, albeit tailored for a younger audience.

The Good News Club program typically consisted of prayer, religious songs, Bible reading, telling a Bible story with a lesson about values or morals, and religion-themed games. See *id.* at 103. The Court found that Milford's exclusion of the Club's meetings as "religious instruction," *id.* at 104, while at the same time conceding that teaching "morals and character development to children" was a permitted use, constituted viewpoint discrimination. *Id.* at 108-109. The Court stated "we can see 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.* at 111. This was

true, the Court held, even though many of the activities engaged in by the Club were "quintessentially religious." *Ibid.*

There is likewise no difference in kind between Bronx Household's weekly worship meetings and the wide array of activities encompassed by the defendants' broad invitation for its facilities to be rented for "social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community." *Bronx II*, 2002 WL 1377306, at *7. Bronx Household's meetings include moral instruction, singing, socializing, and the planning of charitable activities for the community and other community outreach activities. *Id*. at *8. These meetings are plainly "social"; they involve music, singing, and lecturing, all of which are elements of "entertainment events"; and they involve a "use pertaining to the welfare of the community," since these meetings are the focal point of the congregation's efforts to organize charity projects for the surrounding community. *Ibid.* Thus, the district court accurately concluded that "the facts presented here fall squarely within the Supreme Court's precise holding in *Good News Club*: the activities are not limited to 'mere religious worship' but include activities benefitting the welfare of the community, recreational activities and other activities that are consistent with the defined purposes of the limited public forum." *Bronx II*, 2002 WL 1377306, at *11.

The district court correctly found that the inclusion of rituals such as communion in the weekly meeting does not alter the analysis, since ceremony and ritual are part of the meetings of groups permitted to rent the facilities, such as the

Boy Scouts, whose meetings begin and end with formal ceremonies, and the Legionnaire Greys program. *Id.* at *13. The key question, on which the district court properly focused, was whether the "substance of [Bronx Household's] activities" satisfy the District's criteria. *Id*. at *12 (citing *Good News Club*, 533 U.S. at 112 n.4). Since the only difference between Bronx Household and other organizations that rent school property is that Bronx Household engages in activities and services from a religious perspective, the defendants' denial of access to Bronx Household is viewpoint discrimination. See *id*. at *13; cf. *Lamb's Chapel*, 508 U.S. at 393-394.

II

THERE IS NO PRACTICAL OR CONSTITUTIONALLY PERMISSIBLE BASIS TO DISTINGUISH WORSHIP AND RELIGIOUS VIEWPOINTS IN A BROADLY DEFINED FORUM

As set forth above, appellants have shown nothing that calls into question the district court's finding that the substance of Bronx Household's activities falls within the broad uses set forth in the appellants' use policy. Instead, they focus on the fact that Bronx Household has described the weekly meeting as a "worship service" or a "church service," (Br. at 20), and argue that worship is an activity with unique characteristics that are "universally understood," and that have no secular equivalent (Br. at 20-21).

Appellants' efforts to cabin worship into a *sui generis* category of expression that is readily excludable from a forum open to a wide range of activities should be rejected. First, their argument based upon semantics is easily dismissed. Justice

Souter, in his dissent in *Good News Club*, found relevance in the fact that the Club's activities might be best described as "an evangelical service of worship." 533 U.S. at 138. The Court, however, in response, stated that "[r]egardless of the label * * *, what matters is the substance of the Club's activities." *Id*. at 112 n.4.

Second, the substance of worship cannot be so facilely dismissed or readily distinguished by government decision makers from other activities. Worship has characteristics that are unique, certainly, but that is also true of religion generally, and the Court in *Good News Club* was quite clear in rejecting the notion that religion's uniqueness lent itself to treatment as a separate subject rather than as a viewpoint. The Court stated that something such as religious instruction or prayer that is "quintessentially religious" or "decidedly religious in nature" can nonetheless express a viewpoint. *Id*. at 111. The Court cited Judge Jacobs' dissenting opinion in *Good News Club*, *ibid*., which the district court here also relied upon extensively. Judge Jacobs explained, *inter alia*, concisely how religious devotional acts such as prayer and Bible study can be an expression of viewpoint rather than a separate or distinct subject:

> [R]eligious answers * * * tend to be couched in overtly religious terms and to implicate religious devotions, but that is because the sectarian viewpoint is an expression of religious insight, confidence or faith – not because the religious viewpoint is a change of subject.

Good News Club v. *Milford Cent. Sch*, 202 F.3d 502, 514 (2d Cir. 2000). Indeed, even those aspects of religious practice most readily susceptible to being dismissed as "mere worship," such as a liturgical prayer or a ritual such as communion,

communicate specific messages to participants and to observers about the participants' world view.

The notion that worship is a distinct, readily excludable category of speech was rejected by the Court in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). The University of Missouri had permitted numerous student organizations to use its facilities, but denied access to Cornerstone, a Christian group that held meetings that included "prayer, hymns, Bible commentary, and discussion of religious views and experiences." *Id*. at 265 n.2. The Court held that the university's ban on Cornerstone's use of university facilities for "religious worship" or "religious teaching" violated the group's First Amendment rights to free speech and association, and that the university engaged in impermissible "content-based exclusion of religious speech." *Id*. at 273 n.13, 277. The Court explicitly rejected the dissent's distinction between "worship" and other forms of religion-related speech. *Id*. at 269-270 n.6. The Court concluded that there is no "intelligible content" or 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*.

The Court in *Widmar*, like Judge Jacobs in his dissent in *Good News Club*, recognized that making such distinctions is unworkable. It assumes a formalistic definition of worship that does not transfer to actual experience. The children taking part in the Good News Club activities were engaged in what might be called

"an evangelical service of worship," as Justice Souter suggested. *Good News Club*, 533 U.S. at 138. But, the Court found the Club's activities involved expression of a particular viewpoint about character development and youth activities. While the format of religious worship, tradition, and services varies greatly among religions, a viewpoint is expressed in both the free form or informal services, as well as more formal or ritualistic and liturgical activities. For example, expression of viewpoints on a variety of subjects is readily apparent in homilies or sermons, and a ritual that is part of worship each week or the saying of a prayer learned by rote is an expression of adherents, both individually and collectively as a religious community, of their viewpoints on the sources of truth and meaning, and on a myriad of subjects and ideas. See Brief Amicus Curiae For 20 Theologians And Scholars Of Religion In Support Of Petitioners, (filed in *Good News Club* v. *Milton Cent. Sch.*, No. 99-2036), 2000 WL 1803627, at *7 ("For some, including all secularists and the adherents to a few religions, ethics and religion are distinct subjects. For others, including adherents to many of the mainstream religious traditions of the West, ethics and religion are inextricable: to do God's will is to do the good, and knowledge of the good is ultimately derived from knowledge of the character of God.").

Not only does the cabining of worship into a separate, excludable category of speech fail to recognize the subtle ways in which such an undertaking constitutes viewpoint discrimination, it also puts government actors in the position of scrutinizing and dissecting religious practice and doctrine. This is not merely

impracticable, but also requires a degree of involvement in religious matters that violates the Free Speech and Establishment Clauses of the Constitution. Cf. *Lee* v. *Weisman*, 505 U.S. 577, 616-17 (1992) (Souter, J., concurring) ("I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible," than "comparative theology.") (quoted in *Good News Club*, 533 U.S. at 127 (Scalia, J., concurring)).

In *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), the Court concluded that the University's denial of funding for a student-run Christian public policy magazine constituted viewpoint discrimination. The Court held that government actors parsing religious expression implicated both the Free Speech Clause and the Establishment Clause:

> [t]he viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.

Id. at 845-846.

Similarly, the Court in *Widmar*, after observing that the distinction between religious worship and protected religious speech lacked "intelligible content," went on to note that even were such a distinction possible, it would violate the non-entanglement prong of the Establishment Clause:

> [m]erely to draw the distinction would require the university – and ultimately the courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by

> the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.

454 U.S. at 269-270 n.6 (citation omitted); see also *Good News Club*, 533 U.S. at 127 (Scalia, J., concurring) (Even if "courts (and other government officials) were competent, applying the distinction would require the state monitoring of private, religious speech with a degree of pervasiveness that we have previously found unacceptable.").

The district court, therefore, correctly found that the defendants' exclusion of religious worship and instruction from its otherwise extremely broad access policy would entangle them with religion by requiring them "to dissect and categorize the substance of plaintiffs' speech during their four-hour meeting and determine, *inter alia*, 'when "singing hymns, reading Scripture, and teaching biblical principles" cease to be "singing, teaching, and reading" . . . and become unprotected "worship."'" *Bronx Household II*, 2002 WL 1377306, at *20 (quoting *Widmar*, 454 U.S. at 269-270 n.6).

This is not to say that worship may never be excluded from a limited public forum, however. Depending on how a limited public forum's parameters are drawn, weekly worship services will often be inappropriate. For example, forums limited to sporting events or tutoring programs could exclude a group seeking to hold a worship service – though, of course, they could not exclude a religious tutoring program or a religious group's athletic event. Excluding worship in such a

context would neither constitute viewpoint discrimination nor drag government actors into the business of deciding questions of religious doctrine and practice.

DeBoer v. *Village of Oak Park*, 267 F.3d 558 (7th Cir. 2001), is instructive. In *DeBoer*, the court held that the village had engaged in viewpoint discrimination when a limited forum that permitted access to non-profit organizations for "civic program[s] or activit[ies]," *id.* at 561, barred a National Day of Prayer assembly for "[p]rayer for our community, and our local, state, and national governmental leaders." *Id.* at 562. The Seventh Circuit found that such an assembly was plainly civic in nature, and thus met the requirements of the forum. *Id.* at 569. The court noted that the case before it was distinguishable from a situation where the "civic program or activity" policy was used to deny permission "to conduct worship services held as part of a faith's regular religious regimen and bearing no relationship to a specific civic purpose." *Id.* at 570 n.11. Appellants cite (Br. 29) this passage from *DeBoer* as support for their position that religious worship is excludable from *their* forum. Appellants, however, have opened the schools not only to civic activities but to the far broader category of "social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community," criteria that, as discussed above, easily encompass Bronx Household's activities. *Bronx II*, 2002 WL 1377306, at *7. Their attempted comparison is thus plainly misplaced.

Similarly misplaced are appellants' repeated pleas (*e.g.*, Br. at 11, 14) that the primary purpose of the forum is to provide educational activities, and that the

number of such activities would be reduced if Bronx Household and others were allowed to rent space for worship. Appellants are free to create a forum limited to classes and similar educational activities (provided, of course, they do not discriminate based on viewpoint). But once they decide, as they have done, to open a broad forum encompassing, among other uses, "social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community," *Bronx II*, 2002 WL 1377306, at *7, they may not then discriminate against groups seeking to hold worship meetings.

III

PERMITTING BRONX HOUSEHOLD TO RENT SCHOOL FACILITIES ON EQUAL TERMS WITH OTHERS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

Permitting Bronx Household to rent school facilities on equal terms with others would not violate the Establishment Clause. Indeed, as noted above, allowing equal access in this situation actually prevents the excessive entanglement with religion forbidden by the Establishment Clause. Furthermore, "a denial of the right of free speech * * * would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845-846 (1995). As the Supreme Court stated in *School District of Grand Rapids* v. *Ball*, 473 U.S. 373, 382 (1985), the Establishment Clause "requir[es] the government to maintain a course of neutrality among religions, and between religion and nonreligion." See also *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) ("The First

Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.").

In the three cases in which the Supreme Court has addressed the issue of government officials denying religious groups access to government facilities on Establishment Clause grounds, the Court has held consistently that a policy of equal, content-neutral access does not violate the Establishment Clause. In *Widmar* v. *Vincent*, 454 U.S. 263, 273-275 (1981), the Court held that there was no Establishment Clause violation in providing equal access to religious speakers since an open forum does not confer "any imprimatur of state approval" on any of the organizations taking advantage of the policy and since the forum was open to a broad range of organizations. Similarly, in *Lamb's Chapel* v. *Center Moriches Union Free School District*, the Court found that "the posited fears of an Establishment Clause violation [we]re unfounded" since:

> The showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar,* there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.

508 U.S. 384, 395 (1993). And most recently, in *Good News Club* v. *Milford Central School*, 533 U.S. 98, 113 (2001), the Court held that the "Club's activities are materially indistinguishable from those in *Lamb's Chapel* and *Widmar*" and rejected the defendant's Establishment Clause argument. Noting Milford's

assertion that it denied access in order to comply with the Establishment Clause, the Court countered that the "implication that granting access to the Club would do damage to the neutrality principle defies logic" since "allowing the Club to speak on school grounds would ensure neutrality, not threaten it." *Id.* at 114.

As with the plaintiffs in *Lamb's Chapel* and *Good News Club*, Bronx Household seeks access to public school facilities after school hours pursuant to an access policy that permits rental by a broad range of organizations for a broad range of activities. Nothing in allowing equal access lends an imprimatur of state approval or endorsement of Bronx Household's activities, or otherwise sends a message that the State has departed from the required "course of neutrality among religions, and between religion and nonreligion." *Grand Rapids,* 473 U.S. at 382.

CONCLUSION

For the foregoing reasons, the order of the district court granting a preliminary injunction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the Brief For The United States As Amicus Curiae In Support Of Appellees Urging Affirmance complies with the type-volume limitation set forth in Fed. R. App. P. 29(d) and Rule 32(a)(7). This brief contains 5,927 words, as calculated by the WordPerfect word-count system.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the Brief For The United States As Amicus Curiae In Support Of Appellees Urging Affirmance were served by Federal Express, overnight mail, this 25th day of October, 2002, on:

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