No. 14-354

IN THE

# Supreme Court of the United States

THE BRONX HOUSEHOLD OF FAITH, ROBERT HALL, *et al.*,
*Petitioners*,
v.
THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,
*Respondents*.

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

## BRIEF *AMICUS CURIAE* OF THE COUNCIL OF CHURCHES OF THE CITY OF NEW YORK; UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA; AMERICAN BAPTIST CHURCHES OF METROPOLITAN NEW YORK; BROOKLYN COUNCIL OF CHURCHES; QUEENS FEDERATION OF CHURCHES; METROPOLITAN SYNOD, EVANGELICAL LUTHERAN CHURCH IN AMERICA; ATLANTIC DISTRICT, LUTHERAN CHURCH—MISSOURI SYNOD; SYNOD OF NEW YORK, REFORMED CHURCH IN AMERICA; INTERFAITH ASSEMBLY ON HOMELESSNESS AND HOUSING; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA; NATIONAL ASSOCIATION OF EVANGELICALS; NATIONAL HISPANIC CHRISTIAN LEADERSHIP CONFERENCE; ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS; AMERICAN BIBLE SOCIETY; THE REV. DR. CHARLES H. STRAUT; BISHOP ERNEST LYGHT; AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITIONERS


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## QUESTIONS PRESENTED

1. Whether a government policy expressly excluding "religious worship services" from a broadly open forum violates the Free Exercise Clause and Establishment Clause.

2. Whether a government policy expressly excluding "religious worship services" from a broadly open forum violates the Free Speech Clause.

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## INTEREST OF *AMICI CURIAE* [1]

Since 2002, an injunction has protected religious community groups' right to rent unused New York City school facilities on weekends and weeknights on an equal footing with other community groups.[2] In a 2-1 decision, with Judge Walker dissenting, the court of appeals would lift the injunction and allow the New York City Board of Education discriminatorily to deny access to community groups if Board officials deem their meetings to be "religious worship services."

*Amici* represent a significant cross-section of New York City churches and synagogues that will lose their right of equal access if the Second Circuit's decision is allowed to stand. For many of *amici*'s congregations, the right to rent unused school facilities on the weekends and weeknights is a critical safety net for religious congregations that abruptly find themselves displaced due to fire, flood, or other natural disasters. Equal access to unused school facilities is also necessary when new congregations form or when older

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[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any party, party's counsel, person, or entity, other than *amici,* their members, and their counsel, make a monetary contribution to the preparation or submission of this brief. All counsel of record received timely notice pursuant to Rule 37.2 of *amici*'s intent to file this brief. The parties' letters consenting to the filing of this brief are on file with the Clerk.

[2] Pet. App. 57a (district court notes that Bronx Household has held "Sunday religious worship services in a New York City public school . . . without interruption since this Court issued an initial preliminary injunction in 2002 barring Defendants from enforcing a regulation that would prohibit Plaintiffs from conducting their religious worship services in the Board's schools.")

congregations experience numerical growth or seek to relocate in neighborhoods nearer to their congregants. These needs are particularly pressing for small or less affluent congregations, especially in New York City where real estate costs are exceedingly high.

As important as the tangible cost of losing equal access to school facilities is the dignitary harm that these *amici* will suffer if our Nation's largest city is allowed to discriminate against citizens solely because they wish to meet for "religious worship services." Such overt discrimination belies the religious diversity that the City proclaims and the religious pluralism that the First Amendment protects.

*Amici* represent thousands of New York City congregations. In addition, *amici* include national religious organizations that serve tens of thousands of congregations throughout the country. These *amici* anticipate that New York City's discriminatory example will spread to other cities, if left uncontained.

Individual *amici* describe the particular impact of the Board policy on their constituent congregations and members in the Appendix.

## SUMMARY OF ARGUMENT

The New York City Board of Education's policy denies religious community groups access to school facilities on weekends and evenings for "religious worship services"—access for which the religious community groups pay the same fee charged other community groups. In violation of the Free Exercise Clause and the Free Speech Clause, the Board policy prohibits the free exercise of religion and bans a religious practice as if it were disfavored, rather than expressly protected, under the Constitution.

At a minimum, in violation of the Establishment Clause, the policy requires public officials to entangle themselves in distinguishing between "religious worship services" and other "religious speech," and to discriminate among various sects in doing so.

As explained in the statement of interest, for many of *amici*'s congregations, the right to rent unused school facilities on the weekends and weeknights is a critical safety net for religious congregations displaced due to fire, flood, or other natural disasters. Equal access to unused school facilities is also necessary when new congregations form, or older congregations experience numerical growth or seek to relocate in neighborhoods nearer to their congregants. These needs are particularly pressing for small or less affluent congregations, especially in New York City where real estate costs are prohibitively high. It is critical for *amici*'s congregations to have access to public space on an even footing with other community groups.

## ARGUMENT

### I. The Board of Education Policy Violates New York City Citizens' Free Exercise of Religion Because, on Its Face, It Singles out a Specific Religious Practice for Discriminatory Exclusion.

#### A. The use of public buildings, including school facilities, for religious worship services is a widespread, time-honored practice.

Public facilities have been made available on a nondiscriminatory basis from the outset of our nation's history, including the House of Representatives chambers, where Presidents Jefferson and Madison

attended services, and the first Treasury Building, where several denominations conducted church services. *See* Library of Congress*, Religion and the Founding of the American Republic, available at* http://www.loc.gov/ exhibits/religion/rel06-2.html (last visited Oct. 18, 2014). On the other end of the power spectrum, in the Antebellum North, African-American congregants often were ostracized by white congregations. Because they could not afford their own church buildings, they frequently resorted to public buildings to hold their religious services. *See* Craig D. Townsend, *Faith in Their Own Color: Black Episcopalians in Antebellum New York City* ch. 5 (2005).

The need of congregations—especially smaller, less affluent ones—to use public facilities still exists today. Recognizing that "[t]he right to assemble for worship is at the very core of the free exercise of religion," Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq*. (2012) ("RLUIPA"). 146 Cong. Rec. S7774 (daily ed. July 27, 2000) (Jt. Stmt. of Sens. Hatch and Kennedy) ("Jt. Stmt."). Congress was aware that, "[i]n a significant number of communities, land use regulation makes it difficult or impossible to build, buy or rent space for a new house of worship, whether large or small." *Id*. at S7777 (Ltr. of Melissa Rogers, General Counsel, Baptist Jt. Comm. on Public Affairs on behalf of the Coalition for the Free Exercise of Religion, dated July 14, 2000)).

In response, Congress enacted RLUIPA because "[c]hurches and synagogues cannot function without a physical space adequate to their needs. . . . The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble

for religious purposes." *Id*. at S7774 (Jt. Stmt.). Congress found RLUIPA necessary in part because congregations have difficulty building their own facilities: "Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways." *Id*.

Access to public school facilities is a common way for religious congregations to meet the need for facilities, whether the need is created by positive factors, such as numerical growth, or negative factors, such as natural disaster, high real estate costs, or zoning opposition. "Public schools tend to be centrally located in the community and easily accessible by public transportation. Such conveniences make renting public school facilities well suited for religious organizations." Christine Kiracofe, *The Constitutional Parameters of Renting Public School Space for Weekend Worship Services: An Analysis of 15+ Years of Case Law in* Bronx Household of Faith v. New York, 287 Ed. Law Rep. 663, 663 (2013) ("Kiracofe"). As the district court below noted, in this case, the school's central location was important for Bronx Household's congregation, many of whom are "elderly, disabled, or lack transportation." App.68a.

Of course, access to unused school facilities is particularly critical for smaller, less affluent congregations in New York City where real estate is at a premium and rents are high. As a general rule, public school rentals typically are available for "a period of a few hours and . . . at rates significantly lower than other commercially available rental property in the area."

Kiracofe, *supra*, at 663. In this case, as the district court below repeatedly noted, economic cost is an important reason why Bronx Household has needed to rent school facilities. App.68a, 70-72a. "The school is an ideal location for the congregation, as it offers needed space and amenities at an affordable price—something of particular value to a non-profit organization which needs to lease space in a high rent area." Kiracofe, *supra*, at 663.

Community use of public school facilities can be mutually beneficial for school districts and congregations. "[B]y augmenting their budgets," rentals create an additional revenue stream for fiscally challenged districts. *Id*. By strengthening connections with the community, schools and their students may benefit from additional volunteer hours and donations. *Id*. at 664 (noting a Brooklyn congregation that not only paid $38,000 per year in rental fees for use of a local high school but also donated library books, tutored students, and painted classrooms).

### B. On its face, the Board policy singles out a religious practice for discriminatory exclusion.

The Board policy allows community groups to rent 1,197 school facilities for "social, civic, and recreational meetings and entertainment, and other uses pertaining to the welfare of the community" when those facilities are not otherwise being used on weekends, evenings, holidays, or over the summer. App.60a, 290a. Actual community uses include student religious clubs, political candidate forums, carnivals, flea markets, and athletic activities. App.290a-322a. But the Board policy prohibits community groups from using the facilities for "religious worship services" or as a "house of worship," although

those terms are not defined in the policy or elsewhere by the Board. App.292a ("No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship."); App.93-94a (the district court notes the Board's "refusal to define either provision"). The policy requires all users to include the following disclaimer on all public materials: "This activity is not sponsored or endorsed by the New York City Department of Education or the City of New York." App.299-300a.[3]

**1. The Board policy discriminates on its face**. The Board policy unconstitutionally burdens New York City congregations' free exercise of religion. To determine whether a law violates the Free Exercise Clause, the Court begins by examining the text of the law, "for the minimum requirement of neutrality is that a law not discriminate on its face." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). A law that is not neutral toward religion on its face must be justified by a compelling governmental interest narrowly tailored to advance that interest. *Id*. at 531-32.

The Board policy fails the minimal requirement of facial neutrality because it explicitly and automatically denies access to community groups that wish to engage in "religious worship services." As the district court below held, the Board policy "both discriminates against religion on its face and discriminates among religions." App.69a, 62a. *See Fairfax Covenant Church v. Fairfax County Sch. Bd*., 17 F.3d

[3] New York City congregations' rentals are only a small fraction of the overall number of rentals to community groups. App.85-86a (district court finding that "close to 95 percent of all permits issued to community-based organizations do not involve religious activity").

703, 708 (4th Cir. 1993) (school board policy that charged churches higher rental fees than other community groups violated free exercise rights of churches).

The Free Exercise Clause forbids the state from doing exactly what the Board policy does: single out a particular religious exercise for discriminatory treatment. Indeed, this case presents facts more extreme than the laws held unconstitutional in *Lukumi*, because the exclusion here expressly applies to nothing but a form of religious conduct.

**2. The Board policy prohibits conduct undertaken for religious reasons**. But even if the Board policy did not expressly prohibit the free exercise of religion, it would still violate the Free Exercise Clause. In *Lukumi*, this Court considered local ordinances that were facially neutral but nonetheless had the effect of prohibiting a small sect's practice. This Court held that, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue . . . prohibits conduct because it is undertaken for religious reasons." 508 U.S. at 532.

"The Free Exercise Clause protects religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id*. at 542-43 (citation and quotation marks omitted). This free exercise protection in no way requires animus on the part of the government actors. Instead, objectively unequal treatment implies a value judgment on the part of the government that religious needs are less important than nonreligious needs. In *Lukumi*, this Court explained that the city's "application of the ordinance's test of necessity

devalues religious reasons for killing [animals] by judging them to be of lesser import than nonreligious reasons." *Id*. at 537. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.) ("when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny").

The Board policy prohibits a community group's meeting that includes the same conduct as many other meetings—speeches, music, sharing food—because the government deems it a "religious worship service." If the "service" involved were not a *religious* service but a *social* or *civic* one, it could include every objective attribute of a religious worship service—*e.g*., singing, speaking on "moral" and "self-improvement" subjects, studying a book, and even praying—without transgressing the Board policy. But once these activities are part of a religious "service," suddenly they are prohibited. Even more obtusely, the Board acknowledges that it *may not* prohibit community groups from engaging in "religious worship," but insists that it *may* prohibit community groups from engaging in "religious worship *services*,"—a distinction without a difference.

If the injunction were removed, the implementation of the Board policy will have a chilling effect on religious community groups' free exercise of religion and free speech. During their meetings, leaders will constantly need to assess whether the speech at the meetings remains within the bounds of "prayer, religious instruction, expression of devotion to God, and the singing of hymns," which the Board permits (App.63a, 94a, 96a), or whether the meeting has morphed into a "religious worship *service*," which the

Board does *not* permit. As this Court explained in *Corporation of Presiding Bishop v. Amos*, "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." 483 U.S. 327, 336 (1987). How much more a burden to predict which of its *religious* activities the Board will consider to be a "service"—particularly when the Board itself refuses to define that term. App.93-94a (noting the Board's "refusal to define either provision").

Nor can the Board policy be saved by whether or not a prospective renter characterizes a meeting as a "service." App.95a, 100-111a, 145-152a (describing Board officials' attempts to determine whether a meeting is a "religious worship service"). Different religious groups have varying beliefs and traditions for what they consider to be a "religious worship service." One group may label events a "religious worship service" (*e.g.*, a Bible lecture and singing), while another may perform exactly the same activities but not consider it a "religious worship service" (*e.g.*, because it does not include celebration of the Eucharist or is not officiated by clergy). As the district court below held, this inevitably leads to discrimination among sects, violating the neutrality principle inherent in the Religion Clauses—a discrimination that would only be exacerbated by a government official determining what does and does not qualify as a "religious worship service" under the Board policy. App.69a, 80a, 94-95a.

## II. The Board of Education Policy Violates New York City Citizens' Freedom of Speech by Denying Them Equal Access to Public Facilities.

The Board policy contradicts this Court's long line of precedent that protects citizens' right of equal access to public educational facilities for religious speech. *See*, *e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (religious community groups have free speech right to meet at elementary schools immediately after school); *Rosenberger v. Univ. of Va.*, 515 U.S. 819 (1995) (religious student groups have free speech right to funding from student activity fees for student publication containing religious speech); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (religious community groups have free speech right to meet in school auditorium during non-school hours); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (religious student groups have federal statutory right to meet at public secondary schools); *Widmar v. Vincent*, 454 U.S. 263 (1981) (religious student groups have free speech right to meet on college campuses).

In particular, the Board policy distinguishes "religious worship services" from other religious speech, despite this Court's holdings rejecting such distinctions in *Widmar* and *Fowler v. Rhode Island*, 345 U.S. 67 (1953). Affixing the label "religious worship service" to constitutionally protected religious expression—prayer, religious instruction, expression of devotion to God, and the singing of hymns—does not magically transform *protected* religious expression into *prohibited* religious expression. App.63a, 94a.

### A. In *Widmar v. Vincent*, this Court rejected government officials' attempt to distinguish "religious worship" from other "religious speech" protected by the Free Speech Clause.

Like the Board policy, the university policy in *Widmar* did not deny *all* access to religious groups but *conditioned* access upon religious groups agreeing not to use the university facilities for "religious worship" or "religious teaching." 454 U.S. at 265. Specifically, the university policy "prohibit[ed] the use of University buildings or grounds 'for purposes of religious worship or religious teaching.'" *Id*. at 266 n.3.

This Court held that the university policy "violate[s] the fundamental principle that a state regulation of speech should be content-neutral." *Id*. at 277. *Accord Rosenberger*, 515 U.S. at 828 ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."). In so ruling, this Court held that "religious worship and discussion . . . are forms of speech and association protected by the First Amendment." 454 U.S. at 269, *citing Heffron v. International Society for Krishna Consciousness, Inc*., 452 U.S. 640 (1981); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948). *See Capitol Square Review Board v. Pinette*, 515 U.S. 753, 760 (1995) (plurality op.) ("free-speech clause without religion would be Hamlet without the prince" and protects "even acts of worship").

In *Widmar*, this Court rejected the "novel argument," 454 U.S. at 269 n.6, that religious worship can be distinguished from other religious speech and discriminatorily excluded from public facilities, relying on four reasons:

**1. The distinction lacks "intelligible content."** The Court found it impossible to explain when "'singing hymns, reading scripture, and teaching biblical principles,' cease to be 'singing, teaching, and reading'—all apparently forms of 'speech,' despite their religious subject matter—and become unprotected 'worship.'" *Id*. *Accord Rosenberger*, 515 U.S. at 845. Neither the Board nor the court of appeals below offer a satisfactory definition of *what* a "religious worship service" is, or *why* a "religious worship service" differs from other community groups' meetings to such a degree that an unconstitutional prior restraint on religious speech suddenly becomes constitutionally permissible. *See Widmar*, 454 U.S. at 270 n.7 ("the effect of the College's denial of recognition was a form of prior restraint"), *quoting Healy v. James*, 408 U.S. 169, 184 (1972).

**2. The distinction is not administrable by government officials.** In *Widmar*, the Court "doubt[ed] that it would lie within the judicial competence to administer" a distinction between "religious worship" and other "religious speech." 454 U.S. at 269 n.6, *citing Fowler*, 345 U.S. at 70. *See also* 454 U.S. at 271 n.9 (distinction "is judicially unmanageable"); *Lee v. Weisman*, 505 U.S. 577, 616-17 (1992) (Souter, J., concurring) (could "hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible").

**3. The distinction would result in excessive entanglement between government officials and religion.** In *Rosenberger*, this Court condemned "the specter of governmental censorship" that would arise when university officials tried to determine whether

or not a student publication was religious. 515 U.S. at 844. As this Court explained in *Widmar*,

> Merely 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 n.6. Excessive entanglement would also occur because government officials would need "to monitor group meetings to ensure compliance with the rule." *Id*. at 272 n.11. *See Mergens*, 496 U.S. at 248, 253. As the district court below detailed, the Board policy has already led government officials to question whether certain meetings are "religious worship services." App.100-111a, 145-152a. *See* Part III. B., *infra*, pp. 18-19.

**4. The distinction lacks a foundation in the Constitution**. "[R]eligious worship by persons already converted" merits the same protection given "religious speech designed to win religious converts," which is protected by a long line of precedent. *Widmar*, 454 U.S. at 269 n.6, *citing Heffron*, 452 U.S. 640 (1981). The Court, therefore, condemned the distinction as "lack[ing] a foundation in either the Constitution or in our cases." 454 U.S. at 271 n.9.

### B. In *Fowler v. Rhode Island*, this Court struck down a municipal policy that, as applied, distinguished between "religious sermons" and "religious addresses."

In *Fowler*, this Court confronted the mirror image of the Board policy—a city permitted "religious sermons" in a public park but prohibited "religious addresses." The city shut down a Jehovah's Witnesses' meeting in the park at which a minister gave an "address," while it permitted Catholic and Protestant services in the park at which ministers gave a "sermon." 345 U.S. at 67, 70.

The municipal policy as applied in *Fowler* required exactly the same line-drawing as the Board's policy requires here, and *Fowler*'s holding should control: government officials lack authority to decide whether religious speech is a "religious sermon" as opposed to a "religious address." *Id*. This Court recognized that Jehovah's Witnesses have "conventions that are different from the practices of other religious groups. Its religious service is less ritualistic, more unorthodox, less formal than some." *Id*. But, as this Court understood, the difference in religious services among various religions means that it is not "in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings." *Id*. As a result, this Court discerned that "[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." *Id*. (emphasis added).

## III. Rather than Avoiding an Illusory Establishment Clause Violation, the Board Policy Creates a Concrete Establishment Clause Violation.

### A. The Board's unfounded Establishment Clause "fears" do not justify actual violations of citizens' constitutional rights of free exercise of religion and free speech.

The district court below correctly assessed that this case involved "the *burdening* of religion . . . where no *actual* Establishment Clause violation is of concern." App.76a. In contrast, the court of appeals below erred when it indulged the Board's asserted "fear" that a *potential* violation of the Establishment Clause might be alleged by someone someday. App.32a. Instead, the court of appeals shifted the blame to this Court, claiming that "[n]o extant decision by the Supreme Court permits the Board to predict with confidence whether it might be found in violation of the Establishment Clause." App.27a.

But the Board's "fear" is unreasonable. The Board acknowledges, as it must, that the Establishment Clause is *not* violated by religious student groups meeting for prayer, Bible study, and worship immediately before, during, and after the school day in the City's public secondary schools. Twenty-four years ago, the Supreme Court held that such student meetings, protected by the federal Equal Access Act, 20 U.S.C. §§ 4071-74 (2012), do *not* violate the Establishment Clause. *Mergens*, 496 U.S. at 247-53.

The Board acknowledges, as it must, that the Establishment Clause is *not* violated when a community group meets immediately after school in the

city's elementary schools to teach children Bible stories, prayers, and religious songs. Thirteen years ago, this Court held that this does *not* violate the Establishment Clause. *Good News Club*, 533 U.S. at 112-19.

The Board acknowledges, as it must, that the Establishment Clause is *not* violated by community groups using public school facilities on weekends and evenings for the purpose of teaching religious concepts, reading and discussing the Bible, advocating religious viewpoints, and praying. Twenty-one years ago, this Court held that a community group's access to a school auditorium during non-school hours to show a religious film series does not violate the Establishment Clause. *Lamb's Chapel*, 508 U.S. at 395-97.

In the face of three decades of Supreme Court precedent holding that the Establishment Clause is *not* violated by religious groups' access to public school facilities, the Board's unjustified claim that it "fears" an Establishment Clause violation cannot outweigh an *actual* Free Speech or Free Exercise violation. In *Good News Club*, this Court held that a religious community group's free speech "rights have been violated, not merely perceived to have been violated, by the school's actions toward the Club." 533 U.S. at 119. The Court then refused to allow the school district's Establishment Clause "fears" to justify concrete violations of citizens' religious speech rights:

> We cannot operate, as [the school district] would have us do, under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club's religious activity. We decline to employ Establishment Clause

> jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive. There are countervailing constitutional concerns related to rights of other individuals in the community.

*Id*. (quotations and citations omitted).[4]

This Court's consistent response to such hypothetical fears has been to commend the use of disclaimers to educate any confused observer (if one exists) that the speech occurring is not endorsed by the school district. *See*, *e.g*., *Mergens*, 496 U.S. at 251. Because the Board policy already requires such disclaimers on all public announcements and notices, any Establishment Clause "fear," no matter how unfounded, has already been remedied. App.299-300a (Board policy requires disclaimer: "This activity is not sponsored or endorsed by the New York City Department of Education or the City of New York.").

### B. The Establishment Clause is violated when government officials determine what is and is not a "religious worship service."

*Widmar* epitomizes this Court's time-tested reluctance to allow government officials to parse religious

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[4] The court of appeals' transformation of this case into one in which New York City "subsidizes" the religious organizations that use public facilities ignores the fact that users pay a fee, in contrast to the direct governmental payments involved in *Locke v. Davey*, 540 U.S. 712 (2004). But even when rent is not charged, this Court has repeatedly rejected the "subsidization" argument in upholding equal access for religious citizens. *See*, *e.g.*, *Widmar,* 454 U.S. at 272 n.12, 273-75; *Mergens*, 496 U.S. at 248.

expression under the Free Exercise, Free Speech, or Establishment Clauses. Beginning with *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court has held that government officials may not determine whether citizens' speech is or is not religious. Trying to administer a distinction between "religious worship" and "religious speech" "would tend inevitably to entangle the State with religion in a manner forbidden by [this Court's] cases." 454 U.S. at 269 n.6.

In *Widmar*, this Court strongly warned against the excessive entanglement that would result from government officials' attempts to distinguish impermissible "religious worship" from other "religious speech." *Id*. Excessive entanglement would invariably result if government officials "determine[d] which words and activities fall within 'religious worship and religious teaching.'" *Id*. (quotation marks and citation omitted). As this Court recognized, "[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." *Id*. at 269. *See Mergens*, 496 U.S. at 248 (excessive entanglement likely when officials attempt to distinguish religious speech from other speech).

Beyond the "impossible task" of determining which words constitute "religious worship," the Court in *Widmar* recognized that application of such a policy would create "a continuing need to monitor group meetings to ensure compliance with the rule." 454 U.S. at 272 n.11. *See Mergens*, 496 U.S. at 248, 253; *Rosenberger*, 515 U.S. at 844. The district court below recognized these inherent constitutional dangers and held that the Establishment Clause would be violated by Board officials reviewing applications to determine

whether community groups' meetings were actually prohibited "religious worship services." App.106-107a. The district court noted that, even though the Board refused to define the term, school officials have nonetheless reviewed applications to determine whether a "religious worship service" was occurring. App.93-94a; 100-111a, 145-152a. At least one Board official told an applicant that their "Bible study would be ok, but not prayer meetings." App.102a.

### C. Discrimination among religions will result if government officials are allowed to determine whether a religious meeting is, or is not, a "religious worship service."

As the district court below held, the Board policy inevitably leads to discrimination among religions. App. 69a, 62a. Discrimination among religions is a classic Establishment Clause violation. *See*, *e.g.*, *Larson v. Valente*, 456 U.S. 228 (1982); *Fowler*, 345 U.S. at 70 (distinguishing between religious service and religious address "is merely an indirect way of preferring one religion over another").

In *Rosenberger*, this Court warned that university officials' review of student publications to determine whether they contained religious content "risk[ed] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." 515 U.S. at 845-46. Religious worship services take many forms, depending on the particular religious tradition involved. A government official's reaction to a religious meeting could reflect not only the official's own highly subjective religious experience, but also the official's subjective cultural and ethnic attitudes as well. Such decision-making is fertile ground, not only for religious

discrimination, but for racial and ethnic discrimination as well. *See* 146 Cong. Rec. S7774 (daily ed. July 27, 2000) (Jt. Stmt.) (in passing RLUIPA, Congress understood that racial or religious discrimination often "lurk[ed]" behind zoning decisions to exclude a congregation, "especially in cases of black churches and Jewish shuls and synagogues"). *See* Richard Esenberg, *Of Speeches and Sermons: Worship in Limited Purpose Public Forums*, 78 Miss. L. J. 453, 515 (2009) (concluding that officials' attempts to separate worship from other speech would "almost certainly be influenced by cultural and religious biases").

## CONCLUSION

The petition for certiorari should be granted, and the decision below reversed.

Respectfully submitted,

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# APPENDIX

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## DETAILED STATEMENTS OF INTEREST OF *AMICI CURIAE*

The **Council of Churches of the City of New York**, organized in 1895, is the oldest continuing council of churches in the United States. It is an ecumenical coalition of the major religious organizations representing Protestant, Anglican, and Orthodox Christian denominations having ministry in the City of New York. It is governed by a Board of Directors comprised of the bishop or equivalent officer of each local diocese, association, synod, presbytery, conference, or district of its member denominations and of the president and executive officer of the local councils of churches serving in each of the boroughs of the City of New York. The leadership represented by the Council of Churches of the City of New York is aware that congregations often have need to use non-owned space for worship when organizing or when undergoing renovation or replacement of their own place of worship. It regards the policy of the New York City Board of Education as evidencing a hostility toward religion and religious worship which is inconsistent with First Amendment purposes.

The **Union of Orthodox Jewish Congregations of America** ("UOJCA") is a non-profit organization representing nearly 1,000 Jewish congregations throughout the United States. It is the largest Orthodox Jewish umbrella organization in the nation. Through its Institute for Public Affairs, the UOJCA researches and advocates legal and public policy positions on behalf of the Orthodox Jewish community. The UOJCA has filed, or joined in filing, briefs with this Court in many of the important cases which

affect the Jewish community and American society at large.

The **American Baptist Churches of Metropolitan New York** is a region of the American Baptist Churches in the USA, a non-profit religious organization of Baptist Churches and Mission Societies. The American Baptist Churches of Metropolitan New York is composed of 192 Baptist churches located within the five counties comprising New York City (Bronx, Kings, New York, Queens, and Richmond), as well as Nassau, Suffolk, and Westchester. The majority of its member churches are within New York City. Religious freedom is a core belief among Baptists. Efforts to suppress or deny the free expression of religious beliefs and practices by governmental entities have been and are a source of great concern. Further, the density of New York City, with its stringent land use regulations and extraordinarily high construction costs, creates burdens on houses of worship to find and construct places of worship. Weekend use of public school facilities offers relief to worshipping communities' need for space when disasters such as fires or floods strike, as well as for congregations needing space while trying to find or construct a permanent facility. In the past, several of its congregations have been permitted to rent public school facilities on the weekends when there has been fire damage and ongoing renovations to their permanent facilities. This has been in keeping with the public schools' policy to make space available for community organizations. The Board's decision to ban houses of worship from the use of public school facilities on the weekends is discriminatory and prohibits freedom of religious exercise.

The **Brooklyn Council of Churches** continues the work begun in 1829 by the Brooklyn Church and Mission Federation. It is governed by a Board of Managers elected by delegates from its member churches in Brooklyn representing the broad diversity of the Christian community in the Borough of Brooklyn, City of New York. Many of these churches meet the needs of their surrounding communities by housing mentoring programs, community meetings, the homeless, day care centers, food pantries, and soup kitchens. With nearly 1,900 congregations in Brooklyn, some will often have need to rent space temporarily because of damage to their sanctuary or because a dramatic growth in attendance occurs due to neighborhood development and renewal. A church may request the use of public school facilities to meet these temporary needs. The Brooklyn Council of Churches regards the Board policy as discriminatory and hostile to religious congregations by denying them access to public school facilities which are otherwise unused at the time.

The **Queens Federation of Churches**, was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of an equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry. The Queens Federation of Churches has appeared as amicus curiae previously in a variety of actions for the purpose of defending religious liberty. The Federation and its member congregations are vitally concerned for the protection of the principle and practice of religious

liberty as manifest in the present action. The Federation has assisted congregations in Queens which have been affected by the Board of Education's discriminatory policy.

The **Metropolitan Synod, Evangelical Lutheran Church in America**, has 63,959 baptized members in 193 congregations. The Synod has congregations in all five boroughs of New York City.

The **Atlantic District, Lutheran Church—Missouri Synod**, is comprised of 100 congregations, including 30,000 baptized members. Forty-five of these congregations are located within the City of New York.

The **Synod of New York, Reformed Church in America** ("RCA"), is one of eight geographic regions which make up the RCA. Today, the RCA includes 300,000 people of many cultures across the North American continent. It began in 1628 in New Amsterdam, now New York City, by Dutch settlers. It spans two countries—the United States and Canada—and includes approximately 1,000 churches and 170,000 diverse, confessing members with many ethnicities and cultures. The Synod is gravely concerned that people of faith be able to worship as they choose. Religious congregations ought to have access to use public facilities for their core purposes, including worship, on an equal basis with other community organizations in advancing their organizational purposes.

The **Interfaith Assembly on Homelessness and Housing** is an association of over 50 faith-based congregations and organizations in the New York City area committed to addressing the unacceptable and unconscionable reality of homelessness in New York

City. The Assembly was founded in the deeply shared commitment of all great faith traditions that every human being deserves dignity and respect and the belief that this is only possible with the security of a decent home. The Assembly joins this brief so that no faith community is unnecessarily hampered by discrimination, especially in the use of public facilities which are available to the community, in the support of those whom they serve in securing the basic human right of decent and affordable housing and of worshipping God in their selected manner.

The **National Council of the Churches of Christ in the USA**, also known as the National Council of Churches, is a community of 37 Protestant, Anglican, Orthodox, historic African American, and Living Peace member faith groups which include 45 million persons in more than 100,000 local congregations in communities across the nation. Its positions on public issues are taken on the basis of policies developed by its General Assembly. The National Council of Churches is an active defender of religious liberty. It is concerned that congregations of its member and other Christian communions, as well as congregations of other faiths, be able to use public facilities on the same basis as other nonprofit organizations and associations and not be denied access by a creative misuse of the Establishment Clause.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical societies, missions, nonprofits, colleges, seminaries, and independent churches. Its members are mission-oriented and often rent public spaces, particularly for

new congregations and community groups that do not own a building. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that religious freedom is God-given and that the government does not create such freedom, but is charged to protect it. NAE is grateful for the American legal tradition safeguarding religious freedom and believes that this jurisprudential heritage should be maintained in this case.

The **National Hispanic Christian Leadership Conference** ("NHCLC"), The Hispanic National Association of Evangelicals, is America's largest Hispanic Christian organization serving millions of constituents via our 40,118 member churches and member organizations. The NHCLC exists to unify, serve and represent the Hispanic Born Again Faith community by reconciling the vertical and horizontal elements of the Christian message via the 7 directives of Life, Family, Great Commission, Stewardship, Education, Justice and Youth.

The **Ethics & Religious Liberty Commission** ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 44,000 churches and 16.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for SBC churches. The Constitution's guarantee of equal access to public meeting space within their region of ministry is crucial to the ability of SBC churches and other religious organizations to fulfill their divine mandate.

The **General Conference of Seventh-day Adventists** is the highest administrative level of the Seventh-day Adventist Church and represents nearly 59,000 congregations with more than 18 million members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,000 congregations with more than 1.1 million members. The church has congregations in all fifty states. The Seventh-day Adventist Church has a strong interest in maintaining the freedom of its members to meet in public places.

The **American Bible Society** ("ABS"), established in 1816 and based in New York City, works to make the Bible available to every person in a language and format each can understand and afford so that all may experience its life-changing message. ABS partners with churches, national Christian ministries, and the global fellowship of United Bible Societies to help touch millions of lives hungry for the hope of the Bible and to support individual and corporate worship.

**The Rev. Dr. Charles H. Straut, D.Min**., is a United Methodist pastor who has served as Director of the Brooklyn Council of Churches, as District Superintendent for United Methodist congregations in Kings (Brooklyn), Queens, and Nassau Counties, and, following the 9/11 attacks, as Disaster Response Coordinator for the New York Conference of the United Methodist Church. His work with congergations of many denominations and faiths enables him to recognize the need to protect religious liberty for all and to support the use by congregations of public facilities for worship services and other activities on an equal basis with other community organizations.

**The Bishop Ernest Lyght** joins this brief in his personal capacity as Interim Bishop of the New York

Conference of The United Methodist Church. He presides over 462 churches in downstate New York State and western Connecticut, including the five boroughs of New York City.

**The Christian Legal Society** ("CLS") is an association of Christian attorneys, law students, and law professors. CLS has long believed that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their belief, speech, or assembly. Demonstrating its commitment to pluralism, CLS was instrumental in passage of the federal Equal Access Act of 1984 that protects the right of both religious and LGBT student groups to meet in public secondary schools. 20 U.S.C. §§ 4071-74 (2012). *See* 128 Cong. Rec. 11784-85 (1982) (Senator Hatfield statement) (recognizing CLS's role).