No. 11-386

# In the Supreme Court of the United States

THE BRONX HOUSEHOLD OF FAITH, ET AL.,

*Petitioners*,

*v.*

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL.,

*Respondents*.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS


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## QUESTION PRESENTED

Whether the First Amendment permits the government to exclude what it regards as "religious worship services" from after-hours use of public school facilities, when those facilities are otherwise open for all expression "pertaining to the welfare of the community."

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES** **PAGE(S)**

**OTHER AUTHORITIES**

## INTEREST OF THE *AMICUS CURIAE*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

Because religious expression is a fundamental aspect of human culture, the Becket Fund opposes attempts to relegate religious speech to second-class status. It has litigated numerous free speech and Establishment Clause cases before the Federal Courts of Appeals and this Court. Most recently, the Becket Fund served as co-counsel for the petitioner in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *Equal Employment Opportunity Commission*, No. 10-553 (argued Oct. 5, 2011).

The Becket Fund is concerned that the panel's shallow forum analysis will open the door for governments to target religious speech for disfavored status. It is also concerned that the panel's unprecedented distinction between "religious worship" and all other forms of religious speech is deeply entangling, unprincipled, and incompatible with the constitutional guarantee of religious freedom.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certify that no part of this brief was authored by counsel for any party, and no such counsel or party made a monetary contribution to the preparation or submission of the brief. Counsel of record received timely notice of intent to file this brief and granted their consent.

## SUMMARY OF THE ARGUMENT

This should have been a simple case. For thirty years—from *Widmar* to present—this Court has held that religious speech in a government forum must be treated on equal terms with nonreligious speech. It has specifically rejected the claim that religious "worship" is entitled to less protection under the Free Speech Clause than other forms of speech. *Widmar* v. *Vincent*, 454 U.S. 263, 269 n.6 (1981). And it has repeatedly held that equal treatment of religious speech does not violate the Establishment Clause. Thus, if the government broadly opens its facilities for a wide range of speech—as the New York City Board of Education ("Board") has done here—it cannot single out "religious worship services" for disfavored treatment.

Rejecting this principle of equality, and not even citing this Court's rejection of the worship/speech distinction, the Second Circuit held that "religious worship services" present unique problems under the Establishment Clause and thus constitute a disfavored category of speech. Its decision widens a circuit split over whether the government may impose content-based restrictions on "religious worship." It also flouts a long line of this Court's decisions guaranteeing equal treatment for religious speech.

Only this Court can defend its precedents, resolve the circuit split, and define the proper scope of public forum doctrine. This Court's intervention is required.

## REASONS FOR GRANTING THE WRIT

### I. The decision below widens a circuit split over the legality of content-based restrictions on "religious worship."

Six circuits have now addressed the question of whether religious worship services may be excluded from government facilities that have been opened for a wide variety of speech. Four have ruled that such exclusions violate the First Amendment. Two have now ruled the opposite. These decisions apply completely different legal standards on indistinguishable facts. The conflict is square and entrenched. And because it stems from deep confusion over this Court's forum analysis, only this Court can resolve it.

A. When evaluating speech restrictions on government property, this Court employs forum analysis, dividing government property opened to speech into three categories: (1) traditional public fora, (2) designated public fora, and (3) limited public fora. *Christian Legal Soc'y* v. *Martinez*, 130 S.Ct. 2971, 2984 n.11 (2010). Traditional public fora include public parks, streets, and sidewalks; speech in these places must be permitted, subject only to reasonable, content-neutral time, place, or manner restrictions. Designated public fora are created when governments open other property or facilities to private groups for speech of their own choosing. In either traditional or designated fora, any content-based restrictions "must satisfy strict scrutiny." *Ibid.*

A limited public forum is created when government provides opportunities for speech by particular persons or on particular topics—for example, if a city council creates a public comment period on topics

relevant to city government, or a city tourism board sponsors a jazz festival. In a limited public forum, the government is entitled to exclude speech that does not fall within the stated terms and purposes of the forum, and content-based restrictions need only be viewpoint-neutral and "reasonable in light of the purpose served by the forum." *Id.* at 2988.

Despite its apparent simplicity, forum analysis has become the subject of deep confusion among the lower courts. In particular, "[t]he contours of the terms 'designated public forum' and 'limited public forum' have not always been clear." *DiLoreto* v. *Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 n.4 (9th Cir. 1999); accord *United Food & Commercial Workers Local 1099* v. *City of Sidney*, 364 F.3d 738, 750 (6th Cir. 2004) ("Our circuit and others have noted the confusion surrounding the use of the terms 'designated public forum' and 'limited public forum.'"). In indistinguishable cases, circuits have reached opposite conclusions on whether a forum is designated or limited; thus, they have applied different standards of review and have reached conflicting results. The conflict is especially acute in cases involving content-based restrictions on religious speech.

B. In this case, the forum consists of public school facilities, which are available for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community." Pet. App. 368a. Under this policy, thousands of diverse community groups have used the facilities for a wide array of speech. Pet. 5, 7-10. The only limitations on expression are (1) a prohibition on "commercial purposes" except for "flea markets," Pet. App.

371a § 5.10, (2) a prohibition on "conducting political events," except for "candidate forums" where all candidates may participate, Pet. App. 368a-69a §§ 5.6.4, 5.7; and (3) a prohibition on "holding religious worship services, or otherwise using a school as a house of worship," Pet. App. 371a § 5.11. In practice, the prohibition on "commercial purposes" has been ignored, Pet. 6 n.2, and the prohibition on "political events" is defined narrowly to include little more than electioneering, while apparently permitting a wide variety of "civic" and other meetings discussing political subjects. See Pet. App. 369a § 5.7 (defining "political events").

Petitioner argued that these regulations created a designated public forum, noting that the forum is open to everyone, and the stated purpose of the forum—for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community"—is so broad that it essentially allows speech on all topics. Petitioner primarily relied on two cases. First, it cited *Widmar*, in which a university made its facilities generally available for the meetings of registered student organizations, but prohibited use for "religious worship or religious teaching." 454 U.S. at 265. This Court held that the university had created a designated public forum. *Id.* at 267. Second, Petitioner relied on *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), which involved the same New York education law at issue here. Although this Court did not resolve the forum question, it noted that, because "the District's property is heavily used by a wide variety of private organizations," the argument that it was a designated public forum had "considerable force." 508 U.S. at 391.

The Second Circuit, however, held that the Board had created a limited public forum. It distinguished *Widmar* on the ground that "[a] public university is, of course, much different from a public middle school in terms of traditional openness." *Bronx Household of Faith* v. *Cmty. Sch. Dist. No. 10* (*Bronx I*), 127 F.3d 207, 213 (2d Cir. 1997); accord Pet. App. 11a-12a, 97a-98a (adopting the analysis of *Bronx I*). And it dismissed the statements in *Lamb's Chapel* as dicta. *Bronx I*, 127 F.3d at 212-13. Instead, it held that the "limitation [on religious worship] is characteristic of a limited forum, for it represents the exercise of the power to restrict a public forum to certain speakers and to certain subjects." *Id.* at 213; accord Pet. App. 11a-12a, 97a. Thus, it applied a deferential standard of review and upheld the restrictions.

The Ninth Circuit reached the same result in *Faith Center Church Evangelistic Ministries* v. *Glover*, 480 F.3d 891, 908-10 (9th Cir. 2007). There, the forum was the meeting room at a public library. The room was broadly available to "[n]on-profit and civic organizations" for "meetings, programs, or activities of educational, cultural or community interest." *Id.* at 908. In practice, numerous groups used the room for a variety of expressive purposes. But the library imposed two limits: (1) Schools could not use the room "for instructional purposes as a regular part of the curriculum," and (2) no group could use the room for "religious services." *Id.* at 909. Based on these rules, the library rejected a request from a religious group to conduct a "Praise and Worship" service.

A divided panel of the Ninth Circuit held that the room was a limited public forum. *Id.* at 908-09. Citing the restrictions on schools and worship, the requirement to obtain a permit, and the requirement to pay a small fee for certain uses, the court held that the library had "demonstrated its desire to limit access to the library meeting room for certain purposes and speakers." *Id.* at 909. It thus applied deferential reasonableness review and upheld the ban on worship.

C. Four circuits have reached the opposite result on indistinguishable facts. Three of those cases involved public school facilities; one involved a library auditorium; all were deemed to be designated public fora.

*Gregoire* v. *Centennial School District*, 907 F.2d 1366 (3d Cir. 1990), involved a request by an evangelical youth organization to rent a high school auditorium for an evening program including religious worship. The school district rented its facilities to "a wide range of community groups," but prohibited use of its facilities for "religious services, instruction, and/or religious activities." *Id.* at 1369. After a preliminary injunction, the district revised its policy, further limiting access to "civic, cultural and service organizations," "employee associations and labor unions," and for-profit ventures "for the staging of plays and/or musical performances suitable for general audiences." *Id.* at 1372-73. According to the school district, these limitations converted the facilities into a limited public forum. *Id.* at 1373-74.

The Third Circuit, however, concluded that the district had created a designated public forum. "We cannot conclude that, because there is new exclusio-

nary language in the wording of the revised policy, we are precluded from finding that the school district has created a designated open forum." *Id.* at 1378. If the law were otherwise, said the court, the government could "pick and choose those to whom it grants access for purposes of expressive activity simply by framing its access policy to carve out even minute slices of speech which, for one reason or another, it finds objectionable." *Ibid.*

In direct conflict with the Second Circuit, the court rejected the argument that "*Widmar* principles should be confined to the university setting" (*id.* at 1379-80); it rejected the attempt to "draw[] a line between religious discussion and religious worship" (*id.* at 1382); and it rejected the argument that allowing religious worship in an open forum would violate the Establishment Clause (*id.* at 1380-82). Having found that the facilities were a designated public forum, the court applied a heightened standard of review and struck down the content-based restriction on religious expression.

The Fourth Circuit reached the same result in *Fairfax Covenant Church* v. *Fairfax County School Board*, 17 F.3d 703 (4th Cir. 1994). There, a school board made its public school facilities broadly available to community and cultural organizations, but charged churches a "progressively escalating rental rate to encourage them to rent elsewhere." *Id.* at 704. The policy was motivated by concern that long-term use by churches would violate the Establishment Clause. *Ibid.* Relying on *Widmar*, and in direct conflict with the panel in this case, the Fourth Circuit held that the school district had "created a

public forum." *Id.* at 706. It thus struck down the speech restriction under heightened scrutiny.

The First Circuit also addressed the type of forum created by a school district in *Grace Bible Fellowship, Inc.* v. *Maine School Administrative Dist. No. 5*, 941 F.2d 45 (1st Cir. 1991). There, the school district made its facilities available for expressive purposes "reasonably compatible with the mission and function of the school district in the community," but prohibited any activities "for the direct advancement of religion." *Id.* at 46-47. Under this policy, it rejected a church's request to host a free Christmas dinner that would include "an evangelical message." *Id.* at 46.

The First Circuit held that because the school district had "volunteered expressive opportunity to the community at large," it had created a designated public forum. *Id.* 48. Thus, it was prohibited from "excluding some because of the content of their speech." *Ibid.*

Finally, the Fifth Circuit addressed access to a library auditorium in *Concerned Women for America, Inc.* v. *Lafayette County*, 883 F.2d 32 (5th Cir. 1989). There, a library allowed any group to use its auditorium as long as it "would not be meeting for a religious or political purpose." *Id.* at 33. Based on this policy, it denied access to a religious group that wanted to use the auditorium for a prayer meeting.

Citing the "diverse groups" that had been permitted to use the auditorium, the Fifth Circuit held that the library had created a designated public forum. *Id.* at 34. Based on *Widmar*, the court held that "an equal access policy will not offend the Establishment

Clause." Thus, it concluded that the library's content-based restriction on religious speech failed strict scrutiny. *Id.* at 35.

In sum, the First, Third, Fourth, and Fifth Circuits have adopted an approach diametrically opposed to that of the Ninth Circuit and the decision below.

D. This circuit split affects religious organizations across the country. Many congregations rely on equal access to government fora for their existence—especially new congregations and minority faiths, which have difficulty renting or buying their own facilities. According to the record in this case, for example, at least twenty-two congregations held Sunday worship services in New York City public schools in 2005, and the number "has increased substantially since that time." Pet. App. 25a n.11. Similarly, in *Fairfax Covenant Church*, the record showed that the school board received approximately fifty applications from churches seeking to lease its facilities each year. 17 F.3d at 708.

Available statistical evidence confirms that access to public fora is especially important to new congregations. According to a 2007 study of new evangelical Protestant congregations, 12% met in schools in their first year—second only to meeting in homes (18%) and church buildings (13%). Ed Stetzer & Phillip Connor, *Church Plant Survivability and Health Study 2007* at 7, http://www.edstetzer.com/2011/07/18/RESEARCH_REPORT_SURVIVABILITY_HEALTH.pdf. But due to the decisions of the Second and Ninth Circuits—which exercise jurisdiction over approximately 27% of the nation's population—equal

access to public facilities in a large segment of the country is no longer guaranteed.

E. The forum analysis of the Second and Ninth Circuits is conceptually flawed, and should be corrected. A broadly inclusive forum, with no specified subject, does not become a "limited" forum simply because the government has excluded one or a few subjects of speech. On the contrary, such exclusions are subject to strict scrutiny. *Widmar*, 454 U.S. at 269-270. If the mere exclusion of one or a few subjects were enough to turn a designated forum into a limited forum, there would be no designated fora.

Although there may be difficult cases at the margin, the essential fact that distinguishes a limited forum from a designated forum is whether the forum was created to foster speech by a specified group of persons or on a specified topic or set of topics. *Ark. Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 678-680 (1998). If the mayor announces a town hall meeting on plans to build a new civic center, for example, the city can limit speech at the meeting to that topic. But when the forum is broadly open for speech by private groups on topics of their own choosing, it is a designated forum, and any content-based exclusions are subject to strict scrutiny. *Ibid.* (citing *Widmar*).[2]

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[2] We respectfully suggest that a more helpful term for a limited forum would be a "special-purpose forum." See *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983) (limited forum is reserved for "special purpose"). Of course, there are also cases in which the purpose of the facility is "not the promotion of expression" at all, in which case the same deferential standard of review applies. *Int'l Soc'y for Krishna*

This is not a close case. Both the broad definition of the purpose of the forum and the evidence of its actual use by speakers on any number of subjects shows that it is a designated forum. The policy permits "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community." Pet. App. 368a. That is so broad a definition that it is difficult to imagine a meeting or a topic that would not come within its terms. And indeed, the record shows that thousands of diverse community groups have used New York public school facilities for a wide array of speech. Pet. 5, 7-10. The mere decision to exclude a narrow slice of content does not convert a policy of "general access" into one of "selective access." *Ark. Educ. Television Comm'n*, 523 U.S. at 679.

According to the Second Circuit, however, the Board's content-based restrictions "represent[ed] the exercise of the power to restrict a public forum to * * * certain subjects," thus making the facilities a limited public forum. *Bronx I*, 127 F.3d at 213; accord Pet. App. 11a-12a, Pet. App. 97a-98a & n.4 (adopting the analysis of *Bronx I*). That cannot be right. If the exclusion of certain subjects is enough to convert a forum into a "limited" one, then there is no such thing as a designated forum. On the contrary, the exclusion of certain speech from an otherwise open forum, based on its content, is subject to strict scrutiny. It makes no sense to say that such exclusions are instead a reason to downgrade to deferential review.

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*Consciousness, Inc.* v. *Lee*, 505 U.S. 672 (1992) (airport terminal).

Were the law otherwise, narrow content-based restrictions would justify themselves. Governments could create a forum generally available to all, while excluding a narrow slice of disfavored content—say, speech about war, capitalism, unemployment, religion, taxes, or corruption in city government. The government could then use those content-based restrictions to claim that the forum was limited, thus justifying reduced scrutiny for those very same content-based restrictions. As the Third Circuit said in *Gregoire*, such a rule would "sound[] the death knell for the designated open forum." 907 F.2d at 1378.

## II. The decision below conflicts with this Court's decisions in religious speech cases.

This case is virtually a reprise of *Widmar* v. *Vincent*, 454 U.S. 263 (1981), one of this Court's landmark decisions. Here, as in *Widmar*, a public institution has opened its facilities on an after-hours basis to a broad range of expression. Here, as in *Widmar*, the government has excluded otherwise lawful and appropriate speech solely because of its religious content. Respondents offer almost precisely the same justifications here that this Court rejected in *Widmar*: that a public institution may exclude speech from an otherwise open forum in order to uphold a higher standard of separation between church and state than the Establishment Clause commands, and that religious "worship" is somehow different from "speech" and less protected under the Free Speech Clause. Without even troubling to address this Court's rejection of the worship/speech distinction in *Widmar*, the court below sanctioned the same free speech violation this Court forbade in *Widmar*.

To make matters worse, this case involves the same New York law and essentially the same policy this Court held unconstitutional in *Good News Club* v. *Milford Central School*, 553 U.S. 98, 102 (2001). After this Court held that New York public school districts may not discriminate against religious speech when making their facilities available to community groups, the Board of Education revised its policy to remove the exclusion of speech for "religious purposes" and substitute an exclusion of "religious worship services." Pet. App. 8a-9a. That change did not remedy the constitutional violation, but only made it worse, by introducing a hopelessly subjective and constitutionally entangling distinction between some kinds of religious speech and others.

### A. The lower court's forum analysis is contrary to *Widmar* and *Lamb's Chapel*.

1. In *Widmar*, the university made its facilities "generally available" to registered student groups, but prohibited use "for purposes of religious worship or religious teaching." 454 U.S. at 264-65. This Court analyzed the facilities as a designated public forum, subjecting the religious content-based exclusions to strict scrutiny. *Id.* at 269-70.

The forum in this case is indistinguishable from *Widmar*. If anything, it is even more "generally available." In *Widmar*, the facilities were open only to registered student groups. Here, they are open to *any* group for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community." Pet. App. 368a. In other words, unlike *Widmar*, there are essentially *no restrictions* based on speaker identity.

Lacking any restrictions based on speaker identity, the Second Circuit attempted to distinguish *Widmar* based on the presence of the three content-based restrictions already discussed. But that does not distinguish *Widmar*; *Widmar*, too, excluded speech on the basis of content. That did not convert the facilities into a limited public forum.

Alternatively, the Second Circuit tried to distinguish *Widmar* on the ground that "[a] public university is, of course, much different from a public middle school in terms of traditional openness." *Bronx I*, 127 F.3d at 213. But "traditional openness" is the standard for a *traditional* public forum, not a designated public forum. The whole point of a designated public forum is that the government can "designate a place *not traditionally open to assembly* and debate as a public forum." *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (emphasis added). That is precisely what happened here. Perhaps the public school setting would make a difference if the church sought to meet during school hours, when its activities could interfere with the normal functioning of the school. But after-hours speech in a public school building is no different from after-hours speech in a university building.

2. The lower court's forum analysis is also contrary to considered dictum in *Lamb's Chapel*. *Lamb's Chapel* involved a similar public school policy promulgated under the same New York law at issue here. The policy made school facilities available for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," but it excluded certain uses by political organizations and any use "for religious purposes."

508 U.S. at 386-87. The church argued that this policy opened the property "for such a wide variety of communicative purposes" that it became a designated public forum. *Id.* at 391.

The Court found it unnecessary to determine which category of forum was involved, because the "religious purposes" exclusion was viewpoint-discriminatory and therefore unconstitutional no matter what type of forum it was. *Id.* at 393. But the Court expressly stated that the designated public forum argument "has considerable force." *Id.* at 391. Specifically, the Court suggested that the property was a designated public forum because it "is heavily used by a wide variety of private organizations, including some that presented a 'close question'" about whether it was religious. *Ibid.*

Here, the forum is even more open than in *Lamb's Chapel*. Since *Lamb's Chapel*, the Board has revised its policy to allow not just "some" speech that presents a "close question" about whether it is religious. Rather, the Board allows *all* religious speech except "religious worship services." Thus, if the designated public forum argument had "considerable force" in *Lamb's Chapel*, it has even more force here.

### B. The lower court's Establishment Clause analysis is contrary to a long line of equal access cases.

Because the lower court held that the facilities were a limited public forum, it asked only whether the ban on religious worship was "reasonable in light of the purpose served by the forum" and "viewpoint-neutral." Pet. App. 20a, 12a. It found the ban reasonable because the Board had "a strong basis to fear

that permitting [worship] would violate the Establishment Clause." Pet. App. 45a. That conclusion conflicts with a long line of this Court's cases, which have repeatedly rejected claims that opening a government forum to religious speech on equal terms with nonreligious speech violates the Establishment Clause.[3]

The Second Circuit tried to distinguish these cases on three grounds—none persuasive. First, it noted that the students in this case "are not the 'young adults' of *Rosenberger* and *Widmar*, but young children who are less likely to understand that the church in their school is not endorsed by their school." Pet. App. 31a.

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[3] See:

- *Widmar*, 454 U.S. at 265 n.2 (rejecting concerns about allowing an evangelical student group to use university facilities for "prayer, hymns, Bible commentary, and discussion of religious views and experiences");
- *Lamb's Chapel*, 508 U.S. at 387 (rejecting concerns about allowing a church to use public school facilities to show Christian videos on child-rearing);
- *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 825-26 (1995) (rejecting concerns about allowing a Christian student group to be reimbursed for its expenses in producing a religious publication);
- *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 759 (1995) (rejecting concerns about allowing the Ku Klux Klan to erect a cross in a park next to the state capitol building);
- *Good News Club*, 533 U.S. at 103 (rejecting concerns about allowing a Christian organization to use public school facilities to sing songs, teach a Bible lesson, and pray with 6-12 year olds).

This is wrong both factually and legally. Factually, it is wrong because the "young children" are not there to see who is meeting in "their school." The meetings occur outside of school hours. Legally, the same argument was rejected in *Good News Club*. There, the Court held that "any risk that small children would perceive endorsement" was irrelevant, 533 U.S. at 119, because "the relevant community would be the parents, not the elementary school children," *id.* at 115. Moreover, even assuming the children's perspective were relevant, the Court held that there was no risk of endorsement because the activities took place "after the schoolday has ended"; the parents of the children "must sign permission forms"; and "[t]he instructors are not schoolteachers." *Id.* at 117-18. That is even more true here, where the activities take place on Sundays and target adults, rather than taking place immediately after school and targeting 6 to 12-year-old children. Thus, as in *Good News Club*, there is no reason "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." *Id.* at 119.

Second, the Court of Appeals tried to distinguish this Court's cases on the ground that public schools "are more available on Sundays than any other day of the week," creating "a *de facto* bias in favor of Christian groups who want to use the schools for worship services." Pet. App. 31a. But the record shows that religious groups are only a small fraction of the groups that use the forum overall, Pet. 5, that similar numbers of buildings are available on Fridays, Saturdays, and Sundays, Pet. App. 71a n.9

(Walker, J., dissenting), and that Jewish and Muslim groups have routinely used the forum on weekends, Pet. App. 70a (Walker, J., dissenting).

More importantly, even if Christian churches did use the forum more often, this Court has rejected the same argument before: "When a limited public forum is available for use by groups presenting any viewpoint, * * * *we would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a particular time*." *Good News Club*, 533 U.S. at 119 n.9 (emphasis added). It would make no sense to permit the government to impose formal, express, content-based discriminations against speech in an effort to avoid the possibility of unintentional disparate impact.

Finally, the panel tried to distinguish this Court's cases on the ground that the church seeks to use the facilities for "worship services"—which the panel believed were "more likely to promote a perception of endorsement" than other types of religious speech. Pet. App. 31a. According to the Second Circuit, "worship services" are categorically different from any other type of speech:

> When worship services are performed in a place, the nature of the site changes. The site is no longer simply a room in a school being used temporarily for some activity. The church has made the school the place for the performance of its rites, and might well appear to have *established* itself there. The place has, at least for a time, become the church.

Pet. App. 23a (emphasis in original).

This distinction—between religious worship and all other forms of religious speech—fails for many reasons.[4] First, this Court already rejected it. In *Widmar*, the dissent offered the same distinction, arguing that religious worship was less protected under the Free Speech Clause and more problematic under the Establishment Clause. 454 U.S. at 284-86. But this Court disagreed, concluding that a distinction between worship and other speech lacks "intelligible content," lies outside "the judicial competence to administer," and is irrelevant. *Id.* at 270 n.6, 271 n.9. The panel majority did not even cite this portion of *Widmar*, much less try to distinguish it.[5]

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[4] In direct conflict with the decision below, the Seventh and Tenth Circuits have rejected the worship/speech distinction and have treated worship restrictions as viewpoint discrimination. *Badger Catholic, Inc.* v. *Walsh*, 620 F.3d 775, 779, 781 (7th Cir. 2010); *Church on the Rock* v. *City of Albuquerque*, 84 F.3d 1273, 1278-79 (10th Cir. 1996).

[5] The panel suggested that this Court distinguished "'mere' religious worship" from other speech in *Good News Club*. Pet. App. 29a. Not so. In *Good News Club*, one of the permitted uses of the forum was "teaching morals and character development to children." 533 U.S. at 108. The dissent argued that the club's activities fell outside this category because the moral teaching was embedded within "an evangelical service of worship." *Id.* at 138-39. In response, the Court said that the club's activities "do not constitute mere religious worship, divorced from any teaching of moral values." *Id.* at 112 n.4. Rather, the club's activities included both.

In other words, regardless of whether the activities included worship or not, they also included something that clearly fell within the purpose of the forum—moral teaching—and thus had to be permitted. The point was not that "mere religious worship" could be excluded from the forum as a special category of speech. It was that *all* speech could be excluded from the forum if it lacked a connection to the purpose of the forum—

Second, as *Widmar* pointed out, the distinction between religious worship and other religious speech is hopelessly entangling. That is shown by the panel's attempt to define worship in this case. According to the panel, the typical components of a worship service—"[p]rayer, religious instruction, expression of devotion to God, and the singing of hymns"—"do *not* constitute the conduct of worship services." Pet. App. 13a (emphasis added). Rather, these activities *become* a "worship service" only when they are "[1] done according to an order prescribed by and under the auspices of an organized religion, [and] [2] typically but not necessarily conducted by an ordained official of the religion." Pet. App. 14a.

That is a constitutionally troubling definition. If taken seriously, it would require the Board of Education to discriminate among religions on the basis of those two criteria—allowing groups to meet if they do not follow the "prescribed" "order" of an "organized religion" and if their meeting is not "typically" conducted by an "ordained official." Quakers and Buddhists, who run afoul of neither criterion, would be permitted to meet, and probably also Sikhs (who have no ordained clergy) and many low-church Protestants (who follow no particular "order" of worship). Episcopalians, Roman Catholics, and most Jewish congregations are out of luck. It is surely unconstitutional for the government to discriminate among religious denominations based on whether they are "organized," whether they follow a "prescribed order," or whether their worship services are

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whether "mere religious worship," "mere political discussion," or a "mere Tupperware party." *Faith Center*, 480 F.3d at 900-01 (Bybee, J., dissenting from denial of rehearing).

"typically" conducted by an "ordained official." See *Larson* v. *Valente*, 456 U.S. 228 (1982). Indeed, it is hard to see how distinctions of these sorts could be relevant to any governmental purpose, or "reasonable in light of the purpose served by the forum." *Cornelius*, 473 U.S. at 804-06.

We would go further and say that it is impossible, constitutionally, for government to tell the difference between "worship" and mere religious "speech." A sermon is just a speech and a hymn is just a song, unless the person participating in the meeting holds it up to God as an act of devotion. The Board of Education has no way of telling mere religious speech from worship, and it would be offensive for it to try. As Madison said long ago: "the Civil Magistrate is [not] a competent Judge of Religious truth." James Madison, *A Memorial and Remonstrance Against Religious Assessments* ¶ 5 (1785) *reprinted in* James H. Hutson, *Religion and the Founding of the American Republic* 72 (1998).

Even to attempt to draw such a line would require the Board of Education, 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." *Widmar*, 454 U.S. at 269 n.6. As the Court said in *Widmar*, "Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Ibid.*

Finally, the panel's heightened concern about conducting worship services in government buildings is of recent vintage, with no roots in our constitutional tradition. President Washington permitted religious groups to conduct worship services in the

U.S. Capitol building as early as 1795. 1 Wilhelmus Bogart Bryan, *A History of the National Capital from Its Foundation Through the Period of the Adoption of the Organic Act* 260 (1914); Hutson, *supra* at 84. President Jefferson, whose devotion to church-state separation can scarcely be questioned, allowed worship services in the Treasury and War Office buildings as well, and he regularly attended services in the Capitol throughout his presidency. *Id.* at 89. Even the Supreme Court chamber was occasionally used for worship services. *Id.* at 91. Mr. Jefferson later invited religious societies, under "impartial regulations," to conduct "religious exercises" in rooms at his beloved University of Virginia, for the benefit of students who wished to attend. He specifically observed that these arrangements would "leave inviolate the constitutional freedom of religion." 19 *The Writings of Thomas Jefferson* 414-17 (Memorial ed., 1904). This history undermines the panel's assumption that conducting worship services in a public building is a uniquely pernicious Establishment Clause violation. Cf. *Marsh* v. *Chambers*, 463 U.S. 783 (1983).

## CONCLUSION

The panel's decision flies in the face of this Court's precedent, widens an unnecessary circuit split, and harms religious organizations across the country. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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