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 *AMICI CURIAE* FIRST AMENDMENT SCHOLARS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are established scholars at American law schools whose research and teaching interests focus on the Free Speech Clause, Establishment Clause, and Free Exercise Clause of the First Amendment.[1] As law

[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioners and respondents were timely notified of *amici*'s intent to file this brief and the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

professors, *amici* have an interest in ensuring a uniform and coherent interpretation of this Court's jurisprudence. *Amici* believe that the outcome of this case will affect First Amendment law and the freedom of speech and religion in important ways. *Amici* include:

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SUMMARY OF ARGUMENT

Plenary review of the court of appeals' decision is necessary to resolve an important and recurring issue that divides the courts of appeals: whether the First Amendment's Free Speech Clause fully protects religious worship services, or whether the State may single out worship for less favorable treatment.

The court below permitted the New York City Board of Education to open its buildings after school hours to countless community groups and activities but to exclude religious worship on two primary grounds. First, the court of appeals postulated that "religious worship" is an "activity," the exclusion of which is viewpoint neutral. Second, the court of appeals used this distinction to support its contention that "the Board has a strong basis to believe that allowing the conduct of religious worship services in schools would * * * constitute a violation of the Establishment Clause," thus justifying any harm to free speech.

In sanctioning a "religious worship" exception to free speech and invoking phantom Establishment Clause concerns to excuse the denial of equal access, the court of appeals has aligned itself with the Ninth Circuit, deepening a direct circuit split with the Fourth, Seventh, and Tenth Circuits. Compare Pet. App. 5a, and *Faith Ctr. Church Evangelistic Ministries* v. *Glover*, 480 F.3d 891, 911 (9th Cir. 2007), abrogated on other grounds by *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 21-22 (2008), with *Badger Catholic, Inc.* v. *Walsh*, 620 F.3d 775, 777-778 (7th Cir. 2010), *Church on the Rock* v. *City of Albuquerque*, 84 F.3d 1273, 1279-1280 (10th Cir. 1996), and *Fairfax Covenant Church* v. *Fairfax Cnty. Sch. Bd.*, 17 F.3d 703, 706-708 (4th Cir. 1994).

The court of appeals' decision is contrary to decades of this Court's First Amendment jurisprudence beginning

with the decision in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), and continuing with its progeny, *Board of Education of Westside Community Schools* v. *Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel* v. C*enter Moriches Union Free School District*, 508 U.S. 384 (1993); *Rosenberger* v. *Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995); and *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001). These cases hold that the viewpoint-based exclusion of religious speech from school grounds violates the Free Speech Clause, and they make crystal clear that allowing equal access for religious speech does not violate the Establishment Clause.

Ironically, the court of appeals' attempt to protect against Establishment Clause harm has the exact opposite effect. Its approach requires school administrators and federal courts to referee theological disputes over when a gathering crosses the line from protected religious speech to unprotected "worship." Allowing two of the nation's largest circuits to pursue this course, while others pursue a fundamentally different approach, is unsustainable. A grant of certiorari is therefore indispensable.

ARGUMENT

The division among the courts of appeals on the constitutionality of a worship exception threatens the integrity of this Court's First Amendment doctrines. This Court should therefore grant certiorari on the first question presented in the petition and clarify this important area of law.

I. THE SECOND CIRCUIT'S "WORSHIP EXCEPTION" IS A MAJOR DEPARTURE FROM *WIDMAR* AND THE UNBROKEN LINE OF CASES MANDATING EQUAL ACCESS FOR RELIGIOUS SPEECH.

Thirty years ago in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court held that university officials who allow a variety of groups to meet in public buildings may not exclude groups that meet "for purposes of *religious worship* or religious teaching." *Id.* at 265-266 & n.3 (emphasis added). The Court recognized that "religious worship and discussion * * * are forms of speech and association protected by the First Amendment." *Id.* at 269. By an 8-1 vote, the Court rejected the "novel argument" that there is any "constitutional difference between religious 'speech' and religious 'worship.'" *Id.* at 269 n.6, 271 n.9; see *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 111 & n.4 (2001). Indeed, the Court found "no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech * * * [and] for religious worship." *Widmar*, 454 U.S. at 269 n.6. Moreover, requiring school officials and lower courts to determine whether certain speech constitutes "worship" would involve a theological judgment beyond "judicial competence to administer." *Ibid.* For all of these reasons, the Court concluded that the exclusion of religious worship from an open forum cannot survive strict scrutiny. *Id.* at 270, 277.

Furthermore, the Establishment Clause does not require the exclusion of religious worship because allowing religious speech in a neutral forum "does not confer any imprimatur of state approval on [religion]." *Widmar*, 454 U.S. at 274; accord *Good News Club*, 533 U.S. at 113; *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993); *Bd. of Educ. of*

Westside Cmty. Schs. v. *Mergens*, 496 U.S. 226, 248-253 (1990); see *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841-842 (1995). This Court has previously rejected the court of appeals' ostensible concern that "young and impressionable students" might believe that the school subsidized, endorsed, and established Christianity. Compare *Good News Club*, 533 U.S. at 119, with Pet. App. 26a. The relevant community for purposes of the Establishment Clause's "endorsement" test is made up of objective observers, not children. *Good News Club*, 533 U.S. at 115. Letting the mistaken perception of young children negate the protections of the Free Speech Clause creates "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. In all events, the worship services here meet well outside classroom hours, almost always on different days, and are not related to curricular instruction. Moreover, any children are typically accompanied by adults.

In addition, a government entity may not single out religious speech for exclusion based upon a misplaced concern about an Establishment Clause violation or the government's desire to achieve a "greater separation of church and State" than the Establishment Clause requires. *Widmar*, 454 U.S. at 277; see *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 765 (1995) ("erroneous conclusions do not count") (citing *Widmar*, 454 U.S. at 274); *Lamb's Chapel*, 508 U.S. at 395 ("We have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause

violation are unfounded.").[2] The court below ignored these holdings when it concluded that the Board's "strong basis to believe that allowing the conduct of religious worship services in schools would give rise to a sufficient appearance of endorsement to constitute a violation of the Establishment Clause," Pet. App. 21a, was sufficient justification to exclude religious worship during after-school hours.

Since *Widmar*, this Court has repeatedly rejected exclusions of religious expression even from limited fora. *Good News Club*, 533 U.S. at 102; *Rosenberger*, 515 U.S. at 845-846; *Lamb's Chapel*, 508 U.S. at 395-396. In doing so, it has held that exclusion of religious expression constitutes viewpoint discrimination, which is "an egregious form of content discrimination" that has never been permissible in a limited forum. *Rosenberger*, 515 U.S. at 829. Only when discrimination against the content or subject matter of speech is demonstrably viewpoint neutral and reasonable in light of the forum's purposes might the government avoid violating the Free Speech Clause. *Ibid.* Yet viewpoint discrimination necessarily occurs when a policy targets speech "reveal[ing] an avowed religious perspective." *Id.* at 832-

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[2] For a further discussion on why the Establishment Clause is not a proper defense to a Free Speech violation in a neutral forum, see Michael Stokes Paulsen, *Lemon is Dead*, 43 Case W. Res. L. Rev. 795, 807 (1993) (arguing that neutrally allowing religious speech in a forum is no different than neutrally providing a religious entity with police or fire support). Moreover, the Free Speech and Establishment clauses are complimentary, not adverse provisions. Cf. Carl H. Esbeck, *"Play in the Joints Between the Religion Clauses" and Other Supreme Court Catachreses*, 34 Hofstra L. Rev 1331, 1335-1336 (2006) (arguing that the Free Speech and Establishment Clauses do not conflict because the Establishment Clause is only implicated when the government—which has no free speech rights—speaks).

833. Thus, the exclusion of religious expression from a limited forum is unconstitutional, even when the government provides meeting space or subsidizes religious activities. *Good News Club*, 533 U.S. at 111-112; *Rosenberger*, 515 U.S. at 840-841; *Lamb's Chapel*, 508 U.S. at 395-396.

The court of appeals' decision directly conflicts with *Widmar*'s rejection of any constitutional difference between worship and religious speech, as well as the holdings of later cases that viewpoint discrimination is impermissible even in limited fora. The Second Circuit reasoned that religious worship services are merely a form of subject matter or content—no different from "martial arts matches, livestock shows, and horseback riding"—and thus the exclusion of worship services in a limited forum is subject only to reasonableness review.[3] Pet. App. 15a, 20a. But this Court has never considered worship to be merely an activity that can be divorced from religious viewpoint. See *Rosenberger*, 515 U.S. at 825, 832 (holding that it was viewpoint discrimination to exclude a "religious activity" that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality" (alteration in original) (citation omitted)). And even if worship can properly be called an "activity," the exclusion of "religious worship services" singles out an activity only because of its inherently religious perspective.

The Second Circuit's characterization of worship as an activity divorced from viewpoint is directly at odds not only with *Widmar*, but also with this Court's settled

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[3] *Amici* assume for purposes of this brief that the court of appeals correctly held that a limited forum is at issue in this case. While *amici* agree with petitioners that the court of appeals' decision on this issue is questionable, this brief focuses on this Court's *Widmar* jurisprudence.

jurisprudence prohibiting the government from targeting a message simply because the message is contained in an activity. *Texas* v. *Johnson*, 491 U.S. 397, 406 (1989); *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). Under these cases, moreover, the Free Speech Clause does not permit the government to target a particular message merely because the actors could express their viewpoint through other, different modes of speech. *Johnson*, 491 U.S. at 416 n.11. Contra Pet. App. 13a (upholding the policy at issue because "adherents are free to use the school facilities for expression of [religious] viewpoints in all ways except through the reasonably excluded activity").

II. THE SECOND AND NINTH CIRCUITS' "WORSHIP EXCEPTION" CONFLICTS WITH THREE OTHER FEDERAL CIRCUITS.

There is a division of authority among the courts of appeals with respect to whether *Widmar* allows officials to exclude worship from a government forum. Five courts of appeals have faced government policies that expressly exclude religious worship from a forum. Each court had to decide whether religious "worship" was entitled to less constitutional protection than other forms of religious expression. Each court of appeals had to decide whether targeting worship services comprises not only content discrimination, but also viewpoint discrimination. Finally, each court had to consider whether the Establishment Clause, or broader concerns about the separation of church and state, justified the targeted exclusion of worship from the forum.

The Second and Ninth Circuits upheld broad exclusions of "worship services." This viewpoint-based exclusion not only is contrary to decisions of the Fourth,

Seventh, and Tenth Circuits, but also is contrary to this Court's decisions in *Widmar* and later cases.[4]

A. The Ninth Circuit

In 2007, the Ninth Circuit upheld a policy that allowed public library meeting rooms to be used for "meetings, programs, or activities of educational, cultural or community interest" but not for "*religious worship services*." *Faith Ctr. Church Evangelistic Ministries* v. *Glover*, 480 F.3d 891, 902-903 (9th Cir. 2007) (emphasis added), abrogated on other grounds by *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 21-22 (2008). The court held the exclusion of worship services from a limited forum was a permissible regulation of content or subject matter, and not the "suppression of a prohibited perspective from an otherwise permissible topic." *Id.* at 911.

The court therefore concluded that the constitutionality of the worship exclusion was to be measured not under the most rigorous level of scrutiny but under a "reasonableness" standard applicable to viewpoint-neutral content discrimination. *Glover*, 480 F.3d at 910. Applying this test, the Ninth Circuit found the policy to be a reasonable way to alleviate the County's concern about transforming the meeting room into a "house of worship"—a concern that reflected a greater separation of church and state than the Establishment Clause requires. *Ibid.* The Ninth Circuit pointedly did not consider whether an actual

[4] The petition for certiorari in this case presents three other questions for review. Although these issues may also merit this Court's attention, the circuit split on *Widmar*'s applicability to worship exceptions is so severe, and reflects such a recurrent issue, that this Court's grant of review of this question is of paramount importance.

Establishment Clause violation would have arisen if worship had been allowed. *Id.* at 919 n.20.

B. The Second Circuit

In 1997, during an earlier iteration of this case, the Second Circuit ruled that worship services should be treated differently under the First Amendment than other forms of religious expression. *Bronx Household of Faith* v. *Cmty. Sch. Dist. No. 10* ("*Bronx I*"), 127 F.3d 207, 214-215 (2d Cir. 1997). After this Court's decision in *Good News Club*, the Second Circuit reversed course, upholding a preliminary injunction against the exclusion of "religious services" under a predecessor of the policy challenged here. *Bronx Household of Faith* v. *Bd. of Educ. of City of New York* (*Bronx II*), 331 F.3d 342, 354 (2d Cir. 2003). Nevertheless, eight years later and after the Ninth Circuit's intervening decision in *Glover*, a different panel of the Second Circuit reversed course again. The panel followed the Ninth Circuit's lead and held that, because New York City's Board of Education had edited its policy, adding the word "worship" to its "religious services" exclusion, the First Amendment now permitted the Board to allow the use of school buildings for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community" but not for "*religious worship services.*" Pet. App. 6a, 9a, 45a (emphasis added).[5]

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[5]Compare *Bronx II*, 331 F.3d at 354 (relying on *Good News Club* and refusing to find "that the meetings of the Bronx Household of Faith constitute only religious worship, separate and apart from any teaching of moral values"), with Pet. App. 20a (distinguishing the present case from *Good News Club* by arguing that excluding a "'religious worship service' does not constitute viewpoint discrimination, [because] it is a content-based exclusion"); see also Douglas Laycock, *Voting with Your Feet is No Substitute for Constitutional Rights*, 32 Harv. J.L. & Pub. Pol'y 29, 41-42 (2009)

The Second Circuit reasoned that worship is not a fully protected form of religious expression, but instead is an event or activity that merely includes expressions of a religious viewpoint. Pet. App. 13a, 19a-20a. Because the board's policy did not prohibit all ways to express religious viewpoints in the limited forum, the court concluded that the exclusion of worship was merely content discrimination, devoid of viewpoint discrimination. *Ibid.* Applying a lenient "reasonableness" test, the Second Circuit held that officials' subjective fears about the separation of church and state justified the exclusion of worship, even without a proven Establishment Clause violation. *Id.* at 29a-31a.

C. The Fourth Circuit

The Fourth Circuit, by contrast, has rejected any distinction between "religious worship" and other forms of religious expression, and struck down a policy allowing community and cultural organizations to rent school buildings outside of school hours, but requiring churches holding worship services to pay higher rent. *Fairfax Covenant Church* v. *Fairfax Cnty. Sch. Bd.*, 17 F.3d 703, 704-706 (4th Cir. 1994). Officials operating a limited public forum, it held, "cannot discriminate against or exclude * * * groups that wish to engage in religious worship and discussion." *Id.* at 705-706 (citing *Widmar*, 454 U.S. at 269-270). The Fourth Circuit explained that *Widmar* disposed of any Establishment Clause concern about whether permitting worship constituted either an endorsement of religion or an impermissible subsidy to religion. *Id.* at 708-709 (citing *Widmar*, 454 U.S. at 273 n.12). Nor, the court concluded, did the school board's "speculation," "*anxiety* or *concern* about whether [an

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(discussing the fifteen-year history of this litigation and the school board's recalcitrance).

Establishment Clause violation] could exist in the future" justify less favorable treatment for worship. *Id.* at 708.

D. The Tenth Circuit

The Tenth Circuit has also held unconstitutional a policy allowing meeting space to be used for activities of interest to senior citizens, but not "'for sectarian instruction or as a place for *religious worship*.'" *Church on the Rock* v. *City of Albuquerque*, 84 F.3d 1273, 1277 (10th Cir. 1996) (emphasis added). Stating that "religious worship and discussion are forms of speech and association protected by the First Amendment," the Tenth Circuit refused to permit a worship exception, in part because such an exception lacked any official criteria or written standards to assist officials "in deciding whether or not expression constitutes * * * 'religious worship.'" *Id.* at 1277-1278. Citing *Widmar*, *Lamb's Chapel*, and *Rosenberger*, the court expressly rejected the argument that the "policy is a restriction based upon content, not viewpoint," and held that neutral provision of equal access to public facilities does not violate the Establishment Clause. *Id.* at 1279, 1279-1280 (citing *Rosenberger*, 515 U.S. at 829-831; *Lamb's Chapel*, 508 U.S. at 394-396; *Widmar*, 454 U.S. at 270-275).

E. The Seventh Circuit

In 2010, the Seventh Circuit struck down a university policy that funded a wide variety of student activities, but refused to fund "*worship*, proselytizing, and religious instruction." *Badger Catholic, Inc.* v. *Walsh*, 620 F.3d 775, 777 (7th Cir. 2010) (Easterbrook, J.) (emphasis added), cert. denied, 131 S. Ct. 1604 (2011). It, too, regarded *Widmar* as settling that "refusing to allow 'religious worship and discussion' in a public forum is forbidden viewpoint discrimination." *Id.* at 781 (citation omitted). In so concluding, the court strongly questioned how school administrators could permissibly differentiate

between religious worship and other forms of religious speech. *Id.* at 777-781. Moreover, like the Fourth and Tenth Circuits, the Seventh Circuit rejected both the university's Establishment Clause justification and its argument that a "public agency is entitled to withhold funds from religious speech, even though not commanded by the Establishment Clause to do so." *Id.* at 779. Nor could the Free Speech Clause be compromised simply because the university desired to enforce a greater separation of church and state than the Establishment Clause requires. *Id.* at 780.

III. THE COURT OF APPEALS' DECISION ENTANGLES SCHOOL ADMINISTRATORS AND COURTS IN THEOLOGICAL DECISIONS.

This Court should also intervene because the decision below requires school administrators and courts to resolve disputed theological questions. This entanglement creates constitutional problems of its own.

In *Widmar*, this Court noted that a worship exclusion would necessarily lack "intelligible content" and be judicially unmanageable. 454 U.S. at 269 n.6, 271 n.9. Federal courts, much less school administrators, are unable to draw any "arguably principled line" to determine when protected forms of religious expression, such as "'singing hymns, reading scripture, and teaching biblical principles' * * * cease to be 'singing, teaching, and reading' * * * and become unprotected 'worship.'" *Id.* at 269 n.6.

In truth, determining whether certain religious speech constitutes worship requires a theological judgment beyond "judicial competence to administer." *Widmar*, 454 U.S. at 269 n.6. As this Court has observed, a worship exclusion requires school administrators and courts "to inquire into the significance of words and practices to different religious faiths, and in varying

circumstances by the same faith." *Ibid.*; *Rosenberger*, 515 U.S. at 845 (quoting *Widmar*, 454 U.S. at 269 n.6). The Second and Ninth Circuits' approach ensnares school administrators and lower courts in these constitutionally impermissible questions, charging them with figuring out what is worship for a given religious group, and then distinguishing worship from other forms of religious expression. *Widmar*, 454 U.S. at 269 n.6, 272 n.11; see *Rosenberger*, 515 U.S. at 844-846. This Court could not have more clearly rejected that route in *Widmar* and its progeny.

Here, both the Second and Ninth Circuits left the identification of prohibited worship to the ad hoc discretion of school administrators—a task that is unconstitutional, unmanageable, and inherently subject to abuse. Cf. *Badger Catholic*, 620 F.3d at 780-781 (criticizing the school for essentially declaring, in its discretion, that there is "just too much devotional activity in Badger Catholic's program"). The resulting inconsistency and unpredictability will inevitably threaten Establishment Clause values and chill speech. *Rosenberger*, 515 U.S. at 844-846.

CONCLUSION

The court of appeals' decision badly misreads this Court's First Amendment teaching and creates a direct conflict with other courts of appeals. Intervention by this Court is needed to resolve the circuit split and make clear that the First Amendment has no room for the worship exception upheld by the court below.

For the foregoing reasons and those stated in the petition, this Court should grant the writ of certiorari.

Respectfully submitted,

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