12-2730

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE BRONX HOUSEHOLD OF FAITH,
ROBERT HALL, and JACK ROBERTS,

Plaintiffs-Appellees,

v.

BOARD OF EDUCATION OF THE CITY OF NEW YORK
and COMMUNITY SCHOOL DISTRICT NO. 10,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of New York, No. 01-cv-8598(LAP)

STATEMENT IN SUPPORT OF PETITION FOR REHEARING *EN BANC* OF *AMICI CURIAE* COUNCIL OF CHURCHES OF THE CITY OF NEW YORK; UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA; BROOKLYN COUNCIL OF CHURCHES; QUEENS FEDERATION OF CHURCHES; AMERICAN BAPTIST CHURCHES OF METROPOLITAN NEW YORK; SYNOD OF NEW YORK, REFORMED CHURCH IN AMERICA; INTERFAITH ASSEMBLY ON HOMELESSNESS AND HOUSING; ANGLICAN CHURCH IN NORTH AMERICA; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA; GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS; NATIONAL ASSOCIATION OF EVANGELICALS; ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST

CONVENTION; AMERICAN BIBLE SOCIETY; THE REV. CHARLES H. STRAUT, JR.; AND CHRISTIAN LEGAL SOCIETY

Kimberlee Wood Colby
Of Counsel
Center for Law & Religious Freedom
of the Christian Legal Society
8001 Braddock Road
Springfield, Va. 22151

Thomas P. Gies
Counsel of Record
Frederick W. Claybrook, Jr.
Crowell & Moring LLP
590 Madison Avenue, 20th Floor
New York, N.Y. 10022-2544
(212) 223-4000
Attorneys for *Amici Curiae*

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CORPORATE DISCLOSURE STATEMENT

None of the *Amici* have parent corporations or are publicly held.

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INTRODUCTION

The *Amici* respectfully request that this Court rehear this case *en banc* because of its profound impact on many religious citizens and communities of New York City. The *Amici* represent a significant cross-section of the churches and synagogues in the city, as well as a large portion of the national religious community. As the *Amici* explain in their individual statements of interest at the conclusion of this statement, the Board of Education's policy denying 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—discriminates against religious groups in a way that contravenes the city's history in fostering open-minded, wholehearted religious diversity for all its citizens.

The *Amici* and the diverse congregations they represent all share a common commitment to religious liberty, but they do not all share a common definition of "religious worship service." This lack of a common definition for what is a core function for most congregations is one reason why it is vitally important that religious liberty protect the right of all citizens to practice their faith according to their distinctive traditions. It is also why government officials necessarily lack the ability to assess whether a group of citizens is engaged in an "impermissible" "religious worship service" rather than a permissible "religious event."

ARGUMENT

The Board policy conveys an hostility to religious groups that is expressly outlawed by the Free Exercise Clause. A regulation that prohibits "religious worship services" from equal access to public facilities is manifestly a law "prohibiting the free exercise [of religion]." U.S. Const. Amend. I; *see Emp't Div. v. Smith*, 494 U.S. 872, 877-78 (1990) (holding that a worship service is an "exercise of religion"). The majority overcame this actual constitutional violation by giving credence to the Board's asserted "fear" that a potential violation of the Establishment Clause might be alleged by someone in some way some day. Supreme Court precedent confirms that there is no credibility to any such "fear."

1. The Board and the panel majority acknowledge, as they 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, did not violate the Establishment Clause. *Bd. of Educ. v. Mergens,* 496 U.S. 226, 247-53 (1990). Next, the Board and the panel majority also acknowledge, as they 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. Fourteen

years ago, the Supreme Court held that this did not violate the Establishment Clause. *Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 112-19 (2000). Finally, the Board and the panel majority acknowledge, as they must, that the Establishment Clause is not violated by community groups using public school facilities on weekends and evenings for the purpose of teaching religion, singing hymns, worshipping, reading and discussing the Bible, advocating religious viewpoints, and praying. *See, e.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384, 395-97 (1993).

2. Affixing the label "religious worship service" to exactly the same religious conduct as the religious teaching, singing, worshipping, reading, discussing, advocating, and praying repeatedly upheld by the Supreme Court from Establishment Clause challenge does not change the calculus. Indeed, the Board's justification for its policy has been categorically rejected by the Supreme Court. Over thirty years ago, in *Widmar v. Vincent,* writing for an eight-member majority, Justice Powell surgically dissected the sole dissenter's basic premise that religious worship was not protected speech, labeling it "a novel argument." 454 U.S. 263, 269 n.6 (1981). He rejected the dissent's "attempt [at] a distinction between the kinds of religious speech explicitly protected by our cases and a new class of religious 'speech act[s]' . . . constituting 'worship,'" *id.*, on several grounds:

a. 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.*

b. "[R]eligious worship by persons already converted" should not be less protected than "religious speech designed to win religious converts," which is clearly protected by the First Amendment. *Id.*

c. An alleged distinction between "religious worship" and "religious speech" is not "within the judicial competence to administer." *Id.*; *see also id.* at 271 n.9 ("distinction . . . is judicially unmanageable"). Government officials would have to "inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith." *Id.* The Court recognized that this would create an "entanglement" that the Establishment Clause prohibits, particularly because it would be "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *Id.* at 272 n.11. Government agents have neither the competence nor the authority to discriminate between "worship services" and other religious speech.

d. The Establishment Clause would also be violated by the need for the government "to monitor group meetings to ensure compliance with the rule." *Id.*

3. In the face of three decades of Supreme Court precedent holding that the Establishment Clause is not violated by religious groups' access to public educational facilities, the Board's unjustified claim that it "fears" a successful assertion of an Establishment Clause violation cannot counterbalance an actual Free Exercise Clause violation. *See Widmar*, 454 U.S. at 270-76; *Mergens*, 496 U.S. at 247-53; *Lamb's Chapel*, 508 U.S. at 395-97; *Good News Club*, 523 U.S. at 112-19; *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 837-46 (1995). As the Supreme Court explained in *Good News Club*:

> 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. . . . And, we have already found that those rights have been violated, not merely perceived to have been violated, by the school's actions toward the Club.

533 U.S. at 119 (quotations and citations omitted).

4. The majority's transformation of this case into one in which New York City "subsidizes" the religious organizations that use the public facilities also will have a negative impact on the city's religious citizens. New York City makes these public facilities available for all other community purposes except "religious worship services" to users who pay any extra expenses due to their use. This is a

far cry from the direct payments involved in *Locke v. Davey*, 540 U.S. 712 (2004), and the majority's extension of that rationale should be promptly corrected.

In summary, this is an important case that deserves reconsideration by the entire court. The history of this case—beginning with the Board's effort to forbid all religious uses of its schools but then (after the Supreme Court made clear that religious groups must be given equal access to school facilities made available to other community groups) dropping back to forbid "religious worship services" as "conduct"—generates an unfortunate perception of hostility to religion. Any such hostility is forbidden by the Religion Clauses. The injury to *Amici* and those they represent is clear from their following statements of interest.

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 representative 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 **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 **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 worshiping 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 **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 to 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 **Anglican Church in North America** ("ACNA") unites some 100,000 Anglicans in nearly 1,000 congregations across the United States and Canada into a single church. It is a Province in the Fellowship of Confessing Anglicans, initiated at the request of the Global Anglican Future Conference (GAFCon) in June 2008 and formally recognized by the GAFCon Primates—leaders of Anglican Churches representing 70 percent of active Anglicans globally—in April 2009. The ACNA is determined by the help of God to hold and maintain the doctrine, discipline, and worship of Christ as the Anglican Way has received them. The ACNA is also determined to defend the inalienable human right to the free exercise of religion as given by God and embodied in the First Amendment to the United States Constitution. The ACNA is quickly growing, through efforts such as its "Anglican 1000" initiative, to rapidly catalyze the planting of Anglican congregations and communities of faith across North America, and it strongly supports the right of equal access to public facilities for religious worship.

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 **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 16 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 one 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 **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 **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 **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 congregations 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 **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 on public secondary school campuses. 20 U.S.C. §§ 4071-74; *see* 128 Cong. Rec. 11784-85 (1982) (Senator Hatfield statement) (recognizing CLS's role in drafting the EAA).

CONCLUSION

Amici urge the Court to grant the petition for *en banc* rehearing.

Respectfully submitted,

/s/Thomas P. Gies

Thomas P. Gies
Counsel of Record
Frederick W. Claybrook, Jr.
Crowell & Moring LLP
590 Madison Avenue, 20th Floor
New York, N.Y. 10022-2544
(212) 223-4000

Kimberlee Wood Colby
Of Counsel
Center for Law & Religious Freedom
of the Christian Legal Society
8001 Braddock Road
Springfield, Va. 22151

Attorneys for *Amici Curia*

CERTIFICATE OF COMPLIANCE

I, Frederick W. Claybrook, Jr., certify that the foregoing Statement for *Amici Curiae* complies with the page limitation of Federal Rule of Appellate Procedure 35(b)(2), in that it contains 15 pages or less, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point.

/s/ Frederick W. Clayrook, Jr.
Frederick W. Claybrook, Jr.

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