07-5291

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees,

vs.

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

Defendants- Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellees make the following disclosure: Plaintiffs-Appellees have no parent corporations, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Where the Board of Education of the City of New York ("Board") has opened up nearly 1200 school district facilities for use during non-school hours by thousands of community groups, may it, consistent with the Constitution, deny equal access to Plaintiffs-Appellees ("Church") because they wish to engage in religious speech, including worship, in the forum?

2. Whether the Establishment Clause requires, or even justifies, denying Plaintiffs access because they engage in religious speech, including worship, in the forum?

STATEMENT OF THE CASE

Plaintiffs-Appellees agree with the recitation of the course of proceedings below in the section entitled Decision Below found on pages 18-21 of Appellants' Brief ("App. Br."), although we dispute the incorrect characterizations of some of the District Court's findings, and regard many of the facts included by the Board of Education to be irrelevant to the resolution of this case.

STATEMENT OF FACTS

1. The Board of Education of the City of New York ("Board of Education" or "Board") owns and controls 1,197 individual school facilities. Appendix ("A") 16-17 ¶3.

2. The Board's policies open school facilities to various community groups during week nights and weekends. A355; *Bronx Household of Faith v. Bd. of Educ. of the City of New York,* 226 F.Supp.2d 401, 403 (S.D.N.Y. 2002) (*Bronx II*).

3. The Board policies governing the use of school facilities permit a broad range of community uses and may be found in The Standard Operating Procedure Manual ("Policies"). A354-371; *Bronx II*, 226 F.Supp.2d at 409 & n.2. The policy expressly permits the following users: tenants groups, taxpayer associations, drama clubs, local merchant associations, senior citizen groups, local chapters of tax-exempt organizations, youth groups, Scouts, Little League, teen clubs, labor unions, professional societies and private social service agencies, such as the local "Y"s and settlement houses. Supplemental Appendix ("SA") 113.

Forum Users

4. During the 2000-2001 school year, the Board permitted a wide variety of organizations to use school premises for meetings and activities after school hours

and on weekends. SA74-75; 83-87; *Bronx Household of Faith v. Bd. of Educ. of the City of New York*, 331 F.3d 342, 348 (2d Cir. 2003) (*Bronx III*).

5. On July 23, 2004, the Board disclosed a report showing all permits issued for uses of school facilities during the 2003-2004 year. A925-1849.

6. According to the Board of Education, there were 9,804 total community organization permits issued for the 2003-2004 year, excluding uses by government organizations, the Board of Education, and contractors. A1864 ¶c.

7. Many of the total permits issued were for multiple uses (i.e., more frequent than one day), as opposed to "single use" permits. A1865, Defendants' Response to Plaintiffs' Statement of Facts ("DR") ¶11; *see also* A1865-66, Plaintiffs' Statement of Facts ("PS") ¶13 and DR¶13.

8. The Board allows organizations to undertake the teaching of morals and character development while using the Board's school facilities. SA19 ¶6; SA10 ¶6; A1866-67, PS¶14 and DR¶14; *Bronx III*, 331 F.3d at 354.

9. The Board allows organizations to have meals while using the Board's facilities. SA21 ¶7; SA10 ¶5; *Bronx III*, 331 F.3d at 354.

10. The Board allows organizations to sing while using its facilities. SA44; A1868, PS¶16 and DR¶16.

Nature of Forum Use – Girl Scouts

11. At least one Girl Scouts troop meets in P.S. 15, which is the same building that the Church meets. SA32, L23; A1868, PS¶17 and DR¶17.

12. The Girl Scouts leaders teach character qualities to the girls, such as self-esteem, honesty and how to get along with one another. SA31-32; A1868, PS¶18 and DR¶18.

13. At least once a month the meetings begin with a ceremony in which girls bring in the American flag and recite the Pledge of Allegiance. SA37-38; A1869, PS¶20 and DR¶20.

14. The girls recite the Girl Scout Promise, which states: "On my honor, I will try to serve God and my country, to help people at all times and to live by the Girl Scout Law." SA40; A1869, PS¶21 and DR¶21.

15. The girls recite the Girl Scout Law, which states approximately: "I will do my best to be honest, to be fair, to be friendly and considerate, to be a sister to every Girl Scout, to respect authority, to use resources wisely, to protect and improve the world around me." A1869-70, PS¶22 and DR¶22.

16. Girl Scout meetings include the singing of songs, the eating of refreshments, and the paying of dues; A1870, PS¶23 and DR¶23.

17. The Girl Scouts also engage in various ceremonies and rituals in the public schools. "Bridging" is a ceremony in which girls transfer to the next Girl Scout

group appropriate for their age level. SA51-52; A1870, PS¶24 and DR¶24.

18. The "rededication ceremony" renews the girls' commitment to Girl Scouts by having them "sign in" again. SA59. Parents attend this ceremony, SA42-43, and the girls recite the Girl Scout Promise and receive a pin. SA53; A1871, PS¶25 and DR¶25.

19. The Girl Scouts have made no efforts to buy or rent its own building in which to meet. SA56. No school official has asked whether this Girl Scout troop will be building its own facility. SA56; A1871, PS¶26 and DR¶26.

Nature of Forum Use - Boy Scouts and Cub Scouts

20. Boy Scout troops and Cub Scout packs meet regularly in the Board's school facilities. SA14 ¶4; A1871, PS¶27 and DR¶27.

21. The mission of the Boy Scouts is "to prepare young people to make ethical choices over their lifetimes by instilling in them the values of the Scout Oath and the Scout Law." SA13 ¶3; A1872, PS¶28 and DR¶28.

22. Boy Scout meetings typically begin with a flag ceremony that includes the recitation of the Pledge of Allegiance and the Scout Oath or Law. SA14 ¶6. The Scout Oath states:

> On my honor I will do my best
> To do my duty to God and my county
> And to obey the Scout Law;
> To help other people at all times;
> To keep myself physically strong,

Mentally awake and morally straight.

SA14 ¶3; A1872, PS¶29 and DR¶29.

23. The words to the Scout Law are: "A Scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean and reverent." SA3584; A1872-73, PS¶30 and DR¶30.

24. The Boy Scout meetings also include other ceremonies. The closing ceremony is similar to the opening ceremony and includes a motivational teaching message based on Scouting's values called the "Scoutmaster's Minute." SA15 ¶8. The closing ceremony can also include a song. *Id*.; A1873, PS¶31 and DR¶31.

25. The Boy Scouts use an "induction ceremony" to bring new members into the troop. SA15 ¶9. More elaborate ceremonies, called "Courts of Honor," recognize each Scout's accomplishment of achieving a higher rank. *Id*.

26. The purposes of these after school Scouting programs is to build character, instill Scouting values, encourage academic study and promote physical fitness. These programs include singing, an opening ceremony in which the American flag is presented and the children recite the Pledge of Allegiance, the Cub Scout Promise, the Law of the Pack, and the Cub Scout Motto. These programs also include awards ceremonies and a speech called the "Cubmaster's Minute," which is an "inspirational closing thought." A1874, PS¶34 and DR¶34.

Nature of Forum Use - Legionnaire Grey Cadets Program

27. The Legionnaire Grey Cadets have met in M.S. 206B in the Bronx. SA9 ¶1. The weekly program is set in a military style environment with uniforms, ranks, formation, marching, etc. SA3579-80 ¶¶3-4, 6. The program teaches character, honesty, integrity, teamwork, American history, reading, etc. *Id*. The students sing cadences while they march. *Id*. The leader collects food money from the students, who eat a snack on Fridays and a meal on Saturdays. *Id.* at ¶5; A1874-75, PS¶35 and DR¶35.

28. The Legionnaire program includes ceremonies, such as the flag presentation. SA10 ¶4. At the beginning of each meeting, the students line up in proper formation and stand at attention as the flags are presented. *Id.* As the trumpeter plays the National Anthem, the students salute. *Id.;* A1875, PS¶36 and DR¶36.

29. The Legionnaire program conducts a ceremony in which they honor individuals who have demonstrated great achievement in a particular area in the past. SA10 ¶6. The awards include Attendance Awards, Academic Awards and Performance Awards. *Id*. Individuals who have advanced in rank are also honored at these ceremonies. *Id.;* A1875, PS¶37 and DR¶37.

Nature of Forum Use - Mosholu Community Center

30. The Mosholu Community Center conducts an after school program every

day at P.S. 51 in the Bronx. SA20 ¶1. The program helps students with their homework and instructs them how to interact with each other, SA20-21 ¶¶4, 6-8, includes a ceremony to give awards to children who demonstrate great achievement during the week, *id.* at ¶6, and uses specific programs to teach the character qualities of generosity, gratefulness and tolerance of other cultures and traditions. *Id.* at ¶¶7-8; A1876, PS¶38 and DR¶38.

Nature of Forum Use – Bronx Household of Faith Church

31. Since August 2002, the Bronx Household of Faith has used the Board's facilities. A454, LL15-17.

32. The Bronx Household of Faith is an evangelical Christian church that was formed in 1971 and has been meeting in the Bronx for well over 30 years. SA2 ¶2. The church has two pastors, Robert Hall and Jack Roberts. *Id.* at ¶1. The church meets weekly on Sunday mornings. *Id.* at ¶3. Approximately 85-100 people attend on any given Sunday morning. A409, L18.

33. The Sunday morning meetings are an important part of sustaining the people in the Bronx Household of Faith spiritual community as well as those in the surrounding neighborhood. They provide an indispensable integration point and meeting place for the church members and others from the neighborhood to provide for each others' needs and to encourage one another. SA7-8 ¶¶6-9. The

church members have provided food, clothing and rent money to those in need. *Id*. They have provided emotional and social support to help people get off welfare, to lead productive lives, to get off drugs, to get out of a life of crime and to help refugees from other countries. *Id*. Church members have helped others pay for funeral expenses, food, toys, mittens and scarves. A424, LL21-23.

34. The Sunday morning meetings consist of (1) singing of songs and hymns of praise, (2) teaching and preaching from the Bible, (3) sharing of testimonies from people attending, (4) fellowship and social interaction with others, (5) celebrating the Lord's Supper (communion). SA7-8 ¶¶3-4. Those attending are taught many lessons from the Bible, such as how to live, to love their neighbors as themselves, to defend the weak, to help the poor, and to share their needs and problems. SA7. From the particular theological perspective of the pastors, they call these activities done at the Sunday morning meeting collectively a "worship service." A420, LL11-14; *see also Bronx III*, 331 F.3d at 347-48.

35. The Church's meetings are open to the public. A417, LL12-14; *Bronx III*, 331 F.3d at 348.

36. The Church owns a vacant lot on which it has been constructing its own building. A429, LL19-25; A432, LL4-17; A457, LL18-25.

37. The Church desires to meet in a public school to offer its members an

enclosed meeting space large enough to accommodate all of the people who attend on Sunday mornings. A427-28.

38. Bronx Household of Faith does not desire to meet permanently in a public school, but is currently constructing its own building, to be completed as soon as funding allows. A427, LL21-25.

The Board's Prior Exclusion of "Religious Services or Religious Instruction"

39. The Board of Education has placed few limitations on expression in the forum it has created. Those limitations are (1) a prohibition on "commercial purposes," except for some flea markets, (SA9 §5.10), although many commercial uses are routinely approved, such as Blockbuster, Law and Order, A1505; Spelling TV, A1509; Show Bliss Entertainment, A1512; J & R Pizza, A1513; Nickelodeon and Morgan Stanley, A1532; Amalgamated Life, Bank of New York, and Sex & the City Inc., A1534; Smith Barney, A1536; to name a few; (2) some limitations on forums for political candidates, (SA8 §5.6.4); and (3) a flat prohibition on all "religious worship services" (A3594 ¶ 3; 3505 ¶ 5).

40. The religious exclusion that the Board of Education had in place when the District Court issued the preliminary injunction stated:

> 5.11 No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

SA9 §5.11; *Bronx II*, 226 F.Supp.2d at 403, 411.

41. The Board of Education previously relied on the language in §5.11 and New York Education Law §414 to exclude Plaintiffs' church services from the forum. SA94-95 ¶¶13-16.[1]

The Board of Education's New Policy

43. In July 2007, the Board revised its policy to state as follows:

> No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship. Permits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this chapter on the same basis that they are granted to other clubs for students that are sponsored by outside organizations.

A1886, PS¶¶53-54 and DR¶¶53-54; Special Appendix (SPA) 35.

44. The District Court issued a permanent injunction November 1, 2007 enjoining this policy and allowing the Church to continue its meetings there.

SUMMARY OF THE ARGUMENT

The Board of Education for the City of New York has opened a forum in its school buildings for a wide array of expression by community groups, for anything "pertaining to the welfare of the community," well beyond its educational mission. The Board has singled out one type of religious expression, religious worship, and excluded it from the forum. The Board engages in viewpoint discrimination in

violation of the principles announced in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), Although the Board allows other community groups to build the welfare of the community by instructing people in character and moral values using teaching, singing, character development, ceremony and ritual, it will not allow religious groups to do so if the Board characterizes the expression as a "worship service."

The Supreme Court has stated that the First Amendment prohibits the government from separating "religious speech" from "religious worship." *Widmar v. Vincent*, 454 U.S. 263, 269 n. 6. The expression engaged in by Bronx Household of Faith is more than "mere religious worship," *Good News Club,* 533 U.S. at 112 n. 4, because the Church uses its Sunday morning meetings to build up people by teaching them moral values and character qualities from the Bible, and their need to have a relationship with Jesus Christ.

The Board's policy is also an unconstitutional content-based exclusion of speech from this designated forum in violation of *Widmar v. Vincent*, 454 U.S. 263 (1981). The Board opens the forum generally to expression by the public, so it must justify its exclusion of religious worship by a compelling governmental interest, which it lacks here.

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[1] To the extent that the Board relies on N.Y. Education Law §414 to deny access to the forum, Plaintiffs challenge its constitutionality.

Even if the forum here is a "limited public forum," the Free Exercise Clause prevents the Board from using religious expression as the factor to exclude users from the forum. The Supreme Court has clearly stated that when the government uses religion in an explicit way to exclude users from a benefit, it triggers strict scrutiny. *Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 533 (1993).

The Establishment Clause does not require the Board's current policy, nor does it provide an optional justification for its policy. When the government offers a neutral benefit like use of facilities to community groups, and the religious uses only come because of the uncoerced choices of private individuals, the program does not violate the Establishment Clause. The subjective and inaccurate perceptions of either hypothetical reasonable observers or impressionable youth cannot be used to justify censorship of religious expression from the forum.

There is no "domination of the forum" here when 20-25 churches meet weekly along with thousands of other community groups in a school system with 1,197 buildings available for use, many of them capable of handling multiple users simultaneously. If one building is unavailable at a given time, the close proximity of many of the Board's buildings means that every group can be accommodated somewhere near during nonschool hours.

There is also no government subsidy of religion here. The Board offers the same benefit to all community groups. The Church in no way benefits uniquely from the Board's policy than would a synagogue that calls the City fire department when it catches on fire. This Court should affirm the District Court's permanent injunction.

ARGUMENT

I. THE BOARD'S POLICY VIOLATES THE FIRST AMENDMENT.

The District Court correctly struck down the Board's new policy because it violates the First Amendment, according to *Good News Club* and other decisions. The new policy states in part that "[n]o permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship." App. Br. at 6. The old policy stated in part that "[n]o outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school." A303.

The court below found that the Board's new policy is a "post hoc attempt to avoid the prior holdings in this case and the holding in *Good News Club*." SPA39. The new policy suffers from the same constitutional defect as the earlier policy -- it singles out religious worship and excludes it from the forum, while allowing secular groups to engage in similar expression. In fact, the Board admitted "its

intent to *reinstitute* a policy that would prevent any congregation from using a public school for its worship service." SPA37.

The Church does not believe the Supreme Court meant that the government may single out "mere worship" to ban it from a forum with its cryptic comments in *Good News Club*, 533 U.S. at 112 n. 4. Even if it did, the Board's policy goes well beyond that by banning "religious worship services." The weekly meetings of Bronx Household of Faith contain much more than just "mere worship." As this Court earlier said about Bronx Household, "their Sunday meetings are not simply religious worship, divorced from any teaching of moral values or other activities permitted in the forum. 331 F.3d at 354. The Ninth Circuit cited this fact that Bronx Household engaged in more than "mere worship" to distinguish this case from its ruling against a private religious meeting in a library in *Faith Center v. Glover*, 462 F.3d 1194, 1211-12 (9th Cir. 2007). The Ninth Circuit characterized Bronx Household's meetings as containing "'elements of worship' that further secular goals.'" *Id.*

A. The First Amendment Protects Religious Worship As Well As Other Religious Speech.

The Board's entire premise is that religious speech and religious worship can and should be parsed out with the latter being prohibited. The Supreme Court in *Widmar v. Vincent* stated that "we think that the distinction advanced by the

dissent [between religious speech and religious worship] lacks a foundation in either the Constitution or in our cases, and that it is judicially unmanageable." 454 U.S. at 272. Nevertheless, the Board presses on.

Further, the fact that the forum in *Widmar* was found to be "generally" open creates no basis for distinguishing the holding here. The Court's findings regarding the protection for religious worship and proselytizing, the lack of any intelligible way to distinguish between religious speech and worship, the incompetence of the government to make the distinction, and the entanglement violation in attempting to make the distinction, all apply here regardless of the forum.

In *Widmar*, the University allowed student groups to meet in campus facilities, but excluded a student evangelical Christian group from meeting for a worship service on campus:

> Here UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in **religious worship** and discussion. These are forms of speech and association protected by the First Amendment.

Widmar, 454 U.S. at 269 (emphasis added).

The religious meetings in *Widmar* parallel the content of the church worship service at issue here:

1. The offering of prayer;
2. The singing of hymns in praise and thanksgiving;

> 3. The public reading of scripture;
> 4. The sharing of personal views and experiences (in relation to God) by various persons;
> 5. An exposition of, and commentary on, passages of the Bible by one or more persons for the purpose of teaching practical biblical principles; and
> 6. An invitation to the interested to meet for a personal discussion.
>
> As you probably already know, these meetings are open to the public. Any students, be they Jewish, Christian, Moslem, or any other persuasion are invited, and, in fact, actively recruited by the students in Cornerstone.
>
> Although these meetings would not appear to a casual observer to correspond precisely to a traditional worship service, there is no doubt that worship is an important part of the general atmosphere.

Chess v. Widmar, 635 F.2d 1310, 1313-14 (8th Cir. 1980).

For several reasons, all of which apply here, the eight-justice majority in *Widmar* rejected the University's argument that the Constitution protected "religious speech," but not "religious worship." The first reason was that there is no intelligible way to distinguish between "religious speech" and "religious worship":

> There is no indication when "singing, hymns, reading scripture, and teaching biblical principles," *post* at 283, cease to be "singing, teaching and reading" -- all apparently forms of "speech," despite their religious subject matter -- and become unprotected "worship."

Widmar, 454 U.S. at 269, n. 6.

The *Widmar* majority also refused to distinguish between protected religious

speech and "less protected" religious worship because the government and courts have no competence to make this determination:

> Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. 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 (citations omitted).

Lastly, there is no good reason to protect only "religious speech" and subjugate "religious worship" to an inferior, less protected status under the Constitution:

> Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. The dissent apparently wishes to preserve the vitality of the Establishment Clause. *See, post* at 284-285. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, *see Heffron, supra*, than for religious worship by persons already converted. It is far from clear that the State gives greater support in the latter case than in the former.

Id.

Since *Widmar*, the Supreme Court has repeatedly rejected this same distinction advanced by the Board here:

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free speech clause without religion would be *Hamlet* without

> the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, *Heffron, supra*, at 647, or even acts of worship, *Widmar*, supra at 269, n. 6.

Capitol Square Review Bd. v. Pinette, 515 U.S. 753, 760 (1995) (emphasis added). The policy makes an unconstitutional distinction prohibiting "religious worship services."

B. For First Amendment Purposes, "Religious Worship" Must be Examined by the Component Parts of the Expression, Not Lumped Into One Category Depending on the Label.

The District Court properly rejected the Board's argument that it should not look at the component parts of the Church's meeting. SPA15-16. The Board wrongly insists that "worship" or "services" should be considered as an indivisible whole that can be banned from a forum. App. Br. at 39-42.

The Board incorrectly states that the Court in *Good News* "did not adopt Justice Souter's characterization of the Club's activities, in his dissenting opinion, as 'an evangelical service of worship.'" App. Br. at 25. This is wrong on two points. First, what the Court actually stated was that Justice Souter's descriptions were "accurate" and second, "regardless of the label Justice Souter wishes to use, what matters is the substance of the club's activities." 533 U.S. at 112 n.4.

In his dissent, Justice Souter also looked at the component parts of the meeting conducted in *Good News* (even the dissent with whom the Board agrees

examined the component parts) and described the activities as including prayer, Bible teaching about the "Lord Jesus Christ," invitations to "know Jesus as Savior," and other activities similar to what Bronx Household of Faith does at its Sunday morning meetings. *Id.* at 137-38 (Souter, J. dissenting). But the majority held that such a meeting, no matter what label it is given, could not be prohibited from a forum set up by a similar policy as here.

The Supreme Court also examined the component parts of the worship service in *Widmar* to determine that the University had unconstitutionally denied the students access to the forum, 454 U.S. at 269 n.6 ("no indication when "singing hymns, reading scripture, and teaching biblical principles" cease to be "singing, teaching, and reading").

Therefore, whether a "worship service" has "no secular analogue" or not is ultimately irrelevant to resolving this case. *Good News Club* directs us to look past the labels and to look at what actual expression takes place – "regardless of the label Justice Souter wishes to use, what matters is the substance of the club's activities." 533 U.S. at 112 n.4. The Supreme Court said this because the undefined term, "worship service" gives little direction about what is allowed or prohibited.

The fact that the Church calls its Sunday morning meeting a "worship

service" from its particular theological perspective does not help this Court because it does not answer the constitutional question of whether the Board has the competence or authority to determine what is a excludable "worship service." If the Church called its meetings a "birthday party," the Board undoubtedly would have objected to that inaccurate label by pointing to the component parts of the meetings to say they constitute a worship service. The Church's label for its meetings, derived from its own theology, does not validate the Board's attempt to distinguish religious speech from religious worship. *Widmar* clearly prohibits the Board from doing so, no matter what the Church calls its meetings.

C. The Church's Meeting Satisfies The Standards of the Board's Policy For Use Of The Forum.

1. The Church's meetings are social, civic and "pertain to the welfare of the community."

The starting point for the viewpoint discrimination analysis under *Good News Club* is whether the Plaintiffs qualify to meet in the forum and whether their activities meet the standards of the forum. The proper starting point for the First Amendment analysis is <u>not</u> whether a religious worship service is different than other community meetings, as Judge Calabresi stated in his opinion. Judge Walker correctly stated the analysis: "[i]n order to determine whether an element is within a set, a court should both define the set, . . . and analyze the element to discern

whether it has the attributes required for admission to the set." *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 127 (2d Cir. 2007).

There is no question that the Board's policy in general allows the Church to meet in the public schools. The Church has rented school facilities in the past for several activities. SA6, ¶12.

The Board allows community groups to meet when their activities are for holding "social, civic, recreational meetings and entertainments, and other uses pertaining to the welfare of the community," A365, SA 92. The Church's use satisfies all of these standards.

The Sunday morning meetings pertain to the welfare of the community because they provide a place for the people of the neighborhood to meet and to learn morals and character. It also allows them to spend time in social interaction, where they can learn of each others' needs and then take action to meet those needs, by speaking words of comfort and counsel, praying, giving money, etc. SA3-4, ¶¶6-9. They do all of this through learning the teachings of the Bible and by singing praises to Jesus Christ. *Id.* Also, the friendships fostered by the meetings strengthen community ties among the people of the neighborhood. *Id. See e.g. Grace Bible Fellowship v. Maine Sch. Admin.* Dist., 941 F.2d 45, (1st Cir. 1991) ("But SAD 5 [school district] provides the forum, not simply for

educationally related purposes, but as a service to the community. That being so, SAD 5, being a government arm, has no greater right to pick and choose users on account of their views than does the government in general when it provides a park, or a hall, or an auditorium, for public us"); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 568 (7th Cir. 2001) ("In adopting the philosophical and theological position that prayer, the singing of hymns and the use of Bible commentary can never be "civic," the Village has discriminated against the speech of those citizens who utilize these forms of expression to convey their point of view on matters relating to government"). Therefore, the Church's Sunday morning meetings satisfy the policy requirement on several levels.

It is important to note that the Church's activities are much more than "mere religious worship," *Good News Club,* 533 U.S. at 112 n. 4. The Church uses its Sunday morning meetings to build up its members and others from the community by teaching them moral values and character qualities from the Bible, and their need to have a relationship with Jesus Christ.

2. The Church's expressive activities parallel those engaged in by other groups.

The Board engages in viewpoint discrimination that the Supreme Court declared unconstitutional in *Good News Club* by allowing groups to meet to teach morals and character, as long as it they do not do so from a religious perspective.

The Board permits meetings if they advocate from a secular viewpoint, but not from a religious viewpoint.

The District Court followed the direction of the Supreme Court in *Good News Club* by examining what activities the Board allowed community groups, including Plaintiffs, to do in the forum:

> Just as the Supreme Court did in *Good News Club*, I look past any labels, *see* 533 U.S. at 112, n.4 ("Regardless of the label Justice Souter wishes to use, what matters is the substance of the Club's activities….") and motivations. Instead, I look to the substance of the Church's activities. . .

SPA16.

The District Court used the same analysis in granting the preliminary injunction in this case, and found that secular groups did all the same expressive activities that the Church did in its Sunday morning meetings, such as singing, teaching, and including a secular version of ceremony and ritual for the same purposes, to teach morals and character. *Bronx II*, 226 F.Supp.2d at 416; *see also* SA10-11 (Legionnaire's ceremonies), SA14-16 (Scouts' ceremonies), SA16-17 (Mosholu Community Center ceremonies).

And it was also based on these same ceremonies that the District Court found that the Board unconstitutionally denied permission for the Church to meet:

> To the extent that the School District's denial of plaintiffs' application was based on their including ceremony and ritual . . ., it was apparently because the ceremony and ritual involved is religious

> ceremony and ritual. Such an exclusion runs afoul of the Court's holdings in *Good News Club*, *Lamb's Chapel* and *Rosenberger* that the government may not treat activities that are similar to those previously permitted as different in kind just because the subject activities are conducted from a religious perspective.

Bronx II, 226 F.Supp.2d at 418.

Likewise, this Court properly examined the component parts of meetings done by other community groups and compared them to the component parts of the Church's Sunday morning meetings to find that the Board had engaged in viewpoint discrimination against Bronx Household's viewpoint of teaching morals and character with religion:

> We find no principled basis upon which to distinguish the activities set out by the Supreme Court in *Good News Club* from the activities that the Bronx Household of Faith has proposed for its Sunday meetings at Middle School 206B. Like the Good News Club meetings, the Sunday morning meetings of the church combine preaching and teaching with such "quintessentially religious" elements as prayer, the singing of Christian songs, and communion. The church's Sunday morning meetings also encompass secular elements, for instance, a fellowship meal during which church members may talk about their problems and needs. On these facts, it cannot be said that the meetings of the Bronx Household of Faith constitute religious worship, separate and apart from any teaching of moral values. 533 U.S. at 112 n.4.

Bronx III, 331 F.3d at 354.

What must not be ignored here is that these facts have not changed since the last time this Court heard the case. And since this Court held that "on these facts it

cannot be said" that the church meetings constitute worship apart from teaching of moral values, that should end the inquiry. It makes no difference that this Court was previously reviewing the facts for abuse of discretion and *de novo* now, because the facts have not changed and the different standard of review does not change the outcome. There are no new Supreme Court opinions on the matter and regardless of what the Board may conjure up, this issue has been settled by this Court

D. The Board's Policy Allows Student Groups To Engage In Religious Worship During The School Day, But Prohibits Community Groups From Engaging In Religious Worship During Nonschool Hours.

The Board's policy highlights its unconstitutional defects by creating an arbitrary distinction that allows student clubs to engage in religious worship during the school day where children attend under the state's compulsory attendance laws, but prohibits community groups from engaging in the exact same expression during nonschool hours. App. Br. at 36 n. 8; *and see* A298 (allowing student religious clubs pursuant to the Equal Access Act as having "a purpose which is consistent with the Board's educational goals"). Whatever justification, including the Establishment Clause, that the Board touts for its ban on religious worship services during nonschool hours, it is eviscerated by allowing the very same expression by student Bible clubs. In their ongoing attempt to exclude worship

services, the Board of Education has strained the gnat and swallowed the camel.

The Third Circuit cited the unconstitutional nature of a similar school board policy that banned religious worship and instruction on nights and weekends at public schools, because the same policy permitted student clubs to engage in religious expression and worship right after the school day:

> What a student may not hear in the auditorium on a Saturday evening he may, consistent with [the school's] policy, hear in a school classroom with school staff present, immediately after classes. It is illogical to suggest that religious speech which is consistent with the mission and purpose of the school in the afternoon must be excluded as inconsistent when it takes place on a Saturday evening in the school auditorium.

Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1376 (3rd Cir. 1990).

Many cases discussing the Equal Access Act list the student organizations' protected expressive activities under the Act, which are just like Plaintiffs' activities: praying, singing, teaching, fellowship, etc. *See Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 232 (1990) ("the club's purpose would have been, among other things, to permit the students to read and discuss the Bible, to have fellowship, and to pray together"); *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 849 (2d Cir. 1996) (permitted club's meetings would include "singspiration," testimonies from students about their belief in Jesus Christ, guest speakers, Bible study, praising God, "singing and worship of the Lord."); *Prince v.*

Jacoby, 303 F.3d 1074, 1097 n.1 (9th Cir. 2002) (Berzon, J., concurring and dissenting) (permitted club engaged in "religious observance" through evangelizing, praise, prayer, messages, songs, teaching, and worship); *Garnett v. Renton Sch. Dist.*, 987 F.2d 641, 643 (9th Cir. 1993) (permitted club met for "prayer, Bible study and religious discussion").

The Board can't have it both ways. If "worship" is protected under the legislative Equal Access Act as it was in this Court's *Hsu* case, it must therefore be protected under the First Amendment's broader principle of "equal access" in this case as well. As the Establishment Clause was found not to be a sufficient reason to ban the religious activities in each of the prior cases, it is likewise insufficient here.

E. The Board Operates A Designated Public Forum With A Content-Based Exclusion of Religious Expression.

This Court should revisit the questionable decision that the Board has created only a limited forum, where exclusions must only be viewpoint neutral and reasonable. *Bronx Household*, 492 F.3d 89, 97-98 (2d Cir. 2007). The Church has argued repeatedly that the Board has created a designated public forum because of the wide range of private expression it allows by policy and practice.

The policy here mirrors the one at issue in *Widmar* permitted students to hold meetings on campus for "political, cultural, educational, social and

recreational events," but barred religious worship services, *Chess v. Widmar*, 635 F.2d 1310, 1312 (8th Cir. 1980). This is similar to the Board's policy permitting "social, civic, recreational meetings and entertainments, and other uses pertaining to the welfare of the community," A365, SA 92.

This Court has been more skeptical of government claims to have created only a limited forum in cases more recent than the 1997 *Bronx Household* decision. In *New York Magazine v. Metro. Transit Authority*, 136 F.3d 123 (2d Cir. 1998), this Court found that the MTA had created a designated public forum because of the broad spectrum of speech it allowed in its forum of ad space on buses. This Court cautioned against allowing the government to use one or a few exclusions to claim that it had only created a limited forum:

> However, it cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes *ipso facto* a non-public forum, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content.
>
> 136 F.3d at 129-130.

This Court should use the approach it took in *New York Magazine* to find that the Board has created a designated forum.

II. THE SCHOOL BOARD CANNOT DEFINE A LIMITED FORUM IN A MANNER THAT VIOLATES THE FREE EXERCISE CLAUSE

The Board cannot limit the forum in a way that expressly violates the Free Exercise Clause. The Board's "power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be 'reasonable in light of the purpose served by the forum,'" *Good News Club*, 533 U.S. at 106-7. It is blatantly unreasonable, and a violation of the Free Exercise Clause, for the government to use religion as the factor excluding speakers from a forum. The Board violates the Plaintiffs' rights under the Free Exercise Clause because the policy uses religion as the factor to exclude users from the forum:

> No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship.

A1886, PS¶¶53-54 and DR¶¶53-54; SPA35-41.

The Supreme Court ruled that governments violate the Free Exercise Clause if they "impose special disabilities on the basis of religious views or religious status," *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). Governmental policies can do that if they facially discriminate against religion:

> To determine the object of a law, we must begin with its text, **for the minimum requirement of neutrality is that a law not discriminate**

> **on its face**. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context. (Emphasis added).

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533 (1993).

The Board's policy in this case does exactly that. The policy singles out religious worship services for exclusion from the forum. The Supreme Court said in *Smith* that courts are to "strictly scrutinize governmental classifications based on religion." 494 U.S. at 886, n.3. Therefore, the Board must show a compelling state interest, implemented by the least restrictive means, to justify its use of religion as the factor excluding speech from the forum.

The Fourth Circuit found that a similar restriction on rentals of public schools for worship services violated the Free Exercise Clause. "Regulation 8420 also interferes with or burdens the Church's right to speak and practice religion protected by the Free Exercise Clause." *Fairfax Covenant Church v. Fairfax County Sch. Bd*., 17 F.3d 703, 707 (4th Cir. 1994).

Whatever the Board's power to determine the limitations on its forum, it must do so in a way consistent with the Free Exercise Clause. This means, the government may not use religion-specific standards to exclude groups from a forum. This is especially true when the new policy allows religious worship by students in the secondary schools during the compulsory attendance day, but not by

adults during nonschool hours.

III. THE ESTABLISHMENT CLAUSE DOES NOT JUSTIFY DISCRIMINATION AGAINST RELIGIOUS EXPRESSION IN A PUBLIC FORUM.

The Board has improperly invoked the Establishment Clause as the justification for its viewpoint discrimination in this case. App. Br. at 42, *et seq.* But the Establishment Clause neither compels nor permits the Board to have this policy governing its forum.

A. The Board Does Not Endorse the Religious Views of a Church Meeting in the Forum.

The government does not violate the Establishment Clause by allowing a private group to do religious expression in a forum because the government does not endorse the views expressed by the community groups:

> An open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . to religious goals" than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities.

Widmar, 454 U.S. at 274. The Board here no more endorses the Church's views than the views of any of the other tens of thousands of community groups that meet in the Board's facilities. These include many Jewish organizations, A1510-11, groups such as Falun Gong and Taoism, A1530, Pregnant teens and Alcoholics

Anonymous, A1533, Youth Buddhism, A1541, Springfield Rifles, A1560, or the American Martyrs, A1563.

The *Widmar* Court further stated:

> But by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there. Undoubtedly many views are advocated in the forum with which the University desires no association.

Id. at 271-72, n.10. The permanent injunction requiring equal access to facilities for religious expression by private groups does not mean that the Board endorses those views.

The Board's heavy reliance on *Skoros v. City of New York*, 437 F.3d 1 (2d Cir. 2006), is misguided. While *Skoros* obviously describes many general Establishment Clause principles, none of them help the Board when applied to the facts of this case. Also, this Court ruled that the Establishment Clause was not violated in *Skoros*, which is the opposite conclusion that the Board would have this Court reach here. Also the Board attempts to raise the status of small children to that of the reasonable observer, which is contrary to what this Court held in Skoros. *See* App. Br. at 47-48.

Skoros is also factually far afield from this case. At issue in *Skoros* was whether school holiday displays that included certain religious depictions but not others violated the Free Exercise and Establishment Clauses. The intended

audience in *Skoros* was school children. 437 F.3d at 25. The Board attempts to liken this case to *Skoros* by claiming that private religious groups also target their message to young impressionable children. But a private organization using a school building during nonschool hours has no similar audience. The fact that a child may happen to walk by and see that a church is meeting in a school does not create an intended audience of small children. That same child is likely to see any of the thousands of groups using the schools on any given day.

The Supreme Court in *Mergens*, 496 U.S. at 250, observed that government accommodation of private religious speech does not equal government sponsorship of that speech:

> [T]here is a crucial difference between *government* endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.

The Court in *Lamb's Chapel* reiterated the basic holding of *Widmar* concerning a possible violation of the Establishment Clause:

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

Lamb's Chapel, 508 U.S. at 395.

The Supreme Court's decision in *Rosenberger*, 515 U.S. at 839, repeats this principle:

> More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design. *See Lamb's Chapel*, 508 U.S. at 393-94; *Mergens*, 496 U.S. at 248, 252; *Widmar*, *supra* at 274-75.

In *Pinette*, the high court used similar reasoning to explain why it did not violate the Establishment Clause for the Ku Klux Klan to erect a cross near the Ohio state capitol:

> Quite obviously, the factors that we considered determinative in *Lamb's Chapel* and *Widmar* exist here as well. The State did not sponsor respondents' expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups.

Pinette, 515 U.S. at 763.

Most recently, in *Good News*, the Court once again rejected the argument that the Establishment Clause requires schools to exclude religious worship and speech from a forum open to other speech. 533 U.S. at 112-17. The Board simply may not defend its policies by invoking the Establishment Clause. The Supreme Court has rejected the concerns raised by the Board as constitutional justifications for targeted exclusion of religious expression from a forum generally opened to all.

B. Even When Applying *Lemon*, the Supreme Court Has Said Repeatedly That Religious Expression In A Public Forum Does Not Violate the Establishment Clause.

In *Widmar*, *Mergens*, *Lamb's Chapel*, *Rosenberger* and now *Good News*, the Supreme Court rejected the assertion that the Establishment Clause requires or permits government to exclude religious expression from a forum generally opened to all. A policy like the one required by the injunction does not violate the Supreme Court's three-prong Establishment Clause test from *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), because it has: [1] A secular legislative purpose; [2] its principal or primary effect neither advances nor inhibits religion; [3] it does not foster an excessive government entanglement with religion. *Id.*

1. A policy of equal access has an indisputable secular purpose.

A neutral policy allowing both religious and non-religious speakers equal access to a forum embodies a permissible secular purpose. *Widmar*, 454 U.S. at 271-72; *Mergens*, 496 U.S. at 248-49; *Rosenberger*, 515 U.S. at 843-44; and *Lamb's Chapel*, 508 U.S. at 395. This was correctly found by the court below. SPA22-23 ("the policies of the Board are, by any reading, secular in their purpose"). There is no question that an equal access policy satisfies the first prong of *Lemon*.

2. An equal access policy does not have a primary effect of advancing or inhibiting religion.

Second, there is simply no advancement of religion when religious uses get equal access. Allowing religious groups to meet for worship and instruction in a forum on the same terms and conditions as other groups does not have the "primary effect" of advancing religion, but has the *primary effect* of *allowing* and *promoting free speech*, as the Supreme Court found in *Widmar*, 454 U.S. at 273-74. Obviously, Bronx Household of Faith enjoys some secondary benefit of being able to express its views while using the forum, but this is the same benefit that all community groups receive. The Establishment Clause forbids *primary*, not *incidental* effects of utilizing an open forum:

> But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion.

Id. *See also Walz v. Tax Comm'n*, 397 U.S. 664 (1970) and *McGowan v. Maryland*, 366 U.S. 420 (1961). The "primary effect" of the Board's policy is to give community groups temporary meeting places, unless they want to engage in religious worship. The exclusion of worship services violates the Establishment Clause because it is not neutral.

3. A policy of equal access serves to avoid excessive entanglement.

Allowing religious groups to meet in a public forum does not violate the third prong of the *Lemon* test because it does not "excessively entangle" church with state. A neutral policy "would in fact *avoid* entanglement with religion." *Mergens*, 496 U.S. at 248 (quoting *Widmar*, 454 U.S. at 271).

The Board claims that excessive entanglement may occur if school officials "become involved in disputes between different groups seeking to use the same space" at the same time. App. Br. at 66. This could happen with any community group. It is not unique to religious groups. The Board has an available, non-entangling solution--enforce its neutral, first-come, first served policy, *see* A371. Also, the Board has hundreds of buildings available at all times. At worst, a group may have to walk a few blocks in order to meet, *see e.g.* A3508-3522 (150 school facilities within a 2 mile area), which obviously creates no religious violation, *see e.g. Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1228 (11th Cir. 2004).

The Board cannot justify its exclusion of religious expression by pointing to administrative problems that do not even come close to the unconstitutional entanglement created by constant surveillance (discussed below) that would occur in order to prohibit religious uses. The Board has exaggerated concerns about the posting of signs when the religious services occur, placing the name and the

address of the school where the church meets on official church literature, etc., or an instance where an individual user installed a satellite dish and requested installation of a T-1 line. App. Br. at 64. Any group renting the school can create the same problems.

Each of these problems may be dealt with constitutionally by using content-neutral time, place and manner restrictions. *See e.g., Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (New York City requirement that all concerts have their sound boards administered by a city sound engineer was a neutral time, place and manner restriction.) It takes little imagination and no scrutiny of expression to enact a written policy applying to all community groups stating, "no satellite dishes or T-1 lines may be installed without permission," or, a policy that states, "every group (regardless of ideology) must disclaim any association with the individual school where it meets" (in fact a disclaimer requirement has already been enacted, see A321), or "temporary signs identifying meeting locations may be put up only in the specified manner," etc. These are permissible content- and viewpoint-neutral regulations.

4. The Board's Policy Prohibiting Religious Worship Creates Excessive Entanglement.

The Board has it exactly backwards: in order to exclude religious worship services, it would have to scrutinize each program to ensure it does not contain

forbidden expression. The District Court aptly noted this when relying on *Widmar, Rosenberger,* and *Good News* to find that excessive entanglement would occur in any attempt by the Board to identify and prohibit religious worship. SPA33-36 ("such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases").

The much-maligned *Lemon* test arose from a set of facts that created excessive entanglement, as they do here. The Court in *Lemon*, 403 U.S. at 620, held that

> [t]his kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches . . . and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses.

While allowing the Church to use the facilities according to the standard rules garners absolutely no entanglement, prohibiting the Church access does. One need only look at how the Board attempted to gather "evidence" of "illegal" religious worship so that they may continue to keep the Plaintiffs out. The Board requested production of Church documents, dozens of recorded sermons, church flyers, numbers and types of people that attended, etc. SA121-124; 132-135. After listening to the sermons preached by Pastor Hall, the Board's attorneys examined

the pastor in excruciating detail about the meaning of his prayers, A551-554, the meaning of his sermons, A517-518, 522, 544-545, identity of church donors, A460, inviting people to church, A473, distributing church fliers, A26, the church's website, A477, church attendance, A482, explaining the meaning of church membership as it relates to scripture, A485, biblical grounds for church discipline, A485-87, the purpose of Sunday meetings, A397, description of members' testimonies, A405, explanation of the Church's covenant, A436, contritional confessions, A437, and church meeting agendas, A438, just to name a few invasive inquiries. This is exactly why the Supreme Court has held for years that this is a task not to be undertaken.

Further, during Bronx Household of Faith's use of school facilities following the preliminary injunction, school officials (in addition to the security and/or custodial staff required to be present) "just happened" to be at the school on Sundays observing while the church was meeting. A697. It is clear that excessive entanglement has occurred in this case as the Board attempts to exclude use by Bronx Household of Faith.

C. The Board Misapplies the Standard of the "Reasonable Observer," Who Would Not See "Endorsement" of Religion Because All Community Groups are Permitted to Use the Forum on Equal Terms.

The Board's discussion of the "reasonable observer" issue (App. Br. at 45-

46) fails to note that the Supreme Court has rejected use of the "reasonable observer" test when the facts show no Establishment Clause violation.

Specifically, the Supreme Court has ruled that if a government program is (1) widely available to a broad array of community groups or individuals and (2) any religious use occurs because of the choices by private, non-governmental groups and individuals, then the program is constitutional under the Establishment Clause.

The subjective and factually erroneous perceptions of observers who see a symbolic union between church and state do not nullify the constitutionality of a policy that is neutrally available to many and where private choices dictate the religious uses. For example, in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), the Supreme Court reversed the Ninth Circuit's ruling that a government-funded interpreter for a deaf student attending a Catholic School would have the primary effect of establishing religion for "the government would create the appearance that it was a 'joint sponsor' of the school's activities" and that this would create the "symbolic union of government and religion" forbidden by the Establishment Clause. 509 U.S. at 5 (internal citation and quotation marks omitted). The Supreme Court in *Zobrest* explained that "we have consistently held that government programs that neutrally provide benefits to a broad class of

citizens defined without reference to religion are not readily subject to an Establishment Clause challenge[.]" *Id*. at 8. Therefore, the perceptions of an observer are not controlling if the program meets objective Establishment Clause standards of neutrality, wide availability and private choice determining all religious uses.

The *Zobrest* Court reviewed its controlling decisions in *Mueller v. Allen*, 463 U.S. 388 (1983) and *Witters v. Washington Dept. of Services for Blind*, 474 U.S. 481 (1986), and stated that two factors had governed its non-establishment determinations in those cases (which cases involved tax deductions for sectarian education costs, and government vocational assistance at a sectarian college, respectively). *Zobrest*, 509 U.S. at 9, 10. The first factor was the *neutrally* applicable nature of the benefit, which was made available by the government without reference to the sectarian or nonsectarian character of the potential beneficiaries.

The second informing factor was that the benefit was enjoyed as a result of the *private choices* of individuals. *Id*. at 9, 10. As the Court explained in *Mitchell v. Helms*, 530 U.S. 793(2000) (in commenting on *Zobrest*) "private choices helped to ensure neutrality, and neutrality and private choices together eliminated any possible attribution to the government even when the interpreter translated classes

on Catholic doctrine." 530 U.S. at 811.

The Board of Education of the City of New York should be well-familiar with these principles, because they are exactly the ones it argued successfully to the U.S. Supreme Court in *Agostini v. Felton*, 521 U.S. 203 (1997). The Board asked the Supreme Court to lift the old injunction from *Aguilar v. Felton*, 473 U.S. 402 (1985), which prohibited it from sending public school teachers into parochial schools to teach remedial subjects under a federal grant. The Board invoked *Witters*, *Zobrest* and *Rosenberger* as cases showing a change in the law, now allowing the government to set up neutral programs that students at religious schools could participate in. *Agostini*, 521 U.S. at 216.

The Supreme Court agreed with the Board that the program was constitutional because "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, 521 U.S. at 220.

Whatever a "reasonable observer" subjectively perceives cannot cancel out the reality of what is happening. The Board provides the benefit of meeting space to a wide range of community groups. Religious uses occur only by the uncoerced choices of private individuals. Therefore, there is no Establishment Clause violation. That is what the Board argued in *Agostini*, and what the Supreme Court

adopted as the rule in that case and others.

D. Even If The Reasonable Observer Test Should Be Used In This Case, It Shows That the Permanent Injunction Should Be Affirmed.

The "reasonable observer" is one presumed to be "fully cognizant of the history, ubiquity, and context of the practice in question." *Elk Grove Unified Sch. Dist. v. Newdow*, 524 U.S. 1, 40 (2004) (O'Connor, J., concurring). This Court held in *Elewski v. City of Syracuse*, 123 F.3d 51, 54 (2d Cir. 1997), that "[a] reasonable observer is not one who wears blinders and is frozen in a position focusing solely on the [religious expression]." But this is exactly what the Board's observers have done.

"In this respect, the applicable observer is similar to the 'reasonable person' in tort law, who is not to be identified with any ordinary individual, who might occasionally do unreasonable things, but is rather a personification of a community ideal of reasonable behavior, determined by the collective social judgment." *Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring); *see also Skoros*, 437 F.3d at 30.

Morever, as stated in *Skoros*, "it makes no sense at the effect step to view a kindergarten child or first grader as someone fully cognizant of the history, ubiquity, and context of the practice in question;" the reasonable observer is an

"adult who is aware of the history and context of the community and forum in which the religious display appears." 437 F.3d at 30. And as found by the lower court, the reasonable observer is aware of the relevant facts. SPA24-25. The reasonable observer is not represented by the random, unrepresentative actions of the few people that Board has proffered who have complained about the church's use. App. Br. at 59. Indeed, a flurry of counter-affidavits of New Yorkers perceiving no endorsement, and hostility towards religion if the Board barred the religious groups from meeting, would not shift the constitutional analysis to favor Bronx Household of Faith. A contest of affidavits listing people's subjective impressions does not determine the constitutional issues in this case.

It is hard to take seriously a claim that an adult cannot understand (or more likely chooses not to) the principle of equal access, or that he would prefer religious groups receive worse treatment than other community groups. When viewed in this light, the true "reasonable observer" does not espouse those views the Board attributes to him. And as shown below, the Board's observers are really hecklers in disguise.

E. The Board Wrongly Urges This Court to Permit the "Ignoramus/Heckler's Veto" of Religious Expression in the Forum.

The Board improperly relies upon solicited affidavits from local residents

who believe there is something improper about religious groups meeting in public schools for worship services. A54-55. But the Constitution prohibits the Board from excluding religious expression from its forum based on the perceptions of "hecklers" (those who dislike certain viewpoints) and what courts have called "obtuse observers" (those unaware of relevant history, context, abundance of facilities and users, constitutional precedents and the Board's own policy opening the school doors widely to community users).

The Supreme Court ruled that the government may not use the opposition of listeners -- the "heckler's veto" -- to silence unpopular speakers or to exclude them from a forum. "Listeners' reaction to speech is not a content-neutral basis for regulation. . . . Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992).

The Sixth Circuit has ruled that the government may not use a modified version of this concept – the "ignoramus' veto" to exclude religious speakers from a forum:

> We believe that the plaintiffs' argument presents a new threat to religious speech in the concept of the "Ignoramus's Veto." The Ignoramus's Veto lies in the hands of those determined to see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed, by adherence to the traditional public forum doctrine. The plaintiffs posit a "reasonable observer" who knows nothing about

> the nature of the exhibit--he simply sees the religious object in a prominent public place and ignorantly assumes that the government is endorsing it. We refuse to rest important constitutional doctrines on such unrealistic legal fictions.

Americans United v. City of Grand Rapids, 980 F.2d 1538, 1553 (6th Cir. 1992).

The Seventh Circuit used the similar phrase "obtuse observer's veto" to reference an improper justification for censorship of religious speech. *Doe v. Small*, 964 F.2d 611, 630 (7th Cir. 1992) ("If hecklers cannot silence political speech in a public forum, obtuse observers cannot silence religious speech in a public forum"). The court went on to state that the "government's obligation to dissipate any mistaken impression of sponsorship that it has induced is its own burden, and laxity in discharge of public duties is no justification for curtailing private speech." *Id.*

The conclusion easily drawn from these cases is that the subjective claims of "endorsement" by someone unaware of the breadth of the forum, the diversity of the forum users, and the forum policies presents a classic example of an "unreasonable observer" -- a person irrelevant to proper resolution of constitutional questions. The Board's affidavits by objecting parents and school officials, A310, ¶¶4-5; A313, ¶12; A315, ¶18, present precisely the unconstitutional rationale rejected in these cases. As the Court stated in *Pinette*, some uninformed community members "*might* leap to the erroneous conclusion of state

endorsement," but "erroneous conclusions do not count." 515 U.S. at 765.

F. The Supreme Court in *Good News* Rejected the Perceptions of "Impressionable Youth" as Requiring Government Censorship of Religious Speakers.

The Board's concern for "impressionable youth" is likewise misplaced. App. Br. at 20. The Supreme Court in *Good News*, 533 U.S. at 119, squarely rejected the theory that private religious speech in a forum becomes an Establishment Clause violation when viewed by children:

> 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 (emphasis added).

The Court articulated a number of objective principles that if met, render irrelevant any consideration of the subjective perceptions of "impressionable youth:" 1) if private groups, and not the school itself, are the ones advancing religion, impressionability is not a concern; 2) if private groups engage in activity on school premises, when children are there at the permission of their parents, impressionability is not a concern; and 3) impressionability can be a concern if there is danger that students would perceive a message of hostility towards religious groups. *Good News*, 533 U.S. at 114-19. The Court ultimately declined to employ a "modified heckler's veto" and held that the exclusion of religious groups was unconstitutional. *Id.* at 119. The Board specifically argues that the

mere presence of children in the forum at the same time a religious group holds a worship service always violates the Establishment Clause. App. Br. at 20. But this too has been rejected in *Good News*. *Id.* at 115-16.

If the Board were truly concerned about the perceptions of school children, they would follow the approach suggested by the Seventh Circuit in *Hedges v. Wauconda Cmty. Unit Sch. Dist.*:

> School districts seeking an easy way out try to suppress private speech. Then they need not cope with the misconception that whatever speech the school permits, it espouses. Dealing with misunderstandings--here, educating the students in the meaning of the Constitution and the distinction between private speech and public endorsement--is, however, what schools are for. . . .Yet Wauconda proposes to throw up its hands, declaring that because misconceptions are possible . . . the best defense against misunderstanding is censorship. What a lesson Wauconda proposes to teach its students! Far better to teach them about the first amendment, about the difference between private and public action, about why we tolerate divergent views. Public belief that the government is partial does not permit the government to become partial. . . . The school's proper response is to educate the audience rather than squelch the speaker.

9 F.3d 1295, 1299 (7th Cir. 1993) (emphasis added); *see also Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1055 (9th Cir. 2003) (quoting *Hedges* at length for the same principle). The Board should be educating New York's school children about tolerating different viewpoints, not censoring the expression of private groups using the facilities.

G. The Reasonable Observer Would Not See "Forum Domination" by Religious Groups.

The Board asks this Court to find "domination" of a forum by religion in general or one religion in particular. App. Br. at 49-50. But no such domination is present, factually or legally.

The Board's own facts refute its claim of "domination." Only 23 congregations had regular worship services during the 2004-05 school year. App. Br. at 9. Defendants have 1,197 school buildings. SA88, ¶3. This means that up to 1,174 school buildings (98% of the total) have no private groups conducting religious worship services on any given day. Not exactly the figures that one would expect in an argument claiming forum domination.[2]

In *Widmar,* the Supreme Court discussed and rejected the concept of forum domination where the religious group was one out of "over 100." 454 U.S. at 265. In *Rosenberger,* 515 U.S. at 825, the Supreme Court also discussed and rejected the concept of domination where the religious student newspaper was one out of 343 total groups, one out of 118 receiving student funding, and one out of 15

[2] The relevant forum is all of the 1197 schools, not an individual school building. The District Court ruled that way because the same policy applies to all schools; hundreds of schools are in close proximity, and the Board offered evidence from several different schools. SPA at 17 n.8. Further, the Church has met in several schools over the years, and can apply for access to any school pursuant to the same policy.

student media groups. This Court should soundly reject Defendants' absurd attempt to magnify 23 congregations out of thousands into forum domination here.

H. The Court Order Requiring Equal Access Does Not Cause the School Board to Favor One Religion Over Another.

The Board attempts to manufacture an alleged Establishment Clause violation by claiming that the injunction requiring equal access to all community groups in effect favors some religions over others. App. Br. at 50-51. The Board claims that because its facilities are more available on Sundays than Saturdays, due to greater numbers of school activities at some schools on some Saturdays, Jewish groups cannot meet as readily as Christian groups for their meetings. *Id.* at 51. Also, the Board claims that Muslim groups cannot hold Friday midday services during the school year because school is in session. *Id.* This argument is both legally and factually wrong.

First, the alleged favoritism for Christian churches factually does not exist. An examination of the evidence submitted by the Board shows a wide spectrum of religious groups meeting in the public schools on the weekends. To summarize the testimony respecting permits granted on the weekends for the 2004-05 school year:

- **Fridays –** there were approximately 2,717 permits issued on Fridays during the 2004-05 school year. Approximately 13 permits (or less than 1%) were issued to 13 organizations for purposes of "worship" – 6 Buddhist, 6 Christian,

and 1 Jewish.[3] Approximately four different school facilities were used on Fridays for "worship services" or for a congregation. A58-96. In one case (building X113), two different churches met simultaneously in one school building. *See* A95.

- **Saturdays –** there were approximately 7,450 permits issued on Saturdays during the 2004-05 school year. Approximately 44 permits (or less than 1%) were issued to 15 organizations for purposes of "worship" – 8 Christian, 4 Jewish, 2 Buddhist, 1 Jehovah's Witness. Approximately fourteen different school facilities were used on Saturdays for "worship services" or for a congregation. *See* A98-202.

- **Sundays –** there were approximately 2,168 permits issued on Sundays during the 2004-05 school year. Approximately 151 permits (or 7%) were issued to 50 organizations for purposes of "worship" – 35 Christian, 11 Buddhist, 3 Hindu, 1 Muslim. Approximately 39 different school facilities were used on Sundays for "worship services" or a congregation. Two different Christian congregations and a Buddhist organization met in the same school building (A225). In one case, a Muslim organization held its service on the same day in the same school building as the Plaintiffs' church (A229). *See* A204-234.

Plainly, the Board has not "favored" one religion over another, or religion in general, as a result of the lower court's injunction. "Private religious speech cannot be subject to veto by those who see favoritism where there is none." *Pinette*, 515 U.S. at 766. The Board's equal access policy commanded by the

[3] "Worship" is not always expressly indicated on the permits. Some use words such as service, meeting, family meeting and community gathering. A694zz. Additional events include those labeled as Hindu "cultural programs," "gospel concerts" and "black history musicals," A694aaa, "Central Islamic," "Jehovah Witnesses" and "Young Israel." A1559-59. These facts highlight the problem with attempting to exclude speech based on given labels. "Worship service" is not a clear term, and the Board would have to examine what the groups planned to do in order to determine whether they engaged in forbidden "worship."

permanent injunction, demonstrates "neutrality toward religion as well as among religious sects." *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 709 (1994).

But the Board cites *Kiryas Joel* for a completely different proposition than what it actually holds. App. Br. at 48-49. The Supreme Court in *Kiryas Joel* said that the lack of a policy granting the same status equally or neutrally to all religious groups violated the Establishment Clause:

> Because the religious community of Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law, we have no assurance that the next similarly situated group seeking a school district of its own will receive one . . .

Kiryas Joel, 512 U.S. at 703 (emphasis added). The facts in *Kiryas Joel* are exactly the opposite of what we have in the case at hand; similar facts would be akin to the Board allowing *only* Bronx Household of Faith to meet in the schools and no other religious groups. To claim that *Kiryas Joel* supports the School Board's argument is quite a stretch.

Under an "equal access" policy, the reasonable observer sees no improper preference but sees all the non-religious users present on the weekends and the large number of school buildings sitting empty on the weekends.[4] The injunction

[4] Multiplying 365 days in a year times the 1197 school buildings results in 436,905 opportunities for community organizations to use school facilities. This

requiring a neutral policy does not favor any religion or religion in general--it is neutral towards all speakers in the forum.

I. The Number and Types of Community Groups That Take Advantage of a Forum Have No Effect on the Establishment Clause Inquiry.

How private groups chose to use facilities the government opens on a first come, first served basis, does not indicate whether there is an Establishment Clause violation. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982) (emphasis added). No such official religious favoritism exists here.

The Board concedes, as its must, that the facilities use policy (as enforced by the permanent injunction) does not facially favor one religious group over another. App. Br. at 47-50. But the Board nonetheless claims that the policy has the effect of favoring one religion over another allegedly because, for example, they were "forced" to deny a Jewish service on one Saturday morning as the school was not

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does not even take into account that many schools can house multiple uses simultaneously, and have done so. *See e.g.* A3505, ¶10. Saturday usage alone allows 62,244 opportunities, and Sunday use obviously doubles that number to 124,488. The current uses per year approximate 10 % of that total amount. A1896. Lack of space is not deterring any groups from using school buildings. Also, there are about 150 schools within a 2 mile range from where Plaintiffs currently meet. A3505, 3508-3522

available. App. Br. at 49. This selective use of facts creates a misleading picture. First, the Board failed to acknowledge the additional fact that it also denied a Christian organization access for the same reason. A849, ¶¶13-15. Second, as mentioned above, there are 1197 buildings available, and 150 within 2 miles. The Jewish and Christian groups had many other meeting place options available in the schools. Third, a single incident, or even dozens, of a particular school not being available is very likely to happen for many reasons, none of which is constitutionally significant. Fourth, as with all other arguments that the Board makes, it has already been rejected by *Good News Club*: "When a limited public forum is available for use by groups presenting any viewpoint, however, 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." *Id.* at 119 n.9.

The Supreme Court has expressly rejected a "disparate impact" analysis under the Establishment Clause: "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Zelman v. Simmons-Harris*, 536 U.S. 639, 650 (2002), quoting *Mueller v. Allen*, 463 U.S. 388, 401 (1983). The Supreme Court has rejected the view that even a large

percentage of religious users (which we do not have here) who choose to utilize the benefits offered in a facially neutral government program would invalidate that program under the Establishment Clause. *Mueller*, 463 U.S. at 401 (upheld government program where 96% of students taking advantage attended religious schools); *Zelman*, 536 U.S. at 658 (upheld government program where 96% of participating students enrolled in religious schools and 82% of participating schools were religious) and *Agostini v. Felton*, 521 U.S. 203, 229 (1997).

The important principle is that a government program's benefits must be "made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, 521 U.S. at 231. The government cannot single out religious expression for exclusion from a "forum for speech" set up to "encourage a diversity of views from private speakers." *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004), quoting *Rosenberger*, 515 U.S. at 834.

When a government law or policy inadvertently affects religious groups differently because of their own religious beliefs, the law in question does not violate the Establishment Clause. "[I]t does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'" *Harris v. McRae*, 448 U.S. 297, 319-20 (1980), citing *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). *See also Braunfield v. Brown*,

366 U.S. 599 (1961) (Sunday closing law does not violate the free exercise rights of Orthodox Jews who believe they must close for business from sunset Friday to sunset Saturday). There is no religious favoritism here.

J. The Reasonable Observer Would See Hostility to Religion In The Board's Facially Discriminatory Policy.

The Board's policy sends a message of official hostility to religion in violation of the Establishment Clause. The Supreme Court recognized this danger in *Good News*, 533 U.S. at 118: "we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum."

The Establishment Clause prohibits the Board from enacting policies that inhibit religion, just as they may not enact policies that advance it. *See Mergens*, 496 U.S. at 248 ("if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion"). Government neutrality toward private speakers and private speech is the key. *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) ("The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities"). Yet, the Board

keeps insisting on a lopsided view of the Establishment Clause, that it must exclude religious worship from a forum generally opened to all community groups. This is not neutrality, as the Establishment Clause requires, but hostility.

K. The Board Would Not be Subsidizing Churches by Allowing Them to Meet on the Same Terms and Conditions as Other Community Groups.

There is no legal basis, nor factual basis, for the Board's argument that permitting religious groups to use the forum on the same terms and conditions as other community groups constitutes direct governmental funding of religion. App. Br. at 60-61.

This argument is simply wrong. First, there is no direct government funding. The Board obviously does not provide any money to any group, let alone religious ones. The only money changing hands is that of the religious groups paying the Board to use its facilities. Rejecting this argument, the Court in *Rosenberger*, 515 U.S. at 843, held:

> The error made by the Court of Appeals, as well as by the dissent, lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient. If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, than *Widmar, Mergens* and *Lamb's Chapel* would have to be overruled.

Second, even if this is viewed as a non-monetary, "in-kind" contribution to

the religious groups, it does not violate the Establishment Clause because the Board provides the same "financial aid" to every other community group that meets in the schools. The Board implies wrongly that religious groups would be the only ones receiving the "subsidy" by renting the schools. App. Br. at 67. If the Board were correct, it would mean that the government violates the Constitution when it extends fire and police protection to a synagogue or temple, or allows a mosque to hook up to the local sewer and water system:

> For if the Establishment Clause did bar religious groups from receiving general governmental benefits, then "a church could not be protected by the police and fire departments, or have its public sidewalks kept in repair." *Widmar*, 454 U.S. at 274-75 (internal quotation marks omitted). Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Zobrest v. Catalina Foothills Sch.Dist.t, 509 U.S. 1, 8 (1993). *See also Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

Bronx Household of Faith and other religious groups meeting in the public schools do not ask for or receive special treatment. They simply ask to be able to meet in the school buildings on the same terms and conditions as everyone else.

CONCLUSION

This Court should affirm the District Court's permanent injunction.

Date: March 20, 2008

Respectfully submitted,

THE BRONX HOUSEHOLD OF FAITH,
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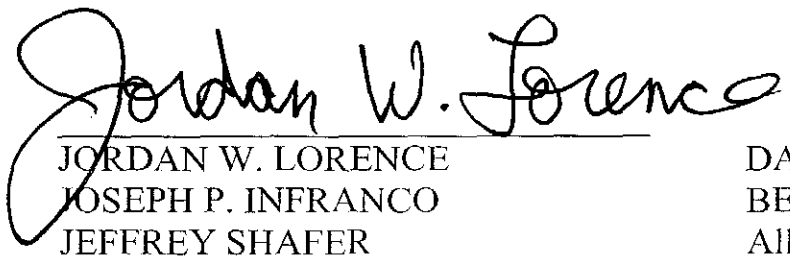

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because this brief contains 13,993 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 pt. font.

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ANTI-VIRUS CERTIFICATE

I, Jordan W. Lorence, certify that I have scanned for viruses the PDF version of the Plaintiffs-Appellee's Brief that will be submitted in this case as an email attachment to brief@ca2.uscourts.gov and that no viruses were detected. The anti-virus detector used was VirusScan Enterprise Version 8.0.

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