No. 14-354

In the Supreme Court of the United States

THE BRONX HOUSEHOLD OF FAITH, ET AL.,

Petitioners,

v.

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

Respondents.

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

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

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QUESTION PRESENTED

Whether the First Amendment allows the government to provide access to public school facilities after hours for any expression "pertaining to the welfare of the community," but to exclude "religious worship services."

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INTEREST OF THE *AMICUS CURIAE*[1]

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

The Becket Fund is concerned that the panel's misguided forum analysis will open the door for governments to disfavor religious speech. It is also concerned that the panel's unprecedented distinction between "religious worship" and all other types of religious speech is entangling, unprincipled, and incompatible with the First Amendment.

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

SUMMARY OF THE ARGUMENT

This should have been a simple case. For thirty years—from *Widmar* to present—this Court has held that religious speech in a government forum must be treated on equal terms with nonreligious speech. It has specifically rejected the claim that religious "worship" is entitled to less protection under the Free Speech Clause than other forms of speech. *Widmar* v. *Vincent*, 454 U.S. 263, 269 n.6 (1981). It has made clear that within a public forum such as this, the government may not exclude religious speech. *Locke* v. *Davey*, 540 U.S. 712, 720 n.3 (2004). And it has repeatedly held that equal treatment of religious speech does not violate the Establishment Clause. See, *e.g.*, *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). Thus, if the government broadly opens its facilities for a wide range of speech—as the New York City Department of Education ("Department") has done here—it cannot single out "religious worship services" for disfavored treatment.

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

This Court should grant certiorari to defend its precedents, resolve the circuit split, and define the proper scope of public forum doctrine.

REASONS FOR GRANTING THE WRIT

A. This case is in an ideal procedural posture to review the free speech question.

The most straightforward way to resolve this case is under the Free Speech Clause. Although this Court denied certiorari on the free speech issue in 2011, 132 S. Ct. 816, several factors now make the case a more attractive vehicle for review.

First, when this Court denied certiorari in 2011, the case was in an interlocutory posture and the factual record was not yet fully developed. Although the lower court had ruled on a motion for summary judgment on one of petitioner's First Amendment claims—under the Free Speech Clause—it had not adjudicated petitioner's claims under the Free Exercise or Establishment Clauses. Pet. App. 153a-160a. Thus, even if this Court had granted certiorari in 2011, it could not have considered the entire case. Now that the lower court has resolved all of petitioner's claims, the entire case is available for review.

Second, reviewing the entire case makes particularly good sense here, because petitioner's free speech, free exercise, and establishment claims are intertwined. The free speech claim depends in part on the strength of the Department's Establishment Clause concerns; if those concerns are baseless, then the restriction on petitioner's speech is not reasonable. The free speech claim also depends on whether the Department can define "worship services" without excessive entanglement or discrimination among religions in violation of the Religion Clauses.

The free speech analysis also affects the claim under the Free Exercise Clause. The lower court rejected

the free exercise claim on the ground that this case involves "a government subsidy" and is therefore controlled by *Locke*. Pet. App. 18a-22a. But *Locke* said that its analysis does not apply to cases involving "a forum for speech." 540 U.S. at 720 n.3. This case obviously involves a forum for speech. Pet. App. 50a, 175a. Thus, the root of the lower court's error under the Free Exercise Clause was its error under the Free Speech Clause. Pet. 19-20.

Finally, since this Court denied certiorari in 2011, the circuit split over the free speech question has remained sharp and entrenched. Neither the Second nor Ninth Circuit has reconsidered its minority position. Nor have they reconciled their jurisprudence with *Widmar* or *Good News Club*. As a result, more than a quarter of the nation's population now lives under a jurisprudence of unequal access that has been emphatically rejected elsewhere. This the first petition to present this circuit split on a full record after all related claims have been resolved. Cf. *Faith Ctr. Church Evangelistic Ministries* v. *Glover*, 480 F.3d 891, 918 n.18 (9th Cir. 2007) (appeal was based on a "limited evidentiary record" on a preliminary injunction).

B. The lower court's free speech analysis exacerbates a circuit split and conflicts with this Court's cases.

The core problem with the lower court's free speech ruling is that it deemed the public school facilities to be a limited public forum, subject only to deferential reasonableness review. That decision exacerbates a circuit split, conflicts with this Court's cases, and distorts the proper forum analysis.

1. When evaluating speech restrictions on government property, this Court recognizes three types of

government fora: (1) traditional public fora, (2) designated public fora, and (3) limited public fora. *Christian Legal Soc'y* v. *Martinez*, 561 U.S. 661, 679 n.11 (2010). Traditional public fora include public parks, streets, and sidewalks; speech in these places must be permitted, subject only to reasonable and content-neutral time, place, or manner restrictions. Designated public fora are created when governments open other property or facilities to private groups for speech of their own choosing. In either traditional or designated fora, any content-based restrictions "'must satisfy strict scrutiny.'" *Ibid.*

A limited public forum is created when government provides opportunities for speech by particular persons or on particular topics—for example, if a city council creates a public comment period on topics relevant to city government, or a city tourism board sponsors a jazz festival. In a limited public forum, the government is entitled to exclude speech that does not fall within the stated terms and purposes of the forum, and content-based restrictions need only be viewpoint-neutral and "reasonable in light of the purpose served by the forum." *Id.* at 2988.

Despite its apparent simplicity, this forum analysis has divided the lower courts. In particular, "[t]he contours of the terms 'designated public forum' and 'limited public forum' have not always been clear." *DiLoreto* v. *Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 n.4 (9th Cir. 1999); accord *United Food & Commercial Workers Local 1099* v. *City of Sidney*, 364 F.3d 738, 750 (6th Cir. 2004) ("Our circuit and others have noted the confusion surrounding the use of the terms 'designated public forum' and 'limited public forum.'").

Six circuits have now considered cases in which the government has opened public schools or public libraries to a wide variety of speech, but has excluded religious worship. Four circuits have held that the government created a designated public forum, have applied heightened scrutiny, and have struck down the exclusion. Two circuits have now held that the government created a limited public forum, have applied reasonableness review, and have upheld the exclusion. These circuits have applied conflicting legal standards to reach conflicting results in indistinguishable cases. The conflict is square and entrenched, and only this Court can resolve it.

2. In this case, the forum consists of public school facilities, which are available for "social, civic, and recreational meetings and entertainment, and other uses pertaining to the welfare of the community." Pet. App. 290a. The only restrictions are on "personal" use (such as weddings), "commercial" use, "gambling," "alcoholic beverage[s]," and certain "political events." Pet. App. 290a-292a, 314a. Under this policy, the Department has issued hundreds of thousands of extended use permits each year, allowing tens of thousands of diverse community groups to use the facilities for a vast array of speech. Pet. 5-6.

Petitioner argued that these regulations created a designated public forum, noting that the forum is open to everyone, and that the stated purpose of the forum—for all "uses pertaining to the welfare of the community"—is so broad that it essentially allows speech on all topics. The Second Circuit, however, held that the Department had created a limited public forum. It concluded that the "limitation [on religious worship] is characteristic of a limited forum, for it represents the exercise of the power to restrict a public

forum to certain speakers and to certain subjects." *Bronx Household of Faith* v. *Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 213 (2d Cir. 1997) (*Bronx I*); accord *Bronx Household of Faith* v. *Bd. of Educ. of New York*, 492 F.3d 89, 97-98 (2d Cir. 2007) (*Bronx III*); Pet. App. 175a (*Bronx IV*). Thus, it applied a deferential standard of review and upheld the restrictions.

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

Over a dissent by Judge Tallman, the Ninth Circuit held that the room was a limited public forum. *Id.* at 908-09. Citing the restrictions on schools and worship, the requirement to obtain a permit, and the requirement to pay a small fee for certain uses, the court held that the library had "demonstrated its desire to limit access to the library meeting room for certain purposes and speakers." *Id.* at 909. It thus applied deferential reasonableness review and upheld the ban on worship. Judge Bybee, joined by six other judges, dissented from the denial of rehearing en banc, arguing that the court had "jettisoned three decades of equal

access jurisprudence" and "should have summarily affirmed" under *Widmar*. *Id.* at 902, 897.

3. In contrast with the Second and Ninth Circuits, four circuits have reached the opposite result on indistinguishable facts. Three of those cases involved public school facilities; one involved a library auditorium. All were held to be designated public fora subject to heightened review—not limited fora subject to reasonableness review. And all four circuits struck down the restriction on worship.

In *Gregoire* v. *Centennial School District*, 907 F.2d 1366, 1369 (3d Cir. 1990), a school district made a high school auditorium available to a wide range of community groups, but not for "religious services, instruction, and/or religious activities." *Id.* at 1369. Under this policy, the district denied access to a group that wanted to hold an evening program involving religious worship. After a preliminary injunction, the district narrowed its policy, limiting the forum to "civic, cultural and service organizations," "employee associations and labor unions," and "plays and/or musical performances suitable for general audiences." *Id.* at 1372-73. According to the school district, these limitations converted the facilities into a limited public forum. *Id.* at 1373-74.

The Third Circuit, however, concluded that the district had created a designated public forum. "We cannot conclude that, because there is new exclusionary language in the wording of the revised policy, we are precluded from finding that the school district has created a designated open forum." *Id.* at 1378. If the law were otherwise, said the court, the government could "pick and choose those to whom it grants access for purposes of expressive activity simply by framing its

access policy to carve out even minute slices of speech which, for one reason or another, it finds objectionable." *Ibid.* Having found that the facilities were a designated public forum, the court applied a heightened standard of review and struck down the restriction on religious worship. In direct conflict with the Second Circuit, the court rejected the attempt to "draw[] a line between religious discussion and religious worship," *id.* at 1382, and it rejected the argument that allowing religious worship in an open forum might violate the Establishment Clause, *id.* at 1380-82.

The Fourth Circuit reached the same result in *Fairfax Covenant Church* v. *Fairfax County School Board*, 17 F.3d 703 (4th Cir. 1994). There, a school board made its public school facilities broadly available to community and cultural organizations, but charged churches a "progressively escalating rental rate to encourage them to rent elsewhere." *Id.* at 704. The escalating rental rate was motivated by concern that long-term use by churches would violate the Establishment Clause. *Ibid.* In direct conflict with the panel in this case, the Fourth Circuit deemed the facilities to be "a public forum," applied heightened scrutiny, and struck down the restriction on religious worship. *Id.* at 706.

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

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

Finally, in *Concerned Women for America, Inc.* v. *Lafayette County*, 883 F.2d 32 (5th Cir. 1989), a public library allowed any group to use its auditorium as long as it "would not be meeting for a religious or political purpose." *Id.* at 33. Based on this policy, it denied access to a religious group that wanted to use the auditorium for a prayer meeting. The Fifth Circuit struck down the speech restriction, concluding that the library, by allowing "diverse groups" to use the auditorium, had created a designated public forum. *Id.* at 34.

The decisions of the First, Third, Fourth, and Fifth Circuits cannot be reconciled with the decisions of the Ninth Circuit or the court below. In all of these circuits, opening public school facilities to any expression "pertaining to the welfare of the community" (Pet. App. 290a) would create a designated public forum subject to strict scrutiny. And in all of these circuits, restrictions on "religious worship services" would be struck down.

4. The lower court's decision also conflicts with this Court's decisions. Indeed, this case is virtually a reprise of *Widmar*. There, a university made its facilities "generally available" to registered student groups. 454 U.S. at 264-65. But it prohibited "religious worship or religious teaching." *Ibid.* This Court analyzed the facilities as a designated public forum, applying strict scrutiny and striking down the restriction on religious worship. *Id.* at 269-70.

The forum in this case is indistinguishable from *Widmar*. If anything, it is even more "generally available" than the forum in *Widmar*, because the forum there was limited to registered student groups. Here, the forum is open to *any* group for "social, civic, and recreational meetings and entertainment, and other uses pertaining to the welfare of the community." Pet. App. 290a. In other words, unlike *Widmar*, there are no restrictions based on speaker identity.

Lacking any restrictions based on speaker identity, the Second Circuit attempted to distinguish *Widmar* on the ground that "[a] public university is, of course, much different from a public middle school in terms of traditional openness." *Bronx I*, 127 F.3d at 213. But "traditional openness" is the standard for a *traditional* public forum, not a designated public forum. The whole point of a designated public forum is that the government can "designate a place *not traditionally open to assembly* and debate as a public forum." *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (emphasis added). That is precisely what happened here. After-hours speech in a public school building is no different from after-hours speech in a university building.

The lower court's forum analysis also conflicts with considered dictum in *Lamb's Chapel*, which involved a policy promulgated under the same New York law at issue here. There, the policy made school facilities available for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," but excluded certain uses by political organizations or any use "for religious purposes." 508 U.S. at 386-87. The church argued that

this policy opened the property "for such a wide variety of communicative purposes" that it became a designated public forum. *Id.* at 391.

This Court found it unnecessary to determine what type of forum was involved, because the exclusion of "religious purposes" was viewpoint-based and therefore unconstitutional regardless of the forum. *Id.* at 393. But the Court still stated that the designated public forum argument "has considerable force." *Id.* at 391. Specifically, the Court suggested that the property was a designated public forum because it "is heavily used by a wide variety of private organizations, including some that presented a 'close question'" about whether it was religious. *Ibid.*

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

5. The lower court's forum analysis is also conceptually flawed, and should be corrected. A broadly inclusive forum, with no specified subject, does not become a "limited" forum simply because the government has excluded one or a few subjects of speech. On the contrary, such exclusions are subject to strict scrutiny. *Widmar*, 454 U.S. at 269-70. If the mere exclusion of one or a few subjects were enough to turn a designated forum into a limited forum, there would be no such thing as a designated forum.

Although there may be difficult cases at the margin, the essential fact that distinguishes a limited forum from a designated forum is whether the forum was created to foster speech by a specified group of persons or on a specified topic or set of topics. *Ark. Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 678-680 (1998). For example, if the mayor announces a town hall meeting on plans to build a new civic center, the city can limit speech at the meeting to that topic. But when the forum is broadly open for speech by private groups on topics of their own choosing, it is a designated forum, and any content-based exclusions are subject to strict scrutiny. *Ibid.* (citing *Widmar*). (We respectfully suggest that a more helpful term for a limited forum would be a "special-purpose forum." See *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983) (limited forum is reserved for "special purpose").)

This is not a close case. Both the broad definition of the purpose of the forum and its actual use by tens of thousands of groups on an unlimited number of subjects show that it is a designated forum. The policy permits "social, civic, and recreational meetings and entertainment, and other uses pertaining to the welfare of the community." Pet. App. 290a. That is so broad a definition that it is difficult to imagine a meeting or a topic that would not come within its terms. And indeed, the record shows that tens of thousands of diverse community groups have used New York public school facilities for a vast array of speech. Pet. 5-6. The mere decision to exclude a narrow slice of content does not convert a policy of "general access" into one of "selective access." *Ark. Educ. Television Comm'n*, 523 U.S. at 679.

According to the Second Circuit, however, the Department's content-based restrictions "represent[ed] the exercise of the power to restrict a public forum to * * * certain subjects," thus making the facilities a limited public forum. *Bronx I*, 127 F.3d at 213; accord *Bronx III*, 492 F.3d at 97-98 (adopting the analysis of *Bronx I*); Pet. App. 175a (same). That cannot be right. If the exclusion of certain subjects is enough to convert a forum into a "limited" one, then every content-based restriction would justify itself. Governments could create a forum generally available to all, while excluding a narrow slice of disfavored content—say, speech about war, capitalism, unemployment, religion, taxes, or corruption in city government. The government could then use those content-based restrictions to claim that the forum was limited, thus justifying reduced scrutiny for those very same content-based restrictions. As the Third Circuit said in *Gregoire*, such a rule would "sound[] the death knell for the designated open forum." 907 F.2d at 1378.

6. The lower court's forum analysis also has a significant practical effect on religious organizations across the country. Many congregations rely on equal access to government fora for their existence—especially new congregations and minority faiths, which have difficulty renting or buying their own facilities. In *Fairfax Covenant Church*, for example, the record showed that the school board received approximately fifty applications from churches seeking to lease its facilities each year. 17 F.3d at 708. Here, in 2011, the District granted permits for worship services to at least eighty-one religious organizations. Pet. App. 84a. (Even then, religious organizations were only a small fraction of the groups using the forum; almost

95% of permits were for nonreligious activity. Pet. App. 85a.)

Available statistical evidence confirms that access to public fora is especially important to new congregations. According to a 2007 study of new evangelical Protestant congregations, 12% met in schools in their first year—trailing only homes (18%) and church buildings (13%). Ed Stetzer & Phillip Connor, *Church Plant Survivability and Health Study 2007* at 7, http://pcamna.org/churchplanting/documents/CPMainReport.pdf. But due to the decisions of the Second and Ninth Circuits—which exercise jurisdiction over approximately 27% of the nation's population—equal access to public facilities in a large segment of the country is no longer guaranteed.

C. The lower court's Establishment Clause analysis conflicts with a long line of this Court's cases.

Even assuming the District's facilities are a limited public forum, the exclusion of "religious worship services" still must be viewpoint neutral and "reasonable in light of the purpose served by the forum." *Cornelius*, 473 U.S. at 804-06. The lower court upheld the exclusion as reasonable because, in its view, the District had "a strong basis to fear that permitting [worship] would violate the Establishment Clause." Pet. App. 209a. But that holding conflicts with a long line of this Court's cases, which have repeatedly held that

permitting religious speech on equal terms with non-religious speech does not violate the Establishment Clause.[2]

1. The Second Circuit tried to distinguish these cases on three grounds—none persuasive. First, it noted that the students in this case "are not the 'young adults' of *Rosenberger* and *Widmar*, but young children who are less likely to understand that the church in their school is not endorsed by their school." Pet. App. 194-95a.

This is wrong both factually and legally. It is wrong factually because the "young children" are not there to see who is meeting in "their school"; the meetings occur outside of school hours. It is wrong legally

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[2] See:

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

because the same argument was rejected in *Good News Club*. There, the Court held that "any risk that small children would perceive endorsement" was irrelevant, 533 U.S. at 119, because "the relevant community would be the parents, not the elementary school children," *id.* at 115. And even assuming the children's perspective were relevant, the Court held that there was no risk of endorsement because the activities took place "after the schoolday has ended"; the parents of the children "must sign permission forms"; and "[t]he instructors are not schoolteachers." *Id.* at 117-18. That is even more true here, where the activities take place on weekends and target adults, rather than taking place immediately after school and targeting 6- to 12-year-old children. Thus, as in *Good News Club*, there is no reason "to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive." *Id.* at 119.

2. Second, the Court of Appeals tried to distinguish this Court's cases on the ground that public schools "are more available on Sundays than any other day of the week," creating "a *de facto* bias in favor of Christian groups who want to use the schools for worship services." Pet. App. 195a. But the record shows that religious groups are only a small fraction of the groups that use the forum overall, Pet. 5-6; that similar numbers of buildings are available on Fridays, Saturdays, and Sundays, Pet. App. 235a n.9 (Walker, J., dissenting); and that Jewish and Muslim groups have routinely used the forum on weekends, Pet. App. 234a-235a (Walker, J., dissenting).

More importantly, even if Christian churches did use the forum more often, this Court has rejected the argument that an equal-access policy is unconstitutional "simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a particular time." *Good News Club*, 533 U.S. at 119 n.9. In other words, the mere risk that an equal-access policy might have a disparate impact does not justify intentional, content-based restrictions on speech.

3. Finally, the panel tried to distinguish this Court's cases on the ground that the church seeks to use the facilities for "worship services"—which the panel believed were "more likely to promote a perception of endorsement" than other types of religious speech. Pet. App. 194a. According to the Second Circuit, "worship services" are categorically different from any other type of speech:

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

Pet. App. 186a-187a (emphasis in original).

This distinction—between religious worship and all other forms of religious speech—has been squarely rejected by the Seventh and Tenth Circuits, both of which treat restrictions on worship as a form of viewpoint discrimination. Pet. 30-34 (discussing *Badger Catholic, Inc.* v. *Walsh*, 620 F.3d 775, 779, 781 (7th

Cir. 2010); *Church on the Rock* v. *City of Albuquerque*, 84 F.3d 1273, 1278-79 (10th Cir. 1996)).

The distinction also fails for multiple reasons. First, this Court already rejected it. In *Widmar*, the dissent offered the same distinction, arguing that religious worship was less protected under the Free Speech Clause and more problematic under the Establishment Clause. 454 U.S. at 284-86. But this Court disagreed, concluding that a distinction between worship and other speech lacks "intelligible content," lies outside "the judicial competence to administer," and is irrelevant. *Id.* at 269 n.6, 271 n.9. The panel majority did not even cite this portion of *Widmar*, much less try to distinguish it. That should be the end of the matter.[3]

Second, as *Widmar* pointed out, the distinction between religious worship and other religious speech is hopelessly entangling. *Id.* at 269 n.6. That is shown by the panel's attempt to define worship in this case. According to the panel, the typical components of a worship service—"[p]rayer, religious instruction, expression of devotion to God, and the singing of hymns"—"do *not* constitute the conduct of worship services." Pet. App. 177a (emphasis added). Rather, these activities *become* a "worship service" only when

[3] The panel suggested that this Court distinguished "'mere' religious worship" from other speech in *Good News Club*. Pet. App. 192a. But *Good News Club* did just the opposite. The Court held that religious speech must be treated equally "[r]egardless of the label"—*i.e.*, whether it is labeled "worship" or otherwise. 533 U.S. at 112 n.4. And in that case, the speech included *both* the "teaching of moral values" *and* "religious worship," and *both* had to be permitted. *Ibid.*; accord *Faith Ctr.*, 480 F.3d at 900-01 (Bybee, J., dissenting from denial of rehearing en banc).

they are "[1] done according to an order prescribed by and under the auspices of an organized religion, [and] [2] typically but not necessarily conducted by an ordained official of the religion." *Ibid.*

That is a constitutionally troubling definition. If taken seriously, it would require the Department to discriminate among religions on the basis of those two criteria—allowing groups to meet if they do not follow the "prescribed" "order" of an "organized religion" and if their meeting is not "typically" conducted by an "ordained official." Quakers and Buddhists, who run afoul of neither criterion, would be permitted to meet; so would Sikhs (who have no ordained clergy) and many low-church Protestants (who follow no particular "order" of worship). Episcopalians, Roman Catholics, and most Jewish congregations would be excluded. Indeed, the panel admitted that banning "worship services" would have, at a minimum, "a disparate impact" across denominations. Pet. App. 23a; accord *Faith Ctr.*, 480 F.3d at 901-02 (Bybee, J., dissenting). It is surely unconstitutional for the government to discriminate among religious denominations based on whether they are "organized," whether they follow a "prescribed order," or whether their worship services are "typically" conducted by an "ordained official." See *Larson* v. *Valente*, 456 U.S. 228 (1982). Indeed, it is hard to see how distinctions of these sorts could be relevant to any governmental purpose, or "reasonable in light of the purpose served by the forum." *Cornelius*, 473 U.S. at 804-06.

We would go further and say that it is impossible, constitutionally, for government to tell the difference between "worship" and mere religious "speech." A sermon is just a speech and a hymn is just a song, unless

the person participating in the meeting holds it up to God as an act of devotion. The Department has no way of telling mere religious speech from worship, and it would be offensive for it to try. As Madison said long ago: "the Civil Magistrate is [not] a competent Judge of Religious truth." James Madison, *A Memorial and Remonstrance against Religious Assessments* ¶ 5 (1785) *reprinted in* James H. Hutson, *Religion and the Founding of the American Republic* 72 (1998).

Acknowledging these problems, the lower court suggested that the Department can simply "rely on the applicant's own characterization as to whether the applicant will conduct religious worship services." Pet. App. 35a. But this argument is doubly flawed. First, the Department does not, in practice, follow this approach; rather, it often substitutes its own definition of "worship services" for that of the applicant. Pet. App. 100a-107a. Second, and more importantly, relying on the applicant's own definition still discriminates among religious groups based on how they define the term "worship." Groups that define their gatherings as "worship" will be excluded, while groups that define their gatherings as something else will be permitted—even if their gatherings are functionally identical. The Constitution does not allow the state to penalize religious groups based on how they define the religiously freighted term "worship."

Finally, the panel's concern about conducting worship services in government buildings lacks any historical basis. President Washington permitted religious groups to conduct worship services in the U.S. Capitol building as early as 1795. 1 Wilhelmus Bogart Bryan, *A History of the National Capital from Its Foundation Through the Period of the Adoption of the*

Organic Act 260 (1914); Hutson, *supra* at 84. President Jefferson, whose devotion to church–state separation cannot be questioned, allowed worship services in the Treasury and War Office buildings, and regularly attended services in the Capitol throughout his presidency. *Id.* at 89. Even the Supreme Court chamber was occasionally used for worship services. *Id.* at 91. Mr. Jefferson later invited religious societies, under "impartial regulations," to conduct "religious exercises" for students in rooms at his beloved University of Virginia. He specifically observed that these arrangements would "leave inviolate the constitutional freedom of religion." 19 *The Writings of Thomas Jefferson* 414-17 (Memorial ed., 1904). This history undermines the panel's assumption that conducting worship services in a public building is a uniquely pernicious Establishment Clause violation. Cf. *Town of Greece*, *N.Y.* v. *Galloway*, 134 S. Ct. 1811 (2014); *Marsh* v. *Chambers*, 463 U.S. 783 (1983).

CONCLUSION

The Second Circuit has repeatedly shown itself unwilling to apply this Court's equal-access jurisprudence. It was reversed 9–0 in *Lamb's Chapel* for refusing to follow *Widmar*. It was reversed 6–3 in *Good News Club* for refusing to follow *Widmar*, *Rosenberger*, and *Lamb's Chapel*. And it should be reversed here for refusing to follow all of the above. The decision below widens an unnecessary circuit split, and the petition for a writ of certiorari should be granted.

Respectfully submitted.

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