06-0725

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees,

-against-

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

Defendants-Appellants.

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE SUPPORTING DEFENDANTS-APPELLANTS AND REVERSAL OF DECISION AND ORDER BELOW

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THE IDENTITY AND INTEREST OF THE AMICUS CURIAE

The Association of the Bar of the City of New York (the "Association") is a professional organization of more than 23,000 attorneys, who work in private practice, public and governmental service and academia. The Association has a long and distinguished history of supporting and protecting the rights, liberties and opportunities of all of the City's residents. The Association's support of the position of the Defendants-Appellants, the City of New York and the City's Department of Education ("Appellants" or the "City"), reflects its commitment to neutrality within the pluralistic society that is a fundamental characteristic of New York City.

SOURCE OF AUTHORITY TO FILE AMICUS BRIEF

The Association is simultaneously filing a motion for leave to file this amicus brief, the grant of which will constitute the authority to file the instant brief.

SUMMARY OF ARGUMENT

This Court recently expressed its adherence to the consensus view that New York City's public school system plays "a particularly important role" in teaching "essential elements of pluralism to future generations of Americans." *Skoros v. City of New York*, 437 F.3d 1, 19 (2d Cir. 2006). In this case, the causes of

pluralism and neutrality are advanced not by the District Court's injunction, but rather by permitting the DOE to enforce Standard Operating Procedure § 5.11 (the "SOP") to preclude Plaintiffs-Appellees (collectively, "Appellees" or the "Church") and similarly situated parties from conducting worship services in the City's public schools.

The District Court held the SOP to be unconstitutional. In doing so, the District Court showed no deference to the City government and, while correctly holding the forum to be limited, incorrectly held the forum to be the school system as a whole, as opposed to the particular school at issue. The District Court also ignored the City's legitimate and long-held concerns about religious divisiveness in public schools. If the District Court's decision is upheld, the City will continue to be placed in the untenable and unconstitutional position of establishing churches in schools, as well as endorsing, aiding and preferring one particular religion over others.

The District Court's decision is critically different from *Skoros*, *Good News v. Milford Central Sch.,* 533 U.S. 98 (2001) and other First Amendment cases, where the goal of pluralism was served by, respectively, upholding the display of holiday symbols from multiple religions and sustaining the right of multiple

student groups to meet in public schools.[1] As noted by Appellants: "[n]one of the forum access cases considered by the Supreme Court involved a forum that would be available for the religious activities of *some religious groups and not others*." Appellants' Brief, dated May 8, 2006 ("Appellants' Brief"), at 50 (discussing *Good News*, 533 U.S. at 114, *Widmar v. Vincent*, 454 U.S. 263, 271 n.10 (1981)) (emphasis added). Critically, none of the relevant Supreme Court cases included evidence that the religious group seeking access would completely dominate the forum. *See* Appellants' Brief, at 57 (citing *Widmar*, 454 U.S. at 275 (noting the "absence of empirical evidence that religious groups will dominate [the university's] open forum"); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 252 (1990) (accord); *Good News*, 533 U.S. at 118 (student religious club met in a classroom and had only 28 student members); *Lamb's Chapel v. Center Moriches Union Free Sch.*, 508 U.S. 384, 387 (1993) (Church sought to use school space to show a six-part film series)).

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[1] *Skoros* is this Court's most recent decision regarding the Establishment Clause in the City's public school system. In *Skoros*, the Court held that the DOE's enactment and enforcement of a holiday display policy "d[id] not violate the Constitution when, in pursuing the secular goal of promoting respect for diverse cultural traditions, they do not include a creche in such displays, representing Christmas through a variety of that holiday's well recognized secular symbols, even though Chanukah is represented by the menorah and Ramadan by the star and crescent." *Skoros*, 437 F.3d at 4.

Here, the main public spaces at the school used by Appellees to conduct their worship services are available to only one group at a time and usually only on Sundays. Appellants' Brief, at 51 (citing A18, ¶7; A238, ¶3; A19, ¶¶13, 59-60, A28, ¶41). Thus, in many of the schools in which these types of worship services have taken place, only one group is observed as using the facilities and thus there is no message of pluralism conveyed. Indeed, the message conveyed is quite the opposite – one of favoritism and exclusivity. As a result, this domination of the forum has caused a critical line to be crossed; *private* religious speech, which might in other circumstances be Constitutionally protected, has instead become *governmental* speech and therefore can, indeed *must*, be prohibited on Establishment Clause grounds.

This case stands in marked contrast to *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), which stands for the proposition that the government's use of a menorah to represent Chanukah in a multicultural holiday display had the "real purpose" "to communicate pluralism rather than to endorse religion." *Skoros*, 437 F.3d at 27 (citing *County of Allegheny*, 492 U.S. at 636 (O'Connor, J., concurring in part and concurring in the judgment); and also citing *Elewski v. City of Syracuse*, 123 F.3d 51, 58 (2d Cir. 1997) (Cabranes, J., dissenting) (noting that "secular context and a message of pluralism" was what "enabled the menorah/Christmas tree display in Allegheny to survive constitutional scrutiny")).

Here, the injunction below, by striking down the SOP, requires the government to permit Appellees and similar groups to hold ongoing, regularly scheduled worship services. As a result, these churches stand alone. While it is, in theory only, possible that other groups with different viewpoints could meet in the schools in the same manner as Appellees, the other groups could not possibly meet in the same school, at the same time, in the same prominent public spaces – such as the auditorium, cafeteria and gymnasium – as Appellees.

In light of the historical context described below, an objective observer would find the recently-minted phenomenon of numerous Christian congregations dominating various City public school buildings so that they are transformed into churches each and every Sunday to be a convincing demonstration of the City's endorsement.

THE HISTORICAL CONTEXT

The public schools have long occupied a unique place in the City's consciousness. They have been abiding symbols of equal access and opportunity for all New Yorkers, regardless of race, religion or racial or ethnic origin. Our public schools have enabled generations of New Yorkers with widely diverse backgrounds to aspire to, and achieve, lives of great accomplishment. Even during extended periods of inadequate school funding, overcrowding and even violence, New Yorkers have never forsaken the belief that the City is obligated to provide an

educational process that will strive to address, without favoritism, the needs and ambitions of *all* citizens.

Sadly, it is no exaggeration to say that the District Court's decision below threatens our citizens' core belief in the City's commitment to neutrality and pluralism. In a misguided devotion to "equal access," the District Court requires the City to grant privileges to adherents of a particular religion that are unavailable to others, and thus requires the City to unwillingly violate the Establishment Clause.

Given the universally recognized importance of public schools everywhere in America, schools in the City also have been a battleground for recurring and heated confrontations, such as over local control (a.k.a., "community control"), centralization of management and the appropriate roles for educational experts.[2] Thankfully, for more than one hundred and fifty years, religion's place in the City's public schools has not been among the issues that have divided its citizens. However, we once did have our share of controversy.

By the early 1840's, a huge influx of Irish immigrant Catholics threatened to leave a substantial minority of school-age children underserved. Even then, the City had large and diverse ethnic populations, concentrated in a series of separate,

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[2] *See generally The Great School Wars, New York City, 1805-1973*, Diane Ravitch, New York, 1974.

homogeneous communities, including the Lower East Side, Five Points, Little Italy and Chinatown.[3] The school system, while then publicly funded, was privately and centrally controlled by the overwhelmingly Protestant, "nonsectarian" (though anti-Catholic and questionably named) "Public School Society." Catholics agitated ferociously for public funding of local districts in which individual community authorities alone, not the Society, would determine the extent and content of religious instruction and observance.

A bill containing such changes actually passed the Assembly with the support of the then governor, William H. Seward. But the compromise enacted by the New York State Legislature in April 1842 instead provided for a centralized but more accountable board of education and simultaneously prohibited *all*

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[3] The *Skoros* Court recognized that:

> In teaching the lesson of pluralism in New York City public schools, the defendants confront a greater challenge than the one at issue in Kiryas Joel, simply by virtue of the enormous size of the City school system and the extraordinary cultural diversity of its student body. Moreover, because a significant number of New York City schoolchildren or their parents are immigrants, sometimes from countries that place little value on other diversity or tolerance, City schools play a particularly important role in teaching these essential elements of pluralism to future generations of Americans.

437 F.3d at 48.

sectarian religious activity.[4] The latter principle was followed without interruption by successive Boards of Education (now the Department of Education) for the next 160 years, and eventually became embodied in the SOP that the District Court has now struck down.

In 1842, the State and City of New York decided that religious observances should be conducted elsewhere than in the public schools. The composition of New York's numerous ethnic and religious populations have changed, but today its communities are at least as, if not more, widely diverse (e.g., Middle Eastern, Dominican, Russian and Sikh) and are as densely concentrated (e.g., Sunset Park, Flushing, Astoria and Brighton Beach). Thus, in 2006 the appearance of governmental endorsement of any religion, much less a single religion, is at least as poor a public policy for New York City as it was 160 years ago.

THE FACTS AND RECORD BELOW

The Association respectfully refers the Court to Appellants' Brief (at 5-23), for a complete recitation of the undisputed facts. The Association here summarizes its factual analysis in support of the City's position, and highlights facts disregarded as irrelevant or insignificant by the District Court, which are, on the contrary, pivotal to the Constitutional analysis.

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[4] *The Great School Wars*, at 70-76. *See also Between Church and State: Religion and Public Education in a Multicultural America*, James W. Fraser, New York, 1999, at 51-57 and materials cited therein.

The District Court's ultimate incorrect conclusion of law is founded on numerous specific factual errors, many of which involve a misapplied reasonable observer standard. Among the flaws in the District Court's legal/factual analysis are the following:

- The District Court stated that: ". . . Defendants contend that the child who happens to be at or near P.S. 15 on a Sunday when the Church is using space in that school is the reasonable observer whose assessment is relevant to the Establishment Clause analysis. . . . This argument is squarely precluded by the Supreme Court's holding in Good News Club, 533 U.S. at 119, and its prior discussions of the reasonable observer, see, e.g., Capitol Square, 515 U.S. at 765 . . . ." *Bronx Household of Faith v. Bd. of Educ. of the City of New York*, 400 F. Supp. 2d 581, 595 (S.D.N.Y. 2005).
- The District Court stated that: "the Supreme Court has proscribed the use of a 'modified heckler's veto' to exclude religious speech from a public forum based on the perceptions of the youngest audience members. See Good News Club, 533 U.S. at 119." *Bronx Household*, 400 F. Supp. 2d at 597.

However, as discussed below, *Skoros* clearly holds that the reasonable observer is the objective adult, a "community ideal" aware of the historical context of the enjoined policy and the effect on the child who, as a result of the injunction, is exposed to the regular religious worship services at P.S. 15. 437 F.2d at 23, 24. Therefore, considering the effect on a child is appropriate and certainly should not be dismissed as a mere "heckler's veto."

- The District Court stated that: ". . . Defendants have not identified any evidence of such domination – either in P.S. 15, in the School District, or in the City. Indeed, according to the Board, ... 9,804 non-government, non-construction contractor permits were issued for use of school property in the 2003-2004 school year. By comparison, in the 2004-2005

school year, approximately 23 congregations held regular worship services in public schools." *Bronx Household*, 400 F. Supp. 2d at 596.

However, as stated, under *Skoros*, the relevant objective observer is the adult seeing the situation, at least in part, through the eyes of a child. A child is not likely to have any comprehension of use made in other schools and certainly not throughout the City's public school system. (Indeed it would be nearly impossible for *any adult* to comprehend fully what occurs throughout the City's public schools.) Therefore, the District Court's aggregation of 9,804 school permits is decidedly off point and indeed misleading. The appropriate forum for consideration is a single school building, not the entire infrastructure of the school system, and the relevant factor is the number of other permits issued within a single school, not all permits issued for all schools.

- The District Court stated that it was "unable to appreciate the legal relevance of Plaintiffs' statements about church planting and establishing additional churches operating out of schools in the future." *Bronx Household*, 400 F. Supp. 2d at 590.

However, understanding the church planting (i.e., establishment) objectives of Plaintiffs is highly relevant to a reasonable adult observer who recognizes that allowing church planting in schools is a major deviation from the historically permitted uses of public schools in New York City.

- The District Court stated that: "Here, the Board's application process is neutral toward religious and secular groups; that the Church takes advantage of the neutral benefit program to use P.S. 15 on Sundays and

> that P.S. 15 is unavailable for use on most Fridays and Saturdays is incidental." *Bronx Household*, 400 F. Supp. 2d at 596.

However, the day of the week on which the school is available is anything but incidental – it shows that a state policy, neutral on its face, has the *effect* of endorsing religion and is therefore unconstitutional. *See Capitol Square Review and Advisory Bd.*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in part and in the judgment) (an Establishment Clause violation may arise when "the State's own actions . . . actually convey a message of endorsement"). As noted in Appellants' Brief, the record shows that "[b]ecause of the way schools are typically used, schools are not equally available for the main worship services for all religions. DOE or school officials may be perceived and, in fact, have been perceived, as favoring one religion over another." Appellants' Brief, at 19 (citing A210, ¶4). The record also shows that "many schools have school-sponsored activities on Friday evenings or Saturday mornings, when Jewish congregations celebrate the Sabbath. Schools are more available on Sundays than on any other day of the week." Appellants' Brief, at 22 (citing A317, ¶24; A241, ¶12). Based on this record, Appellants are correct in concluding that "[b]ecause of school schedules, some congregations are effectively shut out, while others receive a very valuable benefit that is fundamental to their existence. The result is government endorsement of religion in violation of the Establishment Clause." Appellants' Brief, at 51-52.

- The District Court stated that: "with the exception of the modification of Enjoined SOP § 5.11, . . . the record appears to be substantially the same as it was at the preliminary injunction stage." *Bronx Household*, 400 F. Supp. 2d at 590.

However, this statement is clearly erroneous because, among other things, the record now shows that:

-- Appellees now readily admit that they are engaged in worship services (see Appellants' Brief, at 36 ("Plaintiffs have also described worshipping God as different from ascribing worth to secular things (A31, ¶50; A512), and have described their initial avoidance of the term 'worship' as a 'tactical move' that was part of their litigation strategy (A30, ¶47)");

-- some churches dominate the forum by holding their worship services in the largest rooms in the school and regularly over the course of a year or even two years (*see* A35, ¶61; A34, ¶58; *see also* Appellants' Brief, at 8 (citing A847, ¶7 and A698, ¶7)), and these activities are not neutralized by other similar meetings as in *Good News Club* or displays of other symbols in the crèche cases;

-- school children have been solicited across the street from their school during their lunch period (*see* Appellants' Brief, at 9-10 (citing A721, ¶¶3, 10-21));

-- school children or staff members attend the services in some schools (*see, e.g., Bronx Household*, 400 F. Supp. 2d at 594 n.11 (citing Declaration of Thomas Goodkind dated April 15, 2005 regarding the fact that a parent at P.S. 89 is the main pastor at Mosaic);

-- the permit of a Jewish group seeking to use the same school facilities on Saturdays as those regularly used by a Christian Group on Sundays was denied (Appellants' Brief, at 51 (citing A19, ¶¶13, 59-60)); and

-- some community members have been confused and perceived the school as identified with the church (Appellants' Brief, at 19 (citing A699-70, ¶¶9, 11, 13; A727, ¶25; A330, ¶7; A713, ¶6; A7323, ¶4; A737, ¶2); *see also* Appellants' Brief, at 55 (citing A45, ¶77)).

These new facts all contribute to the Appellees' domination of the forum herein.

ARGUMENT

The overall purpose of the Establishment Clause is "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). As the Supreme Court held nearly sixty years ago:

> The 'establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . In the words of Jefferson, the *clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'*

Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947) (emphasis added). *See also Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the

Establishment Clause is that one religious denomination cannot be officially preferred over another").

Appellees' activities in this case cross a fundamental line: the Churches's *private* religious speech so dominates the forum (which is properly identified as the individual school building) that the reasonable observer would perceive it as *governmental* speech endorsing religion. *See, e.g., Mergens*, 496 U.S. 226, *Good News,* 533 U.S. 98, *Capitol Square,* 515 U.S. 753. Accordingly, despite the focus of Appellees and the District Court on the role of the Free Speech Clause in determining the outcome of this case thus far, because Appellees' domination of the forum transforms private speech into perceived governmental endorsement of religion, it is instead the Establishment Clause that provides the most appropriate framework for the requisite Constitutional analysis.

Establishment Clause issues are analyzed under the three-prong analysis articulated in *Lemon.* "Lemon instructs that, consistent with the general neutrality objective of the Establishment Clause, government action that interacts with religion (1) 'must have a secular...purpose,' (2) must have a 'principal or primary effect . . . that neither advances nor inhibits religion,' and (3) 'must not foster an excessive government entanglement with religion.'" *Skoros* 437 F.3d at 17 (quoting *Lemon,* 403 U.S. at 612-13 (internal quotation marks omitted)). The argument below provides a detailed analysis of the *Lemon* test as applied to this

case, which can be summarized essentially as follows: the City unquestionably is obligated to prevent endorsement (establishment) of religion within its public schools; the City has promulgated the SOP to regulate the limited forum to accomplish that result; and the City is not only constitutionally entitled, but constitutionally *obligated*, to enforce the SOP, or a similar regulation or policy, to avoid impermissible endorsement. Accordingly, the District Court's decision must be reversed and the City's summary judgment motion granted.

POINT I

THE CITY'S POLICY IS DESIGNED TO PREVENT UNCONSTITUTIONAL ENDORSEMENT OF RELIGION

The first prong of the *Lemon* test is that the statute or regulation must have a "secular purpose." *Lemon*, 403 U.S. at 612. This requirement is "not intended to favor the secular over the religious but to prevent the government from 'abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.'" *Skoros*, 437 F.3d at 18 (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987)).

The enjoined SOP states 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.

The City consistently has asserted that the intended purpose of the SOP is "to prevent any congregation from using a public school for its worship services but still permit religious clubs for students." (Appellants' Brief, at 28.) The City also is seeking to prevent alienation from the educational process, arising from students who identify their schools with church denominations to which they do not belong. Further, the purpose of the regulation is to protect school principals from making highly divisive decisions regarding the use of limited space. (Declaration of Carmen Farina A309-319 (¶¶ 3-5, 9-10, 19-20, 26-29).) These purposes are clearly secular and similar to the stated goals in *Skoros*: to promote, and effectively manage, the City's pluralistic society. Moreover, there is no evidence in the record that the City's stated purpose is a "sham;" rather it is a reasonable response to potential religious divisiveness. *See Skoros,* 437 F.3d at 19 ("In sum, because the promotion of tolerance and respect for diverse customs is the clearly stated purpose of the holiday display policy at issue in this case, we conclude that this purpose is permissibly secular").

A. The Objective Observer Would Perceive Permitting Churches To Use Schools For Worship Services As Lacking Neutrality

In *Skoros*, the Court defined the "objective" or "reasonable" observer as "an adult who, in taking full account of the policy's text, history, and implementation,

does so mindful that the displays at issue will be viewed primarily by impressionable schoolchildren." *Skoros*, 437 F.3d at 23 (citing *Edwards v. Aguillard,* 482 U.S. 578, 583-84 (1987) (noting schoolchildren's impressionability); *Lee v. Weisman*, 505 U.S. 577, 597 (1992) (same)). The Court further clarified that "the standard strives to identify a personification of a community ideal of reasonable behavior determined by the collective social judgment." *Capitol Square*, 515 U.S. at 780 (alteration and internal quotation marks omitted).

The relevant reasonable observer is therefore fully cognizant that each of New York City's diverse neighborhoods are unaccustomed to observing religious worship services taking place on a regular, ongoing basis in their public schools. This objective observer would perceive the religious activity required under the injunction, which is completely unprecedented in the City's history, as a demonstration of endorsement.

Moreover, as *Skoros* held: "[w]hen, as in this case, we apply an endorsement analysis to a policy that operates throughout a city's public elementary and secondary schools, special concerns arise in the identification of the reasonable observer." 437 F.2d at 30. While a grammar school or even high school aged child would not constitute a reasonable observer, the "community ideal" adult recognizes that the acts at issue will be observed by and perhaps impact such a

child, and therefore the child remains significant. *Skoros,* 437 F.3d at 23. Indeed, "the Supreme Court has demanded vigilance . . . in ensuring that public schools do not appear to endorse religious creed and do not employ religious rituals and ceremonies in school activities." *Skoros*, 437 F.3d at 31 (citing *Sch. Dist. of Abington Township v. Schempp,* 374 U.S. 203, 226-27 (1963) (declaring daily prayer in public school unconstitutional); *Lee v. Weisman,* 505 U.S. 577, 598-99 (1992)*; Stone v. Graham,* 449 U.S. 39, 42-43 (1980)*; Lemon,* 403 U.S. at 619).

B. There Is No Meaningful Way to Convey To The Community The City's Independence From The Regular Worship Services

As described in Appellants' Brief, there is no meaningful or effective way to convey to the community at large the City's independence from the regular worship services conducted by the Appellees. (Farina Declaration A309-319 (¶¶ 20-23). While the churches are required to place disclaimers on relevant information, the "closed" society at issue in *Rosenberger v. Rector*, 515 U.S. 819 (1995) and *Widmar* is not present here. Here, church members interact with and convey information to members of the community at large. They are not likely to convey any "disclaimer," and any such "disclaimer" is not likely to be understood by the community's youngest members. Finally, no wide diversity of speakers, in the same or similar contexts, is present here to undercut the perceived association between church and school. *Cf. Rosenberger*.

POINT II

THE CHURCH'S DOMINANT USE OF THE FORUM TRANSFORMS ITS PRIVATE RELIGIOUS SPEECH INTO GOVERNMENTAL SPEECH THAT HAS THE IMPERMISSIBLE EFFECT OF ENDORSING RELIGION

The second prong of *Lemon* states that the "principal or primary effect" of the challenged government action "neither advance[s] nor inhibit[s] religion" *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 430 (2d Cir. 2001). The SOP seeks to recognize the pluralistic society that is New York City and maintain neutrality towards religion by permitting religious clubs, which have a secular analog, to be held in its public buildings, while carving out a prohibition against worship services. The statute therefore remains neutral among the religions that the City's population practices, and respects those community members who adhere to no religion.

Similar to religious display cases, the issue here is "highly fact-specific" and centers around answering whether a reasonable observer would perceive a message of governmental endorsement or sponsorship of religion. *See Skoros*, 437 F.3d at 29. The Supreme Court has developed certain guidelines to determine whether a particular statute or regulation violates the Establishment Clause:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by

> nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. *E. g., Larkin v. Grendel's Den, Inc.,* 459 U.S. 116 (1982). *The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.* Disapproval sends the opposite message. See generally *Abington School Dist. v. Schempp,* 374 U.S. 203 (1963).

Lynch v. Donnelly, 456 U.S. 668, 687-688 (1984) (emphasis added).

As discussed, the Church's continuous use of P.S. 15 creates *de facto* endorsement of the Christian religion and *private* religious speech so dominates the forum that the reasonable observer would perceive it as *governmental* speech endorsing religion. *See, e.g., Mergens*, 496 U.S. 226, *Good News,* 533 U.S. 98, *Capitol Square,* 515 U.S. at 777-778. As Justice O'Connor observed in her concurring opinion in *Capitol Square*:

> Where the government's operation of a public forum has the *effect of endorsing religion*, even if the governmental actor neither intends nor actively encourages that result, see *Lynch, 465 U.S. at 690* (O'CONNOR, J., concurring), the Establishment Clause is violated. This is so not because of "'transferred endorsement,'" ante, at 764, or mistaken attribution of private speech to the State, *but because the State's own actions (operating the forum in a particular manner and permitting the religious expression to take place therein), and their relationship to the private speech at issue, actually convey a message of endorsement. At some point, for example, a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval. . . . Other circumstances may produce the same effect—whether because of the fortuity of geography, the nature of the particular public space, or the character of the religious speech at issue, among others.*

515 U.S. at 777-78 (emphasis added).

Here, as explained below, based on the "fortuity of geography" and the "nature of the particular public space," the Church's weekly and multiyear conduct of worship services in a public school's main auditorium so totally dominates P.S. 15 that a policy of equal access is transformed into a demonstration of approval, and it is this effective endorsement that violates the Constitution.[5] *Capitol Square,* 515 U.S. at 777-78; *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307 n.21 (2000) (citation omitted) ("the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions").

A. The "Fortuity Of Geography" Exacerbates The Unconstitutional Endorsement

As discussed above, New York City is the quintessential melting pot of populations with diverse cultures, ethnicities and religious beliefs. Millions of our densely populated residents are confronted by whatever activities are being conducted at the City's public schools *every day* – including Sundays. The schools

[5] Appellees previously asserted that the District Court below "would be the first in the nation to find "'domination' of a forum by religion." *See* Plaintiffs' Brief in Opposition to the Defendants' Motion for Summary Judgment, dated May 10, 2005, at 5. Appellees are wrong. In *Doe v. Small*, 726 F. Supp. 713 (N.D. Ill.1989), the trial court found that the placement of religious symbols over a long period of time in a public park constituted domination of the forum. 726 F. Supp. at 724. Although that issue was not germane on appeal, the Seventh Circuit noted that "surely the City cannot allow a religious group to turn a public park into an enormous outdoor church [without violating the Establishment Clause]." *Doe v. Small*, 964 F.2d 611, 625 (7th Cir. 1992).

in which worship services are being conducted are often centrally located in highly populated areas with high traffic volumes every day of the week. Thus, in New York City the "fortuity" of geography obviously enhances the likelihood of unconstitutional endorsement. *See Capitol Square*, 515 U.S. at 777-78; *Allegheny*, 492 U.S. at 621 ("particular physical setting" significant to issue of endorsement).

B. The Nature Of The Limited Public Forum Space Engenders Impermissible Endorsement

The nature of the public forum engenders impermissible endorsement. In conduct that results in a lack of multiplicity of speakers, Appellees and other churches like it have not confined themselves to a single or even multiple classrooms, but rather use the school's main spaces. (A18, ¶7; A238, ¶3; A19, ¶¶13, 59-60, A28, ¶41.) Functionally, these spaces are not, and cannot be made, equally open to other religious speakers. Thus, granting permits to Appellees to use spaces for their intended use creates impermissible domination.

As stated by Justice Scalia in *Capitol Square*, permitting a display of a privately sponsored religious symbol for several weeks in a site not equally open during the same period constitutes impermissible endorsement. *Capitol Square*, 515 U.S. at 764 (citing *Allegheny*, 492 U.S. at 599-600, and n. 50). The placement of a crèche in the "Grand Staircase" was highlighted in the *Allegheny* case and unlike the crèche in *Lynch* and the cross in *Capitol Square*, the crèche was not placed amongst other sectarian and secular displays, but by itself on the "Grand

Staircase" – the "main," "most beautiful" and "most public" part – of the courthouse. *Allegheny*, 492 U.S. at 579. Analogously, Appellees use the "main" and "most public" parts of P.S. 15 for their weekly worship services. Because these facilities are unique within the school, multiple groups cannot use these facilities simultaneously.

This pivotal distinction separates this case from *Good News Club, supra*; *Widmar, supra*; *Rosenberger, supra*; *Capitol Square* and *Lynch*, *supra* – ***all*** of which involved a multiplicity of speakers expressing differing theistic, atheistic or secular views within either a general or limited open forum – and from *Lamb's Chapel*, *supra*, in which the space at hand was intended to be used for a limited period of time and was otherwise generally open to a wide range of speakers.[6] *Good News Club,* in particular, is distinguishable from the instant case: permitting Appellees to dominate the main rooms of schools is fundamentally different from permitting a student religious club to use a single classroom while other student groups are using other classrooms.

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[6] *Good News* involved multiple student clubs, *Widmar* involved multiple student organizations, *Rosenberger* involved multiple student newspapers, and *Lamb's Chapel* involved facilities for use for a finite period (six weekly film segments) which theoretically would make the same forum available for similar use by multiple groups. Similarly, *Capitol Square*, *Lynch* and *Skoros* involved placing religious symbols among multiple secular and sectarian symbols.

As discussed, under the preliminary injunction at least one religious group has questioned whether the City's public school authorities treated it fairly. A Jewish group's application to use school space on Saturdays was denied – even though a Christian group regularly uses the same space on Sundays. (A19, ¶¶13, 59-60.) In this and other situations, the City *effectively* has given preference to Christian groups because they seek to use the main rooms in schools on Sundays. This *effect* constitutes impermissible endorsement. *Capitol Square,* 515 U.S. at 777-78; *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307 n.21 (2000) (citation omitted) ("the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions").

Moreover, Appellees attribute special significance to holding worship services in a public school building, which to them, is "God's house." (A517-519, A557, A544.) This goal of establishing churches in schools, coupled with use of such facilities primarily on the "Lord's Day" for the Christian faith, effectively conflates the schools and churches, resulting in impermissible endorsement. *Cf. Lee v. Weisman*, 505 U.S. 577, 587 (1992) (including clerical members as part of commencement exercises violated the Establishment Clause because the State impermissibly acted in a way that coerced support of religion or otherwise

"establishes a [state] religion or religious faith, or tends to do so'") (citation omitted).

POINT III

THE CHURCH'S USE OF P.S. 15 ENGENDERS UNCONSTITUTIONAL ENTANGLEMENT

The final prong of *Lemon* requires that the regulation at issue not foster impermissible entanglement with religion. This aspect of the L*emon* analysis is "properly treated as 'an aspect' of Lemon's second-prong 'inquiry into a statute's effect.'" *Skoros*, 437 F.3d at 35. "Entanglement is a question of kind and degree," *Id.* at 684, and becomes "excessive" only when it has "the effect of advancing or inhibiting religion." *Agostini v. Felton*, 521 U.S. 203, 233 (1997).

Entanglement issues are of particular significance in the public school context. *See McCollum v. Bd. of Educ.*, 333 U.S. 203, 216-17 (1948) ("Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects"); *see also Edwards v. Aguillard*, 482 U.S. at 583-584 (Establishment Clause must be applied with special sensitivity in the public-school context).

Under the injunction, troublesome entanglement issues have already arisen and will almost certainly continue and worsen. As detailed in Appellants' Brief, the City will continue to be forced to respond to complaints about the churches'

proselytizing activities, to monitor church literature to ensure proper disclaimers, and to use excessive caution in issuing permits. (Appellants' Brief at 18-19.) Moreover, pursuant to the District Court's decision and order, Christian churches are receiving significant support in the form of governmental buildings for use as their principal places of worship, underwritten by taxpayer dollars. *See Destefano v. Emergency Housing Group, Inc.*, 247 F.3d 397, 418-19 (2d Cir. 2001).

None of the other factors which the Supreme Court has held to be significant in finding a particular "program" to be neutral are present here. For example, unlike the payments made in *Rosenberger* (i.e., for third party printing costs of a student-generated publication espousing a religious viewpoint), the facilities benefit here is of a "direct" nature. Similarly, this is not a matter of a benefit being used to support religion as a matter of *private* choice. *Cf. Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481 (1986).

POINT IV

THE CITY'S POLICY IS ENTITLED TO SOME DEFERENCE

In *Skoros,* "this court has recognized that when 'government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause.'" 437 F.3d at 27-28 (citing *Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d 469, 476 (2d

Cir. 1999); *Walz v. Tax Comm'n,* 397 U.S. 664, 669 (1970) (observing the First Amendment allows some "room for play in the joints" productive of a benevolent neutrality); *Locke v. Davey*, 540 U.S. 712, 718 (2004) (same)).

Here, while it is possible that the City might be able to tolerate *occasional* worship services in its public school buildings, that is not what it is being compelled to do; rather, it is being compelled to sponsor weekly Sunday Christian Evangelical worship services for on an ongoing basis, which in practice has been *years at a time.* Moreover, the injunction results in *de facto* exclusion of other religious sects and forced inclusion of one religious sect, which communicates official favoritism that is forbidden. *Lynch v. Donnelly*, 465 U.S. at 687-688.

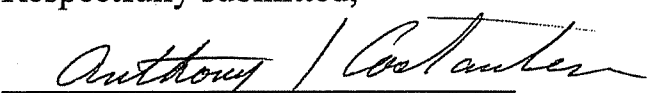
Under controlling precedent, the City should be given leeway to promulgate and enforce the SOP, the regulation embodying the City's good faith attempt to maintain the religious neutrality that has served its vast and varied population so well for so long. The District Court's decision striking down the City's statute should be reversed. In any event, under the Establishment Clause, the City cannot be required – indeed, cannot be allowed – to continue to permit Appellees to transform public school buildings into Christian churches.

CONCLUSION

For the reasons set forth above, as well as those in Appellants' Brief and the record herein, the District Court's decision should be reversed and the City granted summary judgment.

Dated: New York, New York
June 6, 2006

Respectfully submitted,



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CERTIFICATE OF BAR MEMBERSHIP

I, Anthony J. Costantini, am a member in good standing of the Bar of this Court, and so certify in compliance with LAR 46(d).

Dated: June 6, 2006
New York, New York

Anthony J. Costantini

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CERTIFICATE OF SERVICE

I, Cathy M. Smith, hereby certify that on June 6, 2006, two true copies of the BRIEF OF THE ASSOCIATION OF THE CITY OF NEW YORK AS AMICUS CURIAE SUPPORTING DEFENDANTS'-APPELLANTS AND REVERSAL OF DECISION AND ORDER BELOW, ANTI VIRUS CERTIFICATION and CERTIFICATE OF COMPLIANCE WITH RULE 32 (A) was served by First Class Mail upon the following:

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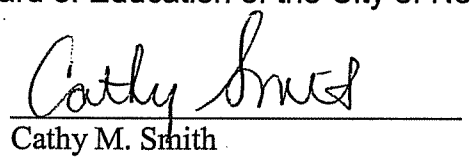

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