12-2730

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE BRONX HOUSEHOLD OF FAITH, ROBERT HALL, and JACK ROBERTS,
Plaintiffs-Appellees,

v.

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

Appeal from the United States District Court
For the Southern District of New York

Brief of The Association of the Bar of the City of New York as Amicus Curiae Supporting Defendants-Appellants

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae The Association of the Bar of the City of New York (the "City Bar") is a Section 501(c)(6) professional association. The City Bar has no corporate parent, and no publicly held corporation owns any part of it.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Regulations

Other Authorities

THE IDENTITY AND INTEREST OF THE AMICUS CURIAE*

The Association of the Bar of the City of New York (the "City Bar") is a professional organization of more than 23,000 attorneys, primarily from New York City, who work in private practice, public and governmental service and academia. The City Bar has a long and distinguished history of supporting and protecting the rights, liberties and opportunities of all the residents of New York City.

The City Bar has supported the policy of the Defendants-Appellants, the City of New York and the City's Department of Education ("Appellants" or the "City") regarding religious worship services – a policy now known as Section I.Q of Chancellor's Regulation D-180 ("Ch. Reg. D-180" or the "Policy") – throughout this extended litigation. Ch. Reg. D-180 would prohibit the conduct of religious worship services in City public schools or using schools as "houses of worship" during non-school hours.

By a decision and order issued by the District Court in June of this year, the Policy was again permanently enjoined (the "Injunction"). *Bronx Household of Faith v. Bd. of Educ. of the City of New York*, No. 01 Civ. 8598 (LAP), 2012 U.S. Dist. Lexis 91015 (S.D.N.Y. June 29, 2012) (the "District Court Opinion"). The City Bar's support of the Policy reflects not hostility toward religion, but rather an

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* No party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than amicus curiae, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

enduring commitment to the pluralism that is fundamentally characteristic of New York City. As detailed here and in the Appellants' Brief ("Appellants' Brief"), allowing churches to use public schools for worship services has the effect of preferring Christian churches over all others largely because school facilities are not available (or not as available) for use for outside groups during the traditional worship times for other faiths, such as Judaism and Islam. (Appellants' Brief at 47-48, citing *Bronx Household of Faith v. Bd. of Educ. of the City of New York*, 650 F.3d 30, 40, *cert. denied*, 132 S. Ct. 816 (2011) ("*Bronx Household IV*")).

By issuing the Injunction against enforcement of the Policy, the District Court Opinion effectively gives preferential treatment to a particular religion. Yet, as Justice Black famously held some sixty-five 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.*

Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (emphasis added) (footnotes and citation omitted). *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"). But the Injunction renders the City powerless to prevent evangelical Christian churches, and in reality no others, from being established in its public schools, and thus being preferred over all other religions.

The City Bar firmly believes that this Court should find that the Injunction has so elevated the risk that a particular religion will be perceived as preferred by the City, that a violation of the Establishment Clause is currently taking place (*See* Part I, below). In *Bronx Household IV*, however, this Court found it unnecessary to determine whether the facts supported a determination that an Establishment Clause violation existed under a prior injunction that also prevented the Policy's enforcement. 650 F.3d at 43, 45. This Court may again find such a determination is unnecessary, given the deference that should be afforded the City when dealing with the serious risk of such a violation. (*See* Point II, below.) In either case, the City Bar strongly urges this Court to reinstate the Policy.

SOURCE OF AUTHORITY TO FILE AMICUS BRIEF

Plaintiffs-Appellees and Defendants-Appellants have consented to the cross filings of amicus briefs, including this one.

PRELIMINARY STATEMENT

The Policy's Historical Context

The District Court Opinion ignores the Policy's historical context described below – a key factor as demonstrated by *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) and *Van Orden v. Perry*, 125 S. Ct. 2854 (2005). This Court has repeatedly expressed its view that the 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). The public schools remain today abiding symbols of equal opportunity for all New Yorkers, regardless of race, religion or racial or ethnic origin. The City public schools have enabled generations of New Yorkers from widely diverse backgrounds to aspire to, and achieve, lives of great accomplishment. Even during extended periods of grave difficulties, 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* of our citizens.

When, 170 years ago, ferocious sectarian strife relating to religious control and instruction in the public schools did threaten civic disorder, serious conflicts were largely overcome by an enduring compromise enacted by the New York State Legislature in April 1842; it provided for a centralized but accountable board of education and simultaneously prohibited *all* sectarian religious activity.[1] The latter principle was followed without interruption by successive Boards of Education (now the Department of Education or the "DOE") for the next 160 years, and eventually became embodied in the Policy, which furthers the goal of operating public school buildings as neutral institutions welcoming to *all* communities.

[1] *See* Diane Ravitch, *The Great School Wars. New York City, 1805-1973*, at 70-76 (1974).

The composition of New York's numerous ethnic and religious populations has changed dramatically since 1842, but today's New Yorkers are at least as widely diverse (*e.g.*, Middle Eastern, Dominican, and Russian) and just as densely concentrated in some areas (*e.g.*, Sunset Park, Flushing, Astoria and Brighton Beach). Thus, in 2012, the appearance of governmental endorsement of a particular religion to the exclusion of all others is still as poor a public policy for New York City as it was 170 years ago. Consistent with the Court's decision in *Bronx Household IV*, *Skoros* and other relevant authority, Ch. Reg. D-180 should be reinstated to allow the DOE to maintain public schools as inclusive, non-sectarian pillars of New York City's communities.

ARGUMENT

POINT I

THE DISTRICT COURT OPINION'S HOLDING THAT NO ESTABLISHMENT CLAUSE VIOLATION CURRENTLY EXISTS IS INCORRECT

While the City might be able to constitutionally abide occasional worship services in its public schools, it is being compelled to do something quite different under the Injunction: it must subsidize weekly Sunday evangelical Christian worship services for years at a time by a swiftly growing group of churches. *Bronx Household IV*, 650 F.3d at 41; Appellants' Brief at 46-47. Moreover, the Injunction effectively permits *de facto* exclusion of other religious sects and forced

preference of one religious sect, communicating the type of official favoritism forbidden by the Establishment Clause. *Bronx Household IV*, 650 F.3d at 40, 43; *Lynch v. Donnelly*, 465 U.S. 668, 687-688 (1984).

Nevertheless, the District Court Opinion held that "allowing religious worship services in the [City public] schools during non-school hours *does not violate* the Establishment Clause." District Court Opinion, 2012 U.S. Dist. LEXIS 91015, at *11, citing *Bronx Household of Faith v. Bd. of Educ. of the City of New York*, No. 01 Civ. 8598, 2012 U.S. Dist. LEXIS 23385, at *8-10 (S.D.N.Y Feb. 24, 2012) (emphasis added). It is unlikely that the District Court Opinion meant to hold that there are *no* circumstances whatsoever under which the conduct of worship services in City public schools would not violate the Establishment Clause. But the District Court Opinion misperceives the importance of the relevant undisputed facts fostering a present Establishment Clause violation, and fails to give appropriate legal weight to a series of factual and legal findings made by this Court in *Bronx Household IV*. The District Court Opinion also incorrectly determined based on a "Free Exercise Clause" analysis that the City should be permitted to enforce its Policy *only if* the Churches' activities would constitute an *actual* violation of the Establishment Clause.[2]

[2] The City Bar has chosen not to examine the District Court Opinion's Free Exercise Clause analysis in this brief, but the City Bar does not find that the purported violation has merit.

(Continued…)

The City Bar respectfully refers the Court to Appellants' Brief (at 5-23), for a recitation of the undisputed fact references to the enhanced record, and also refers to *Bronx Household IV* for this Court's findings based on the still relevant prior record. The District Court Opinion disregards these undisputed material facts and judicial fact findings, despite the fact that every proper Establishment Clause inquiry is necessarily fact intensive. *Bronx Household IV*, 650 F.3d at 47.

A. This Court has upheld the presumptive validity of the City's Policy under the "*Lemon* Test."

The District Court Opinion fails to credit this Court's finding that Section I.Q of Ch. Reg D-180 satisfies the three-prong test set forth in *Lemon v. Kurtzman ("Lemon")*, *i.e.*, it has "a secular . . . purpose," its "principal or primary effect . . . neither advances nor inhibits religion," and it does not "foster an excessive government entanglement with religion." *Bronx Household IV*, 650 F.3d at 40 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)). Accordingly, the Policy has been held valid under current case law by this Court, even if no actual Establishment Clause violation would necessarily be found to exist were the City to decline to enforce the Policy. Of course, this Court's determination of the

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(Continued…)

Indeed, as pointed out elsewhere (*see, e.g.*, amicus curiae brief of Americans United for Separation of Church and State), the City has been forced to underwrite the churches' worship services for the past ten years with a valuable but unlawful subsidy; avoiding the perpetuation of that subsidy cannot logically be said to be a violation of the Free Exercise Clause.

Policy's basic validity under *Lemon* remains, as it must, undisturbed by the District Court's Opinion.

1. This Court found that the Policy has a secular purpose; in contrast, permitting religious worship under the Injunction has no secular purpose.

By finding that the Policy satisfies the first prong of *Lemon*, *i.e.*, that the relevant statute or regulation has a "secular purpose," this Court has effectively found that the Policy 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)). In contrast, it cannot be said, under the facts here, that the Injunction's protection of the Appellees' activities has a secular purpose, since its sole function is to permit religious worship services where none would otherwise take place.

2. This Court found that the Policy neither advances nor inhibits religion; in contrast, permitting religious worship under the Injunction advances religion.

Secondly, by finding that the Policy satisfies the second prong of *Lemon*, this Court has already held that the "principal or primary effect" of the challenged Policy "neither advance[s] nor inhibit[s] religion." *See Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F. 3d 415, 430 (2d Cir. 2001).

In contrast, the Injunction improperly advances religion. In striking down the Policy and requiring the City to permit worship services in its schools, the District Court Opinion is critically different from those in cases in which the goal of pluralism was served by, say, upholding the display of holiday symbols from multiple religions (*Skoros*) or sustaining the right of multiple student groups to meet in public schools (*Good News Club v. Milford Central School*, 533 U.S. 98 (2001)).

Further, none of the Establishment Clause cases considered by the Supreme Court involving the use of a forum had a factual basis like the one here: fora (individual schools) that, by virtue of the times and days on which they are publicly available, permit subsidized religious worship by some groups but not others, and where the religious group using the facilities dominates the forum. *See Good News Club*, 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. Dist.*, 508 U.S. 384, 387 (1993) (church sought to use school to show only a film series); *Widmar v. Vincent*, 454 U.S. 263, 275 (1981) (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).

Here, in contrast, as this Court previously found, the main public spaces at a school used by Appellees and other similar parties to conduct their worship

services are available to only one group at a time and only on limited days – sometimes only on Sunday. *Bronx Household IV*, 650 F.3d at 41-42. Therefore, in many schools in which the religious worship services take place, only one group is perceived as using the facilities for worship; *i.e.*, there is no message of pluralism that is conveyed by Appellees' use of the public school in this manner. In reality, the message conveyed is quite the opposite, one of favoritism and exclusivity.

This case stands in marked contrast to *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). As stated in *Skoros*, *County of Allegheny* 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 *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")).

Requiring the government to permit Appellees and similar groups to hold ongoing, regularly scheduled worship services allows these churches to stand alone as the *de facto* sole group making use of the school's premises in that manner. While it is theoretically possible that other groups with different affiliations 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 as Appellees and similarly situated groups.

Furthermore, in light of the historical context, a reasonable, objective observer would find the recent phenomenon of numerous evangelical Christian congregations transforming various City public school buildings into churches every Sunday to be a demonstration of the City's endorsement.

In *Lynch*, Justice O'Connor, in her concurrence, stated:

> 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*.

465 U.S. at 687-688 (emphasis added).

Speech in this case crosses a fundamental line: here, *private* religious speech so dominates the forum that the reasonable observer could perceive it as *governmental* speech endorsing religion, which is forbidden under the Establishment Clause. *See, e.g., Bd. of Educ. v. Mergens*, 496 U.S. at 250; *Good*

News Club, 533 U.S. at 113, *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 763-64 (1995).

As Justice O'Connor also observed in her concurrence 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, the Establishment Clause is violated. This is so not because of "'transferred endorsement,'" 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.* Cf. *Mergens*, 454 U.S. at 275 (concluding that there was no danger of an Establishment Clause violation in a public university's allowing access by student religious groups to facilities available to others "[a]t least in the absence of empirical evidence that religious groups will dominate [the school's] open forum"). *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*.

Id. at 777-78 (emphasis added and internal citations omitted).

As explained below, based on the "fortuity of geography" and the "nature of the particular public space," the Churches' weekly and multiyear conduct of worship services in a public school's main auditorium so totally dominates the limited public forum, P.S. 15, that a policy of equal access is transformed into a demonstration of approval. *See, e.g.*, *Doe v. Small*, 964 F.2d 611, 625 (7th Cir. 1992) (Cudahy, J., concurring) ("surely the City [of Ottawa] cannot allow a religious group to turn a public park into an enormous outdoor church [without

violating the Establishment Clause]"). Even though the City may *intend* to give equal access to school facilities, in *effect* the City must favor one religious group over another because only one group may use the main rooms of the school at a specific time and such facilities are almost exclusively available for use on Sundays.

3. This Court found that the Policy does not foster impermissible entanglement; in contrast, allowing religious worship in schools under the Injunction creates excessive entanglement with religion.

Third, this Court explicitly has held that the final prong of *Lemon,* that the regulation at issue does not foster impermissible entanglement with religion, has been satisfied by the Policy. *Bronx Household IV*, 650 F.3d at 46-48. Even though any new facts in the record that were developed subsequent to this Court's 2011 decision in *Bronx Household IV* are too equivocal to be relied upon to alter this Court's conclusion regarding excessive entanglement, the District Court Opinion nevertheless does not accept this Court's finding. (*See, e.g.*, Appellants' Brief at 8.)

Entanglement becomes "excessive" or "impermissible" only when it has "the effect of advancing or inhibiting religion." *Agostini v. Felton*, 521 U.S. 203, 233 (1997). Yet the District Court Opinion holds the Policy violates the Establishment Clause because it engenders scrutiny of the applicants' activities. This Court has already heard and rejected this claim (*supra*), and not much more

need be said about it here, except that the Supreme Court recently has clarified that factual inquiries into the management of religious organizations would be necessary to determine whether the criteria for an exception to federal anti-discrimination statutes have been fulfilled. *Hosanna-Tabor Evangelical Church & School v. EEOC*, 132 S. Ct. 694 (2012).

In reality, it is under the Injunction, and not the Policy, that troublesome entanglement issues have already arisen and will almost certainly continue and worsen. As detailed in Appellants' various briefs, the City will be forced to respond to, among other things, 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 57-58.)

Moreover, under the Injunction, Christian churches are continuing to receive significant support in the form of governmental buildings for use principally as their sole places of worship. (Appellants' Brief at 5-6). This substantial benefit is improperly underwritten by taxpayer dollars. *See Destefano v. Emergency Housing Grp., Inc.*, 247 F.3d 397, 418-19 (2d Cir. 2001).

These entanglement issues, created by the Injunction, are of enhanced 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"); *Edwards v. Aguillard*, 482 U.S. 578, 583-584 (1987) (Establishment Clause must be applied with special sensitivity in the public-school context).

None of the other factors which the Supreme Court has held to be significant in finding a specific "subsidized program" to be neutral are present here. For example, unlike the payments made in *Rosenberger v. Rector & Visitors of University of Virginia* for third party printing costs of a student-generated publication espousing a religious viewpoint which were found permissible, the facilities benefit here is of a "direct" rather than "indirect" nature.[3] Similarly, this is not a matter of a benefit being used to support religion as a matter of *private* choice. *Cf. Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481, 487-88 (1986).

B. The Undisputed Material Facts Demonstrate an Establishment Clause Violation.

The District Court Opinion adopts the Court's previous factual findings. 2012 U.S. Dist. LEXIS 91015, at *13. By doing so, the District Court Opinion appears to ignore key facts that have followed. Among other things, the record shows that Appellees are engaged in worship services**,** and concede that their

[3] The Supreme Court in *Rosenberger* focused on the distinction between the student fees at issue therein, which provided indirect, permissible support, and a "tax levied for the direct support of a church or group of churches" which "would run contrary to Establishment Clause concerns dating from the earliest days of the Republic." 515 U.S. 819, 840 (1995).

avoidance of the term "worship" was a tactical move as part of their litigation strategy. (Appellants' Brief at 50-51.) By failing to address the more fully-developed record, the District Court Opinion is based on an incomplete analysis of the ways in which permitting religious worship in schools creates the appearance of religious favoritism or endorsement.

The District Court Opinion's analysis of the Establishment Clause issues is flawed as follows:

1. The relevant "forum," "forum domination," and the irrelevance of the total number of permits for all schools are all highly material factors.

The District Court Opinion found that "even though more religious organizations are using the . . . schools to hold worship services than in 2005, *the increase is statistically insignificant*," 2012 LEXIS 91015, at * 42; (emphasis added), despite the fact that the number of schools in which permits were obtained for worship services for at least three weeks increased from 23 to 81 – an increase of over 300%. *Id.* The District Court Opinion arrived at its conclusion by considering the number of permits requested citywide. *Id.* But the large number of schools in New York City does not diminish the violation of the Constitution when even one school, let alone several score, effectively becomes a church every Sunday for perpetuity.

The District Court's earlier opinion underlying *Bronx Household IV* similarly stated that: ". . . Defendants have not identified any evidence of such domination… 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 of Faith v. Bd. of Educ. of City of New York*, 400 F. Supp. 2d 581, 596 (S.D.N.Y. 2005).

As this Court has found, however, when each school is properly considered a separate forum, there has been and continues to be "domination of the forum" every Sunday at P.S. 15 and elsewhere. "During these Sunday services, the schools are dominated by church use." *Bronx Household IV*, 650 F.3d at 42. The District Court Opinion's aggregation of thousands of school permits is, respectfully, irrelevant. The appropriate forum is a single school building, not the entire City school system, and the relevant factor is the number of other permits issued within a single school, not all permits issued for all schools.

Not only did this Court agree with the City's "domination" analysis in *Bronx Household IV*, but it held that "both church congregants and members of the public identify the churches with the schools" making "the possibility of perceived

endorsement . . . particularly acute" where "schools used by churches are attended by young and impressionable students . . . ." *Bronx Household IV*, 650 F.3d at 42.

2. The appropriate definition of a "reasonable" or "objective observer" was misconstrued by the District Court Opinion.

The District Court stated in its previous opinion 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, 400 F. Supp. 2d at 595. The opinion further held that "the Supreme Court has proscribed a 'modified heckler's veto' to exclude religious speech from a public forum based on the perceptions of the youngest audience members." *Id.* at 597, citing *Good News Club*, 533 U.S. at 119. The District Court Opinion reiterates these views. 2012 U.S. Dist. Lexis 91015, at *46-48.

As discussed below, however, *Skoros* clearly holds, and this Court confirmed in *Bronx Household IV*, 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. *Bronx Household IV*, 650 F.3d at 42. Therefore, considering the effect on a child is entirely appropriate and cannot be

precluded in the Establishment Clause analysis – and certainly cannot be dismissed as a mere "heckler's veto."

The relevant reasonable observer, the ideal personification of the New York City community, is fully cognizant that each of the City's diverse neighborhoods are unaccustomed to observing religious worship services taking place on an ongoing basis in their public schools. This reasonable objective observer would perceive the religious activity compelled under the Injunction, so completely unprecedented, as a demonstration of the City's endorsement of religion.

Moreover, as the *Skoros* Court 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 will be observed by, and perhaps impact, such a child, and therefore the child remains relevant to the analysis. *Id*. at 23. One place "[w]here the Supreme Court has demanded vigilance is in ensuring that public schools do not appear to endorse religious creed and do not employ religious rituals and ceremonies in school activities." *Id*. at 31 (citing *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226-27 (1963); *Lee v. Weisman*, 505

U.S. 577, 589-99 (1992); *Stone v. Graham*, 449 U.S. 39, 42-43 (1980); *Lemon v. Kurtzman*, 403 U.S. at 619.

3. The District Court Opinion disregards important evidence of the "church planting movement."

In its prior opinion, 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. Despite additional evidence showing that evangelical Christian churches aspire to found a church in every public school, the District Court Opinion still fails to appreciate how allowing such a development would violate the Establishment Clause.

But the huge growth in the number of permits for worship services that were sought and granted under the Injunction speaks volumes regarding the intentions of the churches in question, currently aided by a significant governmental subsidy. The City, in its most recent brief, points out the testimony of the pastors themselves in connection with their desire to "plant" a church in every New York City school. (Appellants' Brief at 23.) Plaintiffs' planting objectives and those of other interested parties is highly relevant to a reasonable adult observer.

Moreover, Appellees, in their own words, have established a "beachhead" in City public schools to "enable other churches to rent schools as well" and are thereby facilitating "church planting" by others, with the stated intent of converting

every one of the City's 1,200 schools, which they consider to be "God's house," into a church. (Appellants' Brief at 23, 57.) This goal of "establishing" churches in schools rather than simply using the schools as adjunct or temporary facilities, coupled with their use of such facilities primarily on the "Lord's Day" for the Christian faith, effectively conflates the schools and churches, and results in impermissible endorsement by the City. *See Lee v. Weisman*, 505 U.S. at 587 (including clerical members as part of commencement exercises violated the Establishment Clause as such inclusion resulted in the State impermissibly acting in a way that coerced support of religion or otherwise "establishes a [state] religion or religious faith, or tends to do so") (internal citation omitted)).

4. The District Court Opinion's finding that the exclusive use of the schools for worship services by Christian groups is "incidental" is incorrect.

The District Court previously held that: ". . . 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. The District Court Opinion implicitly finds that still to be true. But this Court has found the day when the school is available is anything but incidental to a proper Establishment Clause analysis – it shows that a state policy, neutral on its face, has the effect of encouraging a perception of

endorsement of a particular religion and is therefore unconstitutional. *Bronx Household IV*, 650 F.3d at 42, n.12.

The record shows that many schools have school-sponsored activities on Friday evenings or Saturday mornings, when, for example, Jewish congregations celebrate the Sabbath. Schools are more readily available on Sundays than on any other day of the week. (Appellants' Brief at 9.) This evidence demonstrates that, even if no one intends this result, other non-Christian congregations are effectively shut out, while at the same time Christian congregations receive a valuable subsidy that they have testified is fundamental to their existence. The result is government endorsement of religion in violation of the Establishment Clause.

5. The District Court Opinion fails to appreciate that the "geography of New York City," and the "geometry" of the relevant spaces, are key factors in fostering a present Establishment Clause violation.

The "fortuity of geography" exacerbates the risk of perception of endorsement. *See Capitol Square*, 515 U.S. at 777 (an Establishment Clause violation may arise when "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").

As discussed above, the City is the quintessential melting pot of populations from all over the world, with diverse cultures, ethnicities and, of course, religious

beliefs. It is also densely populated, with over eight million people living within its five boroughs. Schools are often centrally located in highly trafficked areas; thus residents are confronted by whatever activities are being conducted at the City's public schools *every day* – including Sundays. Thus, in the City, the "fortuity" of geography, *i.e.*, a dense, diverse population concentrated in a relatively small area, clearly 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).

The nature of the limited public forum space also engenders impermissible endorsement. In conduct that results in a lack of multiplicity of speakers, Appellees and other similar churches have not confined themselves to a single or even multiple classrooms, but rather use the main spaces of the school, *i.e.*, the auditorium and cafeteria, on a weekly basis. *Bronx Household IV*, 650 F.3d at 42. Functionally, these spaces are not and cannot be made open to other religious speakers on an equal basis. As a result, granting permits for Appellees and other churches to utilize spaces for their intended use creates domination of these forums that constitutes impermissible endorsement of religion.

As pointed out by Justice Scalia in the plurality opinion in *Capitol Square*, permitting a display of a privately sponsored religious symbol for several weeks in a site that is not open to all on an equal basis 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). Justice Scalia highlighted the placement of a crèche in the "Grand Staircase" in the *Allegheny* case. *Capitol Square*, 515 U.S. at 764 (citing *Allegheny*, 492 U.S. at 599-600, and n. 50). Unlike the crèche in *Lynch* and the cross in *Capitol Square*, the crèche in *Allegheny* was not placed among 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. Here, by analogy, Appellees use the "main" and "most public" parts of P.S. 15 for their worship services every week. Because these facilities are unique within the school, multiple groups cannot use these facilities simultaneously.

This pivotal distinction separates the instant case from *Good News Club, Widmar v. Vincent*, *Rosenberger*, *Capitol Square* and *Lynch*– 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*, 508 U.S. 384, in which the space was intended to be used for a limited period of time and was otherwise open to a wide range of speakers. *Id.* at 395. *Good News Club* is especially distinguishable from the instant case: permitting Appellees and other churches to use the main rooms of schools is fundamentally different from

permitting a student religious club to use a single classroom that can be used at the same time as other groups are using other classrooms.

Here, the City *effectively* has given preference to Christian groups because they use the main rooms in schools on Sundays, when such facilities are less likely to be used for school purposes that receive scheduling priority. It is this *effect* which 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) ("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" (citation omitted)).

The Injunction places the City in the untenable and unconstitutional position of establishing churches in schools, and endorsing, aiding and preferring a particular religion over others.

POINT II

THE DISTRICT COURT OPINION SHOULD HAVE REVIEWED THE POLICY UNDER A LESS STRINGENT STANDARD

In the instant case, as in the earlier iteration of this matter which the Court decided in favor of the City (*Bronx Household IV*), the City's laudable goals of supporting pluralism and inclusion could have been maintained through the enforcement of Ch. Reg. D-180. Instead, the District Court Opinion first

improperly required the City to demonstrate that an actual Establishment Clause violation existed, and then incorrectly found that none did (*See* Point I *supra*).

But this Court held in *Skoros* that the City has ongoing obligations not to abandon neutrality, 437 F.3d at 16, to affirmatively teach the "essential elements of pluralism," *id*. at 19, and to ensure that "public schools do not appear to endorse religious creed," *id*. at 31, regardless of whether an actual Establishment Clause violation has been shown. The Court made clear in *Skoros* 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*." *Id.* at 27-28 (emphasis added) (quoting *Marchi v. Bd. of Coop. Educ. Servs.*, 173 F. 3d 469, 476 (2d Cir. 1999), and citing *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) (observing that, "short of 'governmentally established religion or governmental interference with religion,' 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) (reiterating *Walz's* recognition of "room for play in the joints")). Courts generally accord "deference" to a clear government statement of an actual secular purpose provided that the reason is "'genuine, not a sham, and not merely secondary to a religious objective.'" *Skoros*, 437 F.3d at 19-20 (quoting *McCreary County v. ACLU*, 545

U.S. 844 (2005)); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. at 308; *Edwards v. Aguillard*, 482 U.S. at 587.

Similarly, in *Bronx Household IV*, where this Court declined to determine whether an actual Establishment Clause violation existed, it nevertheless held that the City had a strong interest in avoiding the appearance of endorsement that was "made particularly acute by the fact that P.S. 15 and other schools used by churches are attended by young and impressionable students, who might easily mistake the consequences of a neutral policy for endorsement." 650 F.3d at 42.

The Supreme Court also has recently held that when a religious group seeks access to a limited public forum, such as those the City is operating here, it is the reasonableness analysis of the Free Speech cases, applied by this Court in *Bronx Household IV* to validate the Policy, which the courts should apply when making a determination of how much deference should be given to a governmental authority when it seeks to avoid an Establishment Clause violation by excluding religious activity from a supported program. *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010).

In *Martinez*, as here, the plaintiffs were "seeking what is effectively a state subsidy," *id.* at 2986, and the Supreme Court concluded that this factor, among others, made the less restrictive analysis more appropriate than requiring some

higher standard, such as the "actual violation" applied in the District Court Opinion.

The Supreme Court further determined that when "intertwined rights [*e.g.*, free speech, free association and free exercise of religion] arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review," as the Policy did in *Bronx Household IV*, "only to be invalidated as an impermissible infringement" of another of those rights. *Id.* at 2985.

Under controlling precedent, therefore, the City should be given leeway to enforce Ch. Reg. § 180, 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. Accordingly, even if this Court concludes, despite the overwhelming factual record discussed above, that no actual Establishment Clause violation exists, the District Court Opinion striking down the Policy should nevertheless be reversed.

CONCLUSION

For all the reasons set forth above, as well as in Appellants' Brief and the briefs of the other amicus curiae filed in support of Appellants and the record herein, the District Court's decision should be reversed, the Injunction vacated, and the City's Policy reinstated.

Dated: New York, New York
September 28, 2012

Respectfully submitted,

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[4] Jeffrey Metzler, a member of the Committee on Education and the Law, did not participate in drafting this brief or vote on its adoption by the Committee.

CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,815 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because its body has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Jillian Rennie Stillman Date: September 28, 2012
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