

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

August Term, 2010

(Argued: October 6, 2009

Decided: June 2, 2011)

Docket No. 07-5291-cv

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

Plaintiff-Appellees,

v.

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

Defendant-Appellants.

----- X

Before: WALKER, LEVAL, and CALABRESI, *Circuit Judges.*

Defendants appeal from an order of the United States District Court for the Southern District of New York (Preska, *C.J.*) granting summary judgment to Plaintiffs and entering a permanent injunction barring the Board of Education of the City of New York from enforcing a rule that prohibits outside groups from using school facilities after hours for “religious worship services.” The Court of Appeals (Leval, *J.*) concludes that (1) because the rule does not exclude expressions of religious points of view or of religious devotion, but excludes for valid non-

1 discriminatory reasons only a type of activity – the conduct of worship services, the rule does not
2 constitute viewpoint discrimination; and (2) because Defendants reasonably seek by this rule to
3 avoid violating the Establishment Clause, the exclusion of religious worship services is a
4 reasonable content-based restriction, which does not violate the Free Speech Clause.
5 Accordingly, the judgment of the district court is reversed and the injunction barring
6 enforcement of the rule against Plaintiffs is vacated.

7 Judge Calabresi concurs in the opinion and has filed an additional concurring opinion.

8 Judge Walker dissents by separate opinion.

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7 LEVAL, *Circuit Judge*:

8 Defendants, the Board of Education of the New York City Public Schools and
9 Community School District No. 10 (collectively, “the Department of Education” or “the
10 Board”),¹ appeal from an order of the United States District Court for the Southern District of
11 New York (Preska, *C.J.*), which granted summary judgment to Plaintiffs the Bronx Household of
12 Faith (“Bronx Household”), a Christian church, and its pastors Robert Hall and Jack Roberts,
13 and permanently enjoined the Board from enforcing against Bronx Household a Standard
14 Operating Procedure (“SOP”) that prohibits the use of school facilities by outside groups outside
15 of school hours for “religious worship services.” We conclude that the challenged rule does not
16 constitute viewpoint discrimination because it does not seek to exclude expressions of religious
17 points of view or of religious devotion, but rather excludes for valid non-discriminatory reasons
18 only a type of activity – the conduct of worship services. We also conclude that because
19 Defendants reasonably seek by the rule to avoid violating the Establishment Clause, the
20 exclusion of religious worship services is a reasonable content-based restriction, which does not
21 violate the Free Speech Clause. Accordingly, we reverse the judgment of the district court and
22 vacate the injunction.

¹The Board of Education of the City of New York has been reorganized and renamed the New York City Department of Education. *See, e.g., D.D. ex rel V.D. v. New York City Bd. of Educ.*, 465 F.3d 503, 506 n.1 (2d Cir. 2006).

1 **BACKGROUND**

2 The relevant facts are familiar, and are not in dispute. *See Bronx Household of Faith v.*
3 *Bd. of Educ. of the City of New York (Bronx Household III)*, 492 F.3d 89 (2d Cir. 2007). Under
4 New York State law, a local public school district may permit its facilities to be used outside of
5 school hours for purposes such as “social, civic and recreational meetings and entertainments,
6 and other uses pertaining to the welfare of the community,” as long as the uses are “nonexclusive
7 and . . . open to the general public.” N.Y. Educ. Code § 414(1)(c). Pursuant to this provision,
8 New York City’s Department of Education developed a written policy governing use of school
9 facilities during after-school hours as part of its Standard Operating Procedures Manual. The
10 policy, or SOP, permits outside groups to use school premises for the purposes described in the
11 state law, when the premises are not being used for school programs and activities, but subject to
12 limitations. In earlier stages of this litigation, SOP § 5.9 prohibited the use of school property
13 for “religious services or religious instruction.”² *Bronx Household of Faith v. Cmty. Sch. Dist.*
14 *No. 10 (Bronx Household I)*, 127 F.3d 207, 210 (2d Cir. 1997).

15 In 1994, Bronx Household applied to use space in the Anne Cross Mersereau Middle
16 School (“M.S. 206B”) in the Bronx, New York, for its Sunday morning “church service[s].”
17 *Bronx Household of Faith v. Bd. of Educ. of the City of New York*, 226 F. Supp. 2d 401, 410

²SOP § 5.9 provided:

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

Bronx Household I, 127 F.3d at 210.

1 (S.D.N.Y. 2002) (quoting First Affidavit of Robert Hall). According to Bronx Household's
2 application, its services would include "singing of Christian hymns and songs, prayer, fellowship
3 with other church members and Biblical preaching and teaching, communion, [and] sharing of
4 testimonies," followed by a "fellowship meal," during which attendees "talk to one another,
5 [and] share one another's joys and sorrows so as to be a mutual help and comfort to each other."
6 *Id.* The Board denied Bronx Household's application under SOP § 5.9. *Bronx Household I*, 127
7 F.3d at 211.

8 Plaintiffs brought suit, contending that the Board's denial of Bronx Household's
9 application constituted viewpoint discrimination in violation of the Free Speech Clause of the
10 First Amendment. The district court granted the Board's motion for summary judgment, and
11 dismissed the suit. *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, No. 95 Civ. 5501, 1996
12 WL 700915 (S.D.N.Y. Dec. 5, 1996) (Preska, J.). We affirmed, concluding that the Department
13 of Education had created a limited public forum by opening school facilities only to certain
14 activities, and that the exclusion of religious services and religious instruction was viewpoint-
15 neutral and reasonable in light of the forum's purposes. *Bronx Household I*, 127 F.3d at 211-15,
16 217.

17 In 2001, however, the Supreme Court ruled in *Good News Club v. Milford Central*
18 *School*, 533 U.S. 98 (2001), that it was unconstitutional for a public school district in Milford,
19 New York, to exclude from its facilities "a private Christian organization for children," which
20 had requested permission to use space in a school building after school hours to sing songs, read
21 Bible lessons, memorize scripture, and pray. *Id.* at 103. The Milford district's policy, in
22 accordance with New York state law, permitted school facilities to be used for "social, civic and
23 recreational meetings and entertainment events, and other uses pertaining to the welfare of the

1 community.” *Id.* at 102 (quoting N.Y. Educ. Code § 414(1)(c)). However, it prohibited use “by
2 any individual or organization for religious purposes,” which school district officials interpreted
3 as prohibiting “religious worship” or “religious instruction.” *Id.* at 103-04. The Supreme Court
4 concluded that the Good News Club was seeking to “address a subject otherwise permitted [in
5 the school], the teaching of morals and character, from a religious standpoint,” and, therefore,
6 the school district’s denial of the club’s application constituted impermissible viewpoint
7 discrimination in the context of a limited public forum. *Id.* at 109.

8 After the Supreme Court’s decision in *Good News Club*, Bronx Household applied again,
9 and its application was again denied. *Bronx Household of Faith v. Bd. of Educ. of the City of*
10 *New York (Bronx Household II)*, 331 F.3d 342, 346-48 (2d Cir. 2003). Plaintiffs brought a new
11 action, and this time the district court, citing *Good News Club*, preliminarily enjoined the Board
12 from denying the permit. *Bronx Household*, 226 F. Supp. 2d at 427. We affirmed the
13 preliminary injunction, finding that the district court did not abuse its discretion, and
14 acknowledging the “factual parallels between the activities described in *Good News Club* and the
15 activities at issue in the present litigation.” *Bronx Household II*, 331 F.3d at 354. After the
16 issuance of the preliminary injunction, Bronx Household applied for, and was granted,
17 permission to use P.S. 15 in the Bronx for its Sunday “Christian worship service[s].” *Bronx*
18 *Household III*, 492 F.3d at 94, 101 (Calabresi, J., concurring).

19 Bronx Household thereafter moved for summary judgment to convert the preliminary
20 injunction into a permanent injunction, and the Board cross-moved for summary judgment.
21 During the pendency of the motions for summary judgment, the Board wrote to the district court

1 asking the court to adjudicate the issue under a revised SOP, numbered SOP § 5.11,³ which was
2 intended to replace the old standard. The Board advised that the new SOP § 5.11 had been
3 “approved at the highest levels of the Department of Education” and that if Bronx Household
4 were to reapply, its application would be rejected under the new SOP § 5.11. *Id.* at 95 n.2. The
5 text of the new SOP § 5.11 prohibited use of school property for “religious worship services, or
6 otherwise using a school as a house of worship.”⁴ The district court, after initially expressing
7 doubt about its jurisdiction to rule on the constitutionality of a rule whose status was unclear and
8 which had not been applied against Plaintiffs, nevertheless concluded that the question was
9 justiciable and granted summary judgment in favor of Bronx Household, permanently enjoining
10 the Board from enforcing the proposed SOP § 5.11. *Bronx Household of Faith v. Bd. of Educ. of*
11 *City of New York*, 400 F. Supp. 2d 581, 588, 601 (S.D.N.Y. 2005). The district court concluded
12 that its decision was compelled by the Supreme Court’s decision in *Good News Club*.

13 On appeal, a majority consisting of Judge Calabresi and me, over dissent by Judge
14 Walker, vacated the permanent injunction, although we were divided as to the rationale for doing
15 so. *Bronx Household III*, 492 F.3d at 91 (per curiam). Judge Calabresi would have reached the

³Before the revision of the standard was proposed, the old SOP § 5.9 was renumbered (without change in text) to § 5.11. To avoid confusion, in this opinion we use “SOP § 5.9” to refer to the standard utilized by the Board before revision of the text, and we use “SOP § 5.11” to refer to the new text quoted in footnote 4.

⁴SOP § 5.11 states:

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.

1 merits and would have ruled that the proposed SOP § 5.11 was a reasonable, viewpoint-neutral,
2 content-based restriction. *Id.* at 100-06 (Calabresi, J., concurring). I concluded that litigation
3 over the constitutionality of the proposed SOP § 5.11 was unripe for adjudication. *Id.* at 122-23
4 (Leval, J., concurring). This was because the proposed rule, although “approved at the highest
5 levels,” had not been promulgated by the Board, and Bronx Household had neither applied, nor
6 been refused, under the new standard. *Id.* at 115, 122 n.8. Judge Walker wrote in dissent that he
7 would have reached the merits and would have ruled that enforcement of the new SOP was
8 barred by *Good News Club*, because in his view it constituted impermissible viewpoint
9 discrimination. *Id.* at 123-24 (Walker, J., dissenting). We remanded the case to the district court
10 for all purposes. *Id.* at 91 (per curiam).

11 In July 2007, shortly after our decision remanding the case, the Board adopted the
12 proposed SOP and published it for the first time. Bronx Household applied to use P.S. 15 under
13 the new rule, stating in its application that it planned to use the facilities for “Christian worship
14 services,” and the Board denied the application.⁵ Both parties then moved for summary
15 judgment. The district court again granted summary judgment in favor of Bronx Household and
16 permanently enjoined the Board from enforcing SOP § 5.11 against Bronx Household, adopting

⁵Previously, the Board’s rules, which it published on its website, included no reference to the new SOP § 5.11; a person telephoning the Board to inquire whether there was a rule that governed use of school facilities after hours by religious groups was told no rule was in effect. In short, at the time we last heard this case, the new rule had not been promulgated, applied, or even disclosed to the public, and was not applied to Bronx Household. This led me to conclude, for reasons I explained in my concurring opinion, *see* 492 F.3d at 110-23, that there was no ripe controversy before the court as to the constitutionality of SOP § 5.11.

Judges Walker and Calabresi have authorized me to say that upon reconsideration of the circumstances that obtained when the case was last before us, they are now far less confident that the case was in fact ripe for adjudication at that time. Now that the new SOP has been adopted, published, and applied against Bronx Household, the controversy is unquestionably ripe for adjudication.

1 the reasoning of its previous opinion. *Bronx Household of Faith v. Bd. of Educ. City of New*
2 *York*, No. 01 Civ. 8598 (S.D.N.Y. Nov. 1, 2007) (Preska, J.).

3 The case is now before us for the fourth time.

4 DISCUSSION

5 P.S. 15 is a limited public forum. *See Bronx Household III*, 492 F.3d at 97-98 (Calabresi,
6 J., concurring); *id.* at 125 (Walker, J., dissenting); *Bronx Household I*, 127 F.3d at 211-14. As
7 explained in Judge Calabresi’s opinion in *Bronx Household III*, a category of speakers or
8 expressive activities may be excluded from a limited public forum only on the basis of
9 “reasonable, viewpoint-neutral rules.” *Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426
10 F.3d 617, 626 (2d Cir. 2005). Thus, the operator of a limited public forum may engage in
11 “content discrimination, which may be permissible if it preserves the purposes of that limited
12 forum,” but may not engage in “viewpoint discrimination, which is presumed impermissible
13 when directed against speech otherwise within the forum’s limitations.” *Rosenberger v. Rector*
14 *& Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995); *see also Christian Legal Soc’y v.*
15 *Martinez*, 130 S. Ct. 2971, 2984 (2010); *Good News Club*, 533 U.S. at 106-07.

16 SOP § 5.11, on its face, prohibits use of school facilities for two types of activities. The
17 rule prohibits use of schools for “religious worship services,” and prohibits also “otherwise using
18 a school as a house of worship.” *Bronx Household* stated in its application that it sought a
19 permit to use P.S. 15 for “Christian worship services.” While the Board did not explain its
20 rejection of the application, it is clear that an application to use the school for “Christian worship
21 services” falls under the words of SOP § 5.11 prohibiting use for “religious worship services.”
22 We therefore assume the Board relied, at least in part, on this clause of its rule in rejecting the
23 application. (Accordingly, we need not, and this opinion does not, consider whether the Board

1 could lawfully exclude Bronx Household under the second, less precise, branch of the rule
2 proscribing use of a school “as a house of worship.”⁶

3 A.

4 The prohibition against using school facilities for the conduct of religious worship
5 services bars a type of activity. It does not discriminate against any point of view. The conduct
6 of religious worship services, which the rule excludes, is something quite different from free
7 expression of a religious point of view, which the Board does not prohibit. The conduct of
8 services is the performance of an event or activity. While the conduct of religious services
9 undoubtedly *includes* expressions of a religious point of view, it is not the expression of that
10 point of view that is prohibited by the rule. Prayer, religious instruction, expression of devotion
11 to God, and the singing of hymns, whether done by a person or a group, do not constitute the
12 conduct of worship services. Those activities are not excluded. Indeed SOP § 5.11 expressly
13 specifies that permits will be granted to student religious clubs “on the same basis that they are
14 granted to other clubs for students.” The branch of the rule excluding religious worship services,
15 as we understand it, is designed by the Board to permit use of the school facilities for all of the
16 types of activities considered by the Supreme Court in *Good News Club, Lamb’s Chapel v.*
17 *Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Rosenberger v. Rector &*
18 *Visitors of the University of Virginia*, 515 U.S. 819, 830 (1995). The “religious worship

⁶Nor does this opinion express any views as to whether “worship” may be lawfully excluded. Judge Walker criticizes this opinion for “declining even to consider” the constitutionality of the second branch of SOP § 5.11, which prohibits “using a school as a house of a worship.” Dissenting Op. 3. Because this opinion concludes that the Board’s rejection of Bronx Household’s application was lawful under the “religious worship services” branch of the rule, further inquiry into the whether the Board could also lawfully exclude Bronx Household under the “house of worship” branch of the rule is unnecessary to this ruling.

1 services” clause does not purport to prohibit use of the facility by a person or group of persons
2 for “worship.” What is prohibited by this clause is solely the conduct of a particular type of
3 event: a collective activity characteristically done according to an order prescribed by and under
4 the auspices of an organized religion, typically but not necessarily conducted by an ordained
5 official of the religion. The conduct of a “religious worship service” has the effect of placing
6 centrally, and perhaps even of establishing, the religion in the school.⁷

7 There is an important difference between excluding the *conduct of an event or activity*
8 that includes expression of a point of view, and excluding the *expression* of that point of view.
9 Under rules consistent with the purposes of the forum, schools may exclude from their facilities
10 all sorts of activities, such as martial arts matches, livestock shows, and horseback riding, even

⁷Judge Walker complains that our understanding of the meaning of the term “religious worship services” is “self-styled.” Dissenting Op. 8. We have not found in any dictionary a definition of the compound term “religious worship services.” Dictionaries define the verb to worship as “to honor or reverence as a divine being or supernatural power: VENERATE.” *Webster’s Third New International Dictionary* 2637 (1976); *see also Oxford English Dictionary* (Nov. 2010 online ed.), <http://www.oed.com>. (same). Worship, the noun, is defined as “an act, process, or instance of expressing such veneration by performing or taking part in religious exercises or ritual,” and “a form or type of worship or religious practice with its creed or ritual.” *Webster’s Third New International Dictionary* 2637. The word service is defined as “[w]orship; esp. public worship according to form and order,” “[a] ritual or series of words and ceremonies prescribed for public worship,” *Oxford English Dictionary* (Nov. 2010 online ed.), and “the performance of religious worship esp. according to settled public forms or conventions,” *Webster’s Third New International Dictionary* 2075.

We believe the understanding we have put forth comports with common understanding and find nothing in dictionary definitions of the term’s three component words that is inconsistent with our understanding. Nor does Judge Walker offer a better definition, whether derived from a dictionary or another source.

Furthermore, we do not understand why Judge Walker should concern himself with what we take SOP § 5.11 to mean by “religious worship services.” According to his argument, no matter what SOP § 5.11 means by “religious worship services,” it necessarily constitutes unlawful viewpoint discrimination because it excludes activity on the basis of the activity’s religious nature. If Judge Walker is right as to the applicable test, SOP § 5.11 is void no matter what it means by “religious worship services.”

1 though, by participating in and viewing such events, participants and spectators may express
2 their love of them. The basis for the lawful exclusion of such activities is not viewpoint
3 discrimination, but rather the objective of avoiding either harm to persons or property, or
4 liability, or a mess, which those activities may produce. We think it beyond dispute that a
5 school's decision to exclude martial arts matches would be lawful notwithstanding the honest
6 claim of would-be participants that, through participating in the matches, they express their love
7 of the sport and their character. The exclusion would nonetheless not represent viewpoint
8 discrimination. While a school may prohibit the use of its facilities for such activities for valid
9 reasons, it may not selectively exclude meetings that would celebrate martial arts, cow breeding,
10 or horseback riding, because that would be viewpoint discrimination. When there exists a
11 reasonable basis for excluding a type of activity or event in order to preserve the purposes of the
12 forum, such content-based exclusion survives First Amendment challenge notwithstanding that
13 participants might use the event to express their celebration of the activity. *See Rosenberger*,
14 515 U.S. at 829-30.

15 Similarly, SOP § 5.11 prohibits use of school facilities to conduct worship services, but
16 does not exclude religious groups from using schools for prayer, singing hymns, religious
17 instruction, expression of religious devotion, or the discussion of issues from a religious point of
18 view. While it is true without question that religious worship services *include* such expressions
19 of points of view, the fact that a reasonably excluded activity includes expressions of viewpoints
20 does not render the exclusion of the activity unconstitutional if adherents are free to use the
21 school facilities for expression of those viewpoints in all ways except through the reasonably
22 excluded activity. Under at least this branch of SOP § 5.11, the schools are freely available for
23 use by groups to express religious devotion through prayer, singing of hymns, preaching, and

1 teaching of scripture or doctrine. It is only the performance of a worship service that is
2 excluded.

3 Nor is this rule of exclusion vulnerable on the ground that the activity excluded has some
4 similarities to another activity that is allowed. To begin with, we reject the suggestion that
5 because a religious worship service shares some features with activities such as a Boy Scout
6 meeting, no meaningful distinction can be drawn between the two types of activities. *See*
7 *Dissenting Op.* 11-12. Boy Scout meetings are not religious worship services. The fact that
8 religion often encompasses concern for standards of conduct in human relations does not mean
9 that all activity which expresses concern for standards of conduct in human relations must be
10 deemed religion.

11 The argument might be made that, because the rule prohibits use of facilities for
12 “*religious* worship services,” it excludes religious worship services while permitting non-
13 religious worship services. This argument is a canard. The presence of the word “religious” in
14 the phrase is superfluous and does not change the meaning. There is no difference in usage
15 between a “worship service” and a “religious worship service;” both refer to a service of
16 religious worship. *See Bronx Household I*, 127 F.3d at 221 (Cabrane, J., concurring in part and
17 dissenting in part) (“Unlike religious ‘instruction,’ there is no real secular analogue to religious
18 ‘services,’ such that a ban on religious services might pose a substantial threat of viewpoint
19 discrimination between religion and secularism.”). We think, with confidence, that if 100
20 randomly selected people were polled as to whether they attend “worship services,” all of them
21 would understand the questioner to be inquiring whether they attended services of *religious*
22 worship. While it is true that the word “worship” is occasionally used in nonreligious contexts,
23 such as to describe a miser, who is said to “worship” money, or a fan who “worships” a movie

1 star,⁸ the term “worship services” has no similar use; meetings of a celebrity’s fan club are not
2 described as “worship services.” Worship services are religious; the rule describes the entire
3 category of activity excluded. The meaning of the rule’s exclusion of “religious worship
4 services” would be no different if it identified the excluded activity as “worship services.”

5 The application of SOP § 5.11 to deny Bronx Household’s request to use school facilities
6 for worship services is thus in no way incompatible with the Supreme Court’s decisions in *Good*
7 *News Club*, *Lamb’s Chapel*, and *Rosenberger*. In *Good News Club*, a school district had invoked
8 a policy prohibiting after-hours use of a school for “religious purposes” to deny a Christian
9 organization permission to use space in a school building for “religious instruction” of children
10 aged 6 to 12. 533 U.S. at 103-04. The Supreme Court ruled that this exclusion violated the Free
11 Speech Clause. *Id.* at 120. The denial constituted viewpoint discrimination, rather than content-
12 based restriction, because the school district refused to allow the teaching of moral lessons from
13 a religious perspective, while permitting the teaching of moral lessons from a secular
14 perspective. *Id.* at 107-08.

15 Similarly, in *Lamb’s Chapel*, the Court found unconstitutional a school district’s
16 rejection of a church’s request to show a Christian film series about child rearing and family
17 values, again on the basis of a policy prohibiting after-hours use of school property “for religious
18 purposes.” *Lamb’s Chapel*, 508 U.S. at 387-89, 393. Like the moral lessons taught in the *Good*
19 *News Club*, the film series “dealt with a subject otherwise permissible . . . [but] its exhibition

⁸In the view of the author, such uses of the word are metaphorical. A statement that someone worships money or worships a movie star is intended to be understood as an assertion that the subject treats money or the movie star with the same devotion or reverence that a religious believer accords to God. (Judge Calabresi leaves open the question whether such statements are purely metaphorical or whether they too describe a form of worship. *See* Concurring Op. 1.)

1 was denied solely because the series dealt with the subject from a religious standpoint.” *Id.* at
2 394. And in *Rosenberger*, the Court concluded that the University of Virginia discriminated on
3 the basis of viewpoint, when, in accordance with its policy, it refused to reimburse the printing
4 expenses of a student newspaper with a Christian editorial perspective because the publication
5 “promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality.”
6 *Rosenberger*, 515 U.S. at 827, 831-32. Because the University’s refusal resulted from the
7 newspaper’s “prohibited perspective, not the general subject matter,” it violated the Free Speech
8 Clause. *Id.* at 831.

9 In each of those cases, the policy being enforced categorically excluded expressions of
10 religious content. Here, by contrast, there is no restraint on the free expression of any point of
11 view. Expression of all points of view is permitted. The exclusion applies only to the conduct of
12 a certain type of activity – the conduct of worship services – and not to the free expression of
13 religious views associated with it. It is clear that the Board changed its rule in order to conform
14 to the dictates of *Good News Club*, abandoning the prohibition of “religious instruction” (which
15 involved viewpoint discrimination). Indeed, SOP § 5.11 expressly permits use of school
16 facilities by “religious clubs for students that are sponsored by outside organizations” on the
17 same basis as other clubs for students sponsored by outside organizations.

18 Accordingly, as SOP § 5.11's prohibition of “religious worship services” does not
19 constitute viewpoint discrimination, it is a content-based exclusion, which passes constitutional
20 muster so long as the exclusion is reasonable in light of the purposes of the forum.

1 B.

2 We therefore go on to consider whether this exclusion is “reasonable in light of the
3 purpose served by the forum.” *Rosenberger*, 515 U.S. at 829 (quoting *Cornelius v. NAACP*
4 *Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)). Precedent, furthermore, calls for
5 giving “appropriate regard” to the Board’s judgment as to which activities are compatible with
6 its reasons for opening schools to public use. *Christian Legal Soc’y*, 130 S. Ct. at 2989. By
7 excluding religious worship services, the Board seeks to steer clear of violating the
8 Establishment Clause. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-
9 62 (1995) (“There is no doubt that compliance with the Establishment Clause is a state interest
10 sufficiently compelling to justify content-based restrictions on speech.”); *Widmar v. Vincent*, 454
11 U.S. 263, 271 (1981) (noting that an interest in avoiding a violation of the Establishment Clause
12 “may be characterized as compelling”). In order to determine whether the content restriction for
13 this purpose is reasonable and thus permissible, we need not decide whether use of the school for
14 worship services would in fact violate the Establishment Clause, a question as to which
15 reasonable arguments could be made either way, and on which no determinative ruling exists. It
16 is sufficient if the Board has a strong basis for concern that permitting use of a public school for
17 the conduct of religious worship services would violate the Establishment Clause. *Marchi v. Bd.*
18 *of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 476 (2d Cir. 1999) (“[W]hen government
19 endeavors to police itself and its employees in an effort to avoid transgressing Establishment
20 Clause limits, it must be accorded some leeway, even though the conduct it forbids might not
21 inevitably be determined to violate the Establishment Clause”); *cf. Ricci v. DeStefano*, 129
22 S. Ct. 2658, 2677 (2009) (race-based employment action violates Title VII unless the employer
23 has a strong basis to believe it otherwise will be subject to disparate impact liability). We

1 conclude that the Board has a strong basis to believe that allowing the conduct of religious
2 worship services in schools would give rise to a sufficient appearance of endorsement to
3 constitute a violation of the Establishment Clause.

4 The Supreme Court’s decision in *Lemon v. Kurtzmann*, 403 U.S. 602 (1971), provides the
5 framework for evaluating challenges under the Establishment Clause.⁹ The Court instructed in
6 *Lemon* that government action which interacts with religion (1) “must have a secular . . .
7 purpose,” (2) must have a “principal or primary effect . . . that neither advances nor inhibits
8 religion,” and (3) “must not foster an excessive government entanglement with religion.” *Id.* at
9 612-13 (internal quotation marks omitted). In discussing the second prong of the *Lemon* test, the
10 Supreme Court has warned that violation of the Establishment Clause can result from *perception*
11 of endorsement. “The Establishment Clause, at the very least, prohibits government from
12 *appearing* to take a position on questions of religious belief or from ‘making adherence to a
13 religion relevant in any way to a person’s standing in the political community.’” *Cnty. of*
14 *Allegheny*, 492 U.S. 573, 593-94 (1989) (emphasis added) (quoting *Lynch v. Donnelly*, 465 U.S.
15 668, 687 (O’Connor, J., concurring)); *see also Lynch*, 465 U.S. at 690 (O’Connor, J., concurring)
16 (observing that the second prong of the *Lemon* test “asks whether, irrespective of government’s
17 actual purpose, the practice under review in fact conveys a message of endorsement or
18 disapproval”); *Skoros*, 437 F.3d at 17-18. It was certainly not unreasonable for the Board to
19 conclude that permitting the conduct of religious worship services in the schools might fail the

⁹Although the *Lemon* test has been much criticized, the Supreme Court has declined to disavow it and it continues to govern the analysis of Establishment Clause claims in this Circuit. *Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 634 (2d Cir. 2005); *see Skoros v. City of New York*, 437 F.3d 1, 17 n.13 (2d Cir. 2006) (noting that this Court is required to respect precedent applying the *Lemon* test “until it is reconsidered by this court sitting *en banc* or is rejected by a later Supreme Court decision”).

1 second and third prongs of the *Lemon* test, and that the adoption of the “worship services”
2 branch of SOP § 5.11 was a reasonable means of avoiding a violation of the Establishment
3 Clause.

4 The performance of worship services is a core event in organized religion. *See Bronx*
5 *Household*, 226 F. Supp. 2d at 410 (quoting Pastor Hall describing Bronx Household’s Sunday
6 worship service as “the indispensable integration point for our church”); Mark Chaves,
7 *Congregations in America* 227 (2004) (reporting results of survey finding that 99.3% of religious
8 congregations hold services at least once per week). Religious worship services are conducted
9 according to the rules dictated by the particular religious establishment and are generally
10 performed by an officiant of the church or religion. When worship services are performed in a
11 place, the nature of the site changes. The site is no longer simply a room in a school being used
12 temporarily for some activity. The church has made the school the place for the performance of
13 its rites, and might well appear to have *established* itself there. The place has, at least for a time,
14 become the church.

15 Moreover, the Board’s concern that it would be substantially subsidizing churches if it
16 opened schools for religious worship services is reasonable. The Board neither charges rent for
17 use of its space, nor exacts a fee to cover utilities such as electricity, gas, and air conditioning.¹⁰
18 The City thus foots a major portion of the costs of the operation of a church. It is reasonable for
19 the Board to fear that allowing schools to be converted into churches, at public expense and in
20 public buildings, might “foster an excessive government entanglement with religion” that
21 advances religion. *See DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 419 (2d Cir.

¹⁰The only fee charged is for the partial cost of custodial work, and for security services when provided by the Board.

1 2001) (concluding that a publicly funded private hospital whose employees coerced patients to
2 participate in a religious support group would violate the Establishment Clause, noting that the
3 Supreme Court’s ““decisions provide no precedent for the use of public funds to finance
4 religious activities,”” and that “neutral administration of the state aid program . . . is an
5 insufficient constitutional counterweight to the direct public funding of religious activities”
6 (quoting *Mitchell v. Helms*, 530 U.S. 793, 840 (2000) (O’Connor, J., concurring in the
7 judgment))).

8 The Board could also reasonably worry that the regular, long-term conversion of schools
9 into state-subsidized churches on Sundays would violate the Establishment Clause by reason of
10 public perception of endorsement. *Cf. Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132
11 (2009) (ruling that monument in public park was properly viewed as government speech
12 because, among other reasons, the monument was permanent). Such a concern has been
13 vindicated by the experience in the schools in the seven years since the district court granted the
14 preliminary injunction. For example, Bronx Household has held its worship services at P.S. 15,
15 and nowhere else, every Sunday since 2002. Under the injunction, at least twenty-one other
16 congregations have used a school building on Sundays as their regular place for worship
17 services.¹¹ During these Sunday services, the schools are dominated by church use. *See Capitol*
18 *Square*, 515 U.S. at 777 (O’Connor, J., concurring in part and concurring in the judgment) (“At
19 some point . . . a private religious group may so dominate a public forum that a formal policy of
20 equal access is transformed into a demonstration of approval.”). Because of their large

¹¹The record in this regard has not been updated since 2005. At oral argument, counsel for the Board told us that the number of churches using schools for worship services has increased substantially since that time.

1 congregations, churches generally use the largest room in the building, or multiple rooms,
2 sometimes for the entire day. *See Cnty. of Allegheny*, 492 U.S. at 579, 599-600 (finding
3 unconstitutional endorsement of religion where crèche was placed on the “Grand Staircase” of
4 courthouse, the “main” and “most public” part of the building, which was not available to other
5 displays simultaneously). Church members post signs, distribute flyers, and proselytize outside
6 the school buildings. In some schools, no other outside organizations use the space.
7 Accordingly, on Sundays, some schools effectively become churches. As a result of this church
8 domination of the space, both church congregants and members of the public identify the
9 churches with the schools. The possibility of perceived endorsement is made particularly acute
10 by the fact that P.S. 15 and other schools used by churches are attended by young and
11 impressionable students, who might easily mistake the consequences of a neutral policy for
12 endorsement. *Cf. Van Orden v. Perry*, 545 U.S. 677, 703 (2005) (Breyer, J., concurring)
13 (distinguishing lawful display of Ten Commandments from cases in which display was “on the
14 grounds of a public school, where, given the impressionability of the young, government must
15 exercise particular care in separating church and state”); *Skoros*, 437 F.3d at 24-25 (“A mature
16 reasonable objective observer . . . would take into consideration that schoolchildren are the
17 intended audience for the displays, that these children are being reared in a variety of faiths (as
18 well as none), and that, by virtue of their ages, they may be especially susceptible to any
19 religious messages conveyed by such displays.”).¹²

¹²The dissent maintains that *Good News Club* precludes the Board from relying on this concern, because the facts of this case present less reason to fear the appearance of endorsement than those of *Good News Club*. Dissenting Op. 22-23. We disagree with this assessment of the facts. In our view, Bronx Household’s long-term weekly use of P.S. 15 for Christian worship services at the Board’s expense, and the effective exclusion of competing religious groups who would wish to hold services in schools on days other than Sunday but are effectively precluded

1 Furthermore, the fact that school facilities are principally available for public use on
2 Sundays results in an unintended bias in favor of Christian religions, which prescribe Sunday as
3 the principal day for worship services. Jews and Muslims generally cannot use school facilities
4 for their services because the facilities are often unavailable on the days that their religions
5 principally prescribe for services. At least one request to hold Jewish services (in a school
6 building used for Christian services on Sundays) was denied because the building was
7 unavailable on Saturdays. This contributes to a perception of public schools as Christian
8 churches, but not synagogues or mosques.

9 Finally, the religious services Bronx Household conducts in the school are not open on
10 uniform terms to the general public. Bronx Household acknowledges that it excludes persons
11 not baptized, as well as persons who have been excommunicated or who advocate the Islamic
12 religion, from full participation in its services. *See Bronx Household III*, 492 F.3d at 120 (Leval,
13 J., concurring); *cf. Christian Legal Soc’y*, 130 S. Ct. at 2995 (upholding university’s denial of
14 Registered Student Organization status to student group that refused to comply with non-
15 discrimination policy for ideological reasons). The *de facto* favoritism of the Christian (Sunday
16 service) religions over others, as well as the deliberate exclusion practiced by Bronx Household,
17 aggravates the potential Establishment Clause problems the Board seeks to avoid.

18 In the end, we think the Board could have reasonably concluded that what the public
19 would see, were the Board not to exclude religious worship services, is public schools, which
20 serve on Sundays as state-sponsored Christian churches. For these reasons, the Board had a

by school-related activities from doing so, provides a substantially stronger basis for fearing an
Establishment Clause violation than the after-school use of a single classroom by a religious
group at issue in *Good News Club*.

1 strong basis to be wary that permitting religious worship services in schools, and thus effectively
2 allowing schools to be converted into churches on Sunday, would be found to violate the
3 Establishment Clause. To reiterate, we do not say that a violation has occurred, or would occur
4 but for the policy. We do find, however, that it was objectively reasonable for the Board to
5 worry that use of the City’s schools for religious worship services, conducted primarily on
6 Sunday when the schools are most available to outside groups, exposes the City to a substantial
7 risk of being found to have violated the Establishment Clause.

8 This conclusion is not, as the dissent maintains, foreclosed by the Supreme Court’s
9 precedents. We recognize that in *Good News Club*, *Widmar*, *Lamb’s Chapel*, and *Rosenberger*,
10 the Supreme Court rejected arguments that the rules in question, and their application to bar or
11 disfavor particular activities, were justified by concern to avoid violating the Establishment
12 Clause. But those rulings were based on their particular facts, which are significantly different
13 from those here. In none of those cases did the Supreme Court suggest that a reasonable concern
14 to avoid violation of the Establishment Clause can *never* justify a governmental exclusion of a
15 religious practice. In arguing that the Supreme Court’s precedents forbid our ruling, the dissent
16 relies on broad statements of principle, often from opinions that did not command a majority of
17 the Court, and contends that, taken together, they show the invalidity of the reasons the Board
18 proffers for fearing an Establishment Clause violation. However, neither the Supreme Court nor
19 this court has considered the constitutionality of a policy that allows the regular use of public
20 schools for religious worship services. Indeed, the Court in *Good News Club* expressly declined
21 to address the lawfulness of a policy that excludes “mere” religious worship, a category of
22 activity which is substantially broader than the “religious worship services” covered by the first
23 branch of SOP § 5.11. *Good News Club*, 533 U.S. at 112 n.4.

1 In any event, the reasonableness of the Board’s concern to avoid creating a perception of
2 endorsement resulting from regular Sunday conversion of schools into Christian churches,
3 together with the absence of viewpoint-based discrimination, distinguishes this case from the
4 Supreme Court’s precedents striking down prohibitions of the use of educational facilities or
5 funds by religious groups. All of those cases involved rules or policies which broadly
6 suppressed religious viewpoints and which, in their particular applications, disfavored activities
7 which had far less potential to convey the appearance of official endorsement of religion. In
8 *Widmar*, the challenged policy prohibited the use of university facilities for religious worship or
9 even discussion. In *Rosenberger*, the challenged policy prohibited the reimbursement of
10 expenses incurred by university student groups for activities that “primarily promote[d] or
11 manifest[ed] a particular belie[f] in or about a deity or an ultimate reality.” 515 U.S. at 825.
12 And in *Lamb’s Chapel* and *Good News Club*, the challenged policies prohibited the use of school
13 district property for any and all “religious purposes.” See *Good News Club*, 533 U.S. at 103;
14 *Lamb’s Chapel*, 508 U.S. 387. In each case, the policy being enforced, unlike SOP § 5.11, was
15 broadly categorical in its exclusion of religious content. In addition, the activities disallowed or
16 disfavored under those policies – meetings of Christian clubs for students (in *Widmar* and *Good*
17 *News Club*), the publication of a newspaper with a Christian editorial viewpoint (in
18 *Rosenberger*), and the showing of a Christian film series (in *Lamb’s Chapel*) – were much less
19 likely than the conduct of Sunday worship services to evoke an appearance of endorsement of
20 religion by public school authorities. In determining that there was no danger of an
21 Establishment Clause violation in these cases, the Supreme Court relied on the fact that facilities
22 and funds were available to and used by numerous and diverse private groups. See *Lamb’s*
23 *Chapel*, 508 U.S. at 395 (observing that school district’s property “had repeatedly been used by a

1 wide variety of private organizations”); *Rosenberger*, 515 U.S. at 842 (student activity funds
2 were distributed to “a wide spectrum of student groups”); *Widmar*, 454 U.S. at 277 (university
3 provided benefits to “over 100 student groups of all types”); *Good News Club*, 533 U.S. at 113
4 (district “made its forum available to other organizations”). In finding insufficient risk of the
5 perception of endorsement, the Court observed in *Widmar* that university students are “young
6 adults,” who are “less impressionable than younger students” and can therefore appreciate that a
7 policy permitting religious student groups to use meeting space on the same basis as other types
8 of student groups was neutral toward religion. 454 U.S. at 275-75 & n.14. And in *Lamb’s*
9 *Chapel* and *Good News Club*, the Court found it significant that the proposed film exhibition and
10 club meetings would be open to the public, not just to the members of the Christian groups
11 sponsoring the events. See *Good News Club*, 533 U.S. at 113; *Lamb’s Chapel*, 508 U.S. at 395.

12 The use of P.S. 15 and other schools for Sunday worship services is more likely to
13 promote a perception of endorsement than the uses in those cases. A worship service is an act of
14 organized religion that consecrates the place in which it is performed, making it a church.

15 Unlike the groups seeking access in those cases, Bronx Household and the other churches that
16 have been allowed access under the injunction tend to dominate the schools on the day they use
17 them. They do not use a single, small classroom, and are not merely one of various types of
18 groups using the schools; they use the largest rooms and are typically the only outside group
19 using a school on Sunday. They identify the schools as their churches, as do many residents of
20 the community. The students of P.S. 15 are not the “young adults” of *Rosenberger* and *Widmar*,
21 but young children who are less likely to understand that the church in their school is not
22 endorsed by their school. The fact that New York City’s school facilities are more available on
23 Sundays than any other day of the week means that there is a *de facto* bias in favor of Christian

1 groups who want to use the schools for worship services, compounded by the exclusionary
2 practices of churches like Bronx Household.

3 Furthermore, the Board’s prohibition on the use of school facilities for “religious worship
4 services” is far less broad than the exclusions of use for “religious purposes” or “religious
5 discussion” in the earlier cases, which included in their sweep activities that are similar to
6 secular activities. The broad scope of the exclusions considered in the other cases resulted in
7 viewpoint discrimination, rather than mere content restriction. The exclusions also disfavored
8 more religious activity than necessary to avoid an actual Establishment Clause violation. In
9 contrast, the “religious worship services” clause of SOP § 5.11 is narrowly drawn to exclude a
10 core activity in the establishment of religion – worship services – and thereby avoid the
11 perceived transformation of school buildings into churches.

12 It is not our contention that the Supreme Court’s precedents compel our conclusion. On
13 the other hand, we cannot accept Judge Walker’s contention that the Court has effectively
14 decided this case. This case is terra incognita. The Supreme Court’s precedents provide no
15 secure guidelines as to how it should be decided. The main lesson that can be derived from them
16 is that they do not supply an answer to the case before us. Precedent provides no way of
17 guessing how the Supreme Court will rule when it comes to consider facts comparable to these.
18 By hunting and pecking through the dicta of various opinions, one can find snippets that
19 arguably support a prediction either way. Judge Calabresi and I believe that the Board’s
20 exclusion of Bronx Household’s conduct of worship services is viewpoint-neutral and justified
21 by the Board’s reasonable concern that permitting use of school facilities for worship services
22 would violate the Establishment Clause.

23 * * *

1 Bronx Household contends that SOP § 5.11 is not a measure reasonably designed to
2 avoid an Establishment Clause violation but is instead itself a violation of that clause. Bronx
3 Household argues that SOP § 5.11 fails the *Lemon* test because it sends a message of official
4 hostility to religion and because its enforcement fosters excessive government entanglement with
5 religion. We are not persuaded.

6 As emphasized above, SOP § 5.11 prohibits worship services in schools, but permits the
7 expression of religious points of view through activities such as prayer, singing of hymns,
8 preaching, and teaching or discussion of doctrine or scripture. Given the broad range of
9 expressive religious activity that the policy does allow, we do not think a reasonable observer
10 would perceive hostility to religion in the enforcement of SOP § 5.11.

11 Bronx Household also argues that SOP § 5.11 not only conveys the appearance of official
12 hostility, but is in fact motivated by such hostility. We find no basis for this contention. Of
13 course, “government must abstain from regulating speech when the specific motivating ideology
14 or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger*,
15 515 U.S. at 829. However, we do not understand why Bronx Household attributes the Board’s
16 position to hostility rather than a good faith desire to navigate successfully through the poorly
17 marked, and rapidly changing, channel between the Scylla of viewpoint discrimination and the
18 Charybdis of violation of the Establishment Clause.

19 The Board has by no means been alone in the belief that the Establishment Clause
20 requires governmental educational institutions to be cautious of harboring or sponsoring
21 religious activities. The Supreme Court’s rulings in *Rosenberger*, *Lamb’s Chapel*, and *Good*
22 *News Club* deviated from a previously widespread governmental and judicial perception of the
23 scope of the Establishment Clause’s prohibitions. In each of those three cases, the school

1 administrators and the lower court judges believed that the challenged policies, which were
2 intended to keep religion at a distance from public institutions, were mandated by the
3 Establishment Clause, or at least consistent with the Constitution. And in two of the cases, a
4 number of Supreme Court justices did as well.

5 There is no better reason to believe, as Bronx Household suggests, that the Board was
6 motivated by hostility toward religion than there is to believe that such hostility has motivated
7 other school authorities throughout the country, the lower court judges and dissenting Supreme
8 Court justices in *Lamb’s Chapel*, *Rosenberger*, and *Good News Club*, or Judge Calabresi and me.
9 We see no sound basis for concluding that the Board’s actions have been motivated by anything
10 other than a desire to find the proper balance between two clauses of the First Amendment, the
11 interpretation of which by the Supreme Court has been in flux and uncertain.¹³

12 Bronx Household also argues that SOP § 5.11 cannot be applied without
13 unconstitutionally entangling the Board in matters of religious doctrine. *See Agostini v. Felton*,
14 521 U.S. 203, 232-33 (1997). According to Bronx Household, any attempt by the Board to
15 distinguish between religious activity that falls under the exclusion of “worship services,” and
16 religious activity that does not, necessarily places the Board in violation of the duty imposed by
17 *Lemon* to avoid “excessive government entanglement with religion.” 403 U.S. at 613.¹⁴

¹³Judge Walker similarly asserted in his dissent in *Bronx Household III* that the Board’s adoption of SOP § 5.11 was motivated by “long-standing hostility to religious groups.” *See Bronx Household III*, 492 F.3d at 127 (“The Board’s avowed purposed in enforcing the regulation in this case . . . and its long-standing hostility to religious groups, leads ineluctably to the conclusion that the Board, in fact, has undertaken to exclude a particular viewpoint from its property.”). Judge Walker has not repeated that assertion in his present opinion, but neither has he retracted it.

¹⁴Judge Walker has also made this argument. *See Bronx Household III*, 492 F.3d at 131 (Walker, J., dissenting) (arguing that the Board would “flout[] the Establishment Clause” by trying to distinguish worship because it would “no doubt have to interpret religious doctrine or

1 To begin with, whatever merit this argument may have in other types of cases, we do not
2 see what application it has here. Bronx Household does not contest that it conducts religious
3 worship services. To the contrary, it applied for a permit to conduct “Christian worship
4 services,” and the evidence suggests no reason to question its own characterization of its
5 activities. *Cf. Christian Legal Soc’y*, 130 S. Ct. at 2982-84; *Faith Ctr. Church Evangelistic*
6 *Ministries v. Glover*, 480 F.3d 891, 918 & n.18 (9th Cir. 2007), *abrogated on other grounds by*
7 *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008).

8 This argument, furthermore, overlooks the nature of the duties placed on government
9 officials by the Establishment Clause (as well as the Free Exercise of Religion Clause). As we
10 outlined above, while other clauses of the First Amendment prohibit government officials from
11 discriminating on the basis of religious viewpoint, the Establishment Clause prohibits them from
12 taking action that would constitute establishment of religion. In various circumstances,
13 especially when dealing with initiatives for the conduct of undoubtedly religious exercises on
14 public property, government officials cannot discharge their constitutional obligations without
15 close examination of the particular conduct to determine if it is properly deemed to be religious
16 and if so whether allowing it would constitute a prohibited establishment of religion. Bronx
17 Household’s argument, if valid, would effectively nullify the Establishment Clause.¹⁵

18 Without doubt there are circumstances where a government official’s involvement in

defer to the interpretations of religious officials in order to keep worship, and worship alone, out
of its schools” (internal quotation marks omitted)).

¹⁵The Free Exercise of Religion Clause also at times compels government officials to
examine conduct of an undoubtedly religious nature to determine whether it constitutes exercise
of religion, and is thus entitled to the clause’s protection, or does not, and is thus subject to
regulation.

1 matters of religious doctrine constitutes excessive government entanglement. *See, e.g.,*
2 *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 427 (2d Cir. 2002). But it
3 does not follow, as Bronx Household seems to argue, that the mere act of inspection of religious
4 conduct is an excessive entanglement. The Constitution, far from forbidding government
5 examination of assertedly religious conduct, at times *compels* government officials to undertake
6 such inquiry in order to draw necessary distinctions.¹⁶ *See Lee v. Weisman*, 505 U.S. 577, 598
7 (1992) (“Our jurisprudence in this area is of necessity one of line-drawing, of determining at
8 what point a dissenter’s rights of religious freedom are infringed by the State.”); *Cnty. of*
9 *Allegheny*, 492 U.S. at 630 (O’Connor, J., concurring in part and concurring in the judgment)
10 (“We cannot avoid the obligation to draw lines, often close and difficult lines, in deciding
11 Establishment Clause cases”). It was just such inspection which permitted the Supreme
12 Court to allow the display of arguably religious symbols in certain public contexts while
13 prohibiting it in others. *Compare Van Orden*, 545 U.S. at 703 (Breyer, J., concurring), and *Cnty.*
14 *of Allegheny*, 492 U.S. at 620, with *McCreary*, 545 U.S. at 881, and *Cnty. of Allegheny*, 492 U.S.
15 at 601-02.

16 C.

17 Judge Walker’s dissenting opinion criticizes our ruling on a number of grounds. We
18 believe his criticisms are not well founded.

19 1) Judge Walker’s primary argument is that, because SOP § 5.11’s exclusion of religious
20 worship services depends on their religious nature, which we do not dispute, it necessarily

¹⁶Applying such a rule would, for example, mean that every claim of entitlement under the Religious Land Use and Institutionalized Persons Act (RLIUPA), 42 U.S.C. § 2000cc *et seq.*, would be immune from court inquiry into whether the use is in fact a religious use.

1 discriminates illegally on the basis of viewpoint. *See* Dissenting Op. 10 (“The Board cannot
2 lawfully exclude the conduct of an event based solely on the religious viewpoints expressed
3 during the event.”). He concludes that there is “no doubt that it is ‘religious services’ and
4 ‘worship’ that the Board is targeting for exclusion” because “[t]he Board is otherwise
5 unconcerned with comparable ceremonial speech occurring on school premises.” Dissenting Op.
6 9. According to his analysis, the governing test should be “whether Bronx Household is
7 engaging in speech that fulfills the purposes of the forum and is consistent with non-religious
8 speech occurring on school premises.” Dissenting Op. 9. If Bronx Household is engaging in
9 such speech and is excluded because of the religious nature of its activity, the exclusion is
10 necessarily illegal viewpoint discrimination.

11 The problem we find with Judge Walker’s analysis is that it either ignores the crucial role
12 of the Establishment Clause in motivating the Board’s decision or it simply reads that clause out
13 of the Constitution. The general effect of the Establishment Clause is to prohibit government
14 from taking actions which have the effect of establishing *religion*. Assuming that the
15 Establishment Clause has some meaning – that is to say, assuming there are some forms of
16 activity which government may not conduct (or may not permit) by reason of the Establishment
17 Clause – any such prohibitions necessarily depend on the *religious* nature of the particular
18 activity. If the activity is not of religious nature, it does not fall within the purview of the
19 Establishment Clause.

20 This feature is evident throughout the Supreme Court’s Establishment Clause
21 jurisprudence. In *Lee v. Weisman*, 505 U.S. 577 (1992), for example, the Supreme Court held
22 that the Establishment Clause prohibited a public high school from including the recitation of a
23 prayer in its graduation ceremony. The prayer was unquestionably an expressive act, and the

1 prohibition by the Court under the Establishment Clause unquestionably depended on the
2 religious nature of prayer. Had the school administration sought to include instead of a prayer a
3 non-religious affirmation of patriotism, or of love of learning, that would not have been
4 prohibited by the Establishment Clause.

5 In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Court held that the
6 Establishment Clause prohibited the display of a crèche in the Grand Staircase of the Allegheny
7 County Courthouse, but upheld against Establishment Clause challenge another display which
8 included an 18-foot menorah, a 45-foot Christmas tree, and a sign declaring devotion to liberty.
9 Both displays conveyed an expressive message. What distinguished them was the fact that the
10 crèche “sent an unmistakable message that [the county] supports and promotes the Christian
11 praise to God,” *id.* at 600, while the menorah, tree, and sign celebrated the holiday season on a
12 non-sectarian basis, *id.* at 617-18.

13 In the companion cases of *McCreary County v. ACLU*, 545 U.S. 844 (2005), and *Van*
14 *Orden v. Perry*, 545 U.S. 677 (2005), the Court distinguished between two public displays of the
15 Ten Commandments based on whether they conveyed a message of governmental support or
16 endorsement of religion. In *McCreary*, the Court upheld an injunction prohibiting a display of
17 the Ten Commandments in two courthouses, because the displays had a “predominantly religious
18 purpose.” *McCreary*, 545 U.S. at 881. By contrast, Justice Breyer’s controlling opinion in *Van*
19 *Orden* found that the display of the Ten Commandments in the Texas State Capitol did not
20 violate the Establishment Clause because, when viewed in context, it conveyed a predominantly
21 secular message of the importance of law. *Van Orden*, 545 U.S. at 701-02 (Breyer, J.,
22 concurring). The religious (or non-religious) nature of the two displays again determined
23 whether their presence on public property was lawful.

1 In light of such decisions, Judge Walker's view of the question seems to us not
2 compatible with the Establishment Clause. Inevitably, whatever expressive conduct is
3 prohibited by the Establishment Clause is prohibited by reason of its religious nature and would
4 not be prohibited if what it expressed were not related to religion.

5 We do not suggest for a moment that any and all expressive activity with religious
6 content must be excluded from government property or from government-controlled enterprise,
7 such as the administration of a school system. The Supreme Court has unquestionably ruled
8 otherwise in *Rosenberger*, *Good News Club*, and other cases. Our point is only that the test
9 cannot be as Judge Walker views it. The mere fact that government does not permit an
10 expressive activity, which it would permit if the activity were not religious, does not compel the
11 conclusion that it is engaging in unconstitutional viewpoint discrimination. Whatever forms of
12 governmental action are prohibited by the Establishment Clause are prohibited in part because of
13 their religious nature and would not be prohibited if they were not religious.

14 Where government excludes a category of activity involving religious expression out of
15 concern for the limitations imposed on government by the Establishment Clause, the lawfulness
16 of the exclusion (notwithstanding that the religious content motivates the exclusion) will turn on
17 whether allowing the activity would either violate the Establishment Clause or place the
18 government entity at a reasonably perceived risk of violating the Establishment Clause. The
19 Supreme Court has never ruled on whether permitting the regular conduct of religious worship
20 services in public schools constitutes a violation of the Establishment Clause, and we reach no
21 conclusion on that question. As discussed above, considering all the circumstances, we think the
22 risk that permitting the regular conduct of worship services in public schools would violate the
23 Establishment Clause is sufficiently high to justify the Board's adoption of a content restriction

1 that prohibits the performance of such services but does not otherwise limit the expression of
2 religious viewpoints.

3 2) Judge Walker maintains that our ruling approves the exclusion of the very sort of
4 conduct that the Supreme Court ruled in *Good News Club* could not be excluded. Dissenting Op.
5 10. We respectfully disagree. The application of the Good News Club, which the school district
6 denied, was for a Christian group to hold after-school meetings for children between the ages of
7 six and twelve, where they would have “a fun time of singing songs, hearing a Bible lesson and
8 memorizing scripture.” *Good News Club*, 533 U.S. at 103. The club later gave an expanded
9 description by letter to the effect that

10 Ms. Fournier tak[es] attendance. As she calls a child’s name, if the child recites a
11 Bible verse the child receives a treat. After attendance, the Club sings songs. Next
12 Club members engage in games that involve, *inter alia*, learning Bible verses. Ms.
13 Fournier then relates a Bible story and explains how it applies to Club members’
14 lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the
15 Bible verses for memorization.

16 *Id.*

17 Without doubt there is some overlap between Bronx Household’s conduct of Christian
18 worship services and the children’s club meetings that were the subject of *Good News Club*, in
19 that worship services generally include song, prayer, and scripture. Nonetheless, we doubt that
20 objective observers employing ordinary understandings of the English language would describe
21 Ms. Fournier’s club meetings as worship services. Judge Walker seeks to discern the meaning of
22 the Supreme Court’s majority opinion from the emphatic objections to it expressed in Justice
23 Souter’s dissenting opinion. He bases his assertion that the activities of the Good News Club
24 were “religious worship services” on Justice Souter’s dissenting statement that what the majority
25 allowed into a public school was in effect “an evangelical service of worship.” 533 U.S. at 138.

1 It is axiomatic that a dissenting opinion is generally the least reliable place to look to discern the
2 meaning of a majority opinion. Dissenters commonly exaggerate what they see as inevitable,
3 appalling consequences of the majority’s ruling, a phenomenon which led Judge Friendly to
4 observe that dissenting opinions are “rarely a safe guide to the holding of the majority.” *United*
5 *States v. Gorman*, 355 F.2d 151, 155 (2d Cir. 1965). Regardless of whether the dissenting
6 justices believed the activities of the Good News Club were equivalent to “an evangelical service
7 of worship,” there is no indication that the majority shared that view. Indeed, rejecting the
8 argument advanced by the school district in *Good News Club* “that the Club’s activities
9 constitute ‘religious worship,’” the majority expressly noted that the court below had “made no
10 such determination,” emphasizing that it was not addressing what ruling it would make if the
11 excluded activity were religious worship. *Id.* at 112 n.4.

12 We do not mean to imply that we think the Supreme Court somehow indicated in *Good*
13 *News Club* that it would rule as we do on the exclusion of worship services. Our point is only
14 that the Supreme Court has neither ruled on the question, nor even given any reliable indication
15 of how it would rule.

16 3) Judge Walker argues that we err to the extent that we rely on the heavy predominance
17 of the use of schools for *Christian* worship services (as opposed to services of other religions)
18 because of the greater availability of the schools on the Christian day of worship. He argues that
19 the greater availability of schools for use by Christian organizations is of no constitutional
20 concern, because “[a]n Establishment Clause violation does not result from either private choice
21 or happenstance.” Dissenting Op. 24.

22 The greater availability of schools for use on the Christian day of worship is certainly not
23 “happenstance.” From the first, schools throughout the United States were closed on Sundays

1 precisely because Sunday is the Christian day of worship – the day when schoolchildren were
2 expected to attend church services with their parents. The tradition of closing schools, post
3 offices, courts, and other government buildings on Sunday is no more happenstance than the fact
4 that, until recently, many state laws required businesses to close on Sundays. *See* Alan Raucher,
5 *Sunday Business and the Decline of Sunday Closing Laws: A Historical Overview*, 36 J. Church
6 and State 13 (1994). That choice has origins in the government’s solicitude for Christianity, in
7 what was once widely viewed as “a Christian nation.” *Holy Trinity Church v. United States*, 143
8 U.S. 457, 471 (1892).

9 * * *

10 In rejecting a multitude of Judge Walker’s arguments, we do not imply that his
11 conclusion (as to the constitutional invalidity of the religious worship services branch of SOP
12 § 5.11) is frivolous or even necessarily wrong. The Supreme Court’s rulings have laid down no
13 principles that compel a decision one way or the other on these facts. Nor has the Supreme
14 Court given any reliable indication of how it will rule if and when it confronts these facts. As
15 Judge Calabresi and I view the facts, the use of New York City public schools for religious
16 worship services – with a heavy predominance of Christian worship services because school
17 buildings are most available for non-school use on Sundays – would create a very substantial
18 appearance of governmental endorsement of religion and give the Board a strong basis to fear
19 that permitting such use would violate the Establishment Clause. Because the “religious worship
20 services” clause of SOP § 5.11 is a content restriction that excludes only a type of activity, does
21 so for a reason that is either constitutionally mandated or at least constitutionally reasonable, and
22 does not otherwise curtail free expression of religious viewpoints, we conclude that the
23 restriction does not violate the Constitution.

1 **CONCLUSION**

2 For the foregoing reasons, the judgment of the district court is REVERSED, and the
3 injunction barring enforcement of SOP § 5.11 against Bronx Household is VACATED.

1 CALABRESI, Circuit Judge, concurring:

2 I join Judge Leval’s opinion in full because it states a correct alternative ground
3 upon which to decide this case. But I write separately to emphasize that I continue to
4 adhere to the position I took in my earlier opinion in this case, that worship is *sui generis*.
5 See *Bronx Household III*, 492 F.3d at 100 (Calabresi, J., concurring). And I especially
6 wish to reaffirm my view there stated:

7 A holding that *worship* is only an agglomeration of rites would be a
8 judicial finding on the nature of worship that would not only be grievously
9 wrong, but also deeply insulting to persons of faith.

10
11 *Id.* at 103. Worship is something entirely different. See *id.*; see also *Bronx Household I*,
12 127 F.3d at 221 (Cabrane, J., concurring in part and dissenting in part) (“Unlike
13 religious ‘instruction,’ there is no real secular analogue to religious ‘services,’ such that a
14 ban on religious services might pose a substantial threat of viewpoint discrimination
15 between religion and secularism.”). State rules excluding all “worship” from a limited
16 public forum, therefore, are based on content, not viewpoint.

17 In the context of the rule before us, there is one particular problem: the rule seems
18 to prohibit *religious* worship. See SOP § 5.11 (“No permit shall be granted for the
19 purpose of holding religious worship services”). And if it be the case that *non-*
20 *religious* worship also exists, then the prohibition of *religious* worship would be
21 viewpoint discrimination, and most likely unconstitutional. The question of whether
22 there is a category of nonreligious worship, or whether worship is inherently religious
23 and thus “religious worship” is redundant, is interesting and difficult, but we do not need
24 to decide it in this case. The majority opinion does not need to decide the issue because it
25 concludes that there is no such thing as a non-religious worship *service*. Maj. Op. at [15-

1 **16].** I also need not decide the issue because the rule before us prohibits “using a school
2 as a house of worship,” as well as the holding of “religious worship services.” SOP §
3 5.11. No one questions that what Appellees seek to do in the instant case is to use the
4 school as a house of worship. And since both religious worship and nonreligious worship
5 (if there be any) are subject to the clause barring use of a school as “a house of worship,”
6 the prohibition here is content- and not viewpoint-based.

7 We also do not need to be concerned with whether in some other case it might be
8 hard to say whether what the Appellees wish to do is to use the school as “a house of
9 worship.” Nor need we worry that, in attempting to answer that question, we (or the
10 Appellants) might become unconstitutionally “entangle[d] with religion,” *Lemon v.*
11 *Kurtzman*, 403 U.S. 602, 613 (1971). For Appellees admitted in their permit request, *see*
12 J.A. at 3586, and in their briefs before this court, *see* Appellees’ Br. at 1, that they seek to
13 use school facilities for “worship.” When a group tells the government that what it
14 wishes to do is “worship,” the government is entitled to take the group at its word. *See*
15 *Bronx Household I*, 127 F.3d at 221-22 (Cabrane, J., concurring in part and dissenting in
16 part) (“There may be cases in which the parties dispute whether or not a proposed activity
17 for which permission to use school premises is denied actually constitutes religious
18 instruction or worship However, this issue does not arise in the instant case, as the
19 parties have stipulated that plaintiff seeks to use a school gymnasium for ‘religious
20 worship services.’”). That is all the Appellants did when they enforced SOP § 5.11,¹ and

¹ Whatever the Appellants may have done in deciding whether to grant previous permit applications not governed by the revised SOP § 5.11 is not before us. Under SOP § 5.11, the Appellants denied the Appellees’ permit application four days after it was submitted, because it described the activities to be conducted on school premises as “Christian worship services.” *See* J.A. at 3586, 3588. It also does not matter that the permit

1 it is all a court needs to do here. This case does not, therefore, present an appropriate
2 occasion for deciding how to resolve a dispute over whether something actually is
3 “worship.”

application included the words “as we have done in the past,” J.A. at 3586, or that it might have been worded explicitly to include, in addition to worship, other activities that, if conducted separately from worship, could not constitutionally be excluded from the limited public forum. Once an applicant says that what it wishes to do is “worship,” no inquiry into whether the underlying or accompanying activities actually constitute worship is required.

1 JOHN M. WALKER, JR., Circuit Judge, dissenting:

2 The Board's Standard Operating Procedure ("SOP") § 5.11
3 withholds otherwise broadly available school-use permits from
4 religious groups seeking to use school facilities during non-
5 school hours "for the purpose of holding religious worship
6 services, or otherwise using a school as a house of worship."
7 Without addressing the "house of worship" ban, the majority
8 concludes that the ban on "religious worship services" does not
9 offend the First Amendment's Free Speech Clause because it is a
10 neutral, content-based restriction that is reasonably implemented
11 to avoid an Establishment Clause violation. I disagree: SOP
12 § 5.11 is impermissible viewpoint discrimination against
13 protected speech and is unsupported by a compelling state
14 interest. In this case, Bronx Household's worship services fit
15 easily within the purposes of the Board's broadly available forum
16 and may not be the object of discrimination based upon the
17 religious viewpoint expressed by the services' participants. The
18 Board's purported Establishment Clause concerns are
19 insubstantial: they are not reasonable, much less a compelling
20 reason for the Board to shut the door on Bronx Household's
21 protected speech.

22 * * * * *

23 When this panel split in 2007, Judge Calabresi indicated
24 that he would uphold SOP § 5.11 as a reasonable content-based

1 restriction on the unique subject of "worship," Judge Leval
2 expressed no opinion on the merits of the case due to ripeness
3 concerns, and I indicated that I would strike down the
4 application of SOP § 5.11 as unconstitutional viewpoint
5 discrimination. See generally Bronx Household of Faith v. Bd. of
6 Educ., 492 F.3d 89, 100-106 (Calabresi, J.), 110-123 (Leval, J.),
7 and 123-32 (Walker, J.) (2d Cir. 2007). At that time, I compared
8 the purpose of Bronx Household's proposed use of school property
9 with the purposes for which the Board opened its limited forum to
10 the public under SOP § 5.6.2, and, after inquiring searchingly of
11 the government's motives, concluded that the Board had engaged in
12 impermissible viewpoint discrimination by rejecting permit
13 applicants under SOP § 5.11. Id. at 123-25. In response to
14 Judge Calabresi's willingness to uphold the Board's prohibition
15 on religious worship, I countered that Judge Calabresi had not
16 engaged in any real analysis of the purpose of Bronx Household's
17 proposed expressive activity in light of the purposes of the
18 forum and in comparison to the purposes of the activities the
19 Board had allowed, pointing out that he had erred by simply
20 comparing the speech already permitted on school premises with
21 "worship," which he declared to be sui generis and thus readily
22 excludable from the forum. See id. at 127-130; cf. Op. of J.
23 Calabresi at 1.

24 Now, in this latest iteration of what is effectively the

1 same facial challenge to the Board's exclusions under SOP § 5.11,
2 the majority opinion breaks with Judge Calabresi's earlier
3 analysis that "worship" is a separate category of speech that is
4 readily excludable from the Board's expansive community use
5 policy, declining even to consider either the second part of SOP
6 § 5.11 (which prohibits "using a school as a house of worship")
7 or whether "worship" may be lawfully excluded from the forum.
8 Compare Maj. Op. at 11 & 11 n.6 (expressly avoiding a decision on
9 "worship"), with Op. of J. Calabresi at 1-3 (readily excluding
10 "worship").¹ Rather, the majority adopts a position not argued
11 below or advanced by the Board by focusing solely on the Board's
12 restriction against "religious worship services," characterizing
13 SOP § 5.11 as merely the exclusion of "the conduct of an event or
14 activity that includes expression of a point of view," Maj. Op.
15 at 13. The majority does not disagree that Bronx Household's
16 services fall squarely within the purposes of the limited public
17 forum; it holds, however, that SOP § 5.11's exclusion of services
18 is both viewpoint-neutral and justified by Establishment Clause
19 concerns. Because I believe that neither conclusion is correct,
20 I would affirm the district court's injunction.

1 ¹ While I disagree with Judge Calabresi's analysis and
2 conclusions, he at least recognizes that the two parts of SOP
3 § 5.11 operate in tandem to effectively preclude worship and the
4 practice of religion from school premises during non-school
5 hours.

1 **I. SOP § 5.11's Ban on Religious Worship Services Constitutes**
2 **Viewpoint Discrimination**

3
4 As the majority recognizes, the Board has created a limited
5 public forum by opening its schools for "uses pertaining to the
6 welfare of the community." SOP § 5.6.2. When the state creates
7 such a forum, it "is not required to and does not allow persons
8 to engage in every type of speech." Good News Club v. Milford
9 Cent. Sch., 533 U.S. 98, 106 (2001). The government may, for
10 example, reserve the limited public forum "for the discussion of
11 certain topics." Id. (quoting Rosenberger v. Rector & Visitors
12 of the Univ. of Va., 515 U.S. 819, 829 (1995)). Any restrictions
13 on speech in a limited public forum must, however, be both
14 viewpoint neutral and "reasonable in light of the purpose served
15 by the forum." Cornelius v. NAACP Legal Defense & Educ. Fund,
16 Inc., 473 U.S. 788, 806 (1985). SOP § 5.11 is neither.

17 Here, the Board opened its schools to the public for
18 purposes of "maximiz[ing] educational, cultural, artistic and
19 recreational opportunities for children and parents," Cahill.
20 Decl. ¶ 13, "assist[ing] in . . . development generally," id.,
21 "expand[ing] enrichment opportunities for children," Farina Decl.
22 ¶ 9, and "enhanc[ing] community support for the schools," id.
23 The parties agree, and the majority does not contest, that Bronx
24 Household's intended use of P.S. 15 for "Christian worship
25 services"—which include prayer, the reading and singing of
26 psalms, Bible lessons, personal testimony, communion, preaching,

1 fellowship, and conversation—falls within the purposes of the
2 forum. See, e.g., Transcript of Oral Argument, 10/6/2009
3 (“Tr.”), at 10:7–8, 21:20–21, & 22:20–22 (each statement
4 conceding that Bronx Household’s intended use advances the
5 forum’s purposes). The majority nevertheless finds that the
6 restriction on religious services is content discrimination that
7 is reasonable in light of the purposes of the limited public
8 forum. I disagree and conclude that the Board’s discrimination
9 against Bronx Household is based on its religious viewpoint.

10 The Supreme Court has consistently held that the exclusion
11 of private speakers from open fora or limited public fora on the
12 basis of their religious message constitutes viewpoint
13 discrimination. In Widmar v. Vincent, for example, the Supreme
14 Court reaffirmed that “religious worship and discussion” are
15 “forms of speech and association protected by the First
16 Amendment.” 454 U.S. 263, 269 (1981). On this basis, the Court
17 rejected a university’s attempt to prevent a student organization
18 from using an open forum to hold meetings, similar to those at
19 issue here, that included “prayer, hymns, Bible commentary, and
20 discussion of religious views and experiences.” Id. at 265 n.2.
21 Significantly, the Court rejected a distinction between protected
22 religious speech and “a new class of religious speech act[s]
23 constituting worship.” Id. at 269 n.6 (alteration in original)
24 (citation and internal quotation marks omitted). The Court

1 explained that this proposed distinction lacked "intelligible
2 content" and would not "lie within the judicial competence to
3 administer." Id.

4 The Supreme Court first addressed private religious speech
5 in a limited public forum in Lamb's Chapel v. Center Moriches
6 Union Free School District, 508 U.S. 384 (1993). There, a church
7 sought to use a school's limited public forum, after hours, to
8 show a six-part film series that dealt with "family and child-
9 rearing issues" from a Christian perspective. Id. at 387-89.
10 The Court found that the school district had engaged in viewpoint
11 discrimination by "permit[ting] school property to be used for
12 the presentation of all views about family issues and child
13 rearing except those dealing with the subject matter from a
14 religious standpoint." Id. at 393. Similarly, in Rosenberger v.
15 Rector & Visitors of the University of Virginia, the Court
16 rejected the University of Virginia's refusal to fund a student
17 newspaper on the basis that the newspaper "primarily promote[d]
18 or manifest[ed] a particular belie[f] in or about a deity or an
19 ultimate reality." 515 U.S. 819, 823 (1995). The Court
20 explained that viewpoint discrimination is a subset of content
21 discrimination and that while it is "something of an
22 understatement to speak of religious thought and discussion as
23 just a viewpoint, as distinct from a comprehensive body of
24 thought," religion nevertheless "provides . . . a specific

1 premise, a perspective, a standpoint from which a variety of
2 subjects may be discussed and considered." Id. at 830-31. For
3 that reason, the University's refusal to fund a student
4 publication because of its Christian perspective, while
5 continuing to fund publications with other (secular)
6 perspectives, was impermissible viewpoint discrimination. Id. at
7 831-32.

8 More recently, in Good News Club v. Milford Central School,
9 533 U.S. 98 (2001), the Supreme Court applied its holdings in
10 Lamb's Chapel and Rosenberger to activities that could be labeled
11 "worship." Milford had created a limited public forum that, like
12 SOP § 5.6.2 here, opened its school for purposes "pertaining to
13 the welfare of the community." Good News Club, 533 U.S. at 102.
14 The Good News Club, a private Christian organization, sought to
15 use this forum for weekly meetings, at which participants would
16 "sing[] songs, hear[] a Bible lesson and memoriz[e] scripture."
17 533 U.S. at 103. In finding Milford's exclusion of these
18 meetings unconstitutional, the Court explained that "something
19 that is 'quintessentially religious' or 'decidedly religious in
20 nature' can[] also be characterized properly as the teaching of
21 morals and character development from a particular viewpoint."
22 Id. at 111. While declining to challenge Justice Souter's
23 characterization of the Club's activities as "an evangelical
24 service of worship," the Court wrote that "what matters is the

1 substance of the Club's activities," which the Court found to be
2 "materially indistinguishable from the activities in Lamb's
3 Chapel and Rosenberger." Id. at 112 n.4. Because non-religious
4 groups were permitted to teach morals and character development
5 from a secular viewpoint, excluding the Good News Club's efforts
6 to do the same from a religion viewpoint was impermissible.

7 The majority argues in this case that the Board has not
8 discriminated on the basis of viewpoint and tries to distinguish
9 these prior Supreme Court decisions by focusing narrowly on the
10 Board's exclusion of "religious worship services." The Board,
11 however, has not differentiated these services from religious
12 worship or the practice of religion. Indeed, how could it do so?
13 Nor has the Board offered a definition of religious worship
14 services. Rather, the majority offers its own self-styled
15 definition of "religious worship services," without reference to
16 the record or briefs, as "the conduct of a particular type of
17 event: a collective activity characteristically done according
18 to an order prescribed by and under the auspices of an organized
19 religion, typically but not necessarily conducted by an ordained
20 official of the religion," the conduct of which "has the effect
21 of placing centrally, and perhaps even of establishing, the
22 religion in the school." Maj. Op. at 12. The majority's
23 formulation of "religious worship services," including its shoe-
24 horning of a supposed Establishment Clause problem, is

1 conveniently tailored to support its arguments, but leaves no
2 doubt that it is "religious services" and "worship" that the
3 Board is targeting for exclusion. The Board is otherwise
4 unconcerned with comparable ceremonial speech occurring on school
5 premises.² The majority's definition, it bears noting, leads to
6 anomalous results: while a Catholic or Episcopal service would be
7 shut out of the forum, a Quaker meeting service, Buddhist
8 meditation service, or other religions worship convocation could
9 be allowed because it would not follow a "prescribed order" or
10 because the leader is not "ordained." Ultimately, the majority's
11 definition also obscures the central issue, barely discussed in
12 the majority opinion, of whether Bronx Household is engaging in
13 speech that fulfills the purposes of the forum and is consistent
14 with non-religious speech occurring on school premises.

15 The core of the majority's argument is that by prohibiting
16 "religious worship services," the Board has only prohibited "the

1 ² Indeed, the majority's attempt to differentiate between
2 the "conduct of services," which it defines as "the performance
3 of an event or activity," Maj. Op. at 11, and the conduct of
4 "religious worship services" as two distinct categories of
5 activity relies explicitly on the religious nature of the latter
6 activity. Whereas a Boy Scouts merit badge service constitutes
7 "a collective activity characteristically done according to an
8 order prescribed by and under the auspices of an organized [civic
9 group]" and is "typically . . . conducted by an . . . official of
10 the [group]," Maj. Op. at 12, Bronx Household's weekly "event or
11 activity" is barred solely because it is performed under the
12 auspices of an organized religion and conducted by an ordained
13 official of the religion. Thus, these purportedly distinguishing
14 criteria squarely depend on the fact that religion is the
15 underlying motivation for the expressive activity.

1 conduct of an event or activity that includes expression of a
2 point of view," rather than "excluding the expression of that
3 point of view." Maj Op. at 12. The majority's attempt to
4 differentiate between the conduct of an event, here labeled
5 "services," and the protected viewpoints expressed during the
6 event is futile because the conduct of "services" is the
7 protected expressive activity of the sort recognized in Good News
8 Club and, earlier, in Widmar. The majority turns its back on the
9 Supreme Court's holding in Good News Club that it is viewpoint
10 discrimination for a school to exclude what is effectively "an
11 evangelical service of worship" from a limited public forum that
12 in every material respect is identical to the forum that the
13 Board established in this case. Compare Good News Club, 533 U.S.
14 at 112 n.4, with id. at 137-38 (Souter, J., dissenting). The
15 Board cannot lawfully exclude the conduct of an event based
16 solely on the religious viewpoints expressed during the event.

17 Indeed, in rejecting the claim that religious worship is not
18 protected speech in Widmar, Justice Powell explained that a
19 carve-out of worship from protected religious speech does not
20 have intelligible content and likely would not "lie within the
21 judicial competence to administer." 454 U.S. at 269 n.6. The
22 carve-out, Justice Powell wrote, also lacks "relevance" because
23 there is "no reason why the Establishment Clause, or any other
24 provision of the Constitution, would require different treatment

1 for religious speech designed to win religious converts than for
2 religious worship by persons already converted." Id. (citation
3 omitted).

4 Fixing upon the label "services" for the program of worship
5 at issue here as a carve-out from protected speech-as opposed to
6 other characterizations such as "meeting," "gathering," "prayer
7 group," or "time of worship"-does nothing to resolve the
8 underlying carve-out problems identified by Justice Powell in
9 Widmar. The same concerns-lack of intelligible content, judicial
10 manageability, and relevance-persist. While the majority tries
11 to address these concerns through its own definition of services,
12 the concerns raised in Widmar adhere in the application of the
13 majority's definition. It is as difficult for a court to
14 ascertain when it is dealing with "services" as with "worship"
15 generally and to manage any such distinction. And ultimately,
16 any distinction between "services" and protected religious speech
17 is irrelevant because, regardless of labels, "what matters is the
18 substance of the [group's] activities." Good News Club, 533 U.S.
19 at 112 n.4.

20 Moreover, that SOP § 5.11 exclusively targets religious
21 viewpoints is evident from the fact that, as in Good News Club,
22 only "religious" services are shut out of the forum. No similar
23 restriction is placed on secular gatherings that are materially
24 indistinguishable from Bronx Household's use of P.S. 15. While

1 the Board denies Bronx Household a space to celebrate its ideals,
2 it permits other outside organizations, such as the Legionnaire
3 Greys Program and the Boy Scouts, to meet on school premises to
4 further their secular ideals of "military leadership," or
5 "character building, citizenship, and personal and physical
6 fitness." The Board permits these secular uses despite the fact
7 that these groups also meet according to a prescribed order of
8 conduct that they consider integral to the accomplishment of
9 their goals. See, e.g., 1st Aff. of David Laguer, at ¶¶ 3, 4, &
10 6 (describing Legionnaire Greys Program meetings as "structured
11 and ordered," each consisting of, inter alia, a ceremonial flag
12 presentation, trumpets playing the national anthem, flag salutes,
13 unit lessons, leadership training, and character building); Aff.
14 of Jeffrey G. Fanara, at ¶¶ 5, 6, & 8 (describing Boy Scout troop
15 meetings as consisting of a "pre-opening, a half-hour gathering
16 period, . . . a formal opening ceremony . . . with a flag
17 ceremony and [] a recitation of the Pledge of Allegiance and the
18 Scout Oath or Law," and a "closing ceremony" that "includes a
19 motivational message . . . based on Scouting's values"). There
20 can be little doubt that the Board would similarly allow the use
21 of its facilities by fraternal organizations, such as the Elks or
22 the Freemasons, with comparable missions and ceremonies.

23 Just as each of these groups meets to address and discuss
24 universal concerns while advancing its organizational mission, so

1 too does Bronx Household's "Sunday morning meeting [act as] the
2 indispensable integration point for [the group]. It provides the
3 theological framework to engage in activities that benefit the
4 welfare of the community." First Aff. of Robert Hall ("1st Hall
5 Aff."), at ¶ 7. Further, it is during Bronx Household's
6 gatherings that participants are taught "to love their neighbors
7 as themselves, to defend the weak and disenfranchised, and to
8 help the poor regardless of their particular beliefs. It is a
9 venue where people . . . come to talk about their particular
10 problems and needs."³ Id. Plainly, there can be no claim that
11 Bronx Household's gatherings fail to address subjects that are
12 otherwise permitted in the forum or that they differ from secular
13 groups' meetings in any way other than their invocation of
14 religious doctrine.⁴

1 ³ For this reason, the majority errs by distinguishing Good
2 News Club on the basis of the Supreme Court's statement that the
3 Club meetings in that case did not involve "mere religious
4 worship." 533 U.S. at 112 n.4; see Maj. Op. at 25, 38. The
5 majority, however, omits a critical modifier: the Court made
6 clear that it did not consider the Club's activities to be "mere
7 religious worship, divorced from any teaching of moral values."
8 Id. (emphasis added). The same is true here: Bronx Household's
9 worship services cannot be divorced from the teaching of moral
10 values that are part and parcel of those services, which include
11 Bible lessons and instruction. Indeed, how can the majority's
12 conception of religious worship services ever be divorced from
13 promoting moral values?

1 ⁴ While this case was argued under the First Amendment's
2 Free Speech and Establishment Clauses, the Board's action also
3 raises Free Exercise Clause concerns. "At a minimum, the
4 protections of the Free Exercise Clause pertain if the law at
5 issue discriminates against some or all religious beliefs or

1
2 The majority also relies on a number of hypothetical
3 activities to argue that the Board could deny a permit
4 application in order to avoid "either harm to persons or
5 property, or liability, or a mess, which those activities may
6 produce." Maj. Op. at 13. Irrespective of the Board's power to
7 deny permits for such hypothetical uses out of a concern for
8 safety, sanitation, and non-interference with other uses of the
9 schools, see Capitol Square Review & Adv. Bd. v. Pinette, 515
10 U.S. 753, 758 (1995), none of these concerns has ever been
11 present in this case. Strikingly, while quick to proffer these
12 hypothetical uses, the majority never comes to grips with the
13 significant fact that the Board allows most outside organizations

1 regulates or prohibits conduct because it is undertaken for
2 religious reasons." Church of the Lukumi Babalu Aye, Inc. v.
3 City of Hialeah, 508 U.S. 520, 532 (1993); see also Employment
4 Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 877
5 (1990). Thus, "if the object of a law is to infringe upon or
6 restrict practices because of their religious motivation, the law
7 is not neutral; and it is invalid unless it is justified by a
8 compelling interest and is narrowly tailored to advance that
9 interest." Church of the Lukumi Babalu Aye, 508 U.S. at 533
10 (internal citation omitted). Given the plain language of SOP
11 § 5.11, the Board's persistent exclusion of outside organizations
12 seeking to use school facilities for religious purposes, and the
13 Board's repeated statements that SOP § 5.11 is aimed at the
14 practice of religion, it is undisputable that SOP § 5.11 is not
15 neutral. See Smith, 494 U.S. at 877-78. Because SOP § 5.11
16 specifically burdens religious practices, it must advance a
17 compelling government interest to pass constitutional muster.
18 See id. at 894-95 (O'Connor, J., concurring). Such a compelling
19 interest is absent in this case for the reasons stated in Part
20 II.

1 to access its facilities for uses that "pertain[] to the welfare
2 of the community" and "promot[e] [children's] development
3 generally," so long, of course, as those organizations'
4 activities do not amount to religious worship services or
5 transform the school into a "house of worship." Despite the
6 majority's arguments to the contrary, it is readily apparent that
7 the Board singles out religious worship for disfavored treatment.
8 The majority's argument that SOP § 5.11 is nothing more than a
9 content-based restriction on a specific type of activity, albeit
10 a religious one, plainly fails.⁵

11 Finally, the majority argues that my finding of viewpoint
12 discrimination overlooks the Board's Establishment Clause
13 rationale. Maj. Op. at 33-37. As an initial matter, I disagree
14 that the Board's Establishment Clause concerns are reasonable,
15 for the reasons discussed in Part II. Nevertheless, even if the
16 Board were to have legitimate Establishment Clause concerns,

1 ⁵ The Board's separate reliance on Faith Center Church
2 Evangelistic Ministries v. Glover, 480 F.3d 891 (9th Cir. 2007),
3 to argue that SOP § 5.11 is content, not viewpoint,
4 discrimination is misplaced. In Faith Center, the Ninth Circuit
5 concluded that Contra Costa County's exclusion of a religious
6 congregation from its library meeting space was content, not
7 viewpoint, discrimination because the congregation's intended use
8 of the space during normal operating hours for "Praise and
9 Worship" services was incompatible with (a) the purpose for which
10 the meeting room forum had been created, and (b) the "library's
11 primary function as a sanctuary for reading, writing, and quiet
12 contemplation . . . available to the whole community." Id. at
13 902, 909-11. No such incompatibility in either purpose or
14 facility is present here.

1 those concerns could do nothing to undermine my conclusion that
2 the Board engaged in viewpoint discrimination; at most, they
3 could only serve as a potential justification for such
4 discrimination.

5 Thus, whether the Board's actions under SOP § 5.11 are
6 properly characterized as the exclusion of worship, the exclusion
7 of "religious worship services," or the exclusion of "the conduct
8 of an event or activity that includes expression of a [religious]
9 point of view," Maj. Op. at 13, the Board has discriminated
10 against Bronx Household on the basis of religious viewpoint. The
11 group's proposed use of P.S. 15 fits plainly within the purpose
12 of the limited public forum created under SOP § 5.6.2; is not
13 incompatible with any time, place, and manner restrictions
14 imposed by the Board; and has been denied solely because Bronx
15 Household wishes to address otherwise permissible subjects from a
16 religious viewpoint through its conduct of religious "worship
17 services."

18 19 **II. Bronx Household's Intended Use of P.S. 15 Raises No** 20 **Legitimate Establishment Clause Concerns**

21
22 After concluding that SOP § 5.11 is content discrimination,
23 the majority next considers the reasonableness of SOP § 5.11.
24 However, it does so not in light of the forum's stated purposes,
25 but rather in light of the Board's stated concern that allowing
26 the conduct of "religious worship services" in schools would give

1 rise to a sufficient appearance of endorsement to constitute a
2 violation of the Establishment Clause. See Maj. Op. at 19.
3 Unlike my colleagues in the majority and the Board, I am not
4 prepared to shut out constitutionally-protected speech from a
5 neutral forum on the sole basis that it is "quintessentially
6 religious." Good News Club, 533 U.S. at 111. I would hold that
7 the actions of Bronx Household, a private party, cannot transform
8 the government's neutral action into an Establishment Clause
9 violation. The Board's fear of being perceived as establishing a
10 religion is therefore not reasonable, if the exclusion is viewed
11 (erroneously) as content discrimination, much less sufficiently
12 compelling to justify the viewpoint discrimination that I believe
13 is occurring.

14 Just like the defendants in Widmar, the Board and the
15 majority "misconceive[] the nature of the case." 454 U.S. at 273.
16 The Board has not created a forum open only to religious speech.
17 Rather, "it has opened its facilities for use by [the community],
18 and the question is whether it can now exclude groups because of
19 the content of their speech." Id. In fact, the Supreme Court has
20 "[m]ore than once . . . rejected the position that the
21 Establishment Clause even justifies, much less requires, a refusal
22 to extend free speech rights to religious speakers who participate
23 in broad-reaching government programs neutral in design."
24 Rosenberger, 515 U.S. at 839 (citing Lamb's Chapel, 508 U.S. at

1 393-94; Bd. of Educ. of Westside Cmty. Sch. (Dist. 66) v. Mergens,
2 496 U.S. 226, 248, 252 (1990)). Because the Establishment Clause
3 looks only to the government's role, if any, in establishing
4 religion and not the private speaker's choice in exercising his
5 free speech rights, I reach the opposite conclusion from the
6 majority as to whether a reasonable person would perceive the
7 Board's grant of the neutral-forum permit sought here to be an
8 endorsement of religion.

9 The Board and the majority invoke Lemon v. Kurtzman, 403 U.S.
10 602 (1971), to demonstrate that SOP § 5.11 is reasonable, but they
11 misapply the Lemon test, thereby reaching several conclusions that
12 directly contradict controlling Supreme Court precedent. In
13 particular, the majority offers five bases for concluding that SOP
14 § 5.11 is reasonably based on the Board's supposed concern that
15 granting Bronx Household a permit for "Christian worship services"
16 might have the "principal or primary effect" of endorsing
17 religion, see id. at 612, thereby violating the Establishment
18 Clause.⁶ The battle that the majority and the Board wish to

1 ⁶ The five bases the majority cites are as follows: (1)
2 after-hours use of school premises for "religious worship
3 services" transforms the school into a church because "[t]he
4 church has made the school the place for the performance of its
5 rites," Maj. Op. at 20; (2) the Board might reasonably fear that
6 allowing access for "religious worship services" results in the
7 Board's substantial subsidization of religion, Maj. Op. at 21;
8 (3) granting access for "religious worship services" might
9 permanently convert a school on Sundays into a state-subsidized
10 church "by reason of public perception of endorsement" that "is
11 made particularly acute by the fact that P.S. 15 and other

1 fight, however, has already been lost. The Supreme Court has
2 rejected Establishment Clause concerns, including those raised by
3 the majority, in this context because they are premised on the
4 mistaken belief that permitting religious groups to use school
5 facilities for religious purposes on a non-school day in a neutral
6 forum creates a realistic danger that the public will perceive the
7 Board as endorsing religion.

8 The relevant question to be asked is not whether any person
9 might mistakenly perceive the Board as conveying a message of
10 endorsement or disapproval; rather, the endorsement test asks
11 whether "an objective observer, acquainted with the text,
12 legislative history, and implementation of the [challenged law or
13 policy], would perceive it as a state endorsement of [organized
14 religion] in public schools." Santa Fe Indep. Sch. Dist. v. Doe,
15 530 U.S. 290, 308 (2000) (emphasis added) (quoting Wallace v.
16 Jaffree, 472 U.S. 38, 73, 76 (1985) (O'Connor, J., concurring)).
17 Thus, the majority confuses its analysis when it emphasizes the
18 private speaker's conduct, rather than the government's role, in
19 establishing religion. The fact that a community member might

1 schools used by churches are attended by young and impressionable
2 students," Maj. Op. at 22-23; (4) increased availability of
3 Sunday permits would favor Christian groups over other
4 denominations, see Maj. Op. at 23-24; and (5) deliberate
5 exclusion of certain members of the general public, such as
6 persons excommunicated from the church who advocate the Islamic
7 religion, by a religious organization aggravates existing
8 Establishment Clause concerns, see Maj. Op. at 24.

1 witness an outside organization using a school during non-school
2 hours to further its religious cause does not in itself raise a
3 legitimate concern that the government has acted in contravention
4 of the Establishment Clause. See Capitol Square, 515 U.S. at 767
5 (Scalia, J., for the plurality) ("By its terms th[e]
6 [Establishment] Clause applies only to the words and acts of
7 government. It was never meant, and has never been read by this
8 Court, to serve as an impediment to purely private religious
9 speech connected to the State only through its occurrence in a
10 public forum." (emphasis in original)).

11 For these reasons, the majority's focus on the "religious
12 nature" of the speech, without regard to the nature of the
13 speaker, is misplaced. The majority cites McCreary County v.
14 ACLU, 545 U.S. 844 (2005); County of Allegheny v. ACLU, 492 U.S.
15 573 (1992); and Lee v. Weisman, 505 U.S. 577 (1992), as
16 foundational to its Establish Clause analysis, and of course they
17 would be highly relevant to this case were we dealing with
18 religious speech by the government. In McCreary and County of
19 Allegheny, the government's placement of the Ten Commandments and
20 a nativity creche, respectively, in county courthouses violated
21 the Establishment Clause, as did the government in Lee v. Weisman
22 when a school official invited a rabbi to give an invocation and
23 benediction at a middle-school commencement exercise. In the case
24 before us, however, the most the government has done is to open up

1 a neutral public forum limited by its laudable educational and
2 community-building purposes. Unlike in these three cited cases,
3 it has neither promoted nor endorsed a religious message.

4 Also, "a significant factor in upholding government programs
5 in the face of Establishment Clause attack is their neutrality
6 towards religion." Good News Club, 533 U.S. at 114 (quoting
7 Rosenberger, 515 U.S. at 839). Indeed, the Free Speech Clause's
8 requirement of viewpoint neutrality by the government in opening a
9 forum tends to undermine, if not preclude, a finding of school
10 sponsorship in the Establishment Clause context. See Good News
11 Club, 533 U.S. at 114 ("Because allowing the Club to speak on
12 school grounds would ensure neutrality, not threaten it, [the
13 school district] faces an uphill battle in arguing that the
14 Establishment Clause compels it to exclude the Good News Club.").⁷
15 To an objective, fully informed observer, the fact that the forum
16 is open to a wide spectrum of participants bespeaks the state's

1 ⁷ Indeed, it bears noting that it was, at least in part,
2 the Second Circuit's previous approval of the Board's rejection
3 of Bronx Household's permit application pursuant to an earlier
4 formulation of the religious-use prohibition ("No outside
5 organization or group may be allowed to conduct religious
6 services or religious instruction on school premises after
7 school.") that prompted the Court to grant certiorari in Good
8 News Club. See 533 U.S. at 105-106 (citing Bronx Household I as
9 one of a number of circuit court cases contributing to a circuit
10 conflict "on the question whether speech can be excluded from a
11 limited public forum on the basis of the religious nature of the
12 speech"). It would not have been unreasonable for the Court to
13 have expected that its Good News Club decision would end this
14 case as well.

1 neutrality, not its favoring of religion or any other group.

2 In any event, even if a private actor's conduct could somehow
3 transform a neutral forum into a state endorsement of religion,
4 Bronx Household's services would not do so here. Just as in
5 Lamb's Chapel and Good News Club, Bronx Household's use of P.S. 15
6 takes place during non-school hours (actually on a day when there
7 is no school), lacks school sponsorship, occurs in a forum
8 otherwise available for a wide variety of uses, and is open to the
9 public. See 1st Hall Dep. at 30 ("Worship services are always
10 open to the public."); 1st Hall Aff., ¶ 5 ("Our Sunday morning
11 meetings are open to all members of the public. The meetings are
12 not closed to a limited group of people, such as church members
13 and their guests.").⁸ And while the majority in this case cites
14 the "particularly acute" danger that young and impressionable
15 students will perceive the weekend use of their schools by
16 religious groups as the Board's endorsement of religion or certain
17 religious denominations, see Maj. Op. at [23], the Supreme Court

1 ⁸ While Bronx Household, in accordance with its religious
2 tenets, limits communion to church members who have been
3 baptized, all members of the public are free to attend its Sunday
4 worship services and there is no evidence that Bronx Household
5 has ever refused admission to anyone. The majority's statement
6 that Bronx Household "excludes. . . persons who have been
7 excommunicated or who advocate the Islamic religion from full
8 participation in its services," Maj. Op. at 23, rests on Pastor
9 Robert Hall's answers to hypothetical questions posed to him by
10 the Board during his deposition that specifically addressed
11 church membership, not public attendance at Sunday worship
12 services. See 2nd Hall Dep. at 35-42.

1 rejected this same argument in Good News Club, where it was
2 presented with facts less favorable to Good News Club than those
3 the majority cites to here. See, e.g., Good News Club, 533 U.S.
4 at 117-18. Specifically, the Good News Club's activities took
5 place directly after school and catered to children ages 6-12,
6 id.; here, by contrast, Bronx Household's services occur on
7 Sundays, when the only children present at the school are those
8 attending the services, presumably with their parents.

9 The majority argues at some length that permitting weekly
10 worship services at P.S. 15 transforms the school into a church.
11 See, e.g., Maj. Op. at 20 ("When worship services are performed in
12 a place, . . . [t]he place has, at least for a time, become the
13 church."). The majority then equates permitting worship services
14 to "subsidizing churches" and "allowing schools to be converted
15 into churches." Maj. Op. at 21. The "church" reference appears
16 no less than twelve times in the majority opinion. Such an
17 argument—that somehow a neutral forum is physically (or perhaps
18 metaphysically) transformed into a non-neutral forum by the
19 private activity undertaken there—has the feel of rhetoric. The
20 same claim could have been made in Widmar and Good News Club, in
21 which decidedly church-related activities were permitted to occur
22 on a regular basis. Bronx Household's services do not convert
23 P.S. 15 into a church any more than the Boy Scout's meetings
24 convert it into a Boy Scout lodge.

1 The majority also errs in relying on the fact that some
2 outside religious organizations may more easily obtain school-use
3 permits because they worship on Sundays, not Fridays and
4 Saturdays. See Maj. Op. at 23-24. An Establishment Clause
5 violation does not result from either private choice or
6 happenstance. See Zelman v. Simmons-Harris, 536 U.S. 639, 652
7 (2002); Good News Club, 533 U.S. at 119 n.9; Harris v. McRae, 448
8 U.S. 297, 319 (1980) ("[I]t does not follow that a statute
9 violates the Establishment Clause because it happens to coincide
10 or harmonize with the tenets of some or all religions." (internal
11 quotation marks omitted)). Moreover, that an increasing number of
12 Christian groups have sought Sunday-use permits under SOP § 5.6.2
13 does not equate to permit unavailability for other religious
14 groups. Indeed, while the majority states that "Jews and Muslims
15 generally cannot use school facilities for their services because
16 the facilities are often unavailable on the days that their
17 religions principally prescribe for services," Maj. Op. at 23-24,
18 the record is clear that Jewish and Muslim groups have been
19 granted weekend access to school premises across the city under
20 the community use policy. See, e.g., J.A. at 88 (Friday permit
21 for Downtown Synagogue's "religious services"); id. at 185
22 (Saturday permit for Downtown Synagogue's "religious services");
23 id. at 179 (Saturday permit for Hope of Israel's "fellowship
24 meetings"); id. at 183 (Saturday permit for Khal Bais Yitzchok's

1 "religious fellowship meetings"); id. at 229 (Saturday permit for
2 Muslimmah of NA's "religious services").⁹ Finally, the majority's
3 reliance on County of Allegheny v. ACLU, 492 U.S. 573 (1989), and
4 Lynch v. Donnelly, 465 U.S. 668 (1984), is misplaced because those
5 cases "neither hold[] nor even remotely assume[] that the
6 government's neutral treatment of private religious expression can
7 be unconstitutional." Capitol Square, 515 U.S. at 765 (Scalia,
8 J., for the plurality).

9 Supreme Court caselaw also refutes the Board's argument that
10 granting Bronx Household Sunday access to P.S. 15 constitutes
11 direct aid to religion because it allows Bronx Household to bypass
12 the expensive New York City real estate market that might
13 otherwise preclude it from establishing a congregation. Cf. Maj.
14 Op. at 21. The Board's argument runs afoul of Rosenberger:

1 ⁹ The majority relies on the Board's denial of one group's
2 request to hold Jewish services on Saturdays in a school
3 generally used for Christian services on Sundays in support of
4 its argument that permits are unavailable to Jewish and Muslim
5 groups. See Maj. Op. at 24. While the Board implies that there
6 is a lack of availability of Friday and Saturday permits for use
7 of its 1,197 buildings, its own evidence demonstrates that
8 approximately 750 buildings are available for after-school use on
9 Fridays, that 400 buildings are available for Saturday use, and
10 that 900 buildings are available for Sunday use. See Appellant's
11 Br. at 13-14. Thus, that some religious denominations use school
12 premises more often than others may simply indicate their lack of
13 other adequate meeting space in the community and not any
14 increased ability on their part to secure a permit. See 2nd Hall
15 Dep. at 105-06. That some religious groups utilize the extended
16 use policy more than others simply does not give rise to a
17 legitimate perception that the Board grants permits to particular
18 denominations to the exclusion of others.

1 It does not violate the Establishment Clause for a
2 [school] to grant access to its facilities on a
3 religion-neutral basis to a wide spectrum of student
4 groups, including groups that use meeting rooms for
5 sectarian activities, accompanied by some devotional
6 exercises. . . . The government usually acts by
7 spending money. Even the provision of a meeting room,
8 as in Mergens and Widmar, involved governmental
9 expenditure, if only in the form of electricity and
10 heating or cooling costs. The [analytical] error . . .
11 lies in focusing on the money that is undoubtedly
12 expended by the government, rather than on the nature of
13 the benefit received by the recipient. If the
14 expenditure of governmental funds is prohibited whenever
15 those funds pay for a service that is, pursuant to a
16 religion-neutral program, used by a group for sectarian
17 purposes, then Widmar, Mergens, and Lamb's Chapel would
18 have to be overruled.

19 515 U.S. at 842-43 (emphasis added). Even Justice Souter, who
20 dissented in Rosenberger, agreed that the government does not
21 provide impermissible direct aid to religion each time a non-
22 government speaker utilizes a limited public forum for private
23 religious speech. See id. at 888 (Souter, J., dissenting). Thus,
24 established Supreme Court precedent effectively forecloses the
25 argument that permitting Bronx Household access to P.S. 15 for the
26 purpose of engaging in private religious speech results in the
27 Board's unlawful provision of direct aid to a religious group.

28 In sum, while the majority argues that allowing Bronx
29 Household weekly use of P.S. 15 for "religious worship services"
30 would force the Board to render direct aid to religion, convey a
31 message that the Board endorses religion over non-religion, and
32 exhibit a preference for certain religious denominations over
33 others, these arguments are without merit. Rather, the neutrality

1 of the forum is preserved when religious speech, like non-
2 religious speech, is allowed. Accordingly, if Lemon v. Kurtzman
3 is to apply,¹⁰ I would hold that the Board has failed to
4 demonstrate that granting Bronx Household Sunday access to P.S. 15
5 for worship services would have the principal or primary effect of
6 advancing religion or otherwise conveying a message of
7 endorsement.¹¹ While I would require the Board to demonstrate some
8 sort of government endorsement (an uphill task, to say the least,
9 given the Free Speech Clause's requirement of forum neutrality)
10 before allowing it to restrict the viewpoint advanced by private
11 religious speech that otherwise falls within the purposes of the

1 ¹⁰ The Supreme Court recently noted that many of its
2 Establishment Clause cases "have not applied the Lemon test,"
3 while others "have applied it only after concluding that the
4 challenged practice was invalid under a different Establishment
5 Clause test." Van Orden v. Perry, 545 U.S. 677, 686 (2005).

1 ¹¹ The majority cites Capitol Square for the proposition
2 that a private religious group may so dominate a forum so as to
3 convey a message of governmental approval. See Maj. Op. at 21.
4 While Bronx Household's four-hour use of P.S. 15 on Sundays
5 hardly dominates the limited public forum the Board has created
6 under SOP § 5.6.2, any concern over a given group's prolonged or
7 dominant use of the forum can be addressed through reasonable
8 time, place, and manner restrictions. For example, in order to
9 ensure greater weekend availability of a particular school's
10 facilities to more outside organizations, the Board could limit
11 the number of times per year that any one outside organization
12 may use school facilities. Likewise, the Board may revoke any
13 organization's permit if it fails to adhere to neutral rules
14 imposed by the Board, i.e., by failing to include the Board's
15 sponsorship disclaimer in written materials or by actively
16 creating an impression of school sponsorship. The majority's
17 reliance on Pleasant Grove City, see Maj. Op. at 20, is similarly
18 misplaced.

1 forum, the lack of a basis in law for the Board's establishment
2 concerns undermines any holding that SOP § 5.11 is reasonable,
3 even under the majority's flawed analysis that SOP § 5.11 is mere
4 content discrimination, much less a compelling justification for
5 the Board's viewpoint discrimination.

6 * * * * *

7 I have no doubt that this case stirs deep feelings and
8 carries implications far broader than the Board's exclusion of
9 Bronx Household's "Christian worship services" under SOP § 5.11.
10 This case also presents important doctrinal considerations worthy
11 of the Supreme Court's attention. In the meantime, however, as a
12 result of the majority's decision that "religious worship
13 services" can be barred from the neutral limited public forum the
14 Board created under SOP § 5.6.2, numerous religious groups that
15 provide recognized benefits to the people and their communities,
16 consistent with the forum's purposes, will be denied access to
17 otherwise available school space simply because their private
18 speech is intertwined with their standard devotional practices and
19 deeply-held religious beliefs. Others will be chilled. Because
20 SOP § 5.11's ban on religious worship services violates the Free
21 Speech Clause, I respectfully dissent.