No. 14-354

In The Supreme Court of the United States

BRONX HOUSEHOLD OF FAITH, ET AL.,

Petitioners,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
WALTER M. WEBER
JORDAN A. SEKULOW
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]
Counsel for Amicus Curiae

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The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *McCullen v. Coakley,* 134 S. Ct. 2518 (2014), addressing a variety of issues of constitutional law. The ACLJ is dedicated, *inter alia*, to the freedom of speech and to religious liberty.

SUMMARY OF ARGUMENT

The Second Circuit has once again denied equal access to a forum for speech, based solely upon the religious nature of the proposed expressive activity. In so doing, the court below not only continued a pattern of dissent from this Court's First Amendment cases, but also generated several very pernicious legal holdings.

First, the court rendered a theological judgment – religious worship is special and consecrates a place – to justify legal discrimination. Second, the court

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[1]Counsel of record for the parties received timely notice of the intent to file this brief. Sup. Ct. R. 37.2(a). The parties in this case have consented to the filing of this brief. A copy of the consent letters are being filed with this brief. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

conferred a speech-restrictive "penumbra" upon the Establishment Clause, supposedly justifying content- and viewpoint-based restrictions on speech even when allowing the speech would not yield an Establishment violation. Third, the court penalized private speakers for the fact that the nationwide observance of a Saturday/Sunday weekend supposedly confers an unfair advantage on Christian users of otherwise vacant government facilities. And fourth, the court below conflated the government's own speech, which can be reviewed for religiosity as part of self-policing under the Establishment Clause, with private speech, which the government cannot constitutionally scrutinize for religiosity.

This Court should grant review to put a halt to the Second Circuit's persistent constitutional errors before they produce further mischief in the lower courts.

ARGUMENT

The Second Circuit has long resisted the notion that religious speech should be treated as having at least equal rights to comparable secular speech. Indeed, the Second Circuit is a rather notorious recidivist on this issue. *See, e.g., Brandon v. Board of Educ. of Guilderland Cent. School Dist.*, 635 F.2d 971 (2d Cir. 1980) (allowing student group equal access to meet for prayer on school premises would violate Establishment Clause), *cert. denied*, 454 U.S. 1123 (1981), *overruled*, *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 959 F.2d 381 (2d Cir. 1992) (denial of equal access to school facilities for outside group's

religious speech does not violate First Amendment), *rev'd*, 508 U.S. 384 (1993); *Good News Club v. Milford Cent. School*, 202 F.3d 502 (2d Cir. 2000) (denial of equal access to school for catechesis and prayer program for elementary school children does not violate First Amendment), *rev'd*, 533 U.S. 98 (2001). In fact, the Second Circuit openly adheres to the view that it was the Supreme Court, and not the Second Circuit, that went astray in the equal access cases. *See Bronx Household of Faith v. Board of Educ. of City of New York,* 650 F.3d 30, 46 (2d Cir. 2011) ("The Supreme Court's rulings in *Rosenberger*, *Lamb's Chapel*, and *Good News Club* **deviated** from a previous widespread governmental and judicial perception of the scope of the Establishment Clause's prohibitions") (emphasis added).

Continuing this unfortunate pattern, the Second Circuit has once more upheld the notion that otherwise permissible expressive activities by private parties can be discriminatorily excluded from public school facilities *precisely because those expressive activities are religious*. The court's rationale for that conclusion embraces several pernicious legal positions, elaborated below, which warrant this Court's review and correction.

This amicus brief focuses upon the Second Circuit's mangling of the law under the Free Speech Clause of the First Amendment in its 2011 opinion in the present case. It merits noting, however, that the lower court, by upholding the express exclusion of certain *religious* activities, equally ran afoul of the

Free Exercise (and Establishment) Clause of that same Amendment.

I. THE SECOND CIRCUIT EMBRACED A SERIES OF LEGAL ERRORS IN ITS FREE SPEECH ANALYSIS.

In its 2011 decision in this case, 650 F.3d 30, the Second Circuit squarely faced – and bungled – the church's Free Speech claim to equal access here.[2] The following doctrinal errors merit review and correction by this Court, lest they fester and spread further.

A. That an Activity Is Unique *Theologically* Does Not Mean it Can Be Excluded *Legally*.

Yes, religious worship services are special, 650 F.3d at 36-39 – but in ways cognizable to theology, not civil adjudication. It is not the business of the federal judiciary to determine what "consecrates a place," *id.* at 45. The Second Circuit therefore erred by ruling that worship services are, in effect, expressive activities that are so special that they can be discriminated against.

To be sure, the church would be the first to say that there is something unique and incomparable – *sui generis*, in the words of Judge Calabresi, *id.* at 51 (concurring opinion) – about the worship of God. But

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[2]A grant of certiorari in this case would bring up for review prior decisions of the Second Circuit, including the lower court's ruling on the free speech issue. *See, e.g., Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001).

that difference is a matter for the eyes of faith, not the eyes of judicial (or school board) review. As this Court recognized in *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981), "There is no indication when 'singing hymns, reading scripture, and teaching biblical principles' . . . cease to be 'singing, teaching, and reading' – all apparently forms of 'speech,' despite their religious subject matter – and become unprotected 'worship.'"

That a *term* is exclusively religious does not mean that the *activity* it describes has no secular analogue. A sacrament is uniquely religious, but that does not mean that excluding "sacraments" while allowing comparable secular activities is not an unconstitutional denial of equal access. A school need not allow food to be brought onto its premises by outside groups. But if it does so, it cannot treat a Seder meal differently from a Halloween meal just because the former has profound religious meaning. To exclude the rite of Baptism while allowing bobbing for apples is not to evince concern about water splashing on heads or floors, but to discriminate against an (expressive) activity because of the religious perspective of that activity.

In short, the Second Circuit's discussion about the possible exclusion of "an event or activity that includes expression of a point of view," listing as examples "martial arts matches, livestock shows, and horseback riding," 650 F.3d. at 37, poses the wrong question. Can a school exclude only *religious* martial arts, *see* Harvey Kurland, "Religion and Martial Arts: Are They Inseparable," Black Belt (May 31, 2013), or *religious* livestock shows, *e.g.*, "You Gotta Believe Devotional

Based Show Lamb Camp," Phorum (Feb. 14, 2013) www.breedersworld.com/forum/read.php?1,533053, 533053, or *religious* horseback riding, *e.g.*, Christian Horse-lover's Club Inc., www.chlclub.org? The answer is plainly "no."

B. The Establishment Clause Has No "Penumbra" that Justifies Viewpoint Discrimination.

This Court has observed that "avoiding an Establishment Clause *violation*" could supply a compelling interest justifying content-based[3] restrictions on speech. *Lamb's Chapel*, 508 U.S. at 394 (emphasis added). But the Second Circuit in this case said it "need not decide" whether the church's desired use "would in fact violate the Establishment Clause," 650 F.3d at 40. Instead, the Second Circuit declared, it is enough if the school board has a "strong basis for concern" that there could be a violation. *Id*. *See also id.* at 49 ("reasonably perceived risk" of Establishment violation). This was error.

If this were a case involving the qualified immunity defense to damages, it would make sense for the court below to assess whether a reasonable school official might (albeit mistakenly) think the speech restriction at issue was constitutional. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986). But this is not such a case.

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[3]Whether the same rule would apply even to a *viewpoint*-based restriction, as here, remains an open question. *Good News Club*, 533 U.S. at 112-13.

What the Second Circuit has done is to generate a "shadow" or "force field" around that Establishment Clause that would have censorious legal effect, at the expense of a speaker's rights, *even when there would be no violation* of the Establishment Clause. This Court should repudiate the Second Circuit's erroneous creation of a speech-restrictive penumbra around the Establishment Clause.

C. The Church May Not Be Penalized Because the School District Observes a Seven-Day Week.

The Second Circuit perceived religious favoritism in the coincidence of a Christian church's typical day for holding religious services and the availability of school facilities that same day (Sunday). 650 F.3d at 42 n.12, 45. Meanwhile, religions with different Sabbath days (Friday or Saturday) supposedly face a relative disadvantage. *Id.* at 43. *But see* Pet. at 6 (noting use by Jewish, Muslim, and other religious groups). The Second Circuit's gripe, however, is not with the school's access policy, but with the seven-day week itself (and the corresponding weekend). 650 F.3d at 50-51. That the school chooses to close for regular educational activities on the same days virtually every government office (including courts) closes is not the church's fault and provides no basis for discriminating against private users in a governmental effort to "even the score" among religions.

D. There Is an Essential Difference between Government Scrutiny of its Own Speech and Government Scrutiny of Private Speech.

The Second Circuit perceived no constitutional problem with governmental scrutiny of private speech to identify "what is properly deemed to be religious," and thus excludable, according to the Second Circuit, from the forum. 650 F.3d at 47. But the court below overlooked the enormously important distinction between government review of its *own* speech and government review of *private* speech. As this Court has explained, "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250 (plurality). Consequently, there is no constitutional objection when the government scrutinizes its own speech to determine if it has crossed the Establishment Clause line. But there is no such thing as private speech being "too religious" for the First Amendment; hence, government review of private speech for religiosity, with a view to potential discrimination and exclusion, is not only unjustified but positively forbidden as content- or viewpoint-based censorship.

CONCLUSION

The decision of the Second Circuit badly mangles this Court's equal access precedents under the First Amendment and embraces wrong-headed doctrinal positions that can generate only further mischief. This Court should grant review and reverse the judgment below.

Respectfully submitted,

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
Walter M. Weber
Jordan A. Sekulow
American Center for
Law & Justice
[redacted]

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