Religious Liberties

Bronx Household of Faith and the Access of Public Facilities to Religious Groups

*By Paul J. Zidlicky & Kristen V. Williams**

Recently, the U.S. Court of Appeals for the Second Circuit, in *Bronx Household of Faith v. Community School District No. 10*, rendered an important decision addressing access to public facilities by religious groups.[1] The splintered decision underscores the unsettled nature of this area among the lower courts, notwithstanding the U.S. Supreme Court's consistent decisions recognizing and enforcing the rights of religious groups to meet after hours at public facilities.[2]

The Supreme Court's decisions confirm that the government is prohibited from discriminating against such groups by denying them access to public facilities based on the "religious viewpoint" of their speech.[3] Under these cases, if a secular group were permitted to hold an assembly at a public facility discussing events of the day, a religious group cannot be denied access to the same facilities merely because it seeks to discuss those same issues from a religious perspective.

In *Bronx Household*, Judges Calabresi and Walker issued lengthy opinions reflecting continuing disagreement over whether there is a "religious worship" exception to the protections afforded to religious groups under the First Amendment.[4] That is, whether "religious worship" is a *sui generis* category of speech for which viewpoint discrimination is inapplicable. Part I of this paper discusses the controlling precedent developed by the United States Supreme Court governing this area. Part II examines the procedural background of the *Bronx Household* litigation, culminating in the opinions by Judge Calabresi and Judge Walker. Part III evaluates these competing positions against Supreme Court precedent. Ultimately, the paper concludes that Judge Calabresi errs in seeking to distinguish "religious worship" from "religious speech." Judge Calabresi's approach has been criticized by the Supreme Court, which has explained that the distinction between "religious speech" and "religious worship" lacks "intelligible content," and that efforts to draw such a distinction would impermissibly "entangle the State with religion."[5]

Rather, the appropriate approach is to treat "worship services" as any other form of protected speech and to assess whether religious groups seek to discuss issues that otherwise would be permitted in the public facility. Put simply, if a forum is available to community groups, it should make no difference whether the speech is made by a religious preacher, an agnostic, or an atheist.[6] Applied here, that principle compels the conclusion that the Bronx Household of Faith should be permitted to meet in the public school during non-school hours to hold meetings/services that pertain to the welfare of the community. To the extent the state seeks to exclude them because their meetings involve "religious worship," that prohibition constitutes impermissible viewpoint discrimination that violates the Free Speech Clause.

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I. Supreme Court's Decisions Addressing Access to Public Facilities By Religious Groups

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." On a number of occasions, the Court has addressed the interplay between the Free Speech and Establishment Clauses in the context of access to public facilities by religious groups.[7]

A seminal case in this area is *Widmar v. Vincent*. There, the Court struck down a state university policy that "prohibit[ed] the use of University buildings or grounds for purposes of religious worship or religious teaching."[8] The Court reasoned that the state had "discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion."[9] To justify that discriminatory exclusion, the university was required to "show that its regulation [was] necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end."[10] In doing so, the Court expressly rejected the suggestion by the dissent that "'religious worship' is not speech generally protected by the 'free speech' guarantee."[11]

The *Widmar* Court also rejected the state's argument that exclusion of religious groups was compelled by the Establishment Clause. The Court reasoned that an "equal access policy" would not be "incompatible with this Court's Establishment Clause cases"[12] if it passed the test articulated in *Lemon v. Kurtzman*.[13] Applying *Lemon*, Justice Powell easily determined that "equal access policy" would have a secular purpose, and would avoid entanglement with religion, thus satisfying the first and third *Lemon* prongs.[14] With regard to the second prong—*i.e.*, the primary effect prong—the Court engaged in a detailed analysis, concluding that the primary effect of an equal access policy would not be the advancement of religion; rather, any benefit to religious groups from an open access policy would be merely "incidental."[15]

Almost a decade later, the Supreme Court again considered the issue of access to public facilities by religious groups in *Board of Education of the Westside Community Schools v. Mergens.*[16] There, a majority of the Court applied the reasoning of *Widmar* to public secondary schools, and held that the Equal Access Act (EAA) prohibited the public school from rejecting student requests to form a "non-curriculum related" Christian organization that would be entitled to meet on school grounds.[17] Likewise, a majority of the Justices agreed that the EAA did not violate the Establishment Clause.[18] Although the Justices disagreed about the appropriate test that should govern the Establishment Clause analysis, there was broad agreement

on the Court that "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."[19]

Three years later, in *Lamb's Chapel v. Center Moriches Union Free School District*,[20] the Court addressed whether the Free Speech Clause permitted the state to "deny a church access to school premises to exhibit for public viewing and for assertedly religious purposes, a film series dealing with family and child-rearing issues faced by parents today."[21] The Court unanimously concluded that exclusion of the group amounted to viewpoint discrimination and that, under *Widmar*, such discrimination was not compelled by the Establishment Clause.[22] The *Lamb's Chapel* Court explained that the state engages in viewpoint discrimination when it permits "school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint."[23] And because "the showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members."[24] The Court concluded that "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental."[25]

In *Rosenberger v. Rector & Visitors of the Univ. of Va.*,[26] the Court again ruled that it was unconstitutional for the government to discriminate against a religious entity that is participating in the same activity as a non-religious entity, simply because of its religious viewpoint.[27] The Court held that the University of Virginia was engaged in viewpoint discrimination when it refused to grant a religious student group campus funding to publish a student journal.[28] Additionally, the Court ruled that the Establishment Clause did not forbid the religious group from receiving funds to print articles addressing, from a religious perspective, topics discussed by other student groups that received funding from the University.[29] In doing so, the Court again rejected the notion that the "Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design."[30]

Finally, in 2001, the Court again addressed the intersection of the Free Speech and Establishment Clauses in *Good News Club* v. *Milford Central School*.[31] *Good News Club* involved "a private Christian organization for children ages 6 to 12" that submitted a "request to hold the Club's weekly after school meetings in the school," which housed children from primary grades through high school.[32] The Good News Club proposed to use the facility to teach the children religious songs, to study Scripture and to pray.[33] The school district refused the group's request, alleging that the proposed activities were "the equivalent of religious worship,"[34] and therefore forbidden pursuant to the "community use policy."[35]

The Supreme Court granted certiorari to resolve the "conflict among the Courts of Appeals on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech."[36] Significantly, the conflicting decisions cited included the Second Circuit's resolution of similar claims by *Bronx Household*.[37] The *Good News* Court reversed the Second Circuit, holding that "teaching morals and character development to children is a permissible purpose under [the school district's] policy," and that "it is clear that the [Good News Club] teaches morals and character development to children."[38] The Court rejected the view that instruction from a "Christian viewpoint is unique" because the Court could see "no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations" that were permitted access.[39] It noted that even if the activities of the Club encompassed "religious worship," such activities were not "divorced from any teaching of moral values."[40] Finally, applying *Widmar* and *Lamb's Chapel*, the Court ruled that there was no valid Establishment Clause claim to support the exclusion of the religious group.[41]

II. Equal Access Litigation Brought By The Bronx Household of Faith

The Bronx Household of Faith is an evangelical Christian church run by pastors Jack Roberts and Robert Hall. It sought permission to use the gymnasium-auditorium of Anne Cross Merseau Middle School on Sunday mornings for weekly services.[42] The defendant school district denied the church's request based on its "Standard Operating Procedures: Topic 5 ("SOP") and New York Education Law § 414 (McKinney's 1995), both of which prohibit rental of school property for the purpose of religious worship."[43] The school district policy provides, however, that school facilities may be used for enumerated purposes which include the following:

> 5.6.1 For the purpose of instruction in any branch of education, learning or the arts; examinations; graduations.
>
> 5.6.2 For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such uses shall be nonexclusive and open to the general public.[44]

Specifically, section 5.9 provides:

> 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 purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.[45]

In 1994, after the Court had decided *Lamb's Chapel* and *Widmar*, Bronx Household of Faith made two formal requests to rent a school facility for Sunday morning services. After the second request was denied, "Bronx Household brought suit in the Supreme Court of the State of New York under 42 U.S.C. § 1983. The School District removed the case to federal court."[46]

The case initially came before United States District Court for the Southern District of New York, which granted the defendant school district's motion for summary judgment. As to Bronx Household's Free Speech claim, Judge Preska determined that "because SOP and [state law] clearly limit[s] access to the

school to those purposes enumerated and effectively prohibit use by all exclusive groups, SOP5 and [state law] indicate the creation of a limited public forum."[47] Judge Preska declined to address Plaintiff's Establishment Clause claim "[b]ecause [she found] that the state has not created a public forum and thus must demonstrate only a legitimate purpose to justify its ban of exclusive groups and has done so."[48]

On appeal, the Second Circuit affirmed. The majority ruled that the school had created a limited public forum, and that the exclusion of religious worship and instruction was both reasonable and viewpoint neutral. Specifically, the panel ruled that the school was not engaged in viewpoint discrimination because it "specifically permits any and all speech from a religious viewpoint" and does not permit "religious worship services."[49] As such, the majority concluded that the exclusion was based on the nature of the speech, not the viewpoint of the speaker.[50]

Four years later, after the Supreme Court decided *Good News Club*, plaintiffs renewed their request to rent the public school.[51] Tracking the permitted uses set forth in SOP 5.6.1 and 5.6.2, Bronx Household sought permission to use the school to engage in "singing, the teaching of adults and children from the viewpoint of the Bible," and to engage in "social interaction among members of the church, in order to promote their welfare and the welfare of the community."[52]

Judge Preska granted plaintiff's motion for preliminary injunction. First, applying the Supreme Court's decision in *Good News Club*, Judge Preska noted that the Supreme Court expressly rejected the argument that a "distinction can be drawn without difficulty between religious worship services and other forms of speech from a religious viewpoint."[53] Specifically, she determined that the activities proposed by Bronx Household of Faith "[could not] be categorized as mere religious worship, divorced from any teaching of moral values."[54] Rather, Judge Preska held that the activities were "clearly consistent with the other types of activities previously permitted" by the school district: helping people with basic needs such as food, clothing, and rent; social services like counseling, friendship, welfare-to-work assistance, drug rehabilitation, and personal finances management.[55] "The proposed activities also include the teaching of moral values—another activity benefiting the welfare of the community,"[56] and "singing, socializing, and eating—clearly recreational activities."[57]

Second, relying on the Supreme Court's ruling in *Good News Club*, Judge Preska rejected "defendant's position that religious services or worship are distinct activities not comparable to other activities" in the forum.[58] In particular, she rejected the school district's argument that worship is different because "*inter alia*, the discrete activities are linked… by ceremony and ritual [and] may involve rituals with special significance for a particular religious faith."[59] Judge Preska noted, however, that the record reflected the "use of public middle school facilities by various groups that also engage in ceremony and ritual of particular significance to the group."[60] Judge Preska pointed out that even if worship were an activity different in kind from other permissive activities, attempting to regulate a distinction is "futile." Judge Preska echoed the reasoning of the Supreme Court "[i]n recognizing that religious worship and discussion are forms of speech and association protected by the First Amendment."[61] Accordingly, Judge Preska found it "impossible to distinguish between" worship and non-worship.[62]

The Second Circuit, applying an abuse of discretion standard, affirmed Judge Preska's grant of a preliminary injunction.[63] Thereafter, in 2005, Judge Preska entered a permanent injunction in favor of plaintiffs.[64] On appeal, however, a divided panel of the Second Circuit reversed Judge Preska's grant of a preliminary injunction, although in a manner that leaves unresolved whether religious groups can be excluded from public facilities because they are engaged not in merely religious speech but "religious worship." The panel issued a short per curiam decision reversing the permanent injunction and longer concurring and dissenting opinions by each of the individual panel members.[65] In his opinion, Judge Calabresi concluded that a bar of "worship services... is a content-based restriction and does not constitute viewpoint discrimination."[66] According to Judge Calabresi, "[w]orship is the *sui generis* subject 'that the District has placed off limits to any and all speakers,' regardless of their perspective."[67] His opinion relied upon the fact that Bronx Household's pastor identified the proposed activities as "Christian worship service," which includes "the singing of Christian hymn and songs, prayer, fellowship with other church members, Biblical preaching and teaching, communion, sharing of testimonies and social fellowship among church members."[68]

Judge Calabresi rejected the argument that worship services were "simply the religious analogue of ceremonies and rituals conducted by other associations that are allowed to use school facilities."[69] According to Judge Calabresi, "the notion that worship is the same as rituals and instruction" is "completely at odds with *my* fundamental beliefs" because "[w]orship is adoration, not ritual; and any other characterization is both profoundly demeaning and false."[70] Finally, in drawing a distinction between "religious speech" and "religious worship," Judge Calabresi acknowledged the Supreme Court's decision in *Widmar,* but concluded that it was inapposite, because that Court did not conclude that "the exclusion of worship constituted viewpoint discrimination."[71] Judge Calabresi ultimately concluded that "defendant's exclusion of worship services is viewpoint neutral" and therefore constitutional.[72]

In dissent, Judge Walker concluded that the school district had "engaged in a form of invidious viewpoint discrimination forbidden by the First Amendment."[73] In contrast to the approach of Judge Calabresi, Judge Walker would "compare the purposes of Bronx Household's proposed expressive activity to the purposes for which the Board has created its limited public forum and, if the fit is close, inquire searchingly of the government's motives."[74] To that end, Judge Walker concluded that Bronx Household's expressive activity was designed to develop a community of believers, which has "as its anticipated result increased community support for the school."[75] That purpose "fits within" the Board's desire to "foster a community in their geographic vicinity in ways that will inure to their benefit."[76] Moving to the Board's intent, Judge Walker concluded that the record lead "ineluctably to the conclusion that the Board, in fact, has undertaken to exclude a particular viewpoint from its property."[77]

Neither Judge Calabresi nor Judge Walker garnered a majority for their competing approaches, because Judge Leval, who provided the deciding vote, concluded that there was no standing because the Board had adopted a new regulation that had not yet been applied to Bronx Household. As such, Judge Leval voted to vacate the preliminary injunction on grounds largely unrelated to the merits of the dispute.[78]

III. Analysis of *Bronx Household* Under Supreme Court Precedent

The Second Circuit's decision in *Bronx Household* raises the question—which it does not resolve—of whether there is a "religious worship" exception to the decisions of the Supreme Court, holding that the state may not exclude from a public facility religious groups that seek to engage in expressive activity of a sort permitted to non-religious groups. In assessing whether a "religious worship" exception is workable or appropriate, it is important to understand the scope of that exception, and whether it would swallow the general rule guaranteeing religious groups with equal access to public facilities. To make these assessments, however, it is essential to define what is "religious worship," and how, if at all, it differs from other expressive religious activity that is protected from viewpoint discrimination.

In *Bronx Household*, the opinion of Judge Calabresi makes no real effort to provide an objective definition of "religious worship," or to explain how it differs from other religious speech. Instead, according to Judge Calabresi, "worship" is "a *sui generis* subject 'that the District has placed off limits to any and all speakers.'"[79] The lack of an objective definition is not surprising. Indeed, as Judge Walker explained, the chief difficulty with a "religious worship" exception is that it assumes that "judges can define 'worship,'" when, in fact, judges are not "competent to offer a legal definition of religious worship."[80]

On this issue, the *Bronx Household* panel did not write on a clean slate. Indeed, both Judge Calabresi and Judge Walker acknowledged that in *Widmar* v. *Vincent*, the Supreme Court upheld the rights of students "to use a generally open forum to engage in religious worship and discussion." Nevertheless, Judge Calabresi found *Widmar* to be distinguishable because, there, the Court was concerned "solely with whether worship was religious speech," and did not conclude that "the exclusion of worship constituted viewpoint discrimination," as described in decisions like *Good News Club*, *Rosenberger*, and *Lamb's Chapel*.[81]

Judge Calabresi is correct in stating that *Widmar* did not address viewpoint discrimination because the forum there was a "public forum" for which content-based distinctions must be narrowly tailored to serve a compelling governmental interest. Judge Calabresi, however, is mistaken in concluding that *Widmar* did not address the question whether there was, or could be, a distinction drawn between religious speech and religious worship. The *Widmar* Court held not only that there was no intelligible distinction between the two, but also that no such distinction could be drawn by the courts or by government.

First, the *Widmar* Court held that such a distinction lacks "intelligible content," because there is "no indication when 'singing hymns, reading scripture, and teaching bible principles,' cease to be 'singing, teaching and reading'... and become unprotected 'worship.'"[82] Here, Judge Calabresi's opinion acknowledges that "some of the same activities that were part of the religious instruction validated in *Good News Club* are included in the worship services that Bronx Household seeks to conduct."[83] As noted, there is no principled basis for denying access to public facility when a preacher seeks to present a sermon addressing important issues such as racial strife when the same type of speech would be permitted if it were not called a "sermon."[84]

Second, the *Widmar* Court explained that even if there were a principled line between "religious expression" and "worship," "it is highly doubtful that it would lie within the judicial competence to administer."[85] Specifically, to draw such a distinction, the state would be required "to inquire into the significance of words and practices to different religious faiths," but such "inquiries would tend inevitably to entangle the State with religion in a manner forbidden [by the Supreme Court's] cases."[86] On this point, Judge Calabresi argued that religious worship was not the "analogue of ceremonies and rituals conducted by other associations," but that conclusion was inherently subjective and turned on his own "fundamental beliefs" as a "person of faith."[87] In stark contrast, the Supreme Court in *Good News Club* rejected a similar suggestion that "quintessentially religious" speech was somehow a "unique" category of speech because, for purposes of the First Amendment, there was "no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by the other associations."[88]

Finally, the *Widmar* Court concluded that the difficulty in distinguishing religious speech from worship, even if it could be done, was not worth the effort because there was no reason that different forms of religious speech should be afforded greater or lesser protection under the Constitution.[89] Here, too, Judge Calabresi offered no rationale for concluding that religious worship was entitled to less protection under the First Amendment than religious speech.

Simply put, the Supreme Court has in the past rejected efforts to distinguish religious speech from religious "worship." In rejecting that distinction, the Court has not required that local governments must allow "New York's schools [to] resemble St. Patrick's Cathedral."[90] To the contrary, the government is fully justified in reserving a forum for only certain groups or limiting access to student-sponsored speakers. Likewise, the government may legitimately establish rules so that access would not be provided solely to one or more religious groups in a manner that would convey the message that the government endorses a particular religion or group of religions. What the government cannot do, however, is open its facilities to a broad set of civic associations for general community-building purposes, and then deny access to a religious group that seeks to use the same facilities to conduct expressive activity of the same sort from a religious perspective.

Endnotes

1 Bronx Household of Faith v. Community Sch. Dist. No. 10, 492 F.3d 89 (2d Cir. 2007).

2 *See*, *e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

3 *See* Good News Club, 533 U.S. at 111-12; Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993); Bronx Household of Faith v. Community Sch. Dist. No. 10, 226 F. Supp. 2d 401, 416 (S.D.N.Y. 2002).

4 U.S. Const. amend. I, cl. 1.

5 Widmar v. Vincent, 454 U.S. 263, 269 n.6 (1981) (rejecting distinction between "religious speech explicitly protected by our cases, and a new class of religious 'speech [acts]' constituting 'worship.'").

6 *See*, *e.g.*, *Eulogy for the Martyred Children, reprinted in* I Have a Dream, Writings and Speeches that Changed the World at 115 (Harper 1992) ("The Reverend Dr. King delivered this sermon at the funeral of the little girls who were killed on September 15, 1963, by a bomb as they attended the Sunday school"); *see also The Drum Major Instinct, reprinted in id.* at 180 (recounting a prophetic and highly personal sermon from the pulpit).

7 *Widmar*, 454 U.S. at 269 n.6.

8 *Id.* at 265 (internal citations omitted).

9 *Id.* at 269.

10 *Id.* at 270.

11 *Id.* at 269 n.6.

12 *Id.* at 271.

13 Lemon v. Kurtzman, 403 U.S. 602 (1971). A staple of religious law jurisprudence, the Court's decision in *Lemon* created the framework under which cases involving the Establishment clause are evaluated. The *Lemon* test requires that the government action (1) "must have a secular… purpose," (2) must have a "principle or primary effect… that neither advances nor inhibits religion," and (3) "must not foster an excessive government entanglement with religion." *Id.* at 612-13.

14 *Widmar*, 454 U.S. at 271-72 ("[A]n open-forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion.").

15 *Id.* at 273 ("[The u]niversity has opened its facilities for use by student groups," it has created an open forum, and it may not "exclude groups based on the content of their speech.").

16 *Bd. of Ed. of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

17 *Id.* at 235.

18 *Id.* at 253.

19 *Id.* at 248.

20 Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 384 (1993)

21 *Id.* at 387.

22 *Id.* at 395.

23 *Id.* at 393.

24 *Id.* at 395.

25 *Id.* at 389. Significantly, the Court noted that the church had submitted a request to hold their Sunday morning worship services at the school and were denied access, but they did not challenge the denial.

26 Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

27 *Id.* at 846.

28 *Id.* at 845.

29 *Id.* at 846.

30 *Id.* at 839

31 Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

32 *Id.* at 103.

33 *Id.*

34 *Id.*

35 *Id.* (the community use policy "prohibit[ed] use by any individual or organization for religious purposes") (internal citations omitted).

36 *Id.* at 105.

37 *Id.* at 105-06.

38 *Id.* at 108.

39 *Id.* at 111 (internal quotations omitted).

40 *Id.* at 112 n.4.

41 *Id.* at 113.

42 Bronx Household of Faith v. Community Sch. Dist. No. 10, No. 95 Civ. 5501 (LAP), 1996 U.S. Dist. Lexis 18044, at *2 (S.D.N.Y. December 5, 1996).

43 *Id.* (internal citations omitted). Section 414 of N.Y. Education Law was the same provision at issue in *Lamb's Chapel* and *Good News Club*. New York Education Law § 414 permits use of school facilities for meetings, with the following exception: "such use shall not be permitted if such meeting, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization."

44 *Id.* at *3.

45 *Id.* at *3-4.

46 *Id.* at *5.

47 *Id.* at *15.

48 *Id.* at *18.

49 Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207, 214 (2d Cir. 1997).

50 *Id.* at 217.

51 Bronx Household of Faith v. Community Sch. Dist. No. 10, 226 F. Supp 2d 401, 409 (S.D.N.Y. 2002).

52 *Id.* at 409.

53 *Id.* at 413.

54 *Id.* at 414 (internal quotations omitted).

55 *Id.*

56 *Id.* ("Those who attend the Sunday morning meetings are taught to love their neighbors as themselves, to defend the weak and disenfranchised, and to help the poor regardless of their particular beliefs.").

57 *Id.* at 414-15 ("[T]he facts presented here fall squarely within the Supreme Court's precise holding in *Good News Club*: the activities are not limited to 'mere religious worship' but include activities benefiting the welfare of the community, recreational activities and other activities that are consistent with the defined purposes of the limited public forum.").

58 *Id.* at 416.

59 *Id* (internal quotations omitted).

60 *Id.* at 416-17 ("For example, Dave Laguer, Director of the Legionnaire Greys Program, explains that the group meets in M.S. 206B on Fridays from 6 to 9 p.m. and on Saturday from 9 a.m. to 2 p.m. and counts approximately sixty to seventy people in attendance from age ten. The group's program is geared toward teaching United States history, and because the format of [its] meetings is framed in an army military style environment, uniforms are required, ranks are held and salutes are mandatory to higher ranked individuals just as in the military. Lageur also explains that: at the start of each meeting, the students line up into proper formation and stand at attention as we begin with ceremonial flag presentation. During this ceremony, the flags are brought in and posted while a trumpeter plays the national anthem. At this time, the

students stand at attention and salute while the colors are presented and then posted. Likewise, Jeffrey G. Fanara, the Director of Learning for Life and Urban Emphasis at the Greater New York Councils, Boy Scouts of America, describes the activities of the four Cub Scout Packs and six Boy Scout Troops that meet in New York City public schools in the Bronx. Each Scout takes an oath promising: "On my honor I will do my best to do my duty to God and my country...." Troop meetings start with an initial gathering period followed by a formal opening ceremony, and end with a formal closing ceremony. An induction ceremony is held for each new boy who joins the Troop, and advancements in rank are marked by more elaborate ceremonies called Courts of Honor. On the basis of this uncontradicted evidence, there is no dispute that the Greys Legionnaires engage in ceremony and ritual at M.S. 206B and that the Boy Scouts engage in ceremony and ritual at various New York City public schools in the Bronx.") (internal quotations omitted).

61 *Id.* at 418.

62 *Id.* at 422.

63 Bronx Household of Faith v. Community Sch. Dist. No. 10, 331 F.3d 342, 355 (2d Cir. 2003).

64 Bronx Household of Faith v. Community Sch. Dist. No. 10, 400 F. Supp 2d 581 (S.D.N.Y. 2005).

65 Bronx Household of Faith v. Community Sch. Dist. No. 10, 492 F.3d 89 (2d Cir. 2007).

66 *Id.* at 98.

67 *Id.* at 100.

68 *Id*. at 101.

69 *Id.* at 103.

70 *Id.* at 103.

71 *Id.* at 104.

72 *Id.* at 106.

73 *Id.* at 124 (Walker, J., dissenting).

74 *Id.* at 125.

75 *Id.* at 126.

76 *Id.*

77 *Id.* at 127. Judge Walker strongly criticized the approach adopted by Judge Calabresi. Specifically, Judge Walker argued that Judge Calabresi failed either to define (i) the scope of the "limited public forum" at issue or (ii) the scope of the term "worship" that was central to his ruling.

78 *Id.* at 115.

79 *Id.* at 100.

80 *Id.* at 129 (Walker, J. dissenting).

81 *Id.* at 104.

82 Widmar v. Vincent, *454 U.S. 263, 269 n.6 (1981).*

83 *Bronx Household*, 492 F.3d at 102 (Calabresi, J., concurring).

84 *See supra* note 8.

85 *Widmar*, 454 U.S. at 269 n.6.

86 *Id.*

87 *Bronx Household*, 492 F.3d. at 103 (Calabresi, J., concurring).

88 Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111 (2001).

89 *Widmar*, 454 U.S. at 269 n.6.

90 *Bronx Household*, 492 F.3d at. 127 (Walker, J., dissenting).