No. 11-386

IN THE
Supreme Court of the United States

THE BRONX HOUSEHOLD OF FAITH, ET AL.,
Petitioners,
V.
THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

ROY S. MOORE
BENJAMIN D. DUPRÉ
JOHN A. EIDSMOE*
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com
**Counsel of Record*

October 27, 2011

QUESTIONS PRESENTED FOR REVIEW

1. Should the constitutionality of the Bronx Household of Faith's use of school facilities be determined by the text of the First Amendment or by judicially-fabricated tests?

2. Does the Bronx Household of Faith's use of school facilities constitute a "law respecting an establishment of religion"?

3. Does regular use of the U.S. House of Representatives chamber for Sunday worship services in the 1800s demonstrate that religious services on public property do not violate the Establishment Clause as intended by its Framers?

4. Can the Board of Education use an unfounded concern about the Establishment Clause to justify an infringement of the Bronx Household of Faith's free speech, free exercise, and equal protection rights?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

CONSTITUTIONS & STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law[1] ("the Foundation") is a national public interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God.

The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has assisted, or filed *amicus* briefs, in several cases in this Court and other courts concerning the freedom of religious expression in the public arena.

The Foundation has an interest in this case because it believes that current efforts to censor religious expression in general and Christian expression in particular, and to banish such expression from the public arena, are contrary to the spirit and letter of the First Amendment and contrary to the intent of the Framers of our Constitution.

---

[1] *Amicus curiae* Foundation for Moral Law files this brief with consent from both Petitioners and Respondents, granted with the condition of prior notice. Counsel of record for all parties received timely notice of the Foundation's intention to file this brief, copies of which are on file in the Clerk's Office. Counsel for *amicus* authored this brief in its entirety. No person or entity—other than *amicus*, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

This brief primarily focuses on whether the text of the Constitution should be determinative in this case, whether the Bronx Household of Faith's use of public school facilities violates the Establishment Clause of the First Amendment, whether the Board of Education's policy of discrimination against religious worship is required by the Establishment, and whether the Board of Education's policy of discrimination against religious worship violates the Free Speech and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

Our legal system is at a jurisprudential crossroads: either we will adhere to the plain language of the C onstitution laid down by God and built upon by the Founders, or we will continue to move toward ever-changing, subjective interpretation of the Constitution based upon the postmodern view that every judge may interpret the Constitution according to his own version of "truth."

This Court should exercise its judicial authority in this case based on the text of the document from which that authority is derived, the U.S. Constitution. A court forsakes its duty when it rules based upon case *tests* rather than the Constitution's *text*. *Amicus* urges this Court to return to first principles in this case and to embrace the plain and original text of the Constitution, the "supreme law of the land."

The text of the Establishment Clause states that "Congress shall make no law respecting an *establishment* of *religion*." U.S. Const. amend. I (emphasis added). When these words are defined as

they were originally understood at the time of the ratification of the First Amendment, it becomes evident that the Bronx Household of Faith's use of school facilities is not a "law," it does not require anyone to subscribe to a "religion" or how it should be practiced, and it does not represent an official "establishment" thereof. Thus, it does not violate the First Amendment to the United States Constitution.

This Court has clearly and repeatedly held that the use of public facilities by religious groups does not violate the Establishment Clause, and that the Free Speech, Free Exercise, and Equal Protection Clauses protect the rights of religious groups to use facilities on an equal and nondiscriminatory basis with others. The Second Circuit has either defied the clear holdings of this Court or has used frivolous grounds to distinguish them from the case at hand. The Second Circuit should not be allowed to use unfounded concerns about the Establishment Clause to discriminate against the Bronx Household of Faith and infringe that group's Free Speech, Free Exercise, and Equal Protection rights.

The petition for certiorari should be granted and the decision of the court below should be reversed.

ARGUMENT

> *This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges and return to the original meaning of the Clauses.*

Van Orden v. Perry, 545 U.S. 677, 692-93 (2005) (Thomas, J., concurring).

I. THE CONSTITUTIONALITY OF THE BRONX HOUSEHOLD OF FAITH'S USE OF SCHOOL FACILITIES SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY FABRICATED TESTS.

A. The Constitution is the "supreme Law of the Land."

Our Constitution dictates that the Constitution and all federal laws pursuant thereto are the "supreme Law of the Land." U.S. Const. art. VI. All "judicial Officers" are "bound by Oath or Affirmation, to support *this Constitution*" and not a person, office, government body, or judicial opinion. *Id.* (emphasis added); *see also* 28 U.S.C. § 453 (oaths of justices and judges). This Constitution and the solemn oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a written constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . the legitimate meanings of the Instrument must be derived from the text itself." J. Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James*

Madison 228 (Philip R. Fendall, ed., 1865). "The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).

A textual reading of the Constitution, according to Madison, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), *in Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824).

The words of the Constitution are neither suggestive nor superfluous: "In expounding the Constitution . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

This Court reaffirmed this approach in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 2788 (2008):

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague,* 282 U.S. 716, 731 (1931); *see also Gibbons v. Ogden,* 9 Wheat. 1, 188 (1824).

The meaning of the Constitution is not the province of only the most recent or most clever judges and lawyers: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 128 S. Ct. at 2821.

B. The *McCreary* compare-and-contrast test, the *Lemon* test, and other case-made tests form a confusing labyrinth that contradicts the text of the "supreme Law of the Land."

The current jurisprudential proliferation of tests—the *Lemon* test, the *Agostini*-modified *Lemon* test, the endorsement test, the coercion test, the neutrality test, and so on—have created more problems than they have solved, producing a continuum of disparate and unpredictable results. *See, e.g., Elk Grove United Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas J., concurring in judgment) (collecting cases). "[T]he very 'flexibility' of [the Supreme] Court's Establishment Clause precedent leaves it incapable of consistent application."[2] *Van*

---

[2] The courts of appeals have repeatedly expressed frustration with the difficulty in applying the *Lemon* test in particular and Establishment Clause jurisprudence in general. The Third Circuit has observed that "[t]he uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will

Orden, 545 U.S. at 697 (Thomas, J., concurring). Such impracticability is hardly surprising because attempting to draw a clear legal line without the "straight-edge" of the Constitution is simply impossible.

The federal courts' abandonment of fixed, *per se* rules results in the application of judges' complicated substitutes for the law. The "law" in Establishment Clause cases changes so often and is so incoherent that few can discern what it is today nor can guess what it will be tomorrow, "leav[ing] courts, governments, and believers and nonbelievers alike confused . . . ." *Van Orden*, 545 U.S. at 694 (Thomas, J., concurring). "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court

---

find themselves embroiled in legal and political disputes over the content of municipal displays." *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997). The Fourth Circuit has labeled it "the often dreaded and certainly murky area of Establishment Clause jurisprudence," *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999), and "marked by befuddlement and lack of agreement," *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 406 (4th Cir. 2005). The Fifth Circuit has referred to this area of the law as a "vast, perplexing desert." *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), rev'd sub nom. *Mitchell v. Helms*, 530 U.S. 793 (2000). The Sixth Circuit in Judge DeWeese's first case noted the "oft-aired criticism and debate" in Establishment Clause jurisprudence, *ACLU of Ohio Found. v. Ashbrook*, 375 F.3d 484, 490, n.5 (6th Cir. 2004), and the following year labeled it "purgatory." *ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 636 (6th Cir. 2005). The Seventh Circuit has acknowledged the "persistent criticism" that *Lemon* has received since its inception. *Books v. Elkhart County, Indiana*, 401 F.3d 857, 863-64 (7th Cir. 2005). This Court has opined that there is "perceived to be a morass of inconsistent Establishment Clause decisions." *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 561 (10th Cir. 1997).

majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County*, 545 U.S. at 890-91 (Scalia, J., dissenting).

By adhering to judicial tests rather than the legal text in cases involving the Establishment Clause, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases "agreeably to the constitution," and instead decide cases agreeably to judicial precedent. *Marbury*, 5 U.S. at 180; *see also*, U.S. Const. art. VI. Reliance upon precedents such as *Lemon* and *McCreary*[3] is a poor substitute for the concise language of the Establishment Clause and raises the rule of man above the rule of law.

II. THE BRONX HOUSEHOLD OF FAITH'S USE OF SCHOOL FACILITIES IS NOT A "LAW RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S.

---

[3] This Court should bear in mind that, just as *Lemon* was a substantial departure from the actual wording of the Establishment Clause, *McCreary* is a substantial departure from *Lemon*. *Lemon* simply held that the law must have "a secular purpose," but did not say the secular purpose had to be the *only* purpose, or even the *primary* purpose. Subsequent cases, such as *Aguillard v. Edwards*, 482 U.S. 578 (1987), held that the secular purpose could not be a "sham" purpose, but until *McCreary* this Court had never held that the secular purpose must predominate over any religious purpose. This Court should be hesitant to base constitutional decisions on a framework that represents a departure from another departure from the Establishment Clause itself.

Const. amend I. Regardless of whether the Bronx Household of Faith engages in religious worship on public school grounds, granting the Bronx Household of Faith equal access does not constitute a "law respecting an establishment of religion."[4]

A. It is not a "law."

At the time of the ratification of the First Amendment, Sir William Blackstone defined a "law" as "a rule of civil conduct . . . commanding what is right and prohibiting what is wrong." 1 W. Blackstone, *Commentaries on the Laws of England* 44 (U. Chi. Facsimile Ed. 1765). Several decades later, Noah Webster's 1828 Dictionary defined "laws" as "*imperative* or *mandatory*, commanding what shall be done; *prohibitory*, restraining from what is to be forborn; or *permissive*, declaring what may be done without incurring a penalty." N. Webster, *American Dictionary of the English Language* (Found. for American Christian Educ. 2002) (1828) (emphasis in original). Alexander Hamilton explained the essential attributes of a law in *Federalist No. 15*:

> It is essential to the idea of a law, that it be attended with a sanction; or in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws

---

[4] *Amicus* will not address herein the compelling argument that the Establishment Clause, with its restriction upon only "Congress," should not be "incorporated" against the states and local governments through the guise of the Fourteenth Amendment. Such an argument is a worthy pursuit for another brief (or book), but is hardly necessary to the textual arguments raised in this brief.

> will in fact amount to nothing more than advice or recommendation.

The Federalist No. 15, at 72 (Alexander Hamilton) (Carey & McClellan eds. 2001).

The Bronx Household of Faith's use of school facilities is an agreement, an arrangement, or, at most, a policy. It is not a "law."

B. It does not "respect an establishment of religion."

The Bronx Household of Faith's use of school facilities does not violate the Establishment Clause because it does not "respect," *i.e.*, concern or relate to, "an *establishment* of *religion*." U.S. Const. amend. I (emphasis added.).

1. The definition of "religion"

The original definition of "religion" as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, was quoted by James Madison in his *Memorial and Remonstrance* in 1785, was referenced in the North Carolina, Rhode Island, and Virginia ratifying conventions' proposed amendments to the Constitution, and was echoed by the United States Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in

Everson v. Bd. of Educ., 330 U.S. 1 (1947).[5] In all these instances, "religion" was defined as:

> *The duty which we owe to our Creator, and the manner of discharging it.*

Va. Const. of 1776, art. I, § 16 (emphasis added); *see also*, James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, *reprinted in* 5 *Founders' Constitution* at 82; *The Complete Bill of Rights* 12 (Neil H. Cogan ed. 1997); *Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13. According to the Virginia Constitution, those duties "can be directed only by reason and conviction, and not by force or violence." Va. Const. of 1776, art. I, § 16.

In *Reynolds*, the United States Supreme Court stated that the definition of "religion" contained in the Virginia Constitution was the same as its counterpart in the First Amendment. *See Reynolds*, 98 U.S. at 163-66. The Court thereby found that the duty not to enter into a polygamous marriage was not religion—that is, a duty owed solely to the Creator—but was "an offense against [civil] society," and therefore, was "within the legitimate scope of the power of . . . civil government." *Id.* In *Beason*, the Supreme Court affirmed its decision in *Reynolds*, reiterating that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of

---

[5] Later in *Torcaso v. Watkins*, 367 U.S. 488 (1961), the U.S. Supreme Court reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent. *See Torcaso*, 367 U.S. at 492 n.7.

"religion." *See Beason*, 133 U.S. at 342 ("[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.").

As the constitutional definition makes clear, not everything that may be termed "religious" meets the definition of "religion." "A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God." H. Rep. No. 83-1693 (1954). For example, from its inception in 1789 to the present, Congress has opened its sessions with prayer, a plainly religious exercise; yet those who drafted the First Amendment never considered such prayers to be a "religion" because the prayers do not mandate the duties that members of Congress owe to God or dictate how those duties should be carried out. *See Marsh v. Chambers*, 463 U.S. 783, 788-789 (1983). To equate all that may be deemed "religious" with "religion" would eradicate every vestige of the sacred from the public square. The Supreme Court in *Van Orden* stated that such conflation is erroneous: "Simply having *religious* content or promoting a message consistent with *religious* doctrine does not run afoul of the Establishment Clause."[6] *Van Orden*, 545 U.S. at 678 (emphasis added).

---

[6] [Even *Lemon*] does not require a relentless extirpation of all contact between government and religion. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage, and the Establishment Clause permits government some latitude in recognizing the central role of religion in society. Any approach less sensitive to our heritage would border on latent hostility to religion, as it would require government in all its multifaceted roles to acknowledge only

In *Zorach v. Clauson,* 343 U.S. 306, 314 (1952), the Supreme Court stated, "We are a religious people whose *institutions presuppose* a divine being." (Emphasis added.) And in *McGowan v. Maryland*, 366 U.S. 420, 562-63 (1961) (dissenting opinion), Justice Douglas declared,

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect. The Declaration of Independence stated the now familiar theme: "We hold these truths to be self evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." And the body of the Constitution as well as the Bill of Rights enshrined those principles.

2. The definition of "establishment"

Nor is the Bronx Household of Faith's use of school facilities an "establishment" of religion. An "establishment" of religion, as understood at the time of the adoption of the First Amendment, involved "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*, 213

> the secular, to the exclusion and so to the detriment of the religious.

County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 576 (1989).

(Weisman pub. 1998) (1891). The "establishment of religion" with which the Founders were most familiar was that of England, in which the Church of England was the official church, received tax support, the King or Queen was the official head, and dissenters suffered substantial disabilities or worse. And in the Virginia colony, "where the Church of England had been established [until 1785], ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches." *Newdow*, 542 U.S. at 52 (Thomas, J., concurring in the judgment). In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he "apprehended the meaning of the [Establishment Clause] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Cong*. 757 (1789) (Gales & Seaton's ed. 1834). Justice Joseph Story explained in his *Commentaries on the Constitution* that "[t]he real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government." 2 Joseph Story, *Commentaries on the Constitution* § 1871 (1833).

The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the army and navy, stating that an "establishment of religion" must have

> a creed defining what a man must believe; it must have rites and ordinances which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rights; it must have tests for the submissive, and penalties for the non-conformist. *There never was an established religion without all these*."

H.R. Rep. No. 33-124 (1854) (emphasis added). Therefore, an "establishment involved 'coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.'" *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring) (citations omitted).

At the time the First Amendment was adopted in 1791, "five of the nation's fourteen states (Vermont joined the Union in 1791) provided for tax support of ministers, and those five plus seven others maintained religious tests for state office." Mark A. Noll, *A History of Christianity in the United States and Canada* 144 (1992). To avoid entanglements with the states' policies on religion and to prevent fighting among the plethora of existing religious sects for dominance at the national level, the Founders, via the Establishment Clause of the First Amendment, sought to prohibit Congress from setting up a national church "establishment."[7]

---

[7] *See, e.g.*, Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 441 (1840):

> We do not attribute this prohibition of a national religious establishment to an indifference to religion in general, especially to Christianity, (which none could hold in more reverence, than the framers of the Constitution,) but to a dread by the people of the influence of ecclesiastical power in

The Bronx Household of Faith's use of school facilities does not create, involve, or concern an "*establishment* of religion." It only accords to the Bronx Household of Faith the same access to public facililties that is enjoyed by every other organization.

III. REGULAR USE OF THE U.S. CAPITOL BUILDING FOR SUNDAY MORNING WORSHIP SERVICES IN THE 1800s FURTHER DEMONSTRATES THAT RELIGIOUS SERVICES ON PUBLIC PROPERTY DO NOT VIOLATE THE ESTABLISHMENT CLAUSE AS INTENDED BY ITS FRAMERS.

According to the U.S. Library of Congress, the chamber of the U.S. House of Representatives was regularly used for Sunday morning religious services beginning at least by 1803 and continuing at least until the 1860s:

> Within a year of his inauguration, Jefferson began attending church services in the House of Representatives. Madison followed Jefferson's

---

matters of government; a dread, which their ancestors brought with them from the parent country, and which, unhappily for human infirmity, their own conduct, after their emigration, had not in any just degree, tended to diminish. It was also obvious, from the numerous and powerful sects existing in the United States, that there would be perpetual temptations to struggle for ascendancy in the National councils, if any one might thereby hope to found a permanent and exclusive national establishment of its own, and religious persecutions might thus be introduced, to an extent utterly subversive of the true interests and good order of the Republic. The most effectual mode of suppressing this evil, in the view of the people, was, to strike down the temptations to its introduction.

> example, although unlike Jefferson, who rode on horseback to church in the Capitol, Madison came in a coach and four. Worship services in the House--a practice that continued until after the Civil War--were acceptable to Jefferson because they were nondiscriminatory and voluntary. Preachers of every Protestant denomination appeared. (Catholic priests began officiating in 1826.) As early as January 1806 a female evangelist, Dorothy Ripley, delivered a camp meeting-style exhortation in the House to Jefferson, Vice President Aaron Burr, and a "crowded audience." Throughout his administration Jefferson permitted church services in executive branch buildings. The Gospel was also preached in the Supreme Court chambers.
>
> Jefferson's actions may seem surprising because his attitude toward the relation between religion and government is usually thought to have been embodied in his recommendation that there exist "a wall of separation between church and state." In that statement, Jefferson was apparently declaring his opposition, as Madison had done in introducing the Bill of Rights, to a "national" religion. In attending church services on public property, Jefferson and Madison consciously and deliberately were offering symbolic support to religion as a prop for republican government.[8]

The fact that Congress authorized this use of the House chamber only a few years after Congress

---

[8] U.S. Library of Congress, *Religion and the Founding of the American Republic,* http://www.loc.gov/exhibits/religion/religion.html.

adopted the First Amendment demonstrates that Congress did not consider regular religious services in public buildings to be a violation of the Establishment Clause. The fact that Thomas Jefferson, author of the Virginia Statute of Religious Liberty and of the "wall of separation" metaphor, and James Madison, commonly called the "father of the Constitution" and primary author of the First Amendment, regularly attended these religious services demonstrates that they found such services consistent with the First Amendment.

If these leading Framers saw no Establishment Clause problem with regular church services in the U.S. House of Representatives chamber, certainly they would have seen no Establishment Clause problem with church services in a public school building.

And the sharing of physical facilities works both ways. In 1619 the first Virginia House of Burgesses met in the church in Jamestown, VA. Historically and at present, local governments commonly use church buildings as polling places for civic elections.

IV. THE BOARD OF EDUCATION CANNOT USE AN UNFOUNDED CONCERN ABOUT THE ESTABLISHMENT CLAUSE TO JUSTIFY AN INFRINGEMENT OF THE BRONX HOUSEHOLD OF FAITH'S FREE SPEECH, FREE EXERCISE, AND EQUAL PROTECTION RIGHTS.

The Board of Education and the Second Circuit Court of Appeals contend that the Board may properly distinguish between religious speech and "religious worship services" in determining for what purposes

school facilities may be used during non-school hours. In so doing, they circumvent if not openly defy the clear rulings of this Court.

In *Widmar v. Vincent,* 454 U.S. 263 (1981), this Court clearly held, in an 8-1 decision, that allowing a religious organization to meet in campus facilities did not constitute an Establishment Clause violation, and therefore the Establishment Clause did not require the University to infringe the organization's free speech rights by refusing to allow the organization to meet in campus facilities. The one dissenting vote was that of Justice White, who contended that is not protected by the Free Speech Clause because it is protected by the Free Exercise Clause instead. The majority specifically refuted Justice White's argument, calling it a "novel argument" and holding it invalid for three reasons: (1) There is no clear distinction between "singing hymns, reading scripture, and teaching biblical principles" and unprotected "worship." (2) Even if there were a valid distinction, trying to make these distinctions would involve excessive entanglement of government with religion; and (3) No such distinction appears in the language or history of the First Amendment.

The lone dissenter, Justice White, seems to have abandoned that position, because in *Board of Education of Westside Community Schools v. Mergens,* 496 U.S. 226 (1990), he joined the Court's opinion upholding the constitutionality of the Equal Access Act which required public schools to provide equal access to religious student groups. Then, in *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993), Justice White authored the Court's opinion holding that a school district's rental

of a high school auditorium to a church did not violate the Establishment Clause, and therefore the Establishment Clause could not be used to justify the School District's refusal to rent a high school auditorium to the church. After Justice White's retirement, the Court ruled in *Good News Club v. Milford Central School,* 533 U.S. 98 (2001), that the school could not prohibit the Good News Club, a ministry of Child Evangelism Fellowship, from using school facilities to sign songs, read Bible lessons, memorize Scripture, and pray.

In a feeble attempt to justify its departure from the clear holdings of this Court, the Second Circuit argued that the case at hand is different from *Widmar, Mergens, Lamb's Chapel,* and *Good News Club,* in that the Bronx Household of Faith uses the facilities on a regular basis and uses them for "worship" rather than religious speech. This is an invalid distinction. The religious groups in *Widmar, Mergens,* and *Good News Club* also used school facilities on a regular basis. Even if it were possible to distinguish between religious speech and worship, the courts lack the jurisdiction or the competence to make these distinctions. For example, is the singing of Gospel hymns speech or worship? What about a choral performance of Handel's *Messiah?* If teaching religion is permissible but worship is not, does this mean the church could rent the facility for Sunday school but not for the church service? Does this depend on the individual's intent and motivation? What individual? The pastor? The choir? The parishioner? A visitor? In making such distinctions, the school would have to monitor the meetings and services and analyze what was happening. This would constitute the very

"excessive entanglement" the various Establishment Clause tests are supposedly intended to prevent.

Furthermore, even if worship does not constitute "pure speech," it is undoubtedly "expressive activity" and/or "symbolic speech" which is fully protected by the First Amendment.

The Second Circuit suggests that reasonable concerns about the Establishment Clause are sufficient justification for infringing a religious organization's free speech and free exercise rights. But this Court has never held that a religious group's use of school facilities under such circumstances constitutes an establishment of religion; in fact, in every case the Court has considered involving similar circumstances, the Court has held it was not an Establishment Clause violation. An unreasonable, unfounded, or irrational concern about the Establishment Clause does not justify infringing a person's or group's freedom of expression. The Second Circuit cannot use its own disagreement with this Court's rulings as the basis for discriminating against the Bronx Household of Faith.

CONCLUSION

"When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, [the courts] should not hesitate to resolve the tension in favor of the Constitution's original meaning." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 523 (2005) (Thomas, J., dissenting). Such a clash exists in this case between the shifting sands of Establishment Clause jurisprudence in religious display cases and the fixed, original words of

the Establishment Clause. The proper solution is to fall back to the foundation, the "Constitution's original meaning."

All of the traditional reasons for granting certiorari are present in this case. The case involves issues of major constitutional importance. Every school board across the nation is at least potentially affected by this issue. The lower courts are divided and are (or should be) looking to this Court for direction. And the Court's own authority is at stake, because the Second Circuit has used frivolous grounds to justify its defiance of this Court's rulings. It is therefore time for this Court to declare, in clear and unmistakable terms, that nondiscrimination against religion means exactly that.

For the reasons stated, this Honorable Court should grant Petitioners' writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

ROY S. MOORE
BENJAMIN D. DUPRÉ
JOHN A. EIDSMOE*
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com
**Counsel of Record*

October 27, 2011