UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE BRONX HOUSEHOLD OF FAITH, ROBERT HALL, and JACK ROBERTS,	:	01 Civ. 8598 (LAP)
Plaintiffs,	:	
-against-	:	
BOARD OF EDUCATION OF THE CITY OF NEW YORK and COMMUNITY SCHOOL DISTRICT NO. 10.	:	
Defendants.	:	

MEMORANDUM OF LAW OF *AMICI CURIAE* COUNCIL OF CHURCHES OF THE CITY OF NEW YORK, BROOKLYN COUNCIL OF CHURCHES, QUEENS FEDERATION OF CHURCHES, AMERICAN BAPTIST CHURCHES OF METROPOLITAN NEW YORK, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, NATIONAL ASSOCIATION OF EVANGELICALS, ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, AMERICAN BIBLE SOCIETY, AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT AND INTERESTS OF *AMICI CURIAE* 1
ARGUMENT 6
POINT I 6
THE USE OF SCHOOLS AND OTHER PUBLIC SPACES FOR RELIGIOUS SERVICES IS A WIDESPREAD AND TIME-HONORED PRACTICE 6
POINT II 8
TARGETING A RELIGIOUS PRACTICE VIOLATES THE FREE EXERCISE CLAUSE 8
POINT III 12
THE POLICY INTRUDES ON RELIGIOUS QUESTIONS IN VIOLATION OF THE ESTABLISHMENT CLAUSE 12
CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES

Bd. of Educ. of Westside Cmty. Schs. v. Mergens,
496 U.S. 226 (1990).....7, 16, 17

Bronx Household of Faith v. Bd. of Educ. of City of N.Y.,
650 F.3d 30 (2d Cir. 2011).....6, 9

Church of the Lukumi Babalu Aye, Inc. v. Hialeah,
508 U.S. 520 (1993).....11, 12

Colo. Christian Univ. v. Weaver,
534 F.3d 1245 (10th Cir. 2008).....15, 16

Employment Division v. Smith,
494 U.S. 872 (1990).....9

Fowler v. Rhode Island,
345 U.S. 67 (1953).....13, 14, 15

Fraternal Order of Police Newark Lodge No. 12 v. Newark,
170 F.3d 359 (3d Cir. 1999).....12

Good News Club v. Milford Cent. Sch.,
533 U.S. 98 (2001).....7, 17

Hartman v. Stone,
68 F.3d 973 (6th Cir. 1995).....12

Hedges v. Wauconda Cmty. Unit Sch. Dist.,
9 F.3d 1295 (7th Cir. 1993).....18

Hosanna-Tabor Evangelical Lutheran Church v. EEOC,
132 S. Ct. 694 (2012).....9, 10, 15, 17

Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,
508 U.S. 384 (1993).....7, 16

Larson v. Valente,
456 U.S. 228 (1982).....16

McDaniel v. Paty,
435 U.S. 618 (1978).....9

Peter v. Wedl,
155 F.3d 992 (8th Cir. 1998) 12

Rosenberger v. Rector and Visitors of the Univ. of Va.,
515 U.S. 819 (1995) 16, 17

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290 (2000) 16

Tenafly Eruv Ass'n v. Borough of Tenafly,
309 F.3d 144 (3d Cir. 2002) 12

Univ. of Great Falls v. NLRB,
278 F.3d 1335 (D.C. Cir. 2002) 15

Universidad Central de Bayamon v. NLRB,
793 F.2d 383 (1st Cir. 1985) 15

Welsh v. United States,
398 U.S. 333 (1970) 9

Widmar v. Vincent,
454 U.S. 263 (1981) 7, 14, 15, 17

Zobrest v. Catalina Foothills School District,
509 U.S. 1 (1993) 17

STATUTES AND LEGISLATIVE HISTORY

132 CONG. REC. S7774 (daily ed. July 27, 2000) 8

132 CONG. REC. S7777 (daily ed. July 29, 2000) 8

Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, et. seq. 7

OTHER AUTHORITIES

Thomas C. Berg, et al., *Religious Freedom, Church–State Separation, and the Ministerial Exception,* 106 *Nw. U. Law Rev. Colloquy* 175 (2011) 10, 11

Carl H. Esbeck, *"Play in the Joints Between the Religion Clauses" and Other Supreme Court Catachreses*, 34 Hofstra L. Rev. 1331, 1333-36 (2006) 17

C.T. Foster, *Use of Public School Premises for Religious Purposes During Nonschool Time*, 79 A.L.R.2d 1148 (2007) 8

Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 Minn. L. Rev. 1047, 1088 (1996) 17

Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003) 17

Religion and the Founding of the American Republic, *available at* http://www.loc.gov/exhibits/religion/rel03.html. 6, 7

Craig D. Townsend, *Faith in Their Own Color: Black Episcopalians in Antebellum New York City* ch. 5 (2005) 7

U.S. Congregational Life Survey, *available at* http://www.uscongregations.org/challenges.htm 7

PRELIMINARY STATEMENT AND INTERESTS OF *AMICI CURIAE*

The Council of Churches of the City of New York, Brooklyn Council of Churches, Queens Federation of Churches, American Baptist Churches of Metropolitan New York, National Council of the Churches of Christ In The USA, General Conference of Seventh-day Adventists, National Association of Evangelicals, Ethics & Religious Liberty Commission of the Southern Baptist Convention, the American Bible Society, and the Christian Legal Society (collectively, the "*Amici*") submit this memorandum of law in support of the plaintiffs' motion for summary judgment.

The *Amici* and the diverse congregations they represent all share a common commitment to religious liberty, but they do not all share a common definition of "religious worship service." This lack of a common definition for most congregations' core function is one reason why it is vitally important that religious liberty protect the right of all citizens to worship according to their distinctive faith traditions. It is also why government officials necessarily lack the competence to assess whether a group of citizens is engaged in an impermissible "religious worship service" rather than a "permissible event."

The **Council of Churches of the City of New York**, organized in 1895, is the oldest continuing council of churches in the United States. It is an ecumenical coalition of the major representative religious organizations representing Protestant, Anglican, and Orthodox Christian denominations having ministry in the City of New York. It is governed by a Board of Directors comprised of the bishop or equivalent officer of each local diocese, association, synod, presbytery, conference, or district of its member denominations and of the president and executive officer of the local councils of churches serving in each of the boroughs of the City of New York. The leadership represented by the Council of Churches of the City of New York is aware that congregations often have need to use non-owned space for worship when organizing

or when undergoing renovation or replacement of their own place of worship. It regards the policy of the New York City Board of Education as evidencing a hostility toward religion and religious worship which is inconsistent with First Amendment purposes.

The **Brooklyn Council of Churches** continues the work begun in 1829 by the Brooklyn Church and Mission Federation. It is governed by a Board of Managers elected by delegates from its member churches in Brooklyn representing the broad diversity of the Christian community in the Borough of Brooklyn, City of New York. Many of these churches meet the needs of their surrounding communities by housing mentoring programs, community meetings, the homeless, day care centers, food pantries, and soup kitchens. With nearly 1,900 congregations in Brooklyn, some will often have need to rent space temporarily because of damage to their sanctuary or because a dramatic growth in attendance occurs due to neighborhood development and renewal. A church may request the use of public school facilities to meet these temporary needs. The Brooklyn Council of Churches regards the Board policy as discriminatory and hostile to religious congregations by denying them access to public school facilities which are otherwise unused at the time.

The **Queens Federation of Churches**, was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of an equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry. The Queens Federation of Churches has appeared as *amicus curiae* previously in a variety of actions for the purpose of defending religious liberty. The Federation and its member congregations are vitally concerned for the

protection of the principle and practice of religious liberty as manifest in the present action. The Federation has assisted congregations in Queens which have been affected by the Board of Education's discriminatory policy.

The **American Baptist Churches of Metropolitan New York** is a Region of the American Baptist Churches in the USA, a non-profit religious organization of Baptist Churches and Mission Societies. The American Baptist Churches of Metropolitan New York is composed of 192 Baptist churches located within the five counties comprising New York City (Bronx, Kings, New York, Queens, and Richmond), as well as Nassau, Suffolk, and Westchester. The majority of its member churches are within New York City. Religious freedom is a core belief among Baptists. Efforts to suppress or deny the free expression of religious beliefs and practices by governmental entities have been and are a source of great concern. Further, the density of New York City, with its stringent land use regulations and extraordinarily high construction costs, creates burdens on houses of worship to find and construct places of worship. Weekend use of public school facilities offers relief to worshiping communities' need for space when disasters such as fires or floods strike, as well as for congregations needing space while trying to find or construct a permanent facility. In the past, several of its congregations have been permitted to rent public school facilities on the weekends when there has been fire damage and ongoing renovations to their permanent facilities. This has been in keeping with the public schools' policy to make space available for community organizations. The Board's decision to ban houses of worship from the use of public school facilities on the weekends is discriminatory and prohibits freedom of religious exercise.

The **National Council of the Churches of Christ in the USA**, also known as the National Council of Churches, is a community of 37 Protestant, Anglican, Orthodox, historic

African American and Living Peace member faith groups which include 45 million persons in more than 100,000 local congregations in communities across the nation. Its positions on public issues are taken on the basis of policies developed by its General Assembly. The National Council of Churches is an active defender of religious liberty. It is concerned that congregations of its member and other Christian communions, as well as congregations of other faiths, be able to use public facilities on the same basis as other nonprofit organizations and associations and not be denied access by a creative misuse of the Establishment Clause.

The **General Conference of Seventh-day Adventists** is the highest administrative level of the Seventh-day Adventist church and represents nearly 59,000 congregations with more than 16 million members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,000 congregations with more than one million members. The church has congregations in all fifty states. The Seventh-day Adventist Church has a strong interest in maintaining the freedom of its members to meet in public places.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical societies, missions, nonprofits, colleges, seminaries, and independent churches. Its members are mission-oriented and often rent public spaces, particularly for new congregations and community groups that do not own a building. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that religious freedom is God-given and that the government does not create such freedom, but is charged to protect it. NAE is grateful for the American legal tradition safeguarding religious freedom and believes that this jurisprudential heritage should be maintained in this case.

The **Ethics & Religious Liberty Commission** ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 44,000 churches and 16.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for SBC churches. The Constitution's guarantee of equal access to public meeting space within their region of ministry is crucial to the ability of SBC churches and other religious organizations to fulfill their divine mandate.

The **American Bible Society** ("ABS"), established in 1816 and based in New York City, works to make the Bible available to every person in a language and format each can understand and afford. ABS partners with churches, national Christian ministries, and the global fellowship of United Bible Societies to help touch millions of lives hungry for the hope of the Bible.

The **Christian Legal Society** ("Society") is a nonprofit, interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at numerous accredited law schools. The Society's legal advocacy and information division, the Center for Law & Religious Freedom ("Center"), works, in state and federal courts, for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations. The Center strives to preserve religious freedom in order that men and women might be free to do God's will, and because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Among such inalienable rights is the right of religious liberty.

ARGUMENT

As the *Amici* can amply testify, this case is of critical importance because religious organizations across New York City frequently use the New York City schools and other public spaces for services and other meetings. After setting this tradition of use of public facilities in context, the *Amici* address these important issues:

1. Does the Board policy, which expressly prohibits religious services in a public space, violate the Free Exercise Clause's proscription of any law prohibiting the free exercise of religion?

2. Can school authorities distinguish between religious activities that constitute "worship services" and those that do not without becoming entangled in disputes over, and definitions of, religious practices, violating the Establishment Clause?

The short answer is that the Board's policy violates the Religion Clauses in multiple ways, each of which independently requires the policy to be struck down.

POINT I

THE USE OF SCHOOLS AND OTHER PUBLIC SPACES FOR RELIGIOUS SERVICES IS A WIDESPREAD AND TIME-HONORED PRACTICE

The regulation at issue expressly prohibits religious organizations from conducting "religious worship services" in a public space generally made available for other community organizations for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community." *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.*, 650 F.3d 30, 33 (2d Cir. 2011). This is inconsistent with historical practice and threatens the equal access of religious observance to public space still common in our country.

Public facilities have been made available on a nondiscriminatory basis from the outset of our nation's history, including the House of Representatives chambers, where Presidents Jefferson and Madison attended services, and the first Treasury Building, where several denominations conducted church services. *See Religion and the Founding of the American*

Republic, *available at* http://www.loc.gov/exhibits/religion/rel03.html. On the other end of the power spectrum, African-American congregants in the North in pre-Civil War times were ostracized by white congregations, and, because they often could not afford their own church buildings, they, too, frequently resorted to public buildings for religious services. *See* Craig D. Townsend, *Faith in Their Own Color: Black Episcopalians in Antebellum New York City* ch. 5 (2005).

The need of congregations-especially smaller, less affluent ones-to use public facilities is still present today. The average size of a Christian congregation in the United States is fewer than 100 persons, and many smaller congregations cannot afford to own their own property. U.S. Congregational Life Survey, *available at* http://www.uscongregations.org/challenges.htm (last visited Sept. 23, 2011). Thus, they frequently use public properties, for free or by rental, to conduct their meetings and services. Affordable, temporary access to public places may be the only option for such organizations to gather and practice their respective faiths.

This is true in New York City, as demonstrated by the *Amici*. It is also reflected in the Supreme Court's case law[1] and is amply demonstrated by congressional findings and enactments. For instance, the legislative history of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et. seq.* ("RLUIPA"), reflects religious organizations' widespread need for access to facilities, such as in the following excerpt: "In a *significant number of communities*, land use regulation makes it difficult or impossible to build, buy or *rent*

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[1] *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (religious club to host Bible lessons and singing at public school); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (church to show religious-oriented film series at public school); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990) (religious student group to use public school facilities for prayer and Bible discussion); *Widmar v. Vincent*, 454 U.S. 263 (1981) (religious student group to use state university facilities for worship and religious discussion).

space for a new house of worship, whether large or small." 132 CONG. REC. S7777 (daily ed. July 29, 2000) (Melissa Rogers, then-General Counsel, Baptist Jt. Comm. on Pub. Affairs (July 14, 2000)) (emphasis added). RLUIPA was enacted because "[c]hurches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. *The right to* build, buy, *or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes.*" 132 CONG. REC. S7774 (daily ed. July 27, 2000) (Jt. Stmt. of Sens. Hatch and Kennedy on RLUIPA, Ex. 1) (emphasis added). Congress found RLUIPA necessary in part because congregations have difficulty building their own facilities: "zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways." *Id.*

In short, both history, statutes, and case law reflect the widespread and time-honored use of schools and other public property for religious uses. *See generally* C.T. Foster, *Use of Public School Premises for Religious Purposes During Nonschool Time*, 79 A.L.R.2d 1148 (2007) (collecting cases). The Board's policy imposes a substantial burden on religious congregations in the New York City area.

POINT II

TARGETING A RELIGIOUS PRACTICE VIOLATES THE FREE EXERCISE CLAUSE

The Court properly held in its decision granting a preliminary injunction that the Board policy violates the Free Exercise Clause. And while the Court amply demonstrated that the Board could not show a compelling interest for the policy or that it was narrowly tailored to effectuate such an interest, the policy may not be saved by any such analysis, because it

impermissibly intrudes on matters relating to a church's "right to shape its own faith and mission." *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694, 706 (2012).

All concede that religious worship entails the exercise of religion. Thus, at the most elementary level, the Board's policy violates the proscription that a government "make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. 1. The Supreme Court specified in *Employment Division v. Smith*, 494 U.S. 872, 877-88 (1990), that the "exercise of religion" includes "assembling with others for a worship service, participating in sacramental use of bread and wine, [and] proselytizing"—the very actions the Board has prohibited here.[2]

The Board's policy is not one that feigns neutrality on its face, hiding an ulterior purpose to target religious exercise. The Board's policy openly and notoriously singles out "religious worship services" for exclusion from the public space that is otherwise available for other social and civic functions. In so doing, the Board has trespassed into territory expressly forbidden to it by the Constitution (the state "shall make no law"):

> The government may not . . . impose special disabilities on the basis of religious views or religious status . . . . [A] State would be "prohibiting the free exercise of religion" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. *It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes*," or to prohibit bowing down before a golden calf.

Id. at 877-88. (emphasis supplied).

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[2] The speech/event distinction of the Second Circuit majority, 650 F.3d at 37-38, has no validity in the Religion Clauses context, for those clauses cover both religious words and practices. Justice White wrote in *Welsh v. United States*, 398 U.S. 333, 372 (1970), "The Free Exercise Clause, however, has a deeper cut: it protects conduct as well as religious belief and speech." And Justice Brennan stated, "The Establishment Clause does not license government to treat religion and those who teach *or practice* it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) (emphasis supplied).

This holding is directly applicable here. If the "service" involved were not a religious service but a social one, it could include every single, objective attribute of a religious worship service - *e.g.*, singing and speaking on "moral" and "self-improvement" subjects and even praying - without transgressing the Board's policy. But once these activities are part of a religious event, they suddenly become outlawed. The Board singles out a particular religious exercise for adverse action, but the Free Exercise Clause forbids the state from doing exactly that.

The Supreme Court has recently instructed that, if a law intrudes into areas that are central to church governance and mission, no state interest is sufficient to allow it to be applied. In *Hosanna-Tabor*, the Court had before it, unlike here, a law of general applicability. Nevertheless, it ruled that the Constitution required a categorical exception when the generally applicable law would be applied to interfere with ecclesiastical matters of governance and mission, in that case the dismissal of a church school teacher/minister. The Court observed that "the Free Exercise Clause . . . protects a religious group's right to shape its own faith and mission through its appointments," 132 S. Ct. at 706, and rejected the government's suggestion that the interests served by the statute should be balanced against the church's interests: "the First Amendment has struck the balance for us." *Id.* at 706-07, 710. The ability of a church to direct and determine its own worship services, without second-guessing by, or influence of, the state, is no less a matter of church internal governance and "faith and mission" for which the Free Exercise Clause has already struck the balance.

This point was elaborated upon in *Religious Freedom, Church-State Separation, and the Ministerial Exception*, where the authors noted:

> Reasonably constructed and applied, this rule [*Hosanna-Tabor*] helps civil decision makers avoid deciding essentially religious

> questions. In addition, and more importantly, it protects the fundamental freedom of religious communities to educate their members and form them spiritually and morally.

See Thomas C. Berg, et al., *Religious Freedom, Church–State Separation, and the Ministerial Exception,* 106 *Nw. U. Law Rev. Colloquy* 175 (2011).

Of course, the Board's policy cannot be saved by the fact that a prospective renter identifies whether what will happen in the school as a "religious worship service" or not. As discussed further below, different religious groups have varying beliefs and traditions for what is called a "worship service," and one group may label events a "worship service" (*e.g.*, a Bible lecture and singing) when another may perform exactly the same events but not call it a "worship service" (*e.g.*, because it does not include celebration of the Eucharist or is not officiated by clergy). This will allow discrimination among sects, violating the neutrality principle inherent in the Religion Clauses—a discrimination that would only be exacerbated by a government official trying to determine what does and what does not qualify as a "religious worship service" under the Board policy.

Even were the Board policy not an express prohibition of the free exercise of religion that intruded into internal church governance, it would still fail the "strict scrutiny" analysis applied in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). There, the Supreme Court considered local ordinances that, on their face, were neutral and only prohibited cruelty to animals, but were designed to prohibit a small sect's religious practice. The Court looked behind the face of the ordinances to find an unconstitutional infringement of the free exercise of religion. *Id.* at 534, 545-46. If the ordinances in *Lukumi* needed redress by the High Court, how much more does this Board policy? It is express, and it targets the full panoply of religious worship services. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue . . . prohibits conduct because it is undertaken for religious reasons." *Id.* at 532. The

Free Exercise Clause "protect[s] religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 543-44. Like in *Lukumi*, this Court must intervene to protect congregations whose free exercise rights would otherwise be abridged. For the reasons this Court stated in its decision granting a preliminary injunction, the Board policy cannot pass strict scrutiny.[3]

In summary, the open discrimination against religious worship expressed in the Board's policy is forbidden by the First Amendment, which outlaws any state prohibition of the free exercise of religion. No interest balancing is needed here, as the Board policy intrudes into church governance and mission. Regardless, at a minimum, strict scrutiny must be applied. As the discussion in the next section will further elaborate, the only compelling interest involved here is that the Board not discriminate against religion in general or among various religious groups.

POINT III

THE POLICY INTRUDES ON RELIGIOUS QUESTIONS IN VIOLATION OF THE ESTABLISHMENT CLAUSE

So what exactly is a "religious worship service"? The fact is that different religious organizations, including those represented by the *Amici*, have different traditions and doctrines that inform their individual answers to that question and result in strikingly different expressions

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[3] *See also Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002) (unconstitutional to enforce ordinance banning posting on power poles only against lechis placed by Orthodox Jews; no speech involved); *Fraternal Order of Police Newark Lodge No. 12 v. Newark*, 170 F.3d 359 (3d Cir. 1999) (unconstitutional to deny religious exemption from regulation banning police from having beards when accommodation granted for medical reasons); *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998) (unconstitutional to prohibit special education services only at religious schools); *Hartman v. Stone*, 68 F.3d 973 (6th Cir. 1995) (unconstitutional to restrict government funding only for religious child-care providers).

of worship services. A Catholic straying into a Protestant Pentecostal worship service likely would not be able to recognize it as a worship service. The Board cannot get into the business of deciding what does and does not qualify as a "religious worship service" without entangling itself in issues forbidden to its authority and without discriminating among religious organizations and beliefs. A school administrator charged with enforcing the policy cannot be left only with, "I can't define it, but I know it when I see it." Any such "gut sense" of what worship is, inevitably, will be just one person's subjective feelings based on his personal experience of, and training in, religion. That is why the First Amendment forbids that the task be performed by the state.

First, the Supreme Court, from almost 60 years ago up to and including this year, has repeatedly instructed that the state has no power whatsoever to determine what constitutes "religious worship" and "religious worship services" and what does not. Any such exercise entangles the state with religious concerns and violates the neutrality principle ensconced in the Religion Clauses, causing the state to favor some religious expressions and traditions over others.

In *Fowler v. Rhode Island*, 345 U.S. 67 (1953), the Supreme Court confronted the same situation as the Board policy but from the opposite direction—a city ordinance allowed religious worship services in a public park but prohibited other religious speech. The city shut down a Jehovah's Witnesses "meeting" at which a minister gave a "talk," while it permitted Catholic and mainline Protestant "services" in the park. The ordinance in *Fowler* required exactly the same line-drawing as the Board's policy requires here. The holding in *Fowler* is directly applicable, *i.e.*, no arm of the state under our constitutional system has authority to decide what is a

"worship service" and what is just a religious talk or other activity that somehow is different from a "service." *Id.* 345 U.S. at 69-70.

Striking down the ordinance, the Court in *Fowler* noted that the First Amendment guarantees evenhanded treatment of religious organizations:

> Church services normally entail not only singing, prayer, and other devotionals but preaching as well. . . . Appellant's sect has conventions that are different from the practices of other religious groups. Its religious service is less ritualistic, more unorthodox, less formal than some. . . . [I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment. Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings. Sermons are as much a part of a religious service as prayers. They cover a wide range and have as great a diversity as the Bible or other Holy Book from which they commonly take their texts. To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.

Id.

Officials in applying the Board's policy must attempt to distinguish "religious worship services" from other religious activities, such as Bible instruction, that fall short of "services." This is exactly the type of line-drawing that the Supreme Court in *Fowler* struck down as discriminatory.

The Supreme Court has consistently reaffirmed these principles. It is not a permissible judicial exercise to attempt to parse what is "religious services" content and what is not. The Court in *Widmar* found that distinguishing "worship" from other speech is an "impossible" task, 454 U.S. at 272 n.11, and that the distinction is "judicially unmanageable." *Id.* at 271 n.9. The Court explained:

> [E]ven if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to

> administer. Merely to draw the distinction would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.

Id. at 269 n.6. The Board policy creates exactly what *Fowler* and *Widmar* prohibit categorically, an intrusion by the state into matters of central ecclesiastical concern and a "continuing need to monitor group meetings to ensure compliance with the rule." *Widmar*, 454 U.S. at 272 n.11; *see also Fowler*, 345 U.S. at 70.

The Supreme Court recently reaffirmed these principles in *Hosanna-Tabor* when it also grounded its decision in both the Establishment and Free Exercise Clauses: "According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions. . . . [T]he First Amendment gives special solicitude to the rights of religious organizations." 132 S. Ct. at 703, 706. The authority to decide how to define and conduct a "religious worship service" is no less at the core of church governance. To accord to the state the power to decide what does and does not qualify as a "worship service" is to inject it into ecclesiastical decisions from which it must be walled off.[4]

But even if the Board's policy were facially neutral, which it is not, and did not require entanglement with religious questions, which it does, the Board's application of the policy would

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[4] *See also Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1258-67 (10th Cir. 2008) (striking down on entanglement grounds the state's determination as to which colleges were "pervasively sectarian" and which were not, without need to examine any governmental interest involved); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340-47 (D.C. Cir. 2002) (rejecting on entanglement grounds the agency's statutory interpretation that only universities of "substantial religious character" are exempt from the National Labor Relations Act); *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 398-406 (1st Cir. 1985) (opinion of Breyer, J.) (same).

unconstitutionally discriminate among sects. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). A statute that has that effect must be justified by a "compelling government interest" and be "closely fitted" to that interest. *Id.* at 246-47; *see Colo. Christian Univ.*, 534 F.3d at 1266-67 (noting that only Establishment Clause violations that discriminate among denominations can be justified by a compelling interest; others are categorically forbidden). For the reasons this Court enumerated in its opinion granting the preliminary injunction and that the plaintiffs further explain, the Board's policy cannot begin to meet these exacting standards.

Second, and fundamentally, in ruling on Establishment Clause concerns, the Supreme Court has often emphasized the critical distinction between private action and state-sponsored action. For fifty years, litigants have brought to the Supreme Court a steady flow of cases concerning religious speech in the public schools. And, for fifty years, the Supreme Court has decided those cases with remarkable consistency. Without a single exception in all that time, the Supreme Court's school cases are explained by the "'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.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 324 (2000) (*italics in original*), quoting *Mergens*, 496 U.S. at 250 (plurality opinion). *Accord Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 833-34 (1995) (collecting cases), The church's speech is clearly private speech, not governmental speech. *See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

Third, no legitimate "endorsement" concern is present when the Board makes its facilities open, as it does, to all religions and sects on a nondiscriminatory basis. The fact that more churches than mosques and synagogues use school facilities reflects simple demographics, not endorsement. The Establishment Clause only regulates the conduct of the state, requiring it to allow evenhanded access for religious purposes. In this way, the Religion Clauses are read in harmony, not in opposition.[5] *See Hosanna-Tabor*, 132 S. Ct. at 702. The contention that providing religious citizens evenhanded access to government facilities raises Establishment Clause concerns was put to rest by the neutrality principle articulated in many Supreme Court cases, including *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 8 (1993):

> Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Accord Rosenberger, 515 U.S. at 839, 842; *Mergens*, 496 U.S. at 252; *Widmar*, 454 U.S. at 269.

Fourth, if there were potential confusion generated by nondiscriminatory rental of school facilities for religious worship services, the solution is not to censor the religious speech, punishing those exercising their constitutional rights. As the Supreme Court instructed in *Good News Club*, falsely "perceived" Establishment Clause violations cannot trump actual free exercise violations. 533 U.S. at 119 (maj. opinion), 120-21 (Scalia, J., concurring). If there is perceived confusion, the solution is for the schools to make a simple disclaimer and, if desired,

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[5] *See also* Carl H. Esbeck, *"Play in the Joints Between the Religion Clauses" and Other Supreme Court Catachreses*, 34 Hofstra L. Rev. 1331, 1333-36 (2006); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2207 (2003); Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 Minn. L. Rev. 1047, 1088 (1996).

to use it as a teaching tool to instruct students and the public about our nation's First Amendment freedoms. The Seventh Circuit explained in a related context,

> Public belief that the government *is* partial does not permit the government to *become* partial . . . . The school's proper response is to educate the audience rather than squelch the speaker . . . . Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether the . . . schools can teach anything at all.

Hedges v. Wauconda Cmty. Unit Sch. Dist., 9 F.3d 1295, 1299-300 (7th Cir. 1993) (italics in original).

CONCLUSION

The Board's policy works great mischief. It prohibits the free exercise of religion and requires the government to discriminate against a religious practice as if it were disfavored, rather than expressly protected, under our Constitution. At a minimum, it requires public officials and courts to entangle themselves in distinguishing between "religious worship services" and other "religious speech and conduct" and to discriminate among various sects in doing so.

The *Amici* request that this Court declare the Board policy unconstitutional and issue a permanent injunction prohibiting its enforcement. It is critical for the *Amici* and their congregants to be able to exercise their religion freely and to be afforded their constitutionally protected access to public space on an even footing with all other groups.

Dated: April 20, 2012
New York, New York

Respectfully submitted,

CROWELL & MORING LLP

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CERTIFICATE OF SERVICE

BRUCE J. ZABARAUSKAS, hereby declares under penalty of perjury:

1. I am an attorney duly admitted to practice before the courts of the States of New York and California, and I am a member of the bar of this Court. On April 20, 2012, I caused a copy of the attached **Memorandum Of Law Of Amici Curiae The Council of Churches of the City of New York, Brooklyn Council of Churches, Queens Federation of Churches, American Baptist Churches of Metropolitan New York, National Council of the Churches of Christ In The USA, General Conference of Seventh-day Adventists, National Association of Evangelicals, Ethics & Religious Liberty Commission of the Southern Baptist Convention, the American Bible Society, and the Christian Legal Society In Support of Plaintiffs' Motion For Summary Judgment** to be served by first class mail upon the parties listed on the annexed service list, and at the addresses set forth on such service list.

2. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: April 20, 2012

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Replies, Opposition and Supporting Documents

1:01-cv-08598-LAP The Bronx Household, et al v. Board of Education, et al
APPEAL, ECF, REOPEN

U.S. District Court

Southern District of New York

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Case Number:	1:01-cv-08598-LAP
Filer:	National Council Of The Churches Of Christ In The USA American Bible Society Christian Legal Society And Additional Amici Council Of Churches Of The City Of New York Brooklyn Council of Churches Queens Federation Of Churches American Baptist Churches Of Metropolitan New York General Conference Of The Seventh-day Adventists National Association Of Evangelicals, Ethics And Religious Liberty Commission Of The Southern Baptist Convention
Document Number:	153

Docket Text:
MEMORANDUM OF LAW in Support re: [148] MOTION for Summary Judgment.. Document filed by American Baptist Churches Of Metropolitan New York, American Bible Society, Brooklyn Council of Churches, Christian Legal Society And Additional Amici, Council Of Churches Of The City Of New York, General Conference Of The Seventh-day Adventists, National Association Of Evangelicals, Ethics And Religious Liberty Commission Of The Southern Baptist Convention, National Council Of The Churches Of Christ In The USA, Queens Federation Of Churches. (Attachments: # (1) Certificate Of Service)(Zabarauskas, Bruce)

1:01-cv-08598-LAP Notice has been electronically mailed to:

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