

# No. 07-5291

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees

v.

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

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*  
SUPPORTING APPELLEES AND URGING AFFIRMANCE

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[The Board] permits certain activities in its schools during non-school hours, primarily to supplement schools' educational programs with additional educational, enrichment and recreational activities for children, and to enhance community support for schools. The policy prevents any congregation from using a public school for its worship service, or as a house of worship, and thus prevents the school from being identified with any one congregation in a way that could cause children and others to feel less welcome at the school, and potentially involve school officials in religious matters.

Br. 36 (citation omitted). That brief statement is just a paraphrase of the Board's Establishment Clause argument, which, as we discuss in Section C below, the district court correctly rejected.

As the Board candidly informed the district court, its adoption of the new SOP 5.11 was intended to "reinstigate a policy that would prevent any congregation from using a public school for its worship services." *Bronx Household*, 400 F. Supp. 2d at 599. That is, excluding worship services *was* the Board's purpose in adopting the new SOP, rather than a means to some other end. Such a policy cannot be characterized as defining a limited forum to include only certain speakers or subject matters. As noted above, excluding religious activity *because* it is religious is presumptively unlawful, whether it is analyzed- as discrimination against a religious viewpoint, *Good News Club*, 533 U.S. at 112, discrimination against speech because of its religious content, *Widmar*, 454 U.S. at 270, or even the targeting of religious conduct, *Church of the Lukumi Babalu Aye, Inc. v. City of*





























