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February 2, 2012

New York City Council
Committee on Education
250 Broadway
New York, NY 10007

RE: N.Y.C. Council Res. 1155-2011

Dear New York City Counsel Members:

Thank you for inviting me to testify regarding N.Y.C. Council Res. 1155-2011. By way of introduction, I hold the Paul R.Verkuil Chair in Public Law at the Benjamin N. Cardozo School of Law, Yeshiva University, where I specialize in church/state relations and constitutional law. I have published and lectured extensively in the field, as well as successfully litigated cutting-edge First Amendment issues. Before joining the faculty at Cardozo Law School, I clerked for Justice Sandra Day O'Connor at the United States Supreme Court.

The Supreme Court appropriately denied review in *Bronx Household of Faith v. New York Bd. of Education*, 650 F.3d 30 (2d. Cir. 2011), *cert denied* 132 S.Ct. 816 (2011), because the United States Court of Appeals for the Second Circuit decided the case correctly.

Bronx Household of Faith posed the question whether a church can make a public school its house of worship. The New York Board of Education and the Second Circuit said it could not and should not. The Second Circuit's reasoning was straightforward: the separation of church and state requires that even if public schools cannot exclude extracurricular clubs that are religious, they may not and need not operate as houses of worship.

The Facts of the Case

The parties to the case stipulated to the relevant facts: (1) The New York City Board of Education has a rule that prohibits the use of public schools for religious worship services. However, the Board allowed religious clubs and groups to use public schools, just as the Boy Scouts and other extracurricular clubs did, as long as the clubs'

and groups' activities were open to the general public; (2) the Bronx Household of Faith has used the Anne Cross Mersereau Middle School (M.S. 206B) for weekly Christian worship services, followed by a "fellowship meal"; (3) the school district does not charge rent or impose a fee for utilities (e.g., electricity, gas, or air conditioning) upon any extracurricular clubs, religious or otherwise; (4) Bronx Household of Faith dominates the building with its religious use of the premises on Sundays; and (5) Bronx Household of Faith excludes from its services and post-service meals anyone who is not baptized, is excommunicated, and/or advocates the Islamic religion.

If the Establishment Clause stands for anything, it must stand for the notion that it is not suitable for public schools to be churches. The Second Circuit's decision persuasively concludes that public school districts will likely, if not inevitably, commit Establishment Clause violations if they permit their schools to be used as houses of worship.

That is, in part, because the intensity of the religious worship use undoubtedly leads students to believe that the church and its views are being endorsed by the school, and therefore to be confused regarding the connection between the religious group and the public school. **Bronx Household of Faith is not open to the general public. Its exclusionary practices, while fine for a religious organization occupying its own rented or purchased space, are intolerable in a public school.**

Religious groups are not being prevented from using the New York public schools. There is a commonsense, meaningful distinction between student clubs that are open to all comers, and houses of worship where only believers may attend and participate.

The opposition to the decision is misguided. First, as noted above, the Second Circuit has ruled that it is likely unconstitutional for New York public schools to offer space to exclusive religious groups for worship services. Thus, the pending legislation, N.Y.C. Council Res. 1155-2011, to overturn the decision is likely unconstitutional as well.

Second, and more importantly from the taxpayers' perspective, Res. 1155-2011 is an invitation to federal litigation, which could last years and cost millions. In this economy, why would any elected official seriously consider enacting a law that is so obviously going to be heavily litigated, only to be held unconstitutional?

Third, many constituents should be outraged by Res. 1155-2011 – at least, if they can wade through all the misleading rhetoric: the bill endorses the use of public schools by groups that discriminate on the basis of religion and religious status, like the Bronx Household of Faith. The suggested bill, if passed, will open the door for white supremacist, misogynist, and anti-homosexual religious organizations to take up weekly residence in the public schools for the purpose of full-scale worship in gatherings actively engaging in discrimination. The Constitution would not permit the public schools to pick and choose between religious organizations seeking to make a public school their home.

Fourth, concerned New Yorkers need to understand that such a law is biased toward Christians, because the buildings are not going to be available on Fridays and Saturdays, but only on Sundays. So this is a Christian-friendly law, and New York is decidedly more diverse than that. The bill the Resolution supports violates the Establishment Clause and the Equal Protection Clause in two ways: first by opening public schools to gatherings that are discriminatory and not open to the public, and, second, by preferring only those religious groups that observe a Sunday Sabbath.

I urge the City Council to honor the United States Constitution and the lively diversity that makes New York the extraordinary city that it is. Res. 1155-2011 is unnecessary, unconstitutional, and unwise.

Sincerely,

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