

## ALERTS AND UPDATES

### "Religious Worship Services" After-Hours in School Facilities Prohibited by NYC Rule and Sustained by Second Circuit

June 14, 2011

**Case probably opens a Supreme Court debate about how the Establishment Clause and the Free Speech Clause interface.**

By a 2–1 vote, a panel of the U.S. Court of Appeals for the Second Circuit—in *The Bronx Household of Faith v. Board of Education of the City of New York*<sup>1</sup>—vacated a permanent injunction issued by a U.S. district court that had enjoined the enforcement of a policy prohibiting the use of the New York City Board of Education's school facilities after hours for "religious worship services." The Second Circuit's holding in favor of the Board of Education ended, at least for the moment, a decade-long battle over whether New York's public schools could be used for Sunday religious services.

The majority opinion, authored by Judge Leval, was based on: (i) the conclusion that the New York City Board of Education Rule did not constitute viewpoint discrimination because it did not seek to exclude expressions of religious points of view or of religious devotion, and (ii) the conclusion that the Board of Education reasonably sought to avoid a violation of the Establishment Clause of the U.S. Constitution.

Judge Calabresi's concurring opinion emphasized that the school in question was being used as a house of worship, thus suggesting a violation of the Establishment Clause. (This is close to the view that Duane Morris attorneys previously expressed in an amicus brief filed in the Second Circuit on behalf of the Association of the Bar of the City of New York.)

Judge Walker wrote a vigorous dissent, relying on his interpretation of the U.S. Supreme Court's 2001 opinion in *Good News Club*,<sup>2</sup> which permitted the after-hours use of school buildings for religious activities by the school's students. While the majority found religious worship to be distinguishable, it is highly likely that religious organizations using school properties for religious worship will seek to revisit the issue in the Supreme Court since the case involves the interface between the Free Speech Clause and the Establishment Clause.

#### For Further Information

If you have any questions about the information addressed in this *Alert*, please contact [Anthony J. Costantini](#), [Robert L. Byer](#), any [member](#) of Duane Morris' [Trial Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

#### Notes

1. *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 2011 U.S. App. LEXIS 11107 (2d Cir. N.Y. June 2, 2011).
2. *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

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