NO. _____

# 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*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

New York City allows tens of thousands of community groups to meet in its public schools after hours for any expression "pertaining to the welfare of the community," yet excludes "religious worship services." It justifies this exclusion based on a mere *concern* for violating the Establishment Clause. Bronx Household of Faith desires to rent one of the City's nearly 1,200 schools for worship services, and the City denied its request. The Second Circuit upheld the exclusion of "religious worship services," and thereby created conflicts with its sister courts of appeals on free exercise, establishment, and free speech issues.

The following questions warrant review:

1. Whether a government policy expressly excluding "religious worship services" from a broadly open forum violates the Free Exercise Clause and Establishment Clause.

2. Whether a government policy expressly excluding "religious worship services" from a broadly open forum violates the Free Speech Clause.

## PARTIES TO THE PROCEEDING

Petitioners are the Bronx Household of Faith and its two pastors, Robert Hall and Jack Roberts.

Respondents are the Board of Education of the City of New York and Community School District No. 10. During the litigation below, the Board of Education was renamed the New York City Department of Education.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Bronx Household of Faith is a non-profit corporation, exempt from taxation under 26 U.S.C. § 501(c)(3). It does not have parent companies and is not publicly held.

Petitioners Robert Hall and Jack Roberts are individual persons.

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## INTRODUCTION

Bronx Household of Faith, a church that serves one of the poorest neighborhoods in the Bronx, has been fighting for nearly twenty years for equal access to a broadly available public forum—the empty buildings of the New York City public schools during non-school hours. The New York City Department of Education ("Department"), alone among other major school districts in the country, has tried to exclude worship services from this forum through various policies, and the Second Circuit, virtually alone among other courts of appeals, has upheld that exclusion on multiple occasions.

The Second Circuit has issued five opinions in this ongoing dispute, and like most sequels, the opinions keep getting worse. The latest opinion is no exception. The panel majority upheld the Department's policy of excluding "religious worship services" from its facilities, flouting this Court's precedent, and resulting in multiple circuit conflicts on First Amendment issues. The Second Circuit's opinion below allows the Department to accept a vast number of community uses, including uses that involve prayer, religious teaching, religious songs, and worship, but exclude others that include the same speech merely because the Department labels them "religious worship services."

That the Second Circuit is out of step with this Court on equal access jurisprudence is not a new development, as the Court's precedent on this issue has been shaped by overruling previous Second Circuit decisions in *Good News Club, Bronx I*, and

*Lamb's Chapel*.[1] The departure from this Court's precedent and the conflict among the circuits that now exists can no longer go unchecked. Churches in New York City are on the brink of being expelled from a public forum they have used on an equal basis with other community groups for years, many with nowhere else to go in the communities they serve. This case involves issues of exceptional importance, not only to the Petitioners and other churches meeting in New York City schools, but also to our fundamental liberties of religious freedom and freedom of speech. The petition for writ of certiorari should be granted.

## DECISIONS BELOW

The Second Circuit has issued four decisions in this matter, and a fifth in a previous dispute between the parties. The Second Circuit's most recent fourth opinion reversing in part and vacating in part the judgment for Petitioners is reported at 750 F.3d 184 and reprinted at Petition for Writ of Certiorari Appendix ("App.") 1a. The Second Circuit's order denying rehearing en banc is unreported but reprinted in App.282a.

The District Court's opinion granting Petitioners' third motion for summary judgment is reported at 876 F. Supp. 2d 419 and reprinted at App.56a.

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[1] *See Good News Club v. Milford Cent. Sch.*, 202 F.3d 502 (2d Cir. 2000), *rev'd*, 533 U.S. 98 (2001); *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997), *overruled by*, *Good News Club*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch.*, 959 F.2d 381 (2d Cir. 1992), *rev'd*, 508 U.S. 384 (1993).

The District Court's opinion granting Petitioners' second motion for preliminary injunction is reported in 855 F. Supp. 2d 44 and reprinted at App.113a.

The Second Circuit's third opinion reversing judgment for the Petitioners is reported at 650 F.3d 30 and reprinted in App.165a. The District Court's opinion granting Petitioners' second motion for summary judgment is unreported but is reprinted in App.240a.

The Second Circuit's second opinion vacating the judgment for the Petitioners is reported at 492 F.3d 89. The District Court's opinion granting Petitioners' first motion for summary judgment is reported in 400 F. Supp. 2d 581 and reprinted at App.242a.

The Second Circuit's first opinion affirming the preliminary injunction in favor of Petitioners is reported at 331 F.3d 342. The District Court's opinion granting Petitioners' motion for preliminary injunction is reported at 226 F. Supp. 2d 401.

## JURISDICTION

The Second Circuit issued an opinion on April 3, 2014, and denied a timely petition for rehearing en banc on June 27, 2014. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

## PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The text of the First Amendment to the United States Constitution is set forth in App.330a.

New York Education Law § 414 (2014), the statutory basis invoked for the government policy under review, is reprinted in App.324a.

Chancellor's Regulation D-180 is the policy under review and is reprinted in App.286a.

## STATEMENT OF THE CASE

### I. Factual Background

#### A. The Availability of the Department's Public Schools for Community Use.

Petitioners Bronx Household of Faith, Robert Hall, and Jack Roberts (collectively, the "Church") desire to rent empty public school buildings from the Department for weeknight and weekend meetings.

The Department owns and controls 1,197 individual school facilities. Ct. of Appeals App. ("A") 1771. Pursuant to N.Y. Educ. Law § 414(1)(c), the Department opens these facilities to community groups for extended use. App.325a-326a. Chancellor's Regulation D-180 is the Department's policy that governs extended uses by community groups. App.286a-323a. It permits community groups to rent school facilities for extended periods of time for "social, civic, and recreational meetings and entertainment, and other uses pertaining to the welfare of the community."[2] App.290a. The facilities

[2] D-180 expressly permits the following uses: student religious clubs, polling places, political candidate forums, PTA meetings, civic forums, summer day camps, carnivals, fairs, flea markets, and athletic activities, just to name a few. App.290a-322a.

are available to rent to "'maximize educational, cultural, artistic and recreational opportunities for children and parents.'" App.216a.

The Department places only a few limitations on extended uses.[3] The only limitation relevant here is Regulation D-180 §I(Q) ("Reg. I.Q."), which prohibits using the facilities for "religious worship services" or as a "house of worship." App.292a.

All organizations granted an extended use permit must post a disclaimer indicating the Department does not sponsor or endorse the activities. App.299a-300a. All organizations also must pay rent based on a uniform fee schedule. App.301a-303a. The Department may waive the rent for an outside organization. App.308a-311a. It considers such a waiver to be a subsidy. App.311a; A1779-80 ¶24. But the Department never has granted a fee waiver to the Church or any other religious group conducting a "religious worship service." Nor has the Church ever requested a fee waiver.

### B. Groups that Rent the Schools.

Annually, tens of thousands of community organizations rent schools on weeknights and weekends. For example, in fiscal year 2011, the Department issued over 122,000 extended use permits. A1193 ¶25. Of these, over 22,900 were issued to unions and community organizations,

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[3] D-180 prohibits personal uses, commercial purposes (except flea markets), gambling, sale or consumption of alcohol, and sale of refreshments. App.292a-294a.

A1195 ¶33, A1230-1511, but only 5% of these went to religious groups, which included Buddhists, Hindus, Quakers, Jains, Jews, Muslims, Christians, and Jehovah's Witnesses. A1196 ¶40, A827 ¶20, A1792 ¶51. Many of the uses, religious and non-religious alike, entail expression identical to those subsumed in the stereotypical "worship service," namely, rituals, recitations, moral instruction, songs, collections, and meals. App.23a, 93a-95a.

Regulation D-180 also allows student religious clubs to use the schools for worship during school hours and after school. App.293a. For example, Seekers Fellowship holds meetings where students engage in worship. A713; A1164-65. Jewish and Muslim student organizations likewise meet in the schools for devotional activity. A1165. And a Zen Buddhist center provides meditation opportunities for students in five Department schools. A708. Other student clubs also rent the schools on an extended basis, including the Girl Scouts, Boy Scouts, and Legionnaire Grey Cadets. A1518, A1874-75. Each of these teach morals, sing songs, recite pledges, and host rituals. A1868-75.

### C. The Department's Refusal to Rent to the Church.

The Church is an evangelical Christian church that was formed in 1971 and has been meeting in the Bronx for over 40 years. A1768-69 ¶1. It wants to rent Public School 15 in the Bronx for meetings. The Church has met in P.S. 15 for weekly worship meetings from August 2002, after the District Court granted the preliminary injunction, until the

summer of 2014, when the Church completed its own building near P.S. 15. Although the Church now owns a building, the facility is not large enough for all of its meetings, so therefore the Church wants to meet regularly in P.S. 15 for its large-scale events and activities, which include worship. A427-28.

When the Church meets on Sundays, attendees sing hymns, pray, take communion, receive teaching, and fellowship. A1802 ¶¶76-77. Reg. I.Q. permits these activities.[4] The Church's theology labels these activities "worship," which Reg. I.Q. also permits.[5] But the Department refuses to rent to the Church because the Department considers the Church's activities to be a "religious worship service" prohibited by Reg. I.Q. A1798 ¶¶68-69.

After the Second Circuit upheld Reg. I.Q. under the Free Speech Clause in 2011, the Department granted religious groups a short reprieve before it began enforcing the no-worship service policy once again. A1801. In the meantime, as it processed rental applications under Reg. I.Q., the Department instructed staff to seek clarification on unclear and "suspicious" rental applications. A268. It ordered them to gather as much detail as possible from

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[4] The Second Circuit ruled that under the policy, "Prayer, religious instruction, expression of devotion to God, and the singing of hymns, whether done by a person or a group, do not constitute the conduct of worship services. Those activities are not excluded." App. 177a.

[5] The Second Circuit stated that "[t]he 'religious worship services' clause [in D-180] does not purport to prohibit use of the facility by a person or group of persons for 'worship.'" App. 177a.

church rental applicants, A314-15, A1001-02, A1805, and even asked churches to "clarify what is taking place from the moment you enter [the school] until the moment you leave." A290-92. Staff scoured church websites, A871, listened to church sermons, A1143-44, and were authorized to attend church meetings, A1786-87 ¶¶42-43. Even if church rental applications listed non-religious activities, like "leadership training" or "youth gym night," the Department contacted the church and asked if it would be conducting "worship services." A297, A400-02, A464-67, A1826 ¶125.

The Church experienced this scrutiny first-hand when it reapplied to rent P.S. 15 during this time. It listed "Hymn singing, prayer, communion, preaching, teaching, fellowship" as intended activities. A72, A75. When the Department returned the approved permit, it added "WORHIP [sic]" to the description. A72, A76.

Petitioners' expert witness testified that Reg. I.Q. results in disparate treatment of religious groups, because it allows extended uses by religions that do not worship deities, but disallows use by religions that worship deities. A733. Religions, he found, do not "worship" in the same way. A741. For example, some Christians and Buddhists do not follow a prescribed order or liturgy. *Id*. Mormons and Jehovah's Witnesses have no seminaries or ordained officials; their worship services are led by laymen. *Id*. Plymouth Brethren and Muslim services, and some Jewish services, have non-ordained leaders. A741-42. There are even differences in worship between sects of religions. Classical Hindus do not

worship, but other Hindu sects do worship. A737-38. Zen and Theravada Buddhists are non-theistic, but Tibetan and Mahayana Buddhists do believe in deities. A738-39. Nontheistic Friends (Quakers), Patanjali Yoga, and Jains do not worship. A741. Thus, under Reg. I.Q., some Buddhists, Quakers, and Hindus may rent the Department's schools for all of their devotional activities, but traditional Jewish, Muslim, and Christian groups may not.

## II. Procedural Background

### A. *Bronx I*

In the original but separate case in 1995, the Church sued the Department after it denied the Church's request to rent a middle school. At the time, the Department opened its facilities widely to community groups, as it does today, but prohibited "religious services or religious instruction." The District Court upheld the policy and found that it was reasonable and viewpoint neutral under the Free Speech Clause of the First Amendment. *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 1996 WL 700915, *6 (S.D.N.Y. Dec. 5, 1996). The Second Circuit affirmed. *Bronx Houshold of Faith v. Cmty. Sch. Dist. No. 10* (*Bronx I*), 127 F.3d 207 (2d Cir. 1997). This Court denied review. 523 U.S. 1074 (1998).

### B. *Bronx II*

This Court's decision in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), effectively overruled *Bronx I*. *See* 533 U.S. at 105-06. Thus, the Church reapplied to rent a school, but the

Department denied the request and the Church sued. App.250a-251a. The District Court granted the Church a preliminary injunction, and found that the policy was viewpoint discriminatory under the Free Speech Clause. App.249a-250a; *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.*, 226 F. Supp. 2d 401, 423 (S.D.N.Y. 2002). The Second Circuit affirmed and acknowledged that the activities described in *Good News Club* were "materially indistinguishable" from the Church's proposed worship activities. *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.* (*Bronx II*), 331 F.3d 342, 353 (2d Cir. 2003).

### C. *Bronx III*

After *Bronx II*, the Department amended the policy to forbid "religious worship services" instead of "religious services." App.251a-252a. The District Court, however, found the policy remained viewpoint discriminatory under the Free Speech Clause, and issued a permanent injunction against it. App.261a. The Second Circuit vacated the permanent injunction and remanded the case without a controlling rationale because the Church had not yet applied to rent the school under the amended policy. *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.* (*Bronx III*), 492 F.3d 89, 91 (2d Cir. 2007) (per curiam).

### D. *Bronx IV*

After remand, the Church applied to rent P.S. 15 under the amended policy, and the Department denied its application. App.173a-174a. The District

Court granted summary judgment in the Church's favor on its Free Speech Clause claim, and issued a permanent injunction against the policy. App.240a-241a.

In a 2-1 decision, the Second Circuit reversed. App.167a-168a; *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.* (*Bronx IV*), 650 F.3d 30 (2d Cir. 2011). Judges Leval and Calabresi held that the exclusion of "religious worship services" was not viewpoint discrimination under the First Amendment, but was a permissible content-based exclusion of speech from a limited public forum. App.183a. The majority skirted *Good News Club* by distinguishing between "religious worship" and a "religious worship service." It said "[p]rayer, religious instruction, expression of devotion to God, and the singing of hymns, whether done by a person or a group, do not constitute the conduct of worship services. Those activities are not excluded" by Reg. I.Q. *Id*. But "religious worship services" are "a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion." App.177a. Yet, the majority lamented that the "Supreme Court's precedents provide no secure guidelines as to how [this case] should be decided. The main lesson that can be derived from them is that they do not supply an answer to the case before us." App.195a.

Judge Walker dissented. App.213a-239a. The majority, he stated, "turns its back on the Supreme Court's holding in *Good News Club,*" App.221a, the

terms of which, along with several other cases, make clear that the Department's exclusion of worship from its forum is unconstitutional viewpoint discrimination, App.220a-224a. He also denied the reasonableness of the Board's Establishment Clause concern in view of the series of materially indistinguishable cases rejecting it. App.227a-238a.

This Court denied review. 132 S. Ct. 816 (2011).

### E. *Bronx V*

The case returned to the District Court for resolution of the Church's Free Exercise Clause and Establishment Clause claims. The District Court granted the Church a temporary restraining order, App.162a, and a preliminary injunction, App.113a. After discovery the District Court granted summary judgment for the Church and issued a permanent injunction. App.56a. It found that the ban on "religious worship services" in the Department's open forum violated the Free Exercise Clause, App.71a-81a, because it targeted religion for prohibition and the Department's unsubstantiated fear of violating the Establishment Clause was not sufficiently compelling to justify the exclusion of religious activity, App.81a-99a.

The Second Circuit, in a 2-1 decision, reversed and vacated the injunction. App.1a; *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.* (*Bronx V*), 750 F.3d 184 (2d Cir. 2014). Judges Leval and Calabresi concluded that the Department would be subsidizing religion by renting to the Church, so the Department could single out worship services

and exclude them from renting the school facilities under *Locke v. Davey*, 540 U.S. 712 (2004). App.18a. The panel also ruled that the Department did not violate the Free Exercise Clause because Reg. I.Q. was motivated by a reasonable concern about avoiding a violation of the Establishment Clause and not by animus toward religion. App.14a-15a. In regards to the Church's Establishment Clause claim, the panel held that Reg. I.Q. does not favor certain religions over others, App.21a, and that the Department's searching review of church rental applications for "religious worship services" did not excessively entangle the Department with religion, App.33a.

Judge Walker dissented. He concluded that Reg. I.Q. was neither neutral nor generally applicable under the Free Exercise Clause, and that the Department was not subsidizing religion, but was opening a forum for private speech. App.47a-50a. He also declared that the Department's fear of violating the Establishment Clause was unfounded because the Department made the rental of school facilities broadly available to the public on neutral terms. App.50a-53a.

The Second Circuit denied a timely petition for rehearing en banc. App.282a.

## REASONS FOR GRANTING THE WRIT

This Court's review is needed to resolve an issue of exceptional and recurring importance and which has resulted in significant circuit conflicts: whether the government may exclude religious worship

services from broadly open speech forums. After litigation stretching nearly twenty years and five separate opinions from the Second Circuit, that court has ruled that Reg. I.Q.'s express exclusion of "religious worship services" from an otherwise neutral speech forum comports with the Free Exercise Clause, Establishment Clause, and Free Speech Clause. All of these conclusions conflict with the decisions of this Court and other courts of appeals in multiple ways.[6]

## I. The Second Circuit's Decision on the Free Exercise Clause Conflicts with this Court's Precedent and Creates Two Different Circuit Conflicts.

### A. The Second Circuit Ignored the Controlling Free Exercise Test Set Forth in *Smith* and *Lukumi*.

The Second Circuit mangled the application of this Court's decisions in *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S.

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[6] Although the free speech issue was the subject of an earlier petition for writ of certiorari, this Court has explained that "we have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *MLB Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001); *see also Mercer v. Theriot,* 377 U.S. 152, 153-154 (1964) ("We now consider all of the substantial federal questions determined in the earlier stages of the litigation, for it is settled that we may consider questions raised on the first appeal, as well as those that were before the court of appeals upon the second appeal.") (internal quotation marks and citations omitted).

520 (1993), which create the baseline framework for analysis of Free Exercise claims. Instead of analyzing Reg. I.Q. to determine if it is neutral and generally applicable—a test it cannot withstand—the Second Circuit declared that anti-religious *animus* is a necessary prerequisite to proving a Free Exercise claim, and that granting a religious organization equal access to a widely available public forum constitutes a "subsidy" of religious activity under *Locke v. Davey*. Without even mentioning the *Smith* case, the Second Circuit sidestepped *Lukumi*, invented an animus requirement, and applied *Locke* in direct contradiction of this Court's instruction that *Locke* does not apply to forum situations.

It is well settled that if a law burdening religious exercise is not neutral or generally applicable, then it must be "justified by a compelling state interest and is narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 533. A law is not neutral "if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.*

Reg. I.Q. clearly fails the *Smith* test. First, the regulation is not neutral or generally applicable. It refers to religiously motivated conduct on its face ("religious worship services") and categorically treats that religious expression differently from and worse than all other expression in the forum. App.47a-48a (Walker, J., dissenting). Simply put, the term "religious worship services" "refers to a religious practice without secular meaning." *Lukumi*, 508 U.S. at 533.

The uncontroverted testimony of Petitioners' expert witness established that Reg. I.Q., on its face, favors non-theistic religions that do not engage in "religious worship services," over theistic religions that worship a deity. App.48a (Walker, J., dissenting). Theravada Buddhists, Taoists, and classical Hindus may rent school facilities for their devotional activities, but Jews, Muslims, and Christians may not. A737-41. Thus, Reg. I.Q. is neither neutral nor generally applicable. But the Second Circuit majority did not even apply this test.

Second, the Department lacks a compelling interest in excluding worship under Reg. I.Q. App.50a-52a (Walker, J., dissenting). The Department's asserted fear of violating the Establishment Clause does not justify the exclusion of worship services from the forum. This Court has held repeatedly that providing religious groups equal access to government programs, buildings, or funding does *not* violate the Establishment Clause. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (funding); *Good News Club*, 533 U.S. at 112-17 (buildings); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (funding); *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981) (buildings). Without an actual violation of the Establishment Clause, the Department lacks any compelling state interest. Therefore, the Second Circuit should have held the policy invalid under *Smith* and *Lukumi*.

### B. The Second Circuit's Decision Deepens a Circuit Conflict on Whether Animus Is Necessary to Prove a Free Exercise Claim.

The Second Circuit deepened a divide among the courts of appeals by concluding that *Lukumi* requires proof of animus to sustain a Free Exercise claim. The majority held that *Lukumi* does not apply to this case because, unlike that case, there is no evidence of animus on the part of the Department against a particular religious group here. App.14a-15a; *see also* App.21a ("Our record reveals no animus toward religion generally or toward a particular religion or religious practice in either the text of Reg. I.Q. or the operation of Board's policy."); App.32a ("In view of (1) the absence of discriminatory animus on the part of the Board … we conclude that Reg. I.Q. does not violate Plaintiffs' rights to free exercise of religion…"). In *Lukumi*, abundant evidence of discriminatory intent made for a ready comparison to equal protection analysis. *See* 508 U.S. at 543 (noting that the regulation at issue fell "well below" First Amendment standards). But this Court did not hold that strict scrutiny applies to a law disabling religious practice only when the government acts with animus. Although religious animus may be *sufficient* to violate the Free Exercise Clause, it is not *required*. *See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983) ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment," and "even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."); *Shrum v. City of Coweta*,

449 F.3d 1132, 1144-45 (10th Cir. 2006) (listing cases in which this Court and others have applied the Free Exercise Clause to foreclose the application of laws enacted "not out of hostility or prejudice, but for secular reasons").

Yet the portion of *Lukumi* discussing animus has driven the circuits into sharp disagreement on whether a party must show government animus to prove a free exercise violation, even where the law in question expressly targets religious exercise. The First, Second, and Ninth Circuits require animus in order to trigger strict scrutiny of a law burdening religious exercise. Litigants in those circuits must show some kind of hostility or opposition to religion generally or to the religion in question which motivated the drafters to pass the law. *See* App.12a-17a; *Eulitt ex rel. Eulitt v. Maine*, 386 F.3d 344, 355 (1st Cir. 2004) (requiring a showing equivalent to the "overwhelming evidence" of "substantial animus against Santeria" to trigger strict scrutiny of law banning tuition payments to "any private sectarian school"); *KDM ex rel. WJM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1051 (9th Cir. 1999) (finding "disparate treatment" desiring special education services at "sectarian school" is not enough to burden religion, there must be animus).

By contrast, the Tenth and Eleventh Circuits hold that discriminatory animus is not necessary to trigger strict scrutiny under the Free Exercise Clause. *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) ("If First Amendment protections were limited to 'animus,' the government could favor religions that are

traditional, that are comfortable, or whose mores are compatible with the State, so long as it does not act out of overt hostility to the others. That is plainly not what the framers of the First Amendment had in mind."); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234 n.16 (11th Cir. 2004) ("Under *Lukumi*, it is unnecessary to identify an invidious intent in enacting a law….").

Moreover, in a case with strikingly similar facts to this case, the Fourth Circuit held that a school board violated the Free Exercise Clause by charging religious groups more rent than other community groups when meeting in its broadly open forum. *Fairfax Covenant Church v. Fairfax Cnty. Sch. Bd.*, 17 F.3d 703, 707 (4th Cir. 1994). Unlike the Second Circuit here, the Fourth Circuit did not require proof of animus to sustain a free exercise violation.

This deep conflict among the courts of appeals warrants review by the Court.

### C. The Second Circuit Misapplied *Locke* in Conflict with the Seventh and Tenth Circuits.

The panel majority's reliance on *Locke* to uphold the Department's exclusion of "religious worship services" from otherwise generally available school buildings was erroneous for at least three reasons.

First, *Locke* states that it does not apply to government programs that create a forum for private speech. The scholarship program in *Locke* was "not a forum for speech" and was not designed, like the Department's program here, to "encourage a

diversity of views from private speakers." 540 U.S. at 720 n.3. Thus, this Court explicitly stated: "Our cases dealing with speech forums are simply inapplicable." *Id*. This Court's instruction that *Locke* does not apply to public forums is vital because lower courts could otherwise read that decision as overruling decades of precedent granting religious people equal access to government facilities and benefits. *See*, *e.g.*, *Good News Club*, 533 U.S. at 112-117; *Rosenberger*, 515 U.S. 819; *Widmar*, 454 U.S. 263. The Second Circuit's opinion ignores that directive from *Locke* and makes no effort to distinguish it.

Second, the facts of this case also differ sharply from those in *Locke*. There, the state controlled the scholarship money at every step, including the decision as to which schools and students were eligible to receive it. 540 U.S. at 717. The Department here will rent space to virtually anyone, including those engaged in religious activities—except if they intend to engage in what the Department deems a "religious worship service." Simply put, this is an open forum case and *Locke* was not. No Establishment Clause concerns are raised by providing equal access to all participants in a forum for private speech.

Further, this Court held Washington's program was constitutional because states had for over a century refused to use taxes in direct support of clergy. *Id*. at 722-23. As this Court stated just last term, "reference to historical practices" matters. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014). History is replete with examples of churches

using public buildings for worship: the framers of the Constitution attended church services in the U.S. Capitol building,[7] churches met in the federal court in New York City during the Great Awakening,[8] and 49 of 50 of the largest school districts in the nation allow such practices today. App.52a-53a (Walker, J., dissenting). Unlike *Locke*, there is no argument that history or tradition favors expelling churches from government buildings open to general public use.

Despite these distinguishing factors, the Second Circuit held that a religious group renting an empty public school is receiving a government "subsidy" and that *Locke* allows the Department to refuse to "subsidize" this exercise of religion. App.29a. But the Church, like all extended use permit holders, pays the uniform rental rate set by the Department. A993. The Department is not making direct monetary contributions to churches or any other organization that rents its schools. App.50a (Walker, J., dissenting).

To the extent the Church receives a benefit by not having to pay for other overhead costs the Department incurs, that benefit is the same one all other community groups receive and is therefore, "incidental," not a violation of the Establishment Clause. *Widmar*, 454 U.S. at 273-74. By allowing religious groups to access a widely available public forum on an equal basis with non-religious groups,

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[7] *See* Library of Congress, "Religion and the Founding of the American Republic," *at* http://www.loc.gov/exhibits/religion/rel06-2.html (last accessed Sept. 20, 2014).

[8] J. Edwin Orr, *The Event of the Century, The 1857-1858 Awakening* 74-75 (1989).

the Department "subsidizes" religion no more than it does by providing fire, police, and other city services to churches. *See id*. at 274-75 ("If the Establishment Clause barred the extension of general benefits to religious groups, 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'"). And if the Department were truly concerned that its rental rates do not cover all overhead costs, it could simply raise the rates for everyone. What it cannot do is claim that it is "subsidizing" religious groups when they pay the uniform rental rates paid by thousands of other community groups that meet in school buildings. That is not a subsidy; it is religious discrimination on its face.

The Second Circuit's application of *Locke* created a conflict with the Seventh Circuit's decision in *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775 (7th Cir. 2010). There, the University of Wisconsin refused to provide student activity fees to any student organization that conducted worship, proselytizing, or religious instruction. *Id*. at 777. The university argued that its funding program was constitutional under *Locke*. The Seventh Circuit, in an opinion by Judge Easterbrook, disagreed. It said the program in *Locke* did "not evince hostility to religion," but the University of Wisconsin's exclusion of worship from the funding program did. *Id*. at 780. Also, *Locke* involved government speech because the state retained plenary control over how to use the scholarship funds, but the University "created a public forum where the students, not the University, decide what is to be said." *Id*. By contrast, the Second Circuit upheld Reg. I.Q. under *Locke* even

though this case, like *Badger Catholic*, involves a speech forum, and unlike *Badger Catholic*, does not include direct money payments to community organizations. The Second Circuit's decision directly conflicts with the Seventh Circuit.

The majority's opinion also created a conflict with the Tenth Circuit. In *Colorado Christian University*, the Tenth Circuit held that *Locke* did not forbid providing college scholarships to students at pervasively sectarian institutions. 534 F.3d at 1256. Critically, the Tenth Circuit noted that in *Locke*, this Court distinguished forum cases like *Rosenberger*, 515 U.S. 819, and "indicated that the prohibition on discrimination on the basis of religion continues to apply to funding programs that are forums for speech." *Colo. Christian Univ.*, 534 F.3d 1255 n.3. The court ruled that excluding pervasively sectarian institutions from the program violated the First Amendment because it impermissibly discriminated among religions, unconstitutionally scrutinized religious belief and practice, and there was no substantial historic interest in denying funding to such institutions. *Id.* at 1259, 1261-62, & 1268.

The Second Circuit's divided decision is irreconcilable with this Court's Free Exercise jurisprudence and creates a sharp circuit conflict on the role of animus in free exercise claims and equal access to government speech forums. This Court should grant review to settle the question of whether the government violates the Free Exercise Clause by expressly excluding "religious worship services" from a broadly open forum.

## II. The Second Circuit's Decision on the Establishment Clause Conflicts with this Court's Precedent and Creates Additional Circuit Conflicts.

For over sixty years, this Court has "adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can 'pass laws which … 'prefer one religion over another.'" *Larson v. Valente*, 456 U.S. 228, 246 (1982) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)). In addition, a government policy violates the Establishment Clause if it excessively entangles the government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Reg. I.Q. not only favors some religions over others, but also excessively entangles the Department with religion. The Second Circuit's holding to the contrary is in conflict with this Court's decisions and those in other Circuits.

### A. The Second Circuit's Decision Conflicts with *Larson* by Upholding a Policy That Treats Religions Differently.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson,* 456 U.S. at 244. The Second Circuit concluded that the Department did not violate the Religion Clauses by treating religious groups differently, depending on whether they engage in religious worship services. App.22a. This directly conflicts with the Supreme Court's ruling in *Larson*.

In *Larson*, Minnesota required religious organizations that received less than 50% of their total contributions from members or affiliated organizations to comply with registration and reporting laws applicable to non-religious, non-profit organizations. 456 U.S. at 231-32. The Court held that the 50% rule "clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents." *Id.* at 246.

The Department's exclusion of "religious worship services" results in denominational preference far worse than that in *Larson*. As the majority admitted below, religious groups that have a Judeo-Christian understanding of a worship service, including the Church, are excluded from renting schools. But religious groups that do not hold what the Department views as "religious worship services" may rent the schools for all of their devotional exercises. App.23a. Discrimination among religious denominations is the very evil the Religion Clauses were designed to prevent. *Larson*, 456 U.S. at 244-45. This Court recognized recently that government attempts to classify religious expression are unworkable and impermissible, in part because they result in disparate treatment of various religions and denominations. *See Galloway*, 134 S. Ct. 1822; *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710-11 (2012) (Thomas, J., concurring); *id.* at 711 (Alito, J., and Kagan, J., concurring). The Tenth Circuit also recognized this problem in *Colorado Christian University*, holding that by "giving scholarship money to students who attend sectarian—but not 'pervasively' sectarian—universities, Colorado

necessarily and explicitly discriminates among religious institutions." 534 F.3d at 1258.

### B. The Second Circuit's Decision Conflicts with *Hosanna-Tabor* and the Tenth Circuit on Excessive Entanglement.

Even though Reg. I.Q. led Department officials to intensively parse extended use applications that referred to religious speech, the Second Circuit held that it was not excessively entangled with religion because it likened this investigation to the Court's inquiry into the nature of the plaintiff's employment in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*. But *Hosanna-Tabor* does not authorize government fishing expeditions into religious speech, and, in fact, cautions against the very entanglement the Department committed when it enforced Reg. I.Q.'s ban on "religious worship services." As a result, the Second Circuit's decision conflicts with the Tenth Circuit on a similar entanglement issue.

In *Hosanna-Tabor*, this Court held that the government may not interfere with the internal governance of a church and how it defines its activities. 132 S. Ct. at 706 ("Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."). But here, the Second Circuit authorized the Department to go one step further and hunt through church extended use applications, church websites, and church sermons to find whether the churches used the word "worship." It made no difference that the applicants

were defining "worship" differently according to their own theology. If applicants used the word "worship," or anything like it, then the Department denied their application.

This is the type of entanglement forbidden by *Hosanna-Tabor*. In fact, three Justices pointed out the dangers of government-created definitions of highly religious terms like "minister," *see id.* at 710-11 (Thomas, J., concurring); *id.* at 711 (Alito, J., and Kagan, J., concurring), because defining these terms entangles the government with religion by allowing it to make a religious judgment, and because the wide diversity of religious belief in this country renders it difficult to define religious practices in a way that treats all religions equally.[9] The Second Circuit failed to recognize that the ministerial exception is a legal concept that is not defined in religious terms, but a "religious worship service" is a theology-dependent term that religious groups define differently. Whether a religious group can meet in one of the Department's public schools cannot depend on whether the government decides it is conducting worship service.

As a result, the Second Circuit's opinion conflicts with the Tenth Circuit on the issue of entanglement. In *Colorado Christian University*, the state examined curricula and the religious doctrines of the governing boards to decide whether an institution

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[9] This point was recently reiterated by the Court. *See Galloway,* 134 S. Ct. at 1822 ("The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech.").

was "pervasively sectarian" or just "sectarian." 534 F.3d at 1263. The Tenth Circuit ruled these inquiries violated the Religion Clauses because they involved the evaluation of contested religious doctrinal questions and practices. *Id.* at 1266; *see also Widmar*, 454 U.S. at 269 n.6 ("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."). But the Second Circuit concluded that the Department did not violate the Religion Clauses by "look[ing] beyond the application at the applicant's website and other public materials," including listening to sermons, attending religious meetings, and interrogating clergy. App.36a.

As this Court confirmed just last term, the government excessively involves itself with religion when it "seek[s] to define permissible categories of religious speech" in a forum. *Galloway*, 134 S. Ct. at 1822. In short, it 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." *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953). Just as the church in *Hosanna-Tabor*, not the government, had the right to define what constitutes a "minister," the Church in this case has the right to define what is "worship," and the Department is not qualified to do so without immersing itself deeply in religious matters. This was exemplified when the Department told one

church that it could rent the schools for a Bible study, but not for a prayer meeting. A1151; A1161. In so doing, the Department determined for the church what was and was not a "religious worship service." The Second Circuit's holding to the contrary departs significantly from settled law and creates a circuit conflict.

## III. The Second Circuit's Decision on the Free Speech Clause Conflicts with this Court's Precedent and Magnifies a Conflict Among the Circuits on the Exclusion of Religious Worship from Generally Open Speech Forums.

The Second Circuit's conclusion that "religious worship services" may be excluded from a generally open speech forum "turns its back on the Supreme Court's holding in *Good News Club*," App.221a (Walker, J., dissenting), and is the latest in a line of Second Circuit decisions upholding the exclusion of religious expression from public forums—a long line of decisions uniformly reversed by this Court. *See Lamb's Chapel*, 959 F.2d 381, *rev'd,* 508 U.S. 384; *Bronx I*, 127 F.3d 207, *overruled by, Good News Club*, 533 U.S. 98; *Good News Club*, 202 F.3d 502, *rev'd,* 533 U.S. 98. *Good News Club* and other circuits ruled that the exclusion of worship from a speech forum is viewpoint discrimination. Thus, the Second Circuit's divergent ruling on this issue warrants review.

This case also presents an ideal vehicle for addressing the issue expressly left open in *Good News Club*: whether opening a forum to all speech

pertaining to the welfare of the community creates a designated public forum, triggering strict scrutiny of the exclusion of religious worship services. *See* 533 U.S. at 106 ("we need not resolve the issue here"). The Second Circuit's *Bronx IV* decision concludes that such a forum is limited and restrictions therein are subject only to a reasonableness test, which conflicts with this Court's decision in *Widmar* and the decisions of other circuits, which held that the exclusion of religious worship from a generally open forum is content-based discrimination.

Despite these conflicts, the Second Circuit's *Bronx IV* decision rejected this Court's precedent and held that a bar on religious worship is a permissible content-based exclusion from a public forum broadly open to private expression.

### A. The Second Circuit's Decision Conflicts with *Good News Club* and Deepens a Conflict with Other Circuits on Whether Excluding Religious Worship Services From a Public Forum Constitutes Impermissible Viewpoint Discrimination.

In *Good News Club,* 533 U.S. at 109-10, this Court held that the exclusion of religious worship from what it assumed to be a limited public forum was unconstitutional viewpoint discrimination. In reaching that conclusion, this Court not only reversed the Second Circuit's decision in *Good News Club,* but also overruled the Second Circuit's decision against this Church in *Bronx I*, which—like the decision at bar—found that the government may

exclude religious worship from a limited public forum open to a broad range of speakers. *Good News Club*, 533 U.S. at 105-06.

*Good News Club* declared that there is no difference between "quintessentially religious" speech, including worship, and other forms of religious expression. 533 U.S. at 110-11. The Court emphasized that the labels used to describe speech are unimportant; what matters is the "substance" of the speech activity. *Id*. at 112 n.4. It also reaffirmed that the exclusion of religious expression, including worship, from a speech forum created by the same law at issue in this case—N.Y. Educ. Law § 414—constitutes impermissible viewpoint discrimination.

*Good News Club* followed *Widmar*, which long ago rejected a distinction between religious worship and religious expression, stating, "[w]e think that the distinction advanced by the dissent [between religious speech and religious worship] lacks a foundation in either the Constitution or in our cases, and that it is judicially unmanageable." 454 U.S. at 271 n.9.

Despite this precedent, the *Bronx IV* decision mechanically focused on the *label* the Department applied to the Church's speech—"religious worship service"—rather than evaluating the substantive component parts of the Church's expression. The panel majority held that excluding "religious worship services" from the schools was not viewpoint discrimination, and was an acceptable content-based exclusion in a limited public forum. It claimed to find a meaningful distinction between "religious

worship"—which is allowed—and a "religious worship service"—which is excluded. *Compare* App.177a ("Prayer, religious instruction, expression of devotion to God, and the singing of hymns, whether done by a person or a group, do not constitute the conduct of worship services. Those activities are not excluded."), *with* App.177a ("What is prohibited by this clause is solely the conduct of a particular type of event: a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion."). Thus, it recognized that the Department's ban on "religious worship services" applies only to traditional, organized religions that worship a deity.

In both this case and *Good News Club*, New York City opened a public forum for the general "welfare of the community." *Compare Good News Club*, 533 U.S. at 102, *with* App.221a. (Judge Walker observes that the respective speech forums are "in every material respect … identical"). In both cases the speakers intended to sing, pray, teach about religion, and socialize. *Compare* 533 U.S. at 103, *with* App.221a-223a. And in both cases the school disallowed the use of the facilities for religious "worship." *Compare* 533 U.S. at 103, *with* App.9a. *Good News Club* is thus indistinguishable from the present case and the Second Circuit committed plain error when it sidestepped this Court's controlling precedent.

Despite this Court's holding in *Good News Club* clearly indicating that religious worship services are

no different than other forms of expression, the lower courts are divided on whether excluding worship from a speech forum violates the First Amendment. The Second and Ninth Circuits have upheld such exclusions, while the Seventh and Tenth Circuits have properly struck down such exclusions as either viewpoint or content-based discrimination.

In *Faith Center Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 902-03, 918 (9th Cir. 2007), the Ninth Circuit held that a public library's policy of opening its facilities to "educational, cultural and community related meetings, programs and activities," but excluding "religious services," was reasonable and viewpoint neutral. As a result, a church was prohibited from using the library's facilities for a "praise and worship" meeting. *Id*. at 903-04.

But in *Badger Catholic*, the Seventh Circuit held that a public university's exclusion of student-led worship, proselytizing, or religious instruction from a speech forum violated the First Amendment. 620 F.3d at 776-77, 781. In stark contrast to the Second Circuit's reliance on the label "religious worship service," the Seventh Circuit looked beyond the labels "worship, proselytizing, and religious instruction" used by the university. It instead focused on the substance of the students' activities, which were no different than their secular counterparts. *Id*. at 777-79.

In *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1277, 1279 (10th Cir. 1996), the Tenth

Circuit similarly ruled that the City of Albuquerque discriminated based on viewpoint by excluding a church's "religious worship" and "sectarian instruction" from a senior center, which it held to be a designated public forum.

The Second Circuit's decision deepens the circuit conflict on the question of whether the exclusion of religious worship services from a limited public forum constitutes impermissible viewpoint discrimination. This Court should grant review to correct the Second Circuit's erroneous opinion in light of *Good News Club* and to unify the circuits by clarifying that worship may not be excluded from either a designated or limited public forum otherwise open to similar secular speech.

### B. The Second Circuit's Decision Conflicts with *Widmar* and Four Circuits on Whether Excluding Religious Worship Services from a Broadly Open Public Forum Is Impermissible Content-Based Discrimination.

The majority opinion in *Bronx IV* conflicts with this Court's 8-1 decision in *Widmar*, which held that the exclusion of religious worship from a generally open forum is impermissible content-based discrimination.

In *Widmar*, a public university broadly opened its facilities to students for "political, cultural, educational, social and recreational events," *Chess v. Widmar*, 635 F.2d 1310, 1312 (8th Cir. 1980), but not "for purposes of religious worship or religious

teaching," *Widmar*, 454 U.S. at 265. A religious student group asked to use the university's facilities for meetings that included "prayer, hymns, Bible commentary, and discussion of religious views and experiences." *Id*. at 265 n.2. The university said these activities were "religious worship" and rejected the group's request. *Id*. at 265. This Court held that the university created a public forum and the exclusion of religious worship from that forum was a content-based exclusion that was not justified by a compelling state interest. *Id*. at 269 n.6 & 277.

In conflict with *Widmar*, a divided Second Circuit ruled that a forum opened broadly for "social, civic and recreational meetings and entertainments, among other uses pertaining to the welfare of the community," is a limited public forum when it excludes one form of speech—religious worship services—and that all exclusions are subject to lesser constitutional scrutiny. App.175a; *but see Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 117-18 (5th Cir. 1992) (noting "a general policy of open access does not vanish when the government adopts a specific restriction on speech, because the government's policy is indicated by its consistent practice, not each exceptional regulation that departs from the consistent practice"). The Second Circuit conducted no analysis of the forum's broad parameters and the vast variety of speakers permitted in the forum—122,000 separate uses in one school year alone.

But Reg. I.Q., like the policies in *Lamb's Chapel* and *Good News Club,* permits community groups to meet for "social, civic and recreational" purposes and "other uses pertaining to the welfare of the

community." App.290a. It expressly permits a wide variety of uses. App.290a-322a. By creating such a broad forum, the categories of which clearly encompass the religious speech excluded here, the Department has created a designated public forum. Excluding a small sliver of private expression from the forum, while generally allowing the category of speech to which it belongs, does not create a limited forum.

The Second Circuit's decision also conflicts with the decisions of four other circuits on the question of whether generally open access policies create designated public forums and whether religious exclusions from these forums are constitutional. *See Grace Bible Fellowship v. Maine Sch. Admin. Dist. No. 5*, 941 F.2d 45, 48 (1st Cir. 1991) (panel including Breyer, J.) (holding school created a designated public forum when it opened its buildings for meetings by youth groups, community, civic, and service organizations, government agencies, educational programs, and cultural events, and exclusion of church from forum was content-based discrimination); *Gregoire v. Centennial Sch. Dist.,* 907 F.2d 1366, 1369, 1372-78 (3d Cir. 1990) (holding school created a designated public forum when it permitted meetings by civic groups, cultural activities, resident service organizations, adult education classes and labor unions, but prohibited "religious services, instruction and/or religious activities," and exclusion of evangelistic presentation was content-based discrimination); *Fairfax Covenant Church*, 17 F.3d 703 (holding school created a designated public forum by its policy permitting meetings by cultural, civic, educational,

and political groups, and requirement that churches pay more rent than nonreligious groups was unconstitutional); *Concerned Women for Am. v. Lafayette Cnty.*, 883 F.2d 32, 33-34 (5th Cir. 1989) (holding public library established a designated public forum with its policy permitting meetings of a "civic, cultural or educational character," even though it expressly excluded religious expression, and that exclusion was an unconstitutional content-based regulation of speech).

This Court should grant review to reaffirm that a generally open speech forum is a designated public forum, and that content-based exclusions are not permitted in such forums absent a narrowly tailored compelling state interest.[10]

## IV. This Case Is a Good Vehicle to Resolve These Issues.

This case is a good vehicle for resolving the questions presented because all of the legal issues involved (freedom of speech, free exercise of religion and the Establishment Clause) are properly before this Court, as the lower courts ruled on each of them. This case has gone through two rounds of discovery (2004-05 and in 2012), so the record is well-

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[10] That case presents similar issues on the content-based exclusion of religious speech, as well as the relevance of discriminatory intent to the constitutionality of a facially discriminatory law, as presented in *Reed v. Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2013), *cert. granted*, 134 S. Ct. 2900 (2014) (No. 13-502). If this Court determines not to grant review outright, it should hold this case, vacate the 2011 and 2014 decisions below, and remand in light of the forthcoming decision in *Reed*.

developed and provides a comprehensive set of data to assist the Court's deliberations. The clear conflicts with this Court's precedent and that of the courts of appeals warrant review to ensure the equitable application of constitutional law throughout the country. The Church in this case has been fighting for equal access for twenty years. The time has come for it to receive justice—justice it has been denied repeatedly in contravention of this Court's precedent.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant review.

Respectfully submitted,

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September 24, 2014

# APPENDIX

## APPENDIX TABLE OF CONTENTS

12-2730
Bronx Household v. Board of Education

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

August Term, 2012

(Argued: November 19, 2012 Decided: April 3, 2014)

Docket No. 12-2730-cv

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

*Plaintiff-Appellees*,

v.

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

*Defendant-Appellants.*

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - X

Before: WALKER, LEVAL, and CALABRESI, *Circuit Judges*.

Defendants, the Board of Education of the City of New York and Community School District No. 10 appeal from the grant of summary by the United States District Court for the Southern District of New York (Preska, C.J.), permanently enjoining Defendants from enforcing a policy which permits the use of school facilities outside of school hours by outside organizations and individuals but provides that no permit shall be granted for the purpose of holding religious worship services. The Court of Appeals (Leval, J.) rejects the District Court's conclusion that the policy violates the Free Exercise and Establishment Religion Clauses of the First Amendment. REVERSED.

Judge Walker dissents by separate opinion.

JANE L. GORDON (Edward F.X. Hart, Jon Pines, Lisa Grumet, Janice Casey Silverberg, Charles Carey, *on the brief*), of counsel, for Michael A. Cardozo, Corporation Counsel of the City of New York, New York, NY, *for Appellants*.

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Allison B. Jones, Williams & Connolly LLP, Washington, D.C., *for Amicus Curiae* The New York City Council Black, Latino, and Asian Caucus.

Deborah J. Dewart, Swansboro, NC; Michael W. McConnell, Stanford, CA; Eric C. Rassbach, Luke W. Goodrich, The Becket Fund for Religious Liberty, Washington, D.C., *for Amicus Curiae* The Becket Fund for Religious Liberty.

Thomas P. Gies, Frederick W. Claybrook, Jr., Crowell & Moring, LLP, New York, NY; Kimberlee Wood Colby, Center for Law & Religious Freedom of

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LEVAL, *Circuit Judge*:

This appeal raises the question whether the Board of Education of The City of New York (the "Board"),[1] in making the City's school facilities available outside of school hours for use by outside users and subsidizing such use, may, in furtherance of interests favored by the Establishment Clause of the First Amendment, refuse to permit the holding of religious worship services. The United States District Court for the Southern District of New York (Preska, *C.J.*) concluded that the Free Exercise and Establishment Clauses of the First Amendment compel the Board to allow outside users to conduct religious worship services in the school facilities and

[1] During this litigation, the Board was renamed the New York City Department of Education. *See, e.g., A.R. ex rel. R.V. v. New York City Dep't of Educ.,* 407 F.3d 65, 67 n. 2 (2d Cir.2005).

enjoined the Board from enforcing its prohibition. We conclude that the Board's prohibition was consistent with its constitutional duties. We therefore vacate the injunction imposed by the District Court and reverse its judgment.

The Board and co-defendant Community School District No. 10 appeal from the District Court's grant of summary judgment permanently enjoining Defendants from enforcing Chancellor's Regulation D–180 § I.Q. ("Reg.I.Q.") against Plaintiffs, The Bronx Household of Faith ("Bronx Household") and its pastors Robert Hall and Jack Roberts. Regulation D–180 governs the "extended use" of school facilities (the term refers to the use of school facilities outside of school hours by outside organizations and individuals).[2] Extended use, which requires a permit issued by the Board, is subsidized in that no rent is charged for use of the school facilities.[3] Reg. I.Q. provides: "No permit shall be granted for the purpose

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[2] Reg. D–180 § I.S. provides that "[p]ermits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this regulation on the same basis that they are granted to other clubs for students that are sponsored by outside organizations."

[3] "While the [Board] imposes no excess charge (profit or overhead) on extended use of its schools, there are pass-along contractual costs ... i.e., costs incurred in schools for custodial services when the use is outside of normal school hours." Reg. D–180 § IV.A. Users may also incur charges for use of additional services or specialized equipment or facilities. *See* Reg. D–180 § V.

of holding religious worship services, or otherwise using a school as a house of worship."[4]

The District Court found that enforcement of Reg. I.Q. to exclude religious worship services would violate the Free Exercise and Establishment Clauses. We disagree. We conclude Reg. I.Q. is constitutional in light of the Board's reasonable concern to observe interests favored by the Establishment Clause and avoid the risk of liability under that clause. Accordingly, we vacate the injunction and reverse the District Court's judgment.

## BACKGROUND

We assume familiarity with the facts and procedural history of this long-running litigation, as set forth in our prior opinions, and we recount them here only as necessary to explain our disposition of

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[4] Reg. I.Q. authorizes denial of a permit sought either for (1) "the purpose of holding religious worship services" or (2) "otherwise using a school as a house of worship." In this opinion we limit our consideration to the first clause. Because we conclude that the denial of Bronx Household's application for a permit under this clause is constitutional, we have no need to consider whether the Board might also lawfully deny an application for a permit based solely on the second clause. Judge Calabresi notes that if worship that is not religious does exist, so that, as the dissent may be taken to suggest, Dissenting Op. at 206–07, the first clause discriminates against *religious* worship, the second clause, which does not distinguish between religious and any such putative nonreligious worship, would be sufficient to pass constitutional muster since it does not treat nonreligious worship more favorably than religious worship. *See Bronx Household III,* 492 F.3d at 92–106 (Calabresi, J., concurring); *Bronx Household IV,* 650 F.3d at 51–52 (Calabresi, J., concurring)

this appeal. *See Bronx Household of Faith v. Bd. of Educ. of City of New York,* 650 F.3d 30 (2d Cir.2011) ("*Bronx Household IV*"); *Bronx Household of Faith v. Bd. of Educ. of City of New York,* 492 F.3d 89 (2d Cir.2007) ("*Bronx Household III*"); *Bronx Household of Faith v. Bd. of Educ. of City of New York,* 331 F.3d 342 (2d Cir.2003); *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10,* 127 F.3d 207 (2d Cir.1997).

In July 2007, the Board adopted Reg. I.Q. (then designated Standard Operating Procedure § 5.11). On November 2, 2007, in litigation resulting from the Board's denial of Bronx Household's application for a permit to use school facilities for "Christian worship services," the district court permanently enjoined the Board from enforcing the rule. *Bronx Household IV,* 650 F.3d at 35; *Bronx Household of Faith v. Bd. of Educ. of City of New York,* No. 01 Civ. 8598, 2007 WL 7946842, at *1 (S.D.N.Y. Nov. 2, 2007). The District Court's ruling was predicated on its conclusion that the rule constituted an unconstitutional viewpoint discrimination against religion and as such was forbidden by *Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 111–12, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001), in which the Supreme Court found that a school's refusal to permit a Christian children's club to meet at the school outside of school hours because of the club's religious nature constituted viewpoint discrimination and violated the club's free speech rights. *See Bronx Household of Faith v. Bd. of Educ. of City of New York,* 400 F.Supp.2d 581 (S.D.N.Y.2005).

On appeal, we reversed the District Court's judgment and vacated the injunction. *Bronx Household IV,* 650 F.3d at 51. (We incorporate that opinion into this one by reference as several of the issues we there discussed are pertinent to the present appeal.) Noting the "important difference between excluding the *conduct of an event or activity* that includes expression of a point of view, and excluding the *expression* of that point of view," we observed that, unlike the rule imposed by the school in *Good News Club,* the Board's rule barring the conduct of religious worship services placed no restriction on the use of school facilities by religious groups to teach religion, sing hymns, recite prayers, and express or advocate their religious point of view. *Id.* at 37–38. The rule prohibiting religious worship services therefore did not exclude expression of a religious viewpoint. It was a content-based exclusion of a particular category of activity, which exclusion was constitutionally permissible in light of the Board's reasonable and good faith belief that permitting religious worship services in its schools might give rise to an appearance of endorsement in violation of the Establishment Clause, thus exposing the Board to a substantial risk of liability.[5] *Id.* at 43.

We also rejected Bronx Household's claim that the rule violated the Establishment Clause. *Id.* at

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[5] We did not find that a violation of the Establishment Clause had occurred or would have occurred but for the prohibition on religious worship services but rather that "it was objectively reasonable for the Board to worry that use of the City's schools for religious worship services…expose[d] the City to a substantial risk of being found to have violated the Establishment Clause." *Bronx Household IV*, 650 F.3d. at 43.

45–48. We found no basis for Bronx Household's contention that the rule was motivated by hostility to religion. *Id.* at 46. Nor would a reasonable observer perceive the rule as an expression of such hostility in light of the range of religious activity the rule permitted and in light of the reasonableness of the imposition of the rule to guard against being found in violation of the Establishment Clause. *Id.* at 45–46. Finally, we rejected Bronx Household's claim that the Board would become excessively entangled in religious matters in undertaking to determine whether an applicant's proposed activities constituted a religious worship service. *Id.* at 46–48. In the first place, Bronx Household had expressly applied to conduct "Christian worship services." Moreover, in view of the fact that both the Free Exercise and Establishment Clauses impose restrictions on the conduct of government relating exclusively to religious activities, in many instances "government officials cannot discharge their constitutional obligations without close examination of ... particular conduct to determine if it is properly deemed to be religious and if so whether allowing it would constitute a prohibited establishment of religion." *Id.* at 47.

On remand to the District Court after we vacated the injunction, Bronx Household again moved for a preliminary injunction against enforcement of Reg. I.Q., this time on different grounds. Bronx Household asserted that our prior ruling, which was based on its Free Speech Clause claim, should not close the matter as neither we nor the District Court had passed on its claims that Reg. I.Q. violated the Free Exercise Clause. The District Court again

granted a preliminary injunction, *Bronx Household of Faith v. Bd. of Educ. of City of New York,* 855 F.Supp.2d 44 (S.D.N.Y.2012), and went on to grant summary judgment in favor of Bronx Household, permanently enjoining the enforcement of Reg. I.Q. *Bronx Household of Faith v. Bd. of Educ. of City of New York,* 876 F.Supp.2d 419 (S.D.N.Y.2012).

Defendants appealed, and this case is now before us for the sixth time.

## DISCUSSION

The District Court concluded for a number of reasons that the enforcement of Reg. I.Q. to exclude religious worship services would violate the Free Exercise Clause and the Establishment Clause. We respectfully disagree.

*A. The Free Exercise Clause*

*1) The Free Exercise Clause does not entitle Bronx Household to a grant from the Board of a subsidized place to hold religious worship services.*

The District Court found that the enforcement of Reg. I.Q. to exclude religious worship services would violate Bronx Household's rights under the Free Exercise Clause because the City's schools are "the only location in which [Bronx Household's congregation] can afford to gather as a full congregation [for Sunday worship services] without having to curtail other of their religious practices." *Bronx Household,* 876 F.Supp.2d at 426. The District

Court cited no authority for this proposition, and we know none.

The Free Exercise Clause bars government from "prohibiting the free exercise" of religion. U.S. Const. amend. I ("Congress shall make no law ... prohibiting the free exercise [of religion]."). In the District Court's view, because Bronx Household and its congregants have a constitutional right to worship as they choose without interference from government, and cannot afford to pay for a large enough site to accommodate the entire congregation, the Free Exercise Clause obligates the Board to provide them with a subsidized facility in which to exercise the right. The Free Exercise Clause, however, has never been understood to require government to finance a subject's exercise of religion. And to the extent any such suggestion has been raised in litigation, it has been rejected. *See, e.g., Locke v. Davey,* 540 U.S. 712, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004) (finding that the exclusion of devotional theology degree programs from eligibility for state scholarships does not violate Free Exercise Clause); *Skoros v. City of New York,* 437 F.3d 1, 39 (2d Cir.2006) ("Just as government may not compel any person to adopt a prescribed religious belief or form of worship, no person may require the government itself to behave in ways that the individual believes will further his or her spiritual development." (internal quotation marks and emphasis omitted)); *Eulitt ex. rel. Eulitt v. Maine Dep't of Educ.,* 386 F.3d 344, 354 (1st Cir.2004) ("The fact that the state cannot interfere with a parent's fundamental right to choose religious education for his or her child does not mean that the state must fund that choice...."); *see also Regan v.*

*Taxation With Representation of Washington,* 461 U.S. 540, 549–50, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.... The reasoning of these decisions is simple: although government may not place obstacles in the path of a person's exercise of ... freedom of speech, it need not remove those not of its own creation." (internal quotation marks and brackets omitted)).

*2) The Supreme Court's ruling in Lukumi that invidiously discriminatory ordinances targeting a religious practice of a particular religion are subject to strict scrutiny has no application to Reg. I.Q.*

The District Court believed that under authority of the Supreme Court's ruling in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) ("*Lukumi* "), the validity of Reg. I.Q. must be assessed under strict scrutiny because it prohibits the provision of a subsidized premises for the conduct of religious worship services, constitutes a discrimination against religion generally, and constitutes a discrimination against those religions that conduct worship services. *Bronx Household,* 876 F.Supp.2d at 428–32. We respectfully disagree. In our view the District Court's reasoning is incorrect for several reasons. In the first place, we think the District Court's view that Reg. I.Q. is subject to strict scrutiny is based on a misunderstanding of *Lukumi.* Secondly, on facts very similar to these, the Supreme Court has rejected applicability of strict scrutiny.

Furthermore, a reasonable governmental decision not to subsidize a category of activity is not a suspect discrimination among religions merely because some religions do and others do not engage in that activity.

*a) Suspect discrimination against religion.*

The District Court believed that, under the *Lukumi* precedent, because the conduct of religious worship services is an activity that has no secular analog, a decision by the Board not to subsidize it is necessarily a suspect discrimination against religion to be assessed under strict scrutiny. *But see* note 4; *Bronx Household III,* 492 F.3d at 92–106 (Calabresi, J. concurring); *Bronx Household IV,* 650 F.3d at 51–52 (Calabresi, J., concurring). It is correct without question that in declining to furnish school facilities for the conduct of religious worship services, Reg. I.Q. focuses on a religious activity that has no secular analog. There is no such thing as a nonreligious "religious worship service." In our view, the District Court's conclusion is based on a misunderstanding of the Supreme Court's opinion. While there are indeed words in the *Lukumi* opinion, which, if taken out of context, could be read as expressing such a message, it becomes clear when the words are considered in context that they mean no such thing.

In *Lukumi,* worshipers in the Santeria religion, in which animal sacrifice plays an important part of worship services, were planning to build a house of worship in the city of Hialeah, Florida. 508 U.S. at 525–26. Members of Hialeah's city council

disapproved of Santeria's practice of animal sacrifice and, with a goal of banning the practice, the council passed a set of ordinances prohibiting the unnecessary killing of animals in a ritual or ceremony not primarily for the purpose of food consumption. *Id.* at 526–28. Hialeah claimed that the prohibition was motivated by secular objectives including public health and prevention of cruelty to animals. *Id.* at 527–28. Although the set of ordinances was designed to appear to apply even-handedly to religious and secular conduct alike, a plethora of exceptions and exclusions (exempting, for example, fishing and Kosher slaughter) made the prohibition apply almost exclusively to the Santeria ritual of animal sacrifice. *Id.* at 535 ("[A]lmost the only conduct subject to [the prohibition] is the religious exercise of Santeria church members."). In addition, the legislative history revealed that disapproval of animal sacrifice *as a Santeria religious ritual* had in fact motivated the legislators. *Id.* at 534 ("[S]uppression of the central element of the Santeria worship service was the object of the ordinances."). Furthermore, although the legislation claimed a variety of secular goals, those objectives were belied by exclusions that were incompatible with those goals because they widely permitted animal sacrifice outside the context of Santeria religious ceremonies. *Id.* at 536. Because the prohibition was found to be motivated by disapproval of a religious practice and represented an attempt suppress it, and because, notwithstanding its disguise, it in fact applied almost exclusively to the Santeria ritual of animal sacrifice, the Supreme Court found that the ordinances were subject to

strict scrutiny, and that they violated the plaintiffs' free exercise rights. *Id.* at 547.

The *Lukumi* opinion, indeed, declared the "principle" that "government, in pursuit of legitimate interests, cannot in a selective manner impose *burdens* only on conduct motivated by religious belief," *id.* at 543 (emphasis added), thus justifying strict scrutiny. It characterized this principle as "essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* Yet, there are crucial differences between the facts in *Lukumi* and those in the present case. First, the ordinances in *Lukumi* were intended to, and did, *suppress* a religious ritual of a particular faith, by prohibiting its performance in the city. Reg. I.Q. does no such thing. It leaves all religions free without interference to engage in whatever religious practices they choose (including, of course, religious worship services) throughout the City. It represents only a decision by the Board not to subsidize religious worship services by providing rent-free school facilities in which to conduct them.

Second, the Hialeah ordinances were motivated by the city council's disapproval of the targeted religious practice. The Board has no such motivation. There is not a scintilla of evidence that the Board disapproves of religion or any religion or religious practice, including religious worship services. Its sole reason for excluding religious worship services from its facilities is the concern that by hosting and subsidizing religious worship services, the Board would run a meaningful risk of violating the Establishment Clause by appearing to

endorse religion. This difference is of crucial importance in determining the reach of *Lukumi's* reasoning that a burdensome regulation focused on a religious practice is constitutionally suspect and therefore subject to strict scrutiny. This reasoning makes perfect sense when the regulation's focus on religion is gratuitous, and all the more so when it is motivated by disapproval of religion (or of a particular religion or religious practice). On the other hand, it makes no sense when the regulation's focus on religion is motivated by the governmental entity's reasonable interest in complying with the Establishment Clause. The Free Exercise and Establishment Clauses place limits on the conduct of all governmental entities. The Free Exercise Clause prohibits government from interfering with free exercise of religion. The Establishment Clause prohibits government from engaging in conduct that would constitute an establishment of religion, such as endorsing, or seeming to endorse, a religion. It is only to the extent that governmental conduct *affects religion* that the restrictive force of the Religion Clauses is operative. Accordingly, rules and policies designed to keep a governmental entity in conformity with its obligations under the Religion Clauses must of necessity focus on religious subject matter. If the focus is not religious, the Religion Clauses have no application. Such focus on religion is neither an invidious discrimination nor constitutionally suspect. To the contrary, it is inevitable.

To illustrate, we consider a number of rules that might be adopted with the purpose of complying with the Religion Clauses. One such rule might state,

"This city shall not adopt any rule or practice that constitutes an improper burden on the free exercise of religion, or that constitutes an establishment of religion." Or a school board might adopt a rule stating, "No school or teacher shall compel any student to participate in religious exercises, or seek to persuade any student to alter his or her religious beliefs." Such rules can hardly be constitutionally suspect in view of the fact that they are constitutionally mandated. Going further, a reformed Hialeah, chastened by the Supreme Court's ruling in *Lukumi,* might adopt a new ordinance that summarizes the Supreme Court's ruling. The ordinance might provide something like, "Under no circumstances will this city pass any ordinance prohibiting any practice undertaken as a religious exercise, unless it similarly prohibits the practice when done in a secular context, and in no circumstances will a practice be prohibited because of disapproval of the practice as a religious ceremony." Or, in recognition of the Supreme Court's recent ruling in *Hosanna–Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.,* —— U.S. ——, 132 S.Ct. 694 (2012), that there is a constitutionally compelled "ministerial exception" to the laws forbidding discrimination in employment, the Congress might pass a statute amending the federal laws that forbid discrimination in employment, stating something like, "No minister of a religious faith shall have a claim against the church or religious organization that employs the minister for the performance of ministerial duties." These hypothetical rules—the very rules declared by the Supreme Court to be constitutionally mandated—do not represent invidious discrimination against

religion and are not constitutionally suspect simply because the limitations they impose target religion. They target religion in order to give effect to the Constitution's Religion Clauses, which themselves apply only to religion. Yet under the District Court's analysis, a statute stating the rule of *Lukumi* would fail to pass the test of *Lukumi,* and a statute stating the rule of *Hosanna–Tabor* would fail to pass the test of *Hosanna–Tabor*. We believe the District Court has misunderstood *Lukumi* in construing it to mean that a rule declining to subsidize religious worship services so as not to risk violating the Establishment Clause is automatically constitutionally suspect and subject to strict scrutiny.

*b) Locke v. Davey.*

More importantly, upon facts very similar to ours, the Supreme Court has expressly ruled that where motivated by Establishment Clause concerns, a governmental decision to exclude specified religious causes from eligibility to receive state educational subsidies is neither a violation of free exercise, nor even subject to strict scrutiny under *Lukumi*.[6] In *Locke v. Davey,* 540 U.S. 712 (2004), the State of Washington had established a scholarship program to assist academically gifted students in

[6] Judge Walker argues in his dissent that "*Locke* is not applicable here ... because it dealt only with a government subsidy." Dissenting Op. 7. However, Reg. I.Q. also concerns a government subsidy. As discussed above, the regulation represents a governmental decision not to subsidize religious worship services by providing rent-free facilities to house such services. *See supra* pp. 190–91, 191–92. Therefore, *Locke* is not distinguishable on this ground.

post-secondary education. 540 U.S. at 715. The state, however, provided by statute and by provision of its constitution that students pursuing a degree in theology were not eligible to receive the scholarship grants. *Id.* at 716. This restriction was challenged by Davey, a gifted student, who was awarded a grant but was informed that it could not be used to pursue the degree in pastoral ministries he sought. *Id.* at 717. Davey brought suit alleging, among other claims, that the state's refusal to allow use of its scholarship funds for the study of theology was, under the rule of *Lukumi,* presumptively unconstitutional and subject to strict scrutiny. *Id.* at 720, 124. Recognizing the state's Establishment Clause interest underlying the restriction, the Court observed that "[t]he[ ] two [Religion] Clauses ... are frequently in tension. Yet we have long said that there is room for play in the joints between them. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 718–19 (citations and internal quotation marks omitted). Specifically addressing Davey's claim that the prohibition was presumptively unconstitutional and subject to strict scrutiny pursuant to *Lukumi,* the Court concluded:

> We reject his claim of presumptive unconstitutionality, however; to do otherwise would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning. In *Lukumi,* the city of Hialeah made it a crime to engage in certain kinds of animal slaughter. We found that the law sought to suppress ritualistic animal sacrifices of the Santeria religion. In the

> present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit. The State has merely chosen not to fund a distinct category of instruction.

*Id.* at 720–21 (citations and footnote omitted).

Finding no animus toward religion in the legislative history or text of the prohibition, nor in the operation of the scholarship program, and finding substantial evidence indicating a historical aversion to using tax funds to support the ministry, "which was one of the hallmarks of an 'established' religion," *id.* at 722–25, the Court concluded that, "[g]iven the historic and substantial state [anti-establishment] interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect." *Id.* at 725. Accordingly, Davey's Free Exercise Clause claim failed because "[t]he State's [anti-establishment] interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on [students eligible for scholarship funds]." *Id.*

As Washington's exclusion of students of theology from eligibility for the state's subsidies was not

subject to strict scrutiny under *Lukumi* because the exclusion was enacted in the interest of establishment concerns, we can see no reason why the rule should be any different in this case. We see no meaningful distinctions between the cases. Our record reveals no animus toward religion generally or toward a particular religion or religious practice in either the text of Reg. I.Q. or the operation of Board's policy. Underlying the Board's prohibition is a slightly different manifestation of the same historical and constitutional aversion to the use of public funds to support the practice of religion cited by the Court in *Locke*. As in *Locke,* the Board's interest in respecting the principle of the Establishment Clause that disfavors public funding of religion is substantial, and the burden, if it can properly be called a burden, that falls on Bronx Household in needing to find a location that is not subsidized by the City for the conduct of its religious worship services, is minor from a constitutional point of view.

We do not mean to imply that merely by claiming the motivation of observing interests favored by the Establishment Clause a governmental entity gets a free pass, avoiding *all* scrutiny. We recognize that a school authority's prohibition of a religious practice, even if explained as an attempt to comply with constitutional responsibilities, can in some circumstances represent a suspect discrimination against religion, which violates one or both of the Religion Clauses. A court would likely have rejected, for example, a claim by Hialeah that its ordinances, which prohibited almost exclusively a religious practice of the Santeria church, were permissible in

light of Hialeah's interest in observing the Establishment Clause. *See Good News Club,* 533 U.S. at 112–19 ("[A]corrding to Milford, its restriction was required to avoid violating the Establishment Clause. We disagree.").

Our point is therefore not that a refusal to subsidize a religious practice, sought to be justified as an effort to comply with the Establishment Clause, necessarily defeats a claim of violation of the Free Exercise Clause. It is rather that *Lukumi's* invocation of presumptive unconstitutionality and strict scrutiny cannot reasonably be understood to apply to rules that focus on religious practices in the interest of observing the concerns of the Establishment Clause. The constitutionality of such rules must be assessed neutrally on all the facts and not under strict scrutiny.

*c) Discrimination against particular religions.*

We also disagree with the District Court's view that Reg. I.Q. is a constitutionally suspect discrimination *among religions* because it affects religions that conduct worship services and does not affect religions that do not. Reg. I.Q. treats all religions in the same fashion. It leaves all religions free to engage in whatever practices they wish anywhere other than the Board's school facilities. Furthermore, to the extent that different religions choose to avail themselves of the Board's subsidized facilities, Reg. I.Q. treats them all similarly as to what they may do and may not do. The "religious worship services" prohibition bars all conduct of

religious worship services in the school facilities. The activities not prohibited are likewise permitted to all users.

Religions that conduct religious worship services are not excluded by Reg. I.Q. from the use of school facilities. They may use the facilities for the same purposes and in the same manner as the facilities are used by religions that do not conduct religious worship services. They may use the facilities to teach religion, read from and discuss the Bible, advocate their religious views, sing hymns, say prayers, and do all things that must be permitted under the rule of *Good News Club*. Such religions, it is true, may not use the school facilities for the conduct of religious worship services. While Reg. I.Q. thus treats these two classes of religions equally, its impact on them will be different to the extent that religions that do not conduct religious worship services will not apply to conduct religious worship services and will therefore not be refused something they might have wanted, while religions that do conduct religious worship services, such as Bronx Household, may ask to conduct religious worship services and be denied.

It does not follow, however, that such a disparate impact violates the Free Exercise Clause. "[I]t is a basic tenet of First Amendment law that disparate impact does not, in itself, constitute viewpoint discrimination." *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 130 S.Ct. 2971, 2996 (2010). In *Lukumi,* the reason for striking down the Hialeah ordinances was not that the Santeria religion wished to practice

animal sacrifice while other religions did not. The prohibition of Santeria's ritual animal sacrifice was struck down because the evidence showed that the prohibition was motivated exclusively by discriminatory disapproval of that religious practice, and that the city's claim that the ordinances were motivated by public health and other neutral concerns was false. It is the clear implication of the Supreme Court's opinion that, if the prohibition had applied across-the-board, affecting religious and secular practice equally, and had not been motivated by hostility to Santeria's religious practice, the prohibition would have been upheld, notwithstanding that it would have burdened the Santeria religion without similarly burdening other religions that do not practice animal sacrifice. *See Lukumi,* 508 U.S. at 547 ("Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.").

Thus, it is clear that the Free Exercise Clause would not prohibit the Board from denying permits to those seeking to use school facilities for the killing of animals, or for boxing, or other martial arts contests, so long as the Board's restriction applies to secular usage as well as religious, and was not motivated by discriminatory disapproval of any particular religion's practices. The Board is not compelled to permit a practice it has a justifiable

reason for excluding just because the exclusion may affect one religion that practices the excluded conduct while not affecting other religions that do not.

Nothing in this record remotely supports a finding that the Board disapproves of religious worship services or wishes to favor religions that do not practice religious worship services over those that do. The Board's only motivation is to act consistently with its establishment concerns and protect itself against reasonable Establishment Clause challenges.[7]

We conclude that *Lukumi's* invocation of strict scrutiny has no application to these facts, and that Reg. I.Q. does not impose an unconstitutional burden

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[7] Nor was the District Court correct in its view that Reg. I.Q. discriminates against "religions that fit the 'the ordained' model." *Bronx Household*, 876 F. Supp. 2d at 431. There is no evidence whatsoever that the Board applies Reg. I.Q. only where the proposed religious worship service would be conducted by an ordained minister. The District Court perhaps based this finding on our earlier observation in *Bronx Household IV* that "[r]eligious worship services are conducted according to the rules dictated by the particular religious establishment and are *generally* performed by an officient of the church or religion." 650 F.3d at 41 (emphasis added). This passage was descriptive, rather than prescriptive, and included the word "generally" to make clear that the presence of an officiant was merely a common feature, and not a definitional requirement of a religious worship service. Far from specifying that an ordained officiant is an essential feature of services to which Reg. I.Q. applies, the Board has essentially left it to applicants to state whether they will conduct religious worship services.

on Bronx Household's right of free exercise of religion.[8]

> *3) If the Board has a reasonable, good faith concern that making its school facilities available for the conduct of religious worship services would give rise to a substantial risk of violating the Establishment Clause, the permissibility of the Board's refusal to do so does not turn on whether such use of school facilities would in fact violate the Establishment Clause.*

As in *Bronx Household IV,* we do not reach the question whether the Board would violate the Establishment Clause by allowing the subsidized use of the school facilities for religious worship services because we believe it is unnecessary to do so. The District Court acknowledged that a motivation to avoid violation of the Establishment Clause would justify the Board's exclusion of religious worship services *if* allowing the conduct of religious worship

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[8] Alternatively, the same sensible result could be reached through two other routes of interpretation. First, the *Lukumi* "principle" that "government, in pursuit of legitimate interests, cannot in a selective manner impose *burdens* only on conduct motivated by religious belief," 508 U.S. at 543, 113 S.Ct. 2217 (emphasis added), might be deemed inapplicable to the present case on the ground that a government decision not to subsidize a religious activity is not deemed to constitute a "burden" on that activity, within the meaning of *Lukumi.* Or, the "strict scrutiny" test may apply, but be deemed satisfied when government decides not to subsidize a religious practice acting on a good faith and reasonable concern that such subsidizing would present a meaningful risk of being found in violation of the Establishment Clause. Regardless of which of these three analytical formulas is used, the validity of Reg. I.Q. would be sustained against Bronx Household's *Lukumi*-based challenge.

services would in fact violate the Establishment Clause. But the court expressed the view that, unless the excluded practice would in fact constitute a violation of the Establishment Clause, steering clear of conduct that might be reasonably suspect under the Establishment Clause does not furnish adequate reason for declining to offer the school facilities for the conduct of religious worship services. *Bronx Household,* 876 F.Supp.2d at 433–37. The Board contends this was error.

We cannot accept the District Court's rule for two reasons. First, this rule would unfairly put the Board in an impossible position of being compelled at its peril to risk violating one Religion Clause or the other if it wrongly guessed the Establishment Clause's exact contours. Second, the District Court's rule contradicts the most nearly comparable Supreme Court authority, as well as clear Second Circuit authority.

No extant decision by the Supreme Court permits the Board to predict with confidence whether it might be found in violation of the Establishment Clause if it offers its school facilities to Bronx Household, as well as numerous other churches, for the conduct of subsidized worship services (virtually all of which would be Christian services held on Sundays, as that is when the school facilities are most available for such use). Essentially two choices are open to the Board. It can either make its facilities available for worship services, or decline to do so. If the rule were as the District Court proposed, a wrong guess as to what the Supreme Court will eventually hold would put the Board in violation of

one of the two Religion Clauses. If the Board declines to host and subsidize religious worship services, and the Supreme Court eventually rules that allowing religious worship services would not violate the Establishment Clause, the Board would have committed years of violations of the Free Exercise Clause rights of rejected permit applicants. On the other hand, if the Board offers its facilities for subsidized religious worship services, and the Supreme Court eventually rules that the practice causes sufficient appearance of endorsement to constitute a violation of the Establishment Clause, the Board would have committed years of violation of that clause. Under the District Court's rule, the Board would be compelled to speculate with little guidance which way the Supreme Court will eventually go, and if it guesses wrong, it would have committed extensive violations of one of the Religion Clauses. Such a rule would be exceedingly unfair to the Board. In our view, the better rule allows the Board, if it makes a reasonable, good faith judgment that it runs a substantial risk of incurring a violation of the Establishment Clause by hosting and subsidizing the conduct of religious worship services, to decline to do so.[9]

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[9] *Cf. Ricci v. DeStefano,* 557 U.S. 557, 585 (2009) ("[U]nder Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.").

Furthermore, the Supreme Court in *Locke* expressly rejected the District Court's rule. As we explained above, in *Locke* the Court was ruling on the question whether the State of Washington, acting pursuant to constitutional and historical concerns about government funding of religious practices, could lawfully exclude students seeking degrees in theology from eligibility for state scholarship grants. In ruling that the exclusion did not violate the free exercise rights of the plaintiff who was ineligible for grant funds because he was pursuing a degree in theology, the Court explicitly considered and rejected the argument that establishment concerns could justify the religion-based exclusion only if the reviewing court concluded that granting the subsidy for the excluded religious purpose would in fact violate the Establishment Clause. It explained, as set forth above, that "there is room for play in the joints between [the Religion Clauses].... [S]ome state actions permitted by the Establishment Clause ... [are] not required by the Free Exercise Clause.... If any room exists between the two Religion Clauses, it must be here." 540 U.S. at 718–19, 725 (internal quotation marks omitted). If it was clear that the State of Washington was free in service of establishment interests to exclude theology students from eligibility for its scholarships, even though making them eligible would not have violated the Establishment Clause, we see no reason why the Board may not similarly in service of the establishment interests decline to subsidize religious worship services, even if subsidizing them would not violate the Establishment Clause.

Furthermore, our court has repeatedly rejected the District Court's rule. In *Marchi v. Bd. of Coop. Educ. Servs. of Albany,* 173 F.3d 469 (2d Cir.1999), we considered a teacher's claim that his First Amendment rights were violated by a school board directive that he "cease and desist from using any references to religion in the delivery of [his] instructional program unless it is a required element of a course of instruction for [his] students and has prior approval by [his] supervisor." *Id.* at 472–73. We decided that the school board "d[id] not impermissibly infringe Marchi's free exercise rights" in interpreting the directive to prohibit communications that "sufficiently intruded religious content into a curricular matter, not involving religion, such that the school authorities could reasonably be concerned that communications of this sort would expose it to non-frivolous Establishment Clause challenges." *Id.* at 477. We recognized that "when government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause" because "[t]he decisions governmental agencies make in determining when they are at risk of Establishment Clause violations are difficult." *Id.* at 476; *see id.* ("[I]n dealing with their employees, [governmental agencies] cannot be expected to resolve so precisely the inevitable tensions between the Establishment Clause and the Free Exercise Clause that they may forbid only employee conduct that, if occurring, would violate the Establishment Clause and must tolerate all

employee conduct that, if prohibited as to non-employees, would violate the Free Exercise Clause.").

And in *Skoros v. City of New York,* 437 F.3d 1 (2d Cir.2006), we considered a Free Exercise Clause challenge to New York City Department of Education's school holiday display policy, which had been promulgated in light of Establishment Clause concerns. The policy permitted the display of "secular" holiday symbols including Christmas trees, menorahs and the star and crescent but did not permit a crèche to be displayed as a symbol of Christmas. *Id.* at 5–6. We decided that the holiday display policy did not violate the Free Exercise Clause and, in doing so, recognized that even though the policy might have permitted a crèche to be displayed without violating the Establishment Clause, "we afford the government some leeway in policing itself to avoid Establishment Clause issues, even if it thereby imposes limits that go beyond those required by the Constitution." *Id.* at 34–35.

Returning to the present case, as we explained at length in *Bronx Household IV,* the Board has substantial reasons for concern that hosting and subsidizing the conduct of religious worship services would create a substantial risk of liability under the Establishment Clause. "[T]he Supreme Court has warned that violation of the Establishment Clause can result from *perception* of endorsement. The Establishment Clause, at the very least, prohibits government from *appearing* to take a position on questions of religious belief." 650 F.3d at 41 (internal quotation marks omitted). As we explained, during Sunday services, under the District Court's

injunction, the Board's schools are dominated by church use: "Church members post signs, distribute flyers, and proselytize outside the school buildings. In some schools, no other outside organizations use the space. Accordingly, on Sundays, some schools effectively become churches [as] both church congregants and members of the public identify the churches with the schools." *Id.* at 42. We noted also that the fact that school facilities are available for such use primarily on Sundays results in an unintended bias in favor Christian religions, which prescribe Sunday as the principal day for worship services, while Jews and Muslims, for example, hold worship services on days during which school facilities are less available for such use. *Id.* at 43. All of this, which we explained in greater detail in our earlier opinion, supports a reasonable concern on the part of the Board that hosting and subsidizing the conduct of religious worship services might support a non-frivolous claim that the Board is creating a public perception of endorsement of religion. *Id.* at 42.

In view of (1) the absence of discriminatory animus on the part of the Board against religion, or against religions that conduct worship services; (2) the bona fides and the reasonableness of the Board's concern that offering school facilities for the subsidized conduct of religious worship services would create a substantial risk of incurring a violation of the Establishment Clause claim; and (3) the fact that the Board's policy (a) leaves all persons and religions free to practice religion without interference as they choose, (b) treats all users, whether religious or secular, in identical fashion,

and (c) imposes no burden on any religion, leaving all free to conduct worship services wherever they choose other than the Board's schools; as well as the other reasons recited in this opinion and in *Bronx Household IV,* we conclude that Reg. I.Q. does not violate Plaintiffs' rights to free exercise of religion, whether or not it is subject to strict scrutiny.

*B. The Establishment Clause*

*1) The District Court erred in concluding that Reg. I.Q. violates the Establishment Clause because it compels the Board to become excessively entangled with religion by deciding what are religious worship services.*

The District Court ruled that the Board's very act of determining whether a proposed use of the school facilities is a religious worship service (and therefore is prohibited by Reg. I.Q.) would constitute an excessive entanglement with religion, which violates the Establishment Clause. *Bronx Household,* 876 F.Supp.2d at 440–45; *see Lemon v. Kurtzman,* 403 U.S. 602, 612–13 (1971). We disagree for a number of reasons.

When this case was before us in *Bronx Household IV,* Bronx Household presented us with the same argument. We rejected it. First, we noted that whatever merit the argument might have in other circumstances, it could have no application here because Bronx Household acknowledged its intention to conduct religious worship services in the school facilities. Its application for an extended use permit specified its intention to conduct "Christian

worship services." 650 F.3d at 35. Furthermore, we noted that Bronx Household's argument "overlook[ed] the nature of the duties placed on government officials by the Establishment Clause." *Id.* at 47. The Establishment Clause prohibits government officials from taking action that would constitute an establishment of religion. In many circumstances, especially when dealing with applications to conduct arguably religious exercises on public property, government officials cannot discharge their obligations under the Establishment Clause without examining the conduct to determine whether it is in fact religious and, if so, whether the conduct is of such nature that allowing it to take place on public property would constitute a prohibited establishment of religion. If public officials were not permitted to undertake such inquiries, they could not discharge their duties to guard against violation of the Establishment Clause. Thus, the Constitution, far from forbidding government examination of arguably religious conduct, at times compels government officials to undertake such inspection in order to draw constitutionally necessary distinctions. We concluded that "the mere act of inspection of religious conduct" did not constitute excessive entanglement, observing that to prohibit such inspection "would effectively nullify the Establishment Clause." *Id.*

On remand, the District Court concluded that "[f]actual and legal developments since [*Bronx Household IV* ] merit reconsideration of Plaintiffs' Establishment Clause claim." *Bronx Household,* 855 F.Supp.2d at 60–61. In particular, the District Court

pointed to "new facts documenting how the Board's current policy fosters excessive governmental entanglement" and the Supreme Court's recent decision in *Hosanna–Tabor*. *Id.* at 64. The District Court believed this decision *201 pertinent because the Supreme Court "emphasized the wide berth religious institutions are to be given with respect to their core activities, including worship." *Id.* at 63. Upon reconsidering Bronx Household's Establishment Clause claim, the District Court concluded that Reg. I.Q. compels Board officials to become excessively entangled with religion by requiring them "to make their own bureaucratic determinations as to what constitutes 'worship,' " contravening *Hosanna–Tabor*'s prohibition of such government involvement in ecclesiastical decisions. *Bronx Household,* 876 F.Supp.2d at 440.

We respectfully disagree. The evidentiary record does not sustain the district court's findings that the Board makes its own determination whether an applicant's proposed activities constitute a religious worship service. And, in any event, *Hosanna–Tabor* does not support the proposition that it would be improper for the Board to make such a determination.

The Board's policy is *not* to make its own determination whether conduct proposed by an applicant constitutes a religious worship service. To the contrary, the Board's policy is to rely on the applicant's own characterization as to whether the applicant will conduct religious worship services. Under Reg. D–180, every extended use applicant must submit an application for a permit. The

application form requires the applicant to provide a "Description of Activities to be conducted," and to sign a certification that "the Information I have provided ... is complete and accurate to the best of my knowledge," and that "the activities to be conducted ... do not include any of the prohibited uses described ... in Chancellor's Regulation D–180." App. 996.[15] The Board reviews the applicant's "Description of Activities to be conducted" to see whether the applicant has stated an intention to conduct religious worship services. It does not consider whether proposed activities that the application does not describe as a religious worship service in fact constitute a religious worship service. The Board may, however, look beyond the application at the applicant's website and other public materials. If the applicant states on its website or in other public materials an intention to conduct a religious worship service without having acknowledged that intention in its application, the Board may either request an explanation of the apparent discrepancy or deny the application pursuant to § II.L of Reg. D–180. As with respect to the application itself, in reviewing an applicant's website or other public materials, the Board does not make its own assessment whether the described activities constitute a religious worship service but

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[15] *See also* Reg. D–180 § II.L ("Providing incorrect, incomplete, or misleading information on the Permit Application or the failure to conform to any of the guidelines and/or limitations contained in this regulation, as well as any other applicable laws and regulations governing the use of school buildings and grounds, may lead to the revocation of the permit, the denial of future Permit Applications and other legal actions by the [Board].").

limits its inquiry to the applicant's own characterization. The Board, furthermore, makes no attempt to define, or impose on applicants a definition of, what constitutes a "religious worship service."

Although it is uncontradicted that the Board's policy is not to make its own determination whether an applicant's proposed activities constitute a religious worship service, but rather to rely exclusively on the applicant's own characterization, the District Court nonetheless concluded that Reg. I.Q. compels excessive entanglement because the Board acknowledged that its policy of not making its own determination had not in every instance been properly carried out. *Bronx Household,* 876 F.Supp.2d at 440–41. For example, the Board acknowledged an instance (not involving Bronx Household) in which, contrary to Board policy, a permit applicant who indicated that the activities to be conducted included "Prayer" and "Bible Study" was told by a Board representative that "Bible study would be ok, but not prayer meetings." The fact that there have been instances, none involving Bronx Household, in which Board personnel improperly deviated from the Board's policy cannot justify the District Court's conclusion that Reg. I.Q. compels excessive entanglement and is therefore unconstitutional.

The District Court also justified its finding based on the fact that the Board's policy permits the Board to inspect an applicant's website and other public materials. The court explained,

> While this approach of looking beyond the four corners of the Extended Use Application may be proper for purposes of verifying a political or commercial applicant's compliance with Ch. Reg. D–180, the same cannot be said of verifying whether a religious applicant is complying with the worship-related provisions of the regulation. This is because it is the religious adherents alone who can determine for themselves how to "shape their own faith," *Hosanna–Tabor,* 132 S.Ct. at 706, and no amount of bureaucratic second-guessing—even if based solely on the adherents' own words—may invade their province.

*Bronx Household,* 876 F.Supp.2d at 442 (citation, brackets and internal quotation marks omitted).

We believe the District Court's reasoning was flawed in two respects. First, as explained above, the Board's policy providing that it may examine an applicant's website and other public materials (in addition to the application) was not a deviation from the Board's policy of accepting an applicant's own characterization of whether its activities constitute a religious worship service. According to the Board's policy, it is only when an applicant itself characterizes its conduct as a religious worship service that the Board will consider it to be such. The aspect of the Board's policy that allows it to look at an applicant's website and other public materials in addition to the application does not represent a deviation from the policy of using only an applicant's own characterization.

Because the Board does not make its own determinations whether an applicant's proposed activities constitute worship services, the District Court's interpretation of *Hosanna–Tabor* as prohibiting a governmental authority from making such determinations has no pertinence. But, even if the Board were making its own determinations, *Hosanna–Tabor* would not prohibit such a policy. The Supreme Court's ruling rather supports the opposite conclusion.

In *Hosanna–Tabor,* the plaintiff Perich, who was employed by a church to teach in a capacity regarded by the church as that of a minister, was dismissed from her employment after developing an illness and taking a period of disability leave. 132 S.Ct. at 700. The plaintiff sued for reinstatement, alleging that her dismissal violated the Americans with Disabilities Act (the "ADA"), 42 U.S.C. § 12101 *et seq.* (1990). *Id.* at 701. The Supreme Court ruled in favor of the church, holding that, because the plaintiff was employed by the church as a minister, she had no claim against the church under the employment discrimination laws. *Id.* at 707–10. The Court reasoned that, because the Free Exercise Clause requires that religions be free to select their own ministers, and because the Establishment Clause is offended by giving the state the power to determine which individuals will minister to the faithful on behalf of a church, there is an implicit, constitutionally mandated "ministerial exception" to the employment discrimination laws. The Court explained,

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. 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.

*Id.* at 706.

In the present case, even if the Board were making its own determination whether an applicant's proposed conduct constitutes a religious worship service, *Hosanna–Tabor* would not support the conclusion that the Establishment Clause prohibits a governmental entity from making that determination. This is for two reasons.

First, the constitutional impropriety that led the Supreme Court to read a ministerial exception into the employment discrimination statutes is not present on these facts. The problem in *Hosanna–Tabor* was that, unless the employment discrimination laws are read not to apply to a claim against a church by a minister asserting a right to

employment, the consequence would be that a governmental authority—a judge, or a jury, or an administrative agency—would dictate to the church whom it must employ to serve as minister, communicating its teachings to its faithful. The governmental authority would, to a significant extent, be directing, shaping and controlling the ecclesiastical actions of the church.

The Board deciding for itself whether an applicant's proposed conduct constitutes a religious worship service would not entail imposing any such control over a church's religious activity. Unlike *Hosanna–Tabor,* where a government authority would be requiring a church to communicate the tenets of its faith through a minister not of its own choosing, under no circumstances would the Board under Reg. I.Q. be telling any person or entity how to conduct worship services. The only practical consequences that would turn on the Board's decision would be whether the Board would make its subsidized school facilities available to the applicant. The applicant would remain free to shape its religious worship services in any way it chose.[16]

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[16] Nor could a decision by the Board overruling an applicant's own understanding of whether proposed activities constituted a religious worship service ever deprive an applicant of the opportunity to conduct what it deemed to be a religious worship service. The denial of a permit application based on the Board's rejection of the applicant's own characterization of the proposed activities would occur only when the Board deemed activities that the applicant did not consider a religious worship service to be a religious worship service. In that circumstance, by definition, the denial would only prohibit use for activities that the applicant did not consider to be a religious worship service.

*Hosanna–Tabor,* moreover, does not merely fail to support Bronx Household's claim of Establishment Clause violation due to excessive entanglement by the Board; it actively contradicts the argument. This is because in *Hosanna–Tabor* the Supreme Court itself did precisely what the District Court found a governmental entity prohibited from doing.

The conclusion that there is an implicit ministerial exception that bars a minister from suing the church that employs her under the ADA did not resolve the case. The question remained whether the plaintiff was a minister and thus subject to the ministerial exception. It was undisputed that, according to the church's classification, the plaintiff served in the role of a commissioned minister.[17] If the District Court were correct, the church's classification of the plaintiff as a minister would have ended the matter; the Supreme Court, a governmental authority, would have been compelled (so as to avoid excessive entanglement) to accept the church's designation. The Court did not do so. It undertook to make its own determination whether the plaintiff was a minister subject to the ministerial exception. Based on its own assessment of the pertinent facts (including the nature of the duties assigned to her), the Court determined that she was a minister. *See* 132 S.Ct. at 707–08 ("As a source of religious instruction, Perich performed an important

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[17] "The Synod classifies teachers into two categories: 'called' and 'lay.' ... Once called, a teacher receives the formal title 'Minister of Religion, Commissioned'.... Hosanna–Tabor asked [the plaintiff] to become a called teacher. [She] accepted the call and received a 'diploma of vocation' designating her a commissioned minister." 132 S.Ct. at 699–700.

role in transmitting the Lutheran faith to the next generation. In light of ... the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—we conclude that Perich was a minister covered by the ministerial exception.").[18]

For all the reasons outlined above and as well as those we discussed in our earlier decision in *Bronx Household IV,* which we now reaffirm without need to repeat them, we conclude that the District Court erred in concluding that Reg. I.Q. violates the Establishment Clause by compelling the Board to make decisions that constitute excessive

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[18] Nor was the Supreme Court's undertaking to determine for itself whether the plaintiff was a minister, rather than accept the church's characterization, done carelessly without recognition of its implications for the excessive entanglement argument. Justice Thomas, who concurred in the judgment, wrote separately, espousing the very arguments Bronx Household makes here, to reject the aspect of the Court's decision that refused to regard the church's characterization as conclusive. Justice Thomas argued that, in order not to intrude on theological decision, he would have deemed the plaintiff's ministerial status conclusively established by the fact that the church deemed her a minister. *Id.* at 711 (Thomas, *J.,* concurring) ("Hosanna–Tabor sincerely considered Perich a minister. That would be sufficient for me to conclude that Perich's suit is properly barred by the ministerial exception."). No justice joined in Justice Thomas's objection. All of the eight other justices joined in one or both of the Chief Justice's opinion for the Court, and the concurring opinion of Justice Alito, both of which explicitly justified the judgment on the Supreme Court's determination, rather than the church's designation, that the plaintiff was in fact performing in the role of a minister.

entanglement with religion.[19] We have considered Bronx Household's other arguments and find no merit in them.[20]

## CONCLUSION

For the foregoing reasons, the judgment of the district court is REVERSED, and the injunction barring enforcement of Reg. I.Q. is VACATED.


[19] We similarly reject Bronx Household's claim that Reg. I.Q. causes excessive entanglement by requiring the Board to take an official position on religious doctrine. Unlike in *Commack Self–Service Kosher Meats, Inc. v. Weiss,* 294 F.3d 415 (2d Cir.2002), where we held laws defining "kosher" according to the dictates of Orthodox Judaism "excessively entangle government and religion because they (1) take sides in a religious matter, effectively discriminating in favor of the Orthodox Hebrew view of dietary requirements; (2) require the State to take an official position on religious doctrine; and (3) create an impermissible fusion of governmental and religious functions by delegating civic authority to individuals apparently chosen according to religious criteria," *id.* at 425, the Board had not engaged in any comparable practices.

[20] In his dissent, Judge Walker advances many of the same arguments he advanced in *Bronx Household IV,* 650 F.3d at 52–65. Our responses are contained in previous *Bronx Household* opinions and set forth in this opinion.

JOHN M. WALKER, JR., Circuit Judge, dissenting:

The majority states that the "Free Exercise Clause ... has never been understood to require government to finance a subject's exercise of religion." Maj. Op. at 190. Allowing an entity to use public school space open to all others on equal terms is hardly the financing of that entity. However, shutting the door to religious worship services in such a setting when every other activity is permitted strikes at the Clause's core. "Indeed, it was historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532 (1993) (internal quotation marks omitted). To this end, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* In my view, the Board of Education's policy that disallows "religious worship services" after hours in public schools—limited public fora that are otherwise open to all—violates the Free Exercise Clause because it plainly discriminates against religious belief and cannot be justified by a compelling government interest. I would affirm the district court's permanent injunction.

Department of Education Regulation of the Chancellor D–180 § I.Q. ("Reg.I.Q.") prohibits the use of school facilities outside of school hours by outside groups "for the purpose of holding religious worship services, or otherwise using a school as a

house of worship." The last time this case was before this court, we were asked to decide whether Reg. I.Q. violates the Free Speech Clause of the First Amendment. *See Bronx Household of Faith v. Bd. of Educ. of N.Y.,* 650 F.3d 30 (2d Cir.2011) ("*Bronx Household IV* "). In my view, it does. The majority concluded that Reg. I.Q. is not viewpoint discriminatory because it excluded "the *conduct of an event or activity* that includes expression of a point of view," not "the *expression* of that point of view." *Id.* at 37. The majority held that Reg. I.Q. is a content-based exclusion that is constitutionally permissible because "it was objectively reasonable for the Board to worry that use of the City's schools for religious worship services ... [would] expose[ ] the City to a substantial risk of being found to have violated the Establishment Clause." *Id.* at 43.

I dissented and now incorporate that dissenting opinion into this one by reference. It has never been disputed that the Department of Education's policies for the after-hours use of public school spaces created a limited public forum. *Id.* at 36. I concluded in *Bronx Household IV* that, under *Good News Club v. Milford Central School,* 533 U.S. 98 (2001), *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993), and *Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819 (1995), Reg. I.Q. is viewpoint discriminatory because it disallows expression solely because the expression is from a religious viewpoint. *Bronx Household IV,* 650 F.3d at 54–59 (Walker, J., dissenting). Moreover, I believed that the "majority's attempt to differentiate between the conduct of an event, here labeled 'services,' and the protected

viewpoints expressed during the event is futile because the conduct of 'services' is the protected expressive activity." *Id.* at 56. I thus would have required the Board of Education to show a compelling justification for its viewpoint discrimination.

Particularly relevant to the current appeal, I also concluded that permitting religious groups to use school facilities for religious purposes pursuant to a neutral policy creating a limited public forum would not violate the Establishment Clause because such a policy would "neither promote[ ] nor endorse[ ] a religious message." *Id.* at 61. Such a policy would not provide impermissible aid to religion; rather, it simply would provide a neutral forum for religious and non-religious expression alike. *Id.* at 64. I noted that, in *Rosenberger,* the Supreme Court stated that " '[i]t does not violate the Establishment Clause for a [school] to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises.' " *Id.* at 63 (second alteration in original) (emphasis removed) (quoting *Rosenberger,* 515 U.S. at 842). I thus concluded that the Board of Education could not raise the specter of Establishment Clause concerns as either a reasonable justification (under the majority's holding) or a compelling justification (under my view that strict scrutiny applied) for Reg. I.Q.'s disallowance of religious worship services. *Id.* at 64.

I now turn to the issues presented in the current appeal.

## I. Reg. I.Q.'s Ban on Religious Worship Services Must Be Justified by a Compelling Governmental Interest

A law that is not "neutral and of general applicability" and that affects religion "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi,* 508 U.S. at 531–32 (citing *Emp't Div. v. Smith,* 494 U.S. 872 (1990)). Reg. I.Q. is neither neutral nor generally applicable.

Reg. I.Q. is not neutral or generally applicable because it explicitly conditions use of school facilities on whether an organization is engaging in "religious worship services," a term that by definition has no secular meaning and only burdens religious conduct. Such facial discrimination alone establishes that Reg. I.Q. is not neutral. *See Lukumi,* 508 U.S. at 533. Moreover, it is not generally applicable because in both effect and operation it targets only religious conduct. By disallowing "religious worship services" as the majority has defined that term, Reg. I.Q. burdens many, although not all, religions and no secular organizations. It is thus "an impermissible attempt to target... religious practices." *Lukumi,* 508 U.S. at 535.

Concluding that Reg. I.Q. is neither neutral nor generally applicable in its treatment of religion is an easy call: the Department of Education states that its purpose in creating the policy was to "avoid both the fact and appearance of government endorsement of religion presented when plaintiffs and other congregations use public schools to engage in

worship services." Appellants' Br. 39. The Department thus effectively concedes that its object "is to infringe upon or restrict practices because of their religious motivation." *Lukumi,* 508 U.S. at 533 (citing *Smith,* 494 U.S. at 878–79).

Moreover, contrary to the majority's contention, Bronx Household is sufficiently burdened by Reg. I.Q. to require that strict scrutiny apply. The question is "whether the [government action] imposes any burden on the free exercise of appellant's religion." *Sherbert v. Verner,* 374 U.S. 398. We need not ask whether Bronx Household is "substantially burdened" because the government action here, in specifically targeting religious conduct, is not neutral and not generally applicable. *See, e.g., Thomas v. Review Bd.,* 450 U.S. 707, 718 (1981); *Sherbert,* 374 U.S. at 403; *Tenafly Eruv Assoc. v. Borough of Tenafly,* 309 F.3d 144, 170 (3d Cir.2002) ("[T]here is no substantial burden requirement when government discriminates against religious conduct."); *Brown v. Borough of Mahaffey,* 35 F.3d 846, 849–50 (3d Cir.1994) (holding that requiring plaintiffs to show a substantial burden from "non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment").

As the district court found, "the unopposed testimony is that P.S. 15 is the '*only* location in which [Bronx Household] can afford to gather as a *full* congregation without having to curtail other of their religious practices.' " *Bronx Household of Faith v. Bd. of Educ. of N.Y.,* 876 F.Supp.2d 419, 427

(S.D.N.Y.2012). It is further undisputed that "no other location besides P.S. 15 currently facilitates the Church's religious mandate to worship as an *entire* congregation." *Id.* The burden on Bronx Household is made crystal clear "given the uniquely expensive and crowded real estate market in which the Church resides." *Id.* at 428. In my view, forcing Bronx Household to relocate or suspend its services sufficiently burdens the free exercise of religion to require strict scrutiny.

The majority believes that this case should be decided under *Locke v. Davey,* in which strict scrutiny was not applied to a state-funded scholarship program for post-secondary education that allows students to attend qualified religiously affiliated institutions but disallows students to pursue a degree in theology while receiving the scholarship. 540 U.S. 712, 716 (2004). *Locke* is not applicable here, however, because it dealt only with a government subsidy. The Court in *Locke* explicitly acknowledged that the scholarship at issue "is not a forum for speech," and thus "cases dealing with speech forums are simply inapplicable." *Id.* at 720 n. 3. As discussed, Reg. I.Q. plainly creates a limited public forum. *See Bronx Household IV,* 650 F.3d at 36. Reg. I.Q. is not a government subsidy: the Department of Education charges the same rate to all organizations using its facilities. Whereas *Locke* dealt with directly funding the training of religious clergy, here we are dealing with discriminating against religious exercise in a forum set aside for community-based expression.

Because I believe that Reg. I.Q. is neither neutral nor generally applicable and places a burden on religious conduct, I would apply strict scrutiny.

## II. Reg. I.Q. Fails Strict Scrutiny

The last time this case was before this panel, I explained that in my view, because Reg. I.Q. was viewpoint discriminatory, it must be justified by a compelling governmental interest. *Bronx Household IV,* 650 F.3d at 59 (Walker, J., dissenting). I further explained that the government's interest in avoiding an Establishment Clause violation was not sufficiently compelling because "the neutrality of the forum is preserved when religious speech, like non-religious speech, is allowed. Accordingly, ... I would hold that the Board has failed to demonstrate that granting Bronx Household Sunday access to P.S. 15 for worship services would have the principal or primary effect of advancing religion or otherwise conveying a message of endorsement." *Id.* at 64. My position on this point need not be repeated in full. It is as true now as it was then: the Board's interest in enforcing Reg. I.Q. to avoid an Establishment Clause violation is not compelling because it does not violate the Establishment Clause to allow Bronx Household to worship in public school facilities made broadly available to the public on neutral terms. I would thus hold that Reg. I.Q. violates the Free Exercise Clause.[1]

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[1] Because I believe that Reg. I.Q. violates the Free Exercise Clause, I would not reach the district court's additional holding that Reg. I.Q. "calls for official and continuing surveillance leading to an impermissible degree of government

The majority contends that Reg. I.Q. is permissible because the Board made a "reasonable, good faith judgment that it runs a risk of a non-frivolous charge of violation of the Establishment Clause by hosting and subsidizing the conduct of religious worship services." Maj. Op. at 198. The Board's belief, however, is not reasonable because Supreme Court precedent has foreclosed the possibility that an Establishment Clause violation would result if religious worship services were allowed in school facilities in these circumstances. The Supreme Court has repeatedly "rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Rosenberger,* 515 U.S. at 839 (citing *Lamb's Chapel,* 508 U.S. at 393–94; *Bd. of Educ. v. Mergens,* 496 U.S. 226, 248, 252 (1990); *Widmar v. Vincent,* 454 U.S. 263, 274–75 (1981)); *see also Good News Club,* 533 U.S. at 112–19. The City's Establishment Clause justification has no greater purchase under the Free Exercise Clause than it has under the Free Speech Clause.

This conclusion is bolstered by an empirical survey submitted to this court by *amicus curiae* The New York City Council Black, Latino, and Asian Caucus, in support of appellees. Of the fifty largest school districts in the United States, New York City alone entirely excludes religious worship from its

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entanglement with religion, in violation of the Establishment Clause." *Bronx Household*, 876 F. Supp. 2d at 445 (internal quotation marks and alterations omitted).

facilities. Brief of Amicus Curiae the New York City Council Black, Latino, and Asian Caucus at 9. Twenty-five of these school districts expressly allow religious worship in their facilities. *Id.* at 10. An additional eighteen implicitly allow religious worship services on the same terms as other community organizations. *Id.* Finally, an additional six districts permit religious worship services under certain conditions. *Id.* Of course, the status quo does not ipso facto render government action constitutional, but it bears on whether the City's position is a reasonable one. It is striking that none of these other school districts appear to have the slightest concern about violating the Establishment Clause, nor have any of their community use policies been found to violate the Clause.

Even if there were a real concern that allowing religious services in public schools pursuant to a neutral policy that creates limited public fora would violate the Establishment Clause, and even if Reg. I.Q. were intended to address that problem, Reg. I.Q. would still fail strict scrutiny because it is impermissibly underinclusive to serve that interest. *See Lukumi,* 508 U.S. at 546. Reg. I.Q. permits extensive religious conduct in public schools, such as a Quaker meeting service or a Buddhist meditation service, so long as it is not following a prescribed order or led by an ordained official. *See Bronx Household IV,* 650 F.3d at 56 (Walker, J., dissenting).

Moreover, as the majority in *Bronx Household IV* made clear:

> The "religious worship services" clause does not purport to prohibit use of the facility by a person or group of persons for "worship." What is prohibited by this clause is solely the conduct of a particular type of event: a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion.

*Id.* at 37. Indeed, Reg I.Q. "prohibits use of school facilities to conduct worship services, but does not exclude religious groups from using schools for prayer, singing hymns, religious instruction, expression of religious devotion, or the discussion of issues from a religious point of view." *Id.* at 38. A regulation that bans worship services but not worship in any of its manifestations is thus not sufficiently tailored to accomplish the interest that the School Board has advanced, namely, avoiding the risk of being perceived as establishing religion.

* * * * * *

This case presents substantial questions involving the contours of both religion clauses and the Free Speech Clause of the First Amendment, the resolution of which are ripe for Supreme Court review. In the meantime, because the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion," *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968), I respectfully dissent.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF NEW YORK

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



LORETTA A. PRESKA, Chief United States District Judge:

The Bronx Household of Faith, Robert Hall, and Jack Roberts ("Plaintiffs") seek a permanent injunction against the Board of Education of the City of New York (the "Board")[1] and Community School

[1] Not so far into this litigation the Board of Education was renamed the Department of Education. While this opinion remains faithful to the captioned name, references to the Board should be treated as synonymous with the Department of Education.

District No. 10 (collectively, "Defendants") so that Plaintiffs' Church may continue to hold Sunday religious worship services in a New York City public school, as it has done without interruption since this Court issued an initial preliminary injunction in 2002 barring Defendants from enforcing a regulation that would prohibit Plaintiffs from conducting their religious worship services in the Board's schools.

On February 24, 2012, the Court issued an order [Dkt. No. 131] granting Plaintiffs' most recent motion for a preliminary injunction and enjoining Defendants from enforcing Chancellor's Regulation D-180 so as to deny Plaintiffs' application or the application of any similarly-situated individual or entity to rent space in Defendants' public schools for morning meetings that include religious worship. *See* 855 F.Supp.2d 44 (S.D.N.Y.2012) ("Bronx III ").[2] Defendants immediately appealed, but the Court of Appeals declined to hear the appeal and instead directed this Court to render a final judgment. See Bronx Household of Faith v. Bd. of Educ. of the City of N.Y., No. 12–0751, slip op. at 2 (2d Cir. Feb. 29, 2012). Consequently, the parties agreed to expedite limited discovery and set a briefing schedule for submitting their cross-motions for summary judgment. The Court heard oral argument on the motions on June 1, 2012. For the reasons stated below, Plaintiffs' motion for summary judgment is

[2] For consistency's sake, the case abbreviations used in this opinion to refer to the multiple pronouncements in this litigation in both this Court and the Court of Appeals follow those this Court used in its February 2012 opinion.

GRANTED, and Defendants' cross-motion for summary judgment is DENIED.[3]

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[3] The Court has considered the following submissions in connection with the parties' motions: Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment; Plaintiffs' Opposition to Defendants' Cross–Motion for Summary Judgment and Reply in Further Support of Plaintiffs' Motion for Summary Judgment; Memorandum of Law of Amicus Curiae the Becket Fund for Religious Liberty in Support of Plaintiffs' Motion for Summary Judgment ("Becket Mem."); Memorandum of Law of Amici Curiae Council of Churches of the City of New York et al. in Support of Plaintiffs' Motion for Summary Judgment; Plaintiffs' Response to Defendants' Re–Filed 2005 Statement of Material Facts Pursuant to Rule 56.1 ("Pl. 56.1"); Plaintiffs' Response to Defendants' Supplemental Statement of Material Facts ("Pl. Suppl. 56.1"); Declaration of Jordan W. Lorence in Support of Plaintiffs' Motion for Summary Judgment, dated April 20, 2012 ("Lorence Decl."); Second Declaration of Katie Lynn Geleris in Support of Plaintiffs' Motion for Summary Judgment, dated May 11, 2012 ("Geleris Decl."); Second Declaration of Travis C. Barham in Support of Plaintiffs' Motion for Summary Judgment, dated May 14, 2012 ("Barham Decl."); Declaration of Brad Hertzog, Pastor of Reformation Presbyterian Church, in Support of Plaintiffs' Motion for Summary Judgment, dated April 19, 2012 ("Hertzog Decl."); Declaration of Ryan Holladay, Pastor of Lower Manhattan Community Church, in Support of Plaintiffs' Motion for Summary Judgment, dated May 2, 2012 ("Holladay Decl."); Declaration of Marilynn N. Cole in Support of Plaintiffs' Motion for Summary Judgment, dated May 10, 2012 ("Cole Decl."); Declaration of Jeremy Del Rio in Support of Plaintiffs' Motion for Summary Judgment, dated May 11, 2012 ("Del Rio Decl."); Declaration of Robert Hall in Support of Plaintiffs' Motion for Summary Judgment, dated May 14, 2012 ("Hall Decl."); Memorandum of Law in Support of Defendants' Cross–Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Permanent Injunction ("Def. Mem."); Defendants' Reply Memorandum ("Def. Reply Mem."); Defendants' Response to Plaintiffs' Rule 56.1 Statement of

# I. BACKGROUND

## A. Relevant Facts

The history of this litigation, which dates back to 1995, has been recounted multiple times throughout its multiple movements between this Court and the Court of Appeals, including most recently in this Court's February 2012 opinion granting Plaintiff's motion for a preliminary injunction. See Bronx III, 855 F.Supp.2d at 46–52. The Court thus presumes the readers' familiarity with the facts of the case and recites here only those facts most pertinent to the parties' cross-motions for summary judgment, especially those which have come to light during recent discovery.[4]

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Undisputed Material Facts in Support of Their Motion for Summary Judgment ("Def. 56.1"); Declaration of Jonathan Pines in Support of Defendants' Cross–Motion for Summary Judgment, dated April 20, 2012; Declaration of Sandy Brawer in Support of Defendants' Cross–Motion for Summary Judgment, dated April 20, 2012 ("Brawer Decl."); Declaration of Lois Herrera in Support of Defendants' Cross–Motion for Summary Judgment, dated May 12, 2012 ("Herrera Decl."); Declaration of Tom W. Smith in Support of Defendants' Cross–Motion for Summary Judgment, dated May 15, 2012; Supplemental Declaration of Jonathan Pines in Support of Defendants' Cross–Motion for Summary Judgment, dated May 15, 2012; and Supplemental Declaration of Charles Carey in Support of Defendants' Cross–Motion for Summary Judgment, dated May 15, 2012 ("Carey Decl.").

[4] For a recitation of the facts involving earlier phases of this litigation, see this Court's prior opinions, 400 F.Supp.2d 581, 585–89 (S.D.N.Y.2005) ("Bronx II "); 226 F.Supp.2d 401, 403–11 (S.D.N.Y.2002) ("Bronx I "). For a discussion of the procedural history that led to Plaintiffs' recent request for a preliminary injunction, *see* Bronx III, 855 F.Supp.2d at 50–51.

The Bronx Household of Faith (the "Church") is a 37–year–old, "community-based" Christian church. Id. at 46–48. Approximately ninety people currently attend the Church, including thirty children. (Hall Decl. ¶ 5.) Pursuant to an initial preliminary injunction granted in an earlier phase of this litigation, the Church has used the school auditorium in P.S. 15 in the Bronx, New York, on a weekly basis since 2002 for purposes of holding its Sunday worship services. Bronx III, 855 F.Supp.2d at 46–48. The Church has moved five times since its inception, each move necessitated by the need for a larger space to accommodate all those who attend the Church's services and meetings. (Hall Decl. ¶ 4.) P.S. 15 currently serves the Church's need to "meet collectively in one location so that [all its members] can fellowship together during ... service[s]," which is "vitally important to the Church's theological beliefs." (Id. ¶ 6.) None of the Church's previous meeting locations can accommodate all the Church's current attendees. (Id.)

The Board owns and controls 1,197 school facilities in New York City. (Def. 56.1 ¶ 8.) Defendants seek to enforce in full Chancellor's Regulation D–180 ("Ch. Reg. D–180"), which constitutes the Board's policy on granting "extended use" permits to use the Board's schools for activities occurring outside normal school hours and on days when schools are not in session. Ch. Reg. D–180 generally authorizes the use of school facilities for "holding social, civic, and recreational meetings and entertainment, and other uses pertaining to the welfare of the community," provided that "such uses shall be non-exclusive and open to the general

public." (Id. ¶¶ 11–13.) Section I.Q. of Ch. Reg. D–180 provides that "[n]o permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship."[5] (Id. ¶¶ 11, 18.) However, the regulation also provides that "[p]ermits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this regulation on the same basis that they are granted to other clubs for students that are sponsored by outside organizations." (Id. ¶¶ 11, 17.) Pursuant to Ch. Reg. D–180, Defendants allow community-based organizations to use the Board's public school facilities after school hours, including week nights, weekends, holidays, and over the summer. (Id. ¶ 12.) Defendants require all permit holders to post a disclaimer on any public notice or other material, including media and the Internet, that states: "This activity is not sponsored or endorsed by the New York City Department of Education or the City of New York." (Id. ¶ 25.)

B. The Preliminary Injunction

On February 24, 2012, this Court granted Plaintiffs' motion for a preliminary injunction. The Court found the deprivation of Plaintiffs' First

[5] For simplicity's sake, as well as to be consistent with the parties' apparent preference, going forward this opinion uses the abbreviation "Ch. Reg. D–180" to refer specifically to section I.Q of the regulation. Only section I.Q of Chancellor's Regulation D–180 is being challenged in this litigation. To be clear, this opinion should not be read as invalidating the entire regulation but rather only section I.Q. The Board currently implements the remaining provisions of the regulation without issue and remains free to do so.

Amendment free exercise rights to constitute irreparable harm. Bronx III, 2012 WL 603993 at 5. Regarding Plaintiffs' likelihood of success on the merits, the Court first found that under the Supreme Court's Free Exercise Clause analysis in Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532–33 (1993), Ch. Reg. D–180 is not neutral both on its face—because it "refers to a religious practice without a secular meaning discernable from the language or context"—and because it "discriminates between those religions that fit the 'ordained' model of formal religious worship services and those religions whose worship practices are far less structured." 2012 WL 603993, at *6-7 (internal quotation marks and citations omitted).

Having found the regulation not to be neutral, the Court noted that Ch. Reg. D–180 only passes constitutional muster if it meets a strict scrutiny analysis, meaning Defendants must show the policy serves a compelling state interest and is narrowly tailored to advance that interest. Id. at 7. The Court then found that Defendants could not satisfy either prong of the strict scrutiny analysis. First, the Court found that the Board's stated interest in avoiding the perception that it was endorsing religion is not sufficiently compelling because allowing religious worship services in the Board's schools during non-school hours does not violate the Establishment Clause. Id. at 8-10. This is particularly true given that the objective observer would "know from the legislative history and implementation of the policy (including the lengthy judicial history) that the Board's actions betoken great effort to avoid establishing any religion." Id. at 9.

Second, the Court found that Ch. Reg. D–180 does not even advance the Board's stated interest because, in light of the types of religious activities that are expressly permitted in the Board's schools under Good News Club v. Milford Central School, 533 U.S. 98 (2001), e.g., prayer, religious instruction, expression of devotion to God, and the singing of hymns, the policy's ban on religious worship services is ineffective. 2012 WL 603993, at *10-11 ("Because the individual elements of [worship] services are expressly permitted, the policy's ban on 'religious worship services' is entirely ineffective in dispelling any confusion in the mind of the objective observer over State endorsement of religion. The Board is just as likely to be perceived as endorsing religion with the ban in place as with it enjoined."). The Court further found that Ch. Reg. D–180 is not narrowly tailored "[b]ecause the Board has not shown that other, less restrictive measures would fail to advance the Board's stated interest." Id. at *11-12.

In addition, based on new evidence regarding how the Board was implementing Ch. Reg. D–180 and the Supreme Court's recent decision in Hosanna–Tabor Evangelical Lutheran Church & School v. EEOC, 132 S.Ct. 694 (2012), the Court found that the policy violates the Establishment Clause by fostering excessive government entanglement with religion. 2012 WL 603993, at *12-16. Finally, the Court found that Plaintiffs' Free Exercise Clause and Establishment Clause claims were not procedurally barred. Id. at *17-19.

Plaintiffs now seek to convert the February 2012 preliminary injunction into a permanent injunction

by way of their motion for summary judgment and reassert that Ch. Reg. D–180 violates their free exercise rights and fosters excessive government entanglement with religion in violation of the Establishment Clause.

Defendants, for their part, reargue that enforcing Ch. Reg. D–180's ban on religious worship services does not violate Plaintiffs' free exercise rights and that enforcing the ban is in fact necessary to avoid violating the Establishment Clause. Defendants also restate that implementation of Ch. Reg. D–180 does not require Defendants to entangle themselves excessively with religion, and therefore the policy does not run afoul of the Establishment Clause.

Having considered the latest evidence and the parties' respective arguments, the Court determines that its reasons for granting Plaintiffs' motion for a preliminary injunction were sound and that implementation of Ch. Reg. D–180 violates both the Free Exercise Clause and the Establishment Clause. Rather than merely repeat here the reasoning set forth in Bronx III—which, to be sure, the Court readopts—this opinion primarily addresses why Defendants' latest arguments fail.[6]

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[6] The Court here briefly disposes of Defendants' procedural arguments. In support of their cross-motion for summary judgment, Defendants "reassert, and incorporate by reference" their arguments presented in opposition to Plaintiffs' motion for a preliminary injunction that Plaintiffs' Free Exercise Clause and Establishment Clause claims are procedurally barred.(Def. Mem. at 33-34.) The Court similarly incorporates by reference the reasons stated in Bronx III why the Court disagrees. 2012 WL 603993, at *17-19. The Court notes that

## II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when no genuine dispute as to any material fact exists and the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986). The substantive law governing the suit identifies the essential elements of the claims asserted and therefore indicates whether a fact is material; a fact is material if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "[T]he dispute about a material fact is 'genuine' ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

To determine whether a genuine dispute of material fact exists, a court must review the record in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986); Lucente v. IBM Corp., 310 F.3d 243, 253 (2d Cir.2002). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by…citing to particular parts of materials in the record…" Fed.R.Civ.P. 56(c)(1)(A).

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the Court of Appeals apparently disagrees with Defendants' procedural arguments, too. See Bronx Household of Faith v. Bd. of Educ. of the City of N.Y., No. 12-0751, slip op. at 2 (2d Cir. Feb. 29, 2012) ("In the twelfth year of this litigation, the district court has granted a new preliminary injunction adjudicating grounds previously not addressed." (emphasis added)).

Where, as here, an affidavit is used to support or oppose the motion, it "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant ... is competent to testify on the matters stated." Fed.R.Civ.P. 56(c)(4); see Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 310 (2d Cir. 2008). Ultimately, the court must grant summary judgment "if, under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson, 477 U.S. at 250.

## III. DISCUSSION

The Court finds Plaintiffs have satisfied their burden of demonstrating that no genuine dispute as to any material fact exists and that they are entitled to judgment as a matter of law on their Free Exercise Clause and Establishment Clause claims. Each claim is addressed below.

### A. Ch. Reg. D–180 Violates the Free Exercise Clause

The Free Exercise Clause of the First Amendment, as applied to the states through the Fourteenth Amendment, provides that "Congress shall make no law ... prohibiting the free exercise [of religion]." U.S. Const. amend. I. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." Lukumi, 508 U.S. at 532. In Bronx III, 2012 WL 603993, at *6-12, the Court found that Ch. Reg. D–

180 unconstitutionally burdens Plaintiffs' free exercise rights under the test laid out in Lukumi because it is not neutral and does not satisfy strict scrutiny. See Lukumi, 508 U.S. at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." (internal quotation marks omitted)); *see also* Fifth Ave. Presbyterian Church v. City of N.Y., 293 F.3d 570, 574 (2d Cir.2002) ("Government enforcement of laws or policies that substantially burden the exercise of sincerely held religious beliefs is subject to strict scrutiny.").

Plaintiffs and amici curiae agree with the Court's prior conclusion that Ch. Reg. D–180 is unconstitutional under Lukumi. Defendants, on the other hand, raise three primary objections to that conclusion. First, Defendants argue that Ch. Reg. D–180 does not burden, let alone substantially burden, Plaintiffs' free exercise rights. Second, they argue that Lukumi and strict scrutiny do not apply to the facts of this case. Instead, they urge the Court to adopt the reasoning of Locke v. Davey, 540 U.S. 712 (2004), under which Defendants say Ch. Reg. D–180 passes constitutional muster. Finally, Defendants argue that even if Lukumi applies, Ch. Reg. D–180 withstands strict scrutiny. The Court finds all three objections to be without merit.

1. Ch. Reg. D–180 Burdens Plaintiffs' Free Exercise Rights

In Bronx III, the Court highlighted the burdens on Plaintiffs' free exercise rights that would result from Defendants' implementation of Ch. Reg. D–180. The Court noted:

> Plaintiffs claim that because [Ch. Reg. D–180] prevents them from holding Sunday worship services in the Board's public schools—the only location in which they can afford to gather as a full congregation without having to curtail other of their religious practices—it prohibits their free exercise of religion in violation of their First Amendment rights. Plaintiffs assert the prohibitive cost of renting commercial space for the Church's worship services would force them "to reduce and/or eliminate ministries to [the Church's] members and ... local community." "[The] entire congregation could no longer worship together," which would "undermine the fellowship" that is a "vital aspect of [the Church's] religious ministry and calling." Being banned from using the Board's schools would also "undermine [the Church's] ability to engage in the duties of [the Church's] Christian faith—to corporately pray for one another, hear testimony, engage in collective praise, and serve the local community." "In addition, [the Church] will lose some [congregants] because they would not be able to participate in [the Church's] vital Sunday ministry. Many of these individuals are elderly, disabled, or lack transportation, and traveling to another location is not an option."

2012 WL 603993, at *5 (citations omitted) (all but the first alteration in original). Defendants raise two grounds—one legal and the other factual—for why the foregoing does not constitute any burden on Plaintiffs' free exercise rights.

First, Defendants cite the Court of Appeals' determination that the predecessor to Ch. Reg. D–180 did not raise any free exercise concerns to suggest that the current regulation is similarly immune from any free exercise challenge: "[P]laintiffs' rights under the Free Exercise Clause are not burdened because [Ch. Reg. D–180] does 'not interfere in any way with the free exercise of religion by singling out a particular religion or imposing any disabilities on the basis of religion' ...." (Def. Mem. at 5 (quoting 127 F.3d 207, 216 (2d Cir.1997) ("Bronx Appeal I" )).) But this, of course, is no longer true with respect to Ch. Reg. D–180 because the new regulation both discriminates against religion on its face and discriminates among religions. See Bronx III, 2012 WL 603993 at *6-7.

Moreover, Plaintiffs' Church has grown considerably since the Court of Appeals decided Bronx Appeal I. In this regard, the remainder of the quote that Defendants cite, with all due respect, is stale:

> The members of the Church here are free to practice their religion, albeit in a location separate from [the Board's public schools]. "The free exercise of religion means, first and foremost, the right to believe and profess whatever

> religious doctrine one desires." That right has not been taken from the members of the Church.

Bronx Appeal I, 127 F.3d at 216 (quoting Emp't Div. v. Smith, 494 U.S. 872, 877 (1990)). This characterization of Ch. Reg. D–180's effect on Plaintiffs' free exercise rights ignores the thrust of Lukumi that besides protecting "the right to believe and profess whatever religious doctrine one desires," the Free Exercise Clause also bans government interference with religious "outward physical acts," Hosanna–Tabor, 132 S.Ct. at 707, such as the conduct of worship services at issue in this case, *see* 650 F.3d 30, 37 (2d Cir.2011) ("Bronx Appeal III" ) (defining "worship services" as "a collective *activity* characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion" (emphasis added)). Because the unopposed testimony is that P.S. 15 is the "only location in which [Plaintiffs] can afford to gather as a full congregation without having to curtail other of their religious practices," Bronx III, 855 F.Supp.2d at 52–53 (emphasis added), it cannot be gainsaid that Ch. Reg. D–180 burdens Plaintiffs' free exercise rights.[7]

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[7] Even the Court in Locke—which Defendants urge is the more appropriate case to apply on the facts of this litigation, see infra Part III.A.2—acknowledged that the challenged law there placed some burden on the plaintiff's free exercise rights. See, e.g., Locke, 540 U.S. at 725 ("[T]he exclusion of . . .funding [the pursuit of devotional degrees] places a relatively minor burden on [plaintiff]."). If the challenged law in Locke, which excluded

Second, Defendants argue that because Plaintiffs' Church has moved five times since its inception and "has not only survived such relocations, but has grown after each one" and because certain members of the Church own five houses within one block of P.S. 15—"sites that are not only potentially available for the Church's use, but are, in fact, currently being used by [Plaintiffs] for Church-related activities"—enforcing Ch. Reg. D–180 so as to ban the Church from holding its Sunday worship services in the Board's schools will not cause any harm to Plaintiffs. (Def. Mem. at 4.) But this argument ignores the undisputed testimony of Plaintiff Hall that no other location besides P.S. 15 currently facilitates the Church's religious mandate to worship as an entire congregation. Furthermore, if forced to worship elsewhere, the Church would have no choice but "to reduce and/or eliminate ministries to [the Church's] members and ... local community." Bronx III, 2012 WL 603993, at *5 (alterations in original). And even though the Church is in the process of constructing its own building as a permanent place to hold its worship services, that building is not yet complete. (Pl. Suppl. 56.1 ¶ 6.) As such, and given the uniquely expensive and crowded real estate market in which the Church resides, eviction from the Board's schools

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students who were pursuing a degree in devotional theology from participating in a state scholarship program, at least placed some form of burden—if only a "relatively minor" one—on the free exercise of religion, surely so does Ch. Reg. D-180's ban on religious worship services.

would amount to a concrete loss of religious freedom.[8]

Ultimately, given the plain text of Ch. Reg. D–180, the additional fact that the regulation discriminates *among* religions, controlling caselaw regarding what constitutes a burden on the free exercise of religion, and Plaintiff Hall's unopposed testimony that the Church would be forced to curtail its religious practices were it no longer allowed to hold its worship services in P.S. 15, the Court rejects Defendants' argument that Ch. Reg. D–180 places no burden on Plaintiffs' free exercise rights.

2. Lukumi and Strict Scrutiny Apply to Plaintiffs' Free Exercise Clause Claim

In Bronx III, the Court touched upon Defendants' argument that the test in Lukumi should not apply on the facts of this case due to the existence here of a competing Establishment Clause concern. The Court noted:

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[8] Defendants' attempt to marshal the Church's resources and dictate how those resources should be deployed gives the Court great concern because it suggests that Defendants believe they know best how the Church should conduct its religious affairs. But only Plaintiffs may "decide for themselves, free from state interference, [such] matters of church government as well as those of faith and doctrine." Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952). Certainly Plaintiffs' assessment of what qualifies as sufficient space to conduct the Church's worship services is an "internal church decision," which is outside Defendants' regulatory authority. Hosanna-Tabor, 132 S. Ct. at 706-07.

> At oral argument, counsel for Defendants urged that there could be no Free Exercise Clause violation in this case because the cases cited by Plaintiffs in which the Supreme Court found such violations did not involve a defendant who was motivated by a desire to avoid violating the Establishment Clause. *E.g., Lukumi,* 508 U.S. 520, 113 S.Ct. 2217. Because [Ch. Reg. D–180] results from the Board's balancing of competing constitutional mandates, Defendants argue Plaintiffs' Free Exercise Clause claim is precluded. The Court disagrees. That the Board may need to balance competing interests does not foreclose Plaintiffs' claim but rather speaks to whether [Ch. Reg. D–180] meets strict scrutiny, *i.e.,* whether the Board's interest in adopting the policy is compelling and whether the policy is narrowly tailored to advance that interest.

2012 WL 603993, at *7 n.10; cf. Bronx Appeal III, 650 F.3d at 59 (Walker, J., dissenting) ("[T]he majority argues that my finding of viewpoint discrimination overlooks the Board's Establishment Clause rationale.... [E]ven if the Board were to have legitimate Establishment Clause concerns, those concerns could do nothing to undermine my conclusion that the Board engaged in viewpoint discrimination; at most, they could only serve as a potential justification for such discrimination." (citation omitted)). Defendants have elaborated on

their argument that Lukumi is inapplicable for purposes of the pending cross-motions for summary judgment, but the Court remains unpersuaded.

First, Defendants argue that applying Lukumi's strict scrutiny analysis in the presence of Defendants' competing Establishment Clause concern would essentially render the Establishment Clause meaningless. Defendants say:

> If plaintiffs' expansive reading of Lukumi were to prevail, most government restrictions on religious activity that have been upheld based upon Establishment Clause concerns—for example, the prohibition on prayer in public schools, *see* Engel v. Vitale, 370 U.S. 421 (1962)—would instead have been struck down on free exercise grounds as "non-neutral" to religious expression and exercise. The flaw in this analysis is that, extended to its logical conclusion, the reasoning would find every Establishment Clause concern advanced by the government, necessarily singling out as its concern religious speech and conduct, to be unconstitutionally "non-neutral" and therefore presumptively unconstitutional.

(Def. Mem. at 10.) As an initial matter, the Court notes that Defendants mischaracterize the posture of Engel. In that case, the state defendants had adopted a policy "direct[ing] the School District's

principal to cause ... [a] prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day." Engel, 370 U.S. at 422–23. The parents of ten students affected by the policy subsequently brought suit alleging that a mandate of prayer in public schools violated the Establishment Clause, id. at 423, and the Supreme Court agreed, see id. at 424 ("We think that by using its public school system to encourage recitation of ... prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause."). Thus, it was the Supreme Court—not a state actor—that announced the prohibition on prayer in public school. Because no state law involving a "government restriction [ ] on religious activity" was at issue in Engel, (Def. Mem. at 10), Defendants' citation thereto does not support their argument. See also generally Lee v. Weisman, 505 U.S. 577 (1992) (finding similar Establishment Clause violation in public school district's inclusion of prayer in its graduation ceremonies).

But even putting aside Defendants' mischaracterization of the posture of the "school prayer" cases, it is important to note that those cases did not involve competing Free Exercise Clause claims. That is, the proponents of the policies that introduced prayer in the public schools did not assert a free exercise justification to counter the Establishment Clause concerns raised by the plaintiffs. Nor could they, as no burden was placed on the free exercise of religion in the absence of the policies that mandated school prayer. The school prayer cases, therefore, stand for the unremarkable proposition that "[t]he principle that government

may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." Lee, 505 U.S. at 587, 112 S.Ct. 2649 (emphasis added).

In the absence of a burden on the free exercise of religion[9] and the presence of a concrete Establishment Clause violation, the school prayer cases were relatively simple cases. An entirely different situation is presented here, however, where at issue is not the accommodation of religion but rather the burdening of religion, see supra Part III.A.1, and where no *actual* Establishment Clause violation is of concern, see infra Part III.A.3. In other words, Defendants' argument that applying Lukumi to the facts of this case reads the Establishment Clause out of the Constitution is simply not true a concern over an actual violation of the Establishment Clause could certainly justify a

[9] Because freedom of religion also means freedom from religion, one of the concurrences in Lee viewed as coercion the mandatory nature of the graduation ceremonies that included prayer, in violation of the Free Exercise Clause. See 505 U.S. at 621 (Souter, J., concurring) ("[L]aws that coerce nonadherents to support or participate in any religion or its exercise would virtually by definition violate their right to religious free exercise." (internal quotation marks and citation omitted)). Thus, the school prayer cases may be characterized as presenting both Establishment Clause and Free Exercise Clause violations on the same side of the coin. This case, in contrast, does not implicate the issue of coercion because Plaintiffs' meetings occur on Sundays (i.e., during non-school hours) and no student is forced to attend them.

burden on the free exercise of religion under Lukumi.[10]

Defendants next argue that given the competing interests of Plaintiffs' free exercise rights and Defendants' purported Establishment Clause concern, the Court should decline to apply strict scrutiny based on the reasoning set forth in Locke. The plaintiff in that case was a resident of the State

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[10] Justice Scalia's dissent in Locke addressed a similar argument to the one Defendants put forth here and explained why it is really just form over substance:

> Equally unpersuasive is the [majority's] argument that the State may discriminate against theology majors in distributing public benefits because the Establishment Clause and its state counterparts are themselves discriminatory. The [majority's] premise is true at some level of abstraction-the Establishment Clause discriminates against religion by singling it out as the one thing a State may not establish. All this proves is that a State has a compelling interest in not committing actual Establishment Clause violations. We have never inferred from this principle that a State has a constitutionally sufficient interest in discriminating against religion in whatever other context it pleases, so long as it claims some connection, however attenuated, to establishment concerns.

540 U.S. at 730 n.2 (Scalia, J., dissenting) (citations omitted). Furthermore—and somewhat ironically—Defendants' position that a state actor requires only a rational basis regarding an antiestablishment concern in order to justify religious discrimination threatens to nullify the Free Exercise Clause. See id. ("If religious discrimination required only a rational basis, the Free Exercise Clause would impose no constraints other than those the Constitution already imposes on all government action.").

of Washington who was awarded a state-funded college scholarship. See 540 U.S. at 715–17. Pursuant to the Washington State Constitution, however, no student who was pursuing a degree in devotional theology could participate in the scholarship program. Id. at 716. The plaintiff, who sought to use his scholarship to pursue a degree in pastoral ministries, brought suit against certain state officials alleging the State's refusal to apply the scholarship towards a degree in devotional theology violated, inter alia, his free exercise rights. Id. at 718. The Court of Appeals declared the scholarship program unconstitutional under Lukumi because it found that the State had singled out religion for unfavorable treatment, thereby triggering strict scrutiny, and that the State's Establishment Clause concerns were not sufficiently compelling. Id.

The Supreme Court reversed, finding that the " 'room for play in the joints' " between the Religion Clauses permitted the scholarship program's challenged exclusion. Id. at 718 (quoting Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664, 669 (1970)). "In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." Id. at 718–19. The Court held that the Establishment Clause did not require Washington to ban the funding of religious instruction that prepares students for the ministry, even if the Washington State Constitution did. Id. at 719.

Additionally, given Washington's only "mild[ ]" disfavor of religion, id. at 720–21. ("The State has merely chosen not to fund a distinct category of

instruction."), and the unique historical concern that most States had "around the time of the founding ... against using tax funds to support the ministry," *id.* at 723, the Court decided that Lukumi's "presumption of unconstitutionality"—*i.e.,* strict scrutiny—did not apply, id. at 725 ("Given the historic and substantial interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect."). Having decided not to apply strict scrutiny, the Court upheld the challenged law. Id. But the Court also did not articulate the exact test it was applying other than to say the scholarship program's carve-out was permitted by the "play in the joints" between the Religion Clauses. See id. at 730 (Scalia, J., dissenting) ("[T]he [majority's] opinion is devoid of any mention of standard of review....").

In light of the facts of this case, the Court rejects Defendants' argument that Locke is the more appropriate case to apply. For starters, the Court in Locke made clear that the scholarship program at issue was "not a forum for speech" and that consequently the Court's cases dealing with speech forums were "simply inapplicable." Id. at 720 n. 3, 124 S.Ct. 1307. Defendants acknowledge as much. (Def. Mem. at 8 n. 4.) In fact, the Court did not reference a specific category of cases within which *Locke* comfortably fit. Instead, the Court merely characterized the competing claims at issue there as being compatible with the "play in the joints" between the Religion Clauses and, in doing so, did not seem concerned with establishing much precedential value. See id. at 725 ("If any room exists

between the two Religion Clauses, it must be here. We need not venture further into this difficult area...."). Thus, even the Locke Court itself intimated that Locke is sui generis.

In addition, "Locke involved neither discrimination among religions nor intrusive determinations regarding contested religious questions." Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1256 (10th Cir.2008). The same cannot be said here. First, Ch. Reg. D–180's ban on religious worship services "discriminates between those religions that fit the 'ordained' model of formal religious worship services and those religions whose worship practices are far less structured." Bronx III, 2012 WL 603993, at *7 (citation omitted). "[L]aws discriminating *among* religions are subject to strict scrutiny." Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 339 (1987). Second, the Board's policy of verifying whether applicants are in fact worshiping in the Board's schools "entail[s] intrusive governmental judgments regarding matters of religious belief and practice," Colo. Christian Univ., 534 F.3d at 1256, in violation of the Establishment Clause, see infra Part III.B.

Finally, the counter-interests at play in this case are altogether differently balanced from those at issue in Locke. While the Locke Court confronted a minimal burden on the free exercise of religion and a substantial and historic antiestablishment interest, here the Court faces a substantial burden on

Plaintiffs' free exercise rights[11] and a misperceived Establishment Clause concern raised by Defendants.[12] Because of this additional fact that the constitutional scales tilt in the opposite direction here than in Locke, the Court determines that *Locke* is inapposite.[13] See Colo. Christian Univ., 534 F.3d

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[11] The Court finds that the free exercise burdens Plaintiffs say they would face were Defendants permitted to enforce Ch. Reg. D-180, see supra Part III.A.1, are undoubtedly substantial. But even putting aside the qualitative nature of the burdens alleged in this case, the Court agrees with the general proposition that "[t]he indignity of being singled out for special burdens on the basis of one's religious calling [on the face of a statute] is so profound that the concrete harm produced can never be dismissed as insubstantial." Locke, 540 U.S. at 731 (Scalia, J., dissenting). Indeed, as much is implied by Lukumi's directive to apply strict scrutiny when presented with a law that is not neutral.

[12] Furthermore, whereas history was on the state defendant's side in Locke, it appears Plaintiffs can lay claim to it here. See infra Part III.A.3.

[13] At oral argument, Defendants took issue with Plaintiffs' suggestion that only an actual Establishment Clause violation could justify any burden on the free exercise of religion and cited Locke as an example where the Supreme Court tolerated such a burden even in the absence of such a violation. The Court does not dispute Defendants' reading of Locke yet fails to see the relevance of Defendants' point. Because the Court did not apply strict scrutiny in Locke, the bar was lowered such that the state-defendant was not required to show an actual violation of the Establishment Clause in order to prove the constitutionality of the challenged law. But where there is a greater burden placed on the free exercise of religion such that strict scrutiny does apply, as in this case, the Supreme Court's jurisprudence suggests only an actual violation of the Establishment Clause amounts to a compelling interest that could justify so considerable a burden on religion. Cf., e.g., Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761–62 (1995) (noting that, in the context of free speech

at 1255–56 ("The Court's ... holding [in *Locke* ] that 'minor burden[s]' and 'milder' forms of 'disfavor' are tolerable in service of 'historic and substantial state interest[s]' implies that major burdens and categorical exclusions from public benefits might not be permitted in service of lesser or less long-established governmental ends." (quoting Locke, 540 U.S. at 720, 725) (all but the first two alterations in original)).

3. Ch. Reg. D–180 Does Not Withstand Strict Scrutiny

Defendants argue that Ch. Reg. D–180 survives even a strict scrutiny analysis. They say the Board's interest in avoiding an Establishment Clause violation has already been deemed compelling by the Court of Appeals and is further supported by the latest evidence adduced in this case. Defendants also say Ch. Reg. D–180 is narrowly tailored to advance the Board's compelling interest. Here, too, the Court disagrees.

a) Defendants Do Not Have a Compelling Interest

First, contrary to Defendants' reading of Bronx Appeal III, the Court of Appeals did not hold that Defendants' stated interest in "seek[ing] to steer clear of violating the Establishment Clause" was compelling for purposes of a strict scrutiny analysis. 650 F.3d at 40. Because the Court of Appeals was

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analysis, "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech").

conducting a limited public forum free speech analysis, its task was only to determine whether Ch. Reg. D–180's ban on religious worship services was reasonable in light of the purposes served by the forum. While the Court of Appeals cited the undisputed proposition that "an interest in avoiding a violation of the Establishment Clause 'may be characterized as compelling,' " the reasonableness inquiry at issue did not require it to "decide whether use of the school for worship services would in fact violate the Establishment Clause." Id. (emphasis added) (quoting Widmar v. Vincent, 454 U.S. 263, 271 (1981)). And the Court of Appeals did not voluntarily confront that question. Id. at 43 ("To reiterate, we do not say that [an Establishment Clause] violation has occurred, or would occur but for the policy."). Instead, it only went so far as to say the Board had a "strong basis to believe that allowing the conduct of religious worship services in schools would give rise to a sufficient appearance of endorsement to constitute a violation of the Establishment Clause." Id. at 40. But strict scrutiny requires more than a "strong basis;" it requires a compelling interest.

In Bronx III, the Court determined that the inquiry into whether Defendants' antiestablishment interest is compelling for purposes of a strict scrutiny analysis required the Court to answer the question that the Court of Appeals declined to entertain—i.e., whether use of the Board's schools for worship services during non-school hours violates the Establishment Clause. 2012 WL 603993, at *8. In answering that question in the negative, the Court readopted its findings from 2002 when it

granted Plaintiffs' earlier motion for a preliminary injunction. Those findings included the following: Plaintiffs' Sunday meetings "are obviously not endorsed by the School District;" no school employee attends Plaintiffs' meetings; the meetings are open to all members of the public; children are not present around the school on Sunday mornings; and no student attends the meetings. Bronx I, 226 F.Supp.2d at 426. In light of the recent evidentiary record, Defendants say the Court's reliance on its 2002 findings is misplaced. While the Court acknowledges that changed circumstances warrant reconsideration of the Court's prior findings, the latest evidence does not alter the Court's conclusion that Defendants misperceive an Establishment Clause violation.

Turning first to the number of extended use permits, Defendants received 122,874 permit applications for the fiscal year 2011. (Barham Decl. ¶ 25.) The parties have applied different methodologies to discern how many of these permits were granted for the purposes of holding religious worship services; as a result, they have reached different conclusions about the total number of permit applications granted for such purposes. Defendants say the most important figure is that 81 religious organizations obtained permits to hold worship services in the Board's schools for at least three weeks in the fiscal year 2011, up from the 23 that did so when the record previously closed in 2005. (Def. Mem. at 17.) Assuming all these organizations used different school buildings, this would equal 6.77 percent of all the Board's schools. (Barham Decl. ¶ 16.) Plaintiffs, for their part, focus

on the percentage of all permits involving religious activity issued to unions and community-based organizations, which they say fluctuates near five percent. (*Id.* ¶ 40.) At the end of the day, however, the parties concur that the gaps in their statistics are not "material enough to really belabor".[14] (Summ. J. Hr'g Tr. at 24.)

Based on these figures, the Court finds that even though more religious organizations are using the Board's schools to hold worship services now than in 2005, the increase is statistically insignificant. Today, close to 95 percent of all permits issued to community-based organizations do not involve religious activity, and the same can be said for the percentage of the Board's public school buildings that are not being used for religious purposes. Furthermore, of the 23 religious organizations that

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[14] Were the statistical differences material the Court would rely on Plaintiffs' methodology because it provides a more accurate presentation of the data than that of Defendants. Plaintiffs contend that for purposes of classifying the permit applications it is more accurate to use the codes assigned by the Board than the varying descriptions provided by the organizations themselves. (Barham Decl. ¶ 9.) The Court agrees. While Defendants contend that the Board's codes do not accurately reflect all the permits they believe are for religious services, (Carey Decl. ¶ 20), the Board's codes provide a more objective and uniform system of classification. Moreover, Defendants make a number of errors in applying their own methodology, which affects 508 of Defendants' entries. (Barham Decl. ¶¶ 7-13.) For example, Defendants include a number of entries that they claimed to exclude. (See Carey Decl. Ex. M-2.) In addition, Defendants include in their analysis 100 permits that have not been granted final approval. (See id.) By contrast, Plaintiffs exclude any permits without final approval. (Barham Decl.¶ 32.)

were meeting in the Board's schools in 2005, only seven continued to meet there in 2011. (Geleris Decl. ¶ 8.) At least one of those seven, Lower Manhattan Community Church, has since left the Board's schools. (Holladay Decl. ¶ 7.) Thus, the Court's conclusion in *Bronx II* that "[b]y any measure, the data reflecting the use by religious congregations of schools cannot be deemed dominant"—"either in P.S. 15, in the School District, or in the City"—remains sound. 400 F.Supp.2d at 596.

Defendants next point to the fact that in at least three schools, children and staff from the schools have attended worship services. (Pl. 56.1 ¶¶ 70–71.)[15] But because the Board has opened its limited public forum "for holding social, civic, and recreational meetings and entertainment, and other uses pertaining to the welfare of the community," provided that "such uses shall be non-exclusive and open to the general public," (Def. 56.1 ¶¶ 11–13), this merely reflects the permit holders' efforts to comply

[15] In connection with their cross-motion for summary judgment, Defendants re-filed their Rule 56.1 statement from 2005, along with Plaintiffs' responses thereto. Plaintiffs, in turn, filed updated responses to Defendants' 2005 Rule 56.1 statement; Defendants object to their having done so. Putting aside the substantial authority that suggests Plaintiffs' 2005 responses were binding only for purposes of the prior motion for summary judgment they were filed in connection with, the reality is that some of the 2005 responses are no longer true. Defendants cannot dispute this, as even they have responded to Plaintiffs' new Rule 56.1 statement at times in a manner inconsistent with their 2005 responses. In any event, Defendants cannot show that they have been prejudiced by Plaintiffs' updated responses because none of the facts relied upon in this opinion are the product of a "more favorable" updated response.

with the Board's open use requirement. The Church's Sunday meetings comply with that requirement.[16] And if parents of students choose to exercise their (and their children's) First Amendment rights by attending the Church's services, and school staff do the same, the Court fails to see any impact this would have on the endorsement test analysis under Lemon v. Kurtzman. See 403 U.S. 602, 612 (1971) (requiring that the "principal or primary effect [of the law in question] ... neither advance[ ] nor inhibit[ ] religion"). Certainly there is no evidence that the school staff who attend the meetings are proselytizing to the school's students during the school day. Given the disclaimer all permit holders are required to post on any public notice or other material, stating that "[t]his activity is not sponsored or endorsed by the New York City Department of Education or the City of New York," (Def. 56.1 ¶ 25), not to mention the long history of this litigation, the limited attendance of students and staff cited by Defendants would not alter the objective, fully informed observer's conclusion that "the Board's actions betoken great effort to avoid establishing any religion." Bronx III, 2012 WL 603993, at *9.

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[16] Indeed, the Court of Appeals in Bronx Appeal III believed that any form of exclusion would only "aggravate[] the potential Establishment Clause problems the Board seeks to avoid." 650 F.3d at 43. Were Plaintiffs to exclude anyone from its Sunday meetings, no doubt Defendants would point to that in support of their antiestablishment interest. Defendants cannot have it both ways.

Finally, Defendants point out that, contrary to the Court's finding in 2002 that there was no evidence children are in the school on Sunday mornings while the Church conducts its services, "sports programs, literacy enrichment programs, test preparation programs, and other activities for children and families have taken place in schools at the same time as religious organizations have held their worship services in the schools." (Def. Mem. at 18.) But this evidence cuts both ways. Defendants cannot argue domination on the one hand—i.e., that the worship services so dominate the schools on Sunday mornings that Defendants' Establishment Clause concern is heightened—and then also point to simultaneous non-worship Sunday activities that involve students to prove the same. The fact that a youth basketball program holds tournaments in a school at the same time that a church holds Sunday services there, both pursuant to a neutral policy that promotes the general welfare of the community, does not suggest to the informed objective observer that the school is endorsing religion just as it does not suggest the school is endorsing basketball.[17] See

[17] To the extent Defendants point to the fact that some of the schools where services take place are elementary schools attended by young and impressionable students, such as P.S. 15, to show their Establishment Clause concern is particularly acute, the Supreme Court has already rejected this argument. See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 113-19 (2001) ("[W]hatever significance we may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present."

Bronx III, 2012 WL 603993, at *11 ("The objective, fully informed observer who passes by the Board's schools and witnesses a wide variety of community groups meeting on weeknights, followed by a Jewish Friday night service, a Ramadan Saturday evening service, and finally a Sunday morning Christian worship service, could not reasonably infer that the Board was endorsing religion in its public schools. Rather, the informed observer would conclude that the Board opens its schools during non-school hours to a diverse group of organizations pursuant to a neutral policy generally aimed at improving the welfare of the community." (internal quotation marks omitted)).

In short, none of the scant evidence that Defendants point to proves that an Establishment Clause violation would result but for Ch. Reg. D–180's religious use prohibitions. Instead, the opposite is true. "[V]iewed in its totality by an ordinary, reasonable observer," Galloway v. Town of Greece, 681 F.3d 20, 29–31 (2d Cir.2012), a policy that treats neutrally all applicants—religious and secular

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(citation omitted)); cf. Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1381-82 (3d Cir. 1990) ("So long as [the school district] maintains a limited student open forum to which outsiders may be invited, it expresses a judgment concerning its students' ability to distinguish neutral access from state sponsorship of the view expressed. [The school district] cannot, therefore, rely on the impressionability of these same students as the basis for content-based exclusions from its facilities in the evening hours or as the basis for an establishment clause defense.").

alike—would not "convey[ ] the view that the [Board] favored or disfavored certain religious beliefs," id.[18]

One last consideration deserves mentioning. When considering a law challenged under the First Amendment or assessing a defendant's purported justification for enacting such a law, the Supreme Court has often conducted a historical analysis to gauge how the Framers would have viewed the law or justification at issue. Compare, e.g., Locke, 540 U.S. at 725 (justifying minimal burden on religion in light of state-defendant's historic antiestablishment interest in not funding the religious training of clergy), with Marsh, 463 U.S. at 788 (finding state-funded legislative prayer not per se invalid under the Establishment Clause because "[c]learly the men who wrote the First Amendment Religion Clause did

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[18] In Bronx Appeal III, the Court of Appeals found that "the fact that school facilities are principally available for public use on Sundays results in an unintended bias in favor of Christian religions." 650 F.3d at 43. This factored into the Court of Appeals' conclusion that the Board's Establishment Clause concern was reasonable. Now that the Court is tackling the question of whether the Board's antiestablishment interest is compelling, on this point the Court notes the Supreme Court's conclusion in Marsh v. Chambers, 463 U.S. 783 (1983), that the mere fact "a clergyman of only one denomination-Presbyterian-has been selected for 16 years" as a state legislative chaplain does not "in itself" violate the Establishment Clause. Id. at 793-94. The Court rejected the argument that such a long tenure had "the effect of giving preference to his religious views," absent proof that the chaplain's reappointment "stemmed from an impermissible motive." Id. at 793. Thus, even if the Board's schools lend themselves to being available more frequently for religions that hold worship services over the weekend, based on Marsh, this fact alone does not violate the Establishment Clause.

not view paid legislative chaplains and opening prayers as a violation of that Amendment"). Here, history suggests that the Framers would not have given much credence to Defendants' purported Establishment Clause concern. As amicus curiae point out:

> President Washington permitted religious groups to conduct worship services in the U.S. Capitol building as early as 1795. President Jefferson, whose devotion to church-state separation cannot be questioned, regularly attended services in the Capitol throughout his presidency, and allowed worship services in the Treasury and War Office buildings as well. Even the Supreme Court chamber was occasionally used for worship services. Mr. Jefferson later invited religious societies, under "impartial regulations," to conduct "religious exercises" in rooms at his beloved University of Virginia, for the benefit of students who wished to attend. He specifically observed that these arrangements would "leave inviolate the constitutional freedom of religion."

(Becket Mem. at 10–11 (citations omitted) (quoting 19 The Writings of Thomas Jefferson at 414–17 (Memorial ed. 1904)).) Thus, contrary to the situation in Locke, Defendants' stated Establishment Clause concern is in fact contradicted by history.

Given all the above considerations, it is unsurprising that Defendants cite no case—and the Court is aware of none—in which a court has struck down a public school board's policy of permitting religious worship during non-school hours as violative of the Establishment Clause. At the same, there is authority to the contrary. See Fairfax Covenant Church v. Fairfax Cnty. Sch. Bd., 17 F.3d 703, 706–08 (4th Cir.1994); Gregoire, 907 F.2d at 1379–81. The Court agrees with those other courts that have directly confronted the merits of Defendants' constitutional concern and concluded that a school board does not violate the Establishment Clause by permitting religious organizations to hold worship services during non-school hours. Accordingly, for the reasons stated above, as well as those stated in Bronx II, 400 F.Supp.2d at 592–98, and Bronx III, 2012 WL 603993, at *8-10, the Court concludes that Defendants' purported antiestablishment interest is not compelling and that, as a result, Ch. Reg. D–180 fails to satisfy the first prong of Lukumi's strict scrutiny analysis. Ch. Reg. D–180 thus violates the Free Exercise Clause, and the Court grants Plaintiffs' motion for summary judgment on this ground.

b) Ch. Reg. D–180 Does Not Advance Board's Antiestablishment Interest

The Court concluded in Bronx III that Ch. Reg. D–180 also fails the second prong of Lukumi's strict scrutiny analysis in that it does not advance the Board's stated antiestablishment interest and is not

narrowly tailored to advance that interest. 2012 WL 603993, at *10-12. The Court briefly elaborates here on the first part of that conclusion.

To begin, the Court previously found that "[b]ecause [Ch. Reg. D–180] singles out only those religions that conduct 'ordained' worship services, the ban works against the informed observer's perception of neutrality that would otherwise result if all religions were treated on the same terms." Id. at 10. Defendants now assert that "[t]aken together, ... the two provisions of Ch. Reg. D–180, § I.Q—the 'religious worship services' provision and the 'house of worship' provision—reach all forms of worship, whether practiced by ordained religions or those with less formal worship practices." (Def. Reply Mem. at 3.) The Court finds two fundamental flaws with Defendants' assertion.

First, the Court does not see how Defendants can possibly prove their assertion that "the two provisions of Ch. Reg. D–180 ... reach all forms of worship" in light of their refusal to define either provision. The Court of Appeals has undertaken to define "religious worship services" as "a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion." Bronx Appeal III, 650 F.3d at 37. In the absence of any guidance or objection from Defendants, this Court has proceeded to analyze Plaintiffs' pending claims with that definition in mind. However, because the Court of Appeals declined to consider the reach of the "house of worship" prong, it did not attempt to define that

term. Id. at 36 & n. 6. Because Defendants continue to refuse to define it as well, this Court cannot competently assess the merits of their argument that both worship-related prongs of Ch. Reg. D–180 work together to treat all religions equally. As such, the Court is left to analyze the "religious worship services" prong alone. Based on the Court of Appeals' definition of that term, this Court reaffirms its conclusion in Bronx III that Ch. Reg. D–180 is ineffective in advancing the Board's antiestablishment interest because the regulation discriminates among religions.[19]

Second, the report submitted by Plaintiffs' expert, Gerard R. McDermott, demonstrates the practical impossibility that Ch. Reg. D–180 treats all religions equally. Many non-theistic religions exist that do not "worship." (Lorence Decl. Ex. 32, at 16–20.) For example, Theravada Buddhists do not worship or participate in worship services but they do hold

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[19] Defendants' failure to define the term "house of worship" presents an additional problem. Under Good News Club, the Board may not exclude from its schools organizations who wish to conduct activities such as prayer, religious instruction, expression of devotion to God, and the singing of hymns; to do so would encroach impermissibly on their free speech rights. See Bronx Appeal III, 650 F.3d at 36-37. Yet the vagueness of Ch. Reg. D-180's religious use ban coupled with the regulation's certification requirement, see infra Part III.B, threatens to keep certain organizations out of the Board's schools for exactly these types of activities. Defendants admit that if a religious organization considered, for example, the singing of hymns to be barred under the Board's ban on using its schools as a "house of worship," that organization could be precluded from fully exercising its free speech rights. (See Summ. J. Hr'g Tr. at 52-53.) The Court finds this risk to be all too real and unacceptable.

"meetings in which believers teach and learn and meditate and chant." (Id. Ex. 32, at 18.) These religious adherents therefore would not be excluded from the Board's schools under Ch. Reg. D–180, whereas followers of an "ordained" religion would be excluded. Thus, the dual worship-related provisions are not comprehensive and neutral; rather, they treat certain religions differently from others. Furthermore, because the Board relies in the first instance on the religious applicants themselves to determine whether their proposed uses are prohibited under the regulation, Ch. Reg. D–180 would allow the very same activities on behalf of one church that does not consider them to be worship that it would prohibit on behalf of another church that does view them as worship. The end result, as Defendants admit, is that some religious applicants "will fall through th[e] net." (Summ. J. Hr'g Tr. at 48.) For these additional reasons, the Court remains convinced that Ch. Reg. D–180 is ineffective in advancing Defendants' antiestablishment interest.

In Bronx III, the Court noted that Ch. Reg. D–180's ineffectiveness is also evidenced by the fact that student religious clubs conduct the constituent activities of a worship service that would otherwise be banned under the regulation:

> Given the variety of religious practices that are permitted under [Ch. Reg. D–180]—as to which the Board makes clear there is no endorsement of religion—the Board fails to explain how the informed observer would view any differently the Board's permitting Plaintiffs' use of its

> schools for Sunday worship services. Because the individual elements of those services are expressly permitted, the policy's ban on "religious worship services" is entirely ineffective in dispelling any confusion in the mind of the objective observer over State endorsement of religion. The Board is just as likely to be perceived as endorsing religion with the ban in place as with it enjoined. In both instances, the observer would see "[p]rayer, religious instruction, expression of devotion to God, and the singing of hymns." Whether the applicant or a Board bureaucrat deems those activities to constitute "worship services" or not does not change the objective observer's perception of whether or not the Board is endorsing religion.

2012 WL 603993, at *11 (quoting Bronx Appeal III, 650 F.3d at 36–37). New insight into how religious student clubs operate in the Board's schools buttresses the Court's prior discussion on this issue.

The typical meeting of one such student-led religious club—Seeker Christian Fellowship—occurs either right before or after the school day. (Del Rio Decl. ¶ 2.)[20] Anywhere from a few students to over

[20] Defendants object to the Del Rio declaration as based purely on inadmissible hearsay. But the declaration makes clear that it is based upon the declarant's personal knowledge. (Del Rio Decl. ¶ 1.) Furthermore, Defendants themselves have filed declarations in support of their cross-motion for summary

one hundred students attend meetings. (Id. ¶ 9.) The meetings occur weekly, usually last thirty minutes or less, and "consist of prayer, singing, study of the Bilbe and students discussing with each other their Christian beliefs." (Id.) A faculty advisor is present during the meetings but does not participate in them. (Id. ¶ 8.) All students are invited to attend the meetings, which occur in "rooms where students are walking by and can note the fact that the Christian meetings are taking place." (Id. ¶ 10.) "[S]tudents from other religious faiths conduct[ ] meetings in the New York City public schools right before, after, or during the school day, including Muslim, Jewish, and other religious student groups." (Id. ¶ 12.)

Defendants argue that the student-led religious clubs do not raise the same Establishment Clause concerns as do Plaintiffs' meetings. In fact, Defendants go so far as to say "the requirements under which student groups operate insure that there is virtually no likelihood that students, or members of the public, will discern a message of endorsement on the part of [the Board]." (Def. Reply Mem. at 13.) Given the functionally similar restrictions under which both types of meetings operate, the Court rejects Defendants' position that students and members of the public would interpret so differently the Board's message of endorsement with respect to the activities of Plaintiffs' meetings versus those of student-led religious clubs.

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judgment that are littered with objectionable hearsay. The Court therefore rejects Defendants' objection.

For example, Defendants point to the fact that student clubs only advertise their meetings within the school whereas Plaintiffs are free to advertise their meetings outside the school community. But given the size of the respective environments, the Court fails to see the significance of this distinction. In fact, a student-led religious club's advertisement on a bulletin board or over the school's public address announcement system, (see Herrera Decl. ¶ 12), is more likely to be noticed by a greater percentage of people within the school than is Plaintiff's announcement of its meetings by the eight million plus inhabitants of New York City or the seemingly infinite number of users surfing the Web. Defendants also say "[s]ome congregations have more than 100 people in attendance at their services," (Def. Reply Mem. at 13), but the same can be said for certain student club meetings, (Del Rio Decl. ¶ 9).

But perhaps most telling is the fact that student-led religious clubs, even though they meet during non-instructional time, hold their meetings on school days when significantly more students are present than on Sundays (when Plaintiffs' meetings take place). This suggests the likelihood that a student or parent would misperceive that the Board was endorsing the club's religious activities is greater than the likelihood either would have the same misperception regarding Plaintiffs' Sunday meetings. In this regard, the Court agrees with Plaintiffs' counsel's comment at oral argument that "high school students may not have the benefit of reading the Second Circuit's decision [in Bronx Appeal III ] and [may] not be able to parse between a

worship service and [the activities of a student-led religious club]. They're going to see a lot of worship-like activity going on by their peers, permitted by the public school officials." (Summ. J. Hr'g Tr. at 25.) Of course, the endorsement test looks to the objective, fully informed observer's perception as determinative of whether there is an actual Establishment Clause violation. But the fact that the risk of confusion by the uninformed regarding endorsement is greater with respect to the activities of student-led religious clubs than it is with respect to Plaintiff's Sunday meetings highlights the ineffectiveness of Ch. Reg. D–180 in advancing the Board's stated antiestablishment interest.[21]

Accordingly, the Court rejects Defendants' argument that Ch. Reg. D–180 is effective in advancing their antiestablishment interest.[22]

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[21] Putting the activities of student-led religious clubs aside, Ch. Reg. D-180—which relies on the subjective labels applicants use to describe their religious practices—is ineffective in countering the perception of establishment because observers still see outside groups conducting the constituent parts of a worship service in the Board's schools. See Bronx III, 2012 WL 603993, at *11.

[22] Defendants argued for the first time at oral argument that the effectiveness of Ch. Reg. D-180's ban on "religious worship services" and otherwise using the Board's schools as a "house of worship" is evidenced by the fact that, prior to this Court's issuing its preliminary injunction, some organizations that had previously been meeting in the schools either vacated them or were planning to leave upon learning that the Board would begin enforcing the regulation in February 2012. While Defendants did not elaborate on this argument, the gist appears to be that because religious organizations were leaving the schools entirely and not remaining to conduct the individual elements of worship permitted under Good News

Because the Court finds to the contrary—*i.e.,* that the regulation does *not* advance the Board's interest—Ch. Reg. D–180 also fails the second prong of *Lukumi*'s strict scrutiny analysis. Ch. Reg. D–180 thus violates the Free Exercise Clause for this additional reason.

B. Ch. Reg. D–180 Also Violates the Establishment Clause

The Court additionally based its February 2012 preliminary injunction on post-Bronx Appeal III factual and legal developments, which the Court found warranted reconsideration of Plaintiffs' Establishment Clause claim. See Bronx III, 2012 WL 603993, at *12-16. Specifically, the Court found that Ch. Reg. D–180 violates the Establishment Clause under Lemon because it causes the Board's officials to become excessively entangled with religion by requiring them to make their own bureaucratic determinations as to what constitutes "worship." The Court also found that the Supreme Court's recent decision in Hosanna–Tabor confirms that the

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Club, the schools were trending towards being entirely "religious free," thus demonstrating the effectiveness of Board's policy. Because Defendants did not raise this argument until the eleventh hour and failed to submit a declaration detailing the number of religious organizations that previously obtained permits to conduct the types of activities expressly permitted under Good News Club but which decided to leave the schools after being informed that worship services would no longer be allowed, the Court cannot address the merits of Defendants' argument. Furthermore, the Cole declaration contradicts Defendants' assertion. See infra Part III.B. Therefore, Defendants' unsupported argument does not factor into the Court's analysis.

Establishment Clause "prohibits government involvement in such ecclesiastical decisions." 132 S.Ct. at 706. At oral argument on Plaintiffs' motion for a preliminary injunction, Defendants provided a rough sketch of the verification procedure for determining applicants' compliance with Ch. Reg. D–180's worship-related provisions; Defendants were unsuccessful in convincing the Court of the constitutionality of that procedure. Defendants have now sought to explain in greater detail their current verification method and why it does not cause excessive government entanglement with religion, but the Court remains unconvinced.

In Bronx III, the Court cited the testimony of a permit applicant who sought the Board's guidance whether his church's proposed activities would be permitted under Ch. Reg. D–180. The applicant provided the Board with descriptions of his church's meetings, and the Board ultimately determined that the meetings constituted impermissible "religious worship services" under the regulation. The Court concluded the following:

> The declarations recently filed in this case ... demonstrate that the Board does not engage in a mere act of inspection of religious conduct when enforcing [Ch. Reg. D–180]. Rather, the Board has evidenced a willingness to decide for itself which religious practices rise to the level of worship services and which do not, thereby causing the government's entanglement with religion to become excessive.

Bronx III, 2012 WL 603993, at *16 (internal quotation marks omitted). The Board's excessive entanglement with religion is further evidenced by the declaration of Marilynn N. Cole ("Cole"), submitted in support of Plaintiffs' motion for summary judgment.

Cole serves as an elder for Unbroken Chain Church, a Christian church that currently meets on Sunday mornings for its "main worship service" in one of the Board's schools. (Cole Decl. ¶ 3.) When Cole learned of the Board's intention to begin enforcing Ch. Reg. D–180's ban on religious worship services after February 12, 2012, she called a Board official to see whether her church's weekly Wednesday night prayer meeting and weekly Friday night Bible study would also be prohibited. (Id. ¶¶ 7–8.) The Board official told Cole to "write him an email describing what [the church does] at those meetings." (Id. ¶ 8.) Cole explained in a subsequent email that "Wednesday night is Prayer ... and congregation members come to the front to share their requests. And then they pray. Our Bible Study is teaching from our Pastor or from one of our elders or ministers." (Id. (alteration in original).) The Board official eventually answered Cole's inquiry by stating that "Bible study would be ok, but not prayer meetings." (Id. ¶ 10.) Cole's unopposed declaration reaffirms the Court's conclusion that "the Board has evidenced a willingness to decide for itself which religious practices rise to the level of worship services and which do not, thereby causing the government's entanglement with religion to become excessive." Bronx III, 2012 WL 603993, at *16.

Defendants, for their part, admit that some Board officials made mistakes in following the Board's protocol for verifying compliance with Ch. Reg. D–180. (See, e.g., Brawer Decl. ¶ 32.) But Defendants insist the Board's method of implementing Ch. Reg. D–180 is constitutionally sound because it first looks to the religious applicants themselves to certify whether they intend to use the schools for "religious worship services" or as a "house of worship." Defendants summarize the Board's verification procedure as follows:

> Staff will rely, in the first instance, upon the representations of religious organization applicants regarding their compliance with the worship-related provisions of [Ch. Reg. D–180], but reserve the right to look to other sources of publicly available information to verify applicants' representations made on permit forms, just as staff do with non-religious applicants.

(Def. Reply Mem. at 8; *see also* Brawer Decl. ¶¶ 20–21, 47.) While this approach of "look[ing] beyond the four corners of the Extended Use Application," (Brawer Decl. ¶ 20), may be proper for purposes of verifying a political or commercial applicant's compliance with Ch. Reg. D–180, the same cannot be said of verifying whether a religious applicant is complying with the worship-related provisions of the regulation. This is because it is the religious adherents alone who can determine for themselves how to "shape [their] own faith," Hosanna–Tabor, 132 S.Ct. at 706, and no amount of bureaucratic

second-guessing—even if based solely on the adherents' own words—may invade their province.[23]

The following colloquy at oral argument highlights the problem of excessive entanglement that results from Defendants' verification process:

> COURT: If there is no definition in [Ch. Reg. D–180] of [religious] worship service or ... house of worship, how can the regulation be enforced and how will folks know whether they are in or out?
>
> DEFENDANTS: Well, your Honor, the plaintiffs themselves in their 56.1 statement make that argument for us, because they say it is only the religious worshiper who knows what worship is.... The definition [of "religious worship services" or "house of worship"] is what the religious organization believes it to be.

(Summ. J. Hr'g Tr. at 44–45, 60 (emphasis added).) If it is true that only a religious organization can define for itself what it means to conduct "religious worship services" or to use a building as a "house of worship," it is equally true that an outsider has no insight into whether that organization is acting

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[23] The fact that Defendants may investigate a political or commercial applicant's public statements to confirm compliance with Ch. Reg. D-180 is irrelevant. Whereas specific First Amendment prohibitions on state action are implicated when a religious adherent applies for an extended use permit under Ch. Reg. D-180, no such constitutional limitations are triggered when Board officials review a politician's or a merchant's application.

consistently with its own religious beliefs. Defendants' attempts to do so in this case only serve to illustrate the constitutional impropriety of such a task.

For example, Defendants point to a religious applicant's use of the word "worship" in public documents and statements as a red flag that the applicant may have deceitfully certified compliance with Ch. Reg. D–180. (See, e.g., Def. Mem. at 27 ("[N]otwithstanding plaintiffs' varying approaches to Ch. Reg. D–180 and purported difficulty with the regulation's use of the word 'worship,' their use of the word when facing the larger community is remarkably clear and straightforward. Hall testified that the Church has consistently distributed flyers to the public over ten years, inviting the community 'to worship with them Sunday at 11:00 AM' at P.S.15.").) Defendants seem to be conflating "worship" with "religious worship services," *see* Bronx Appeal III, 650 F.3d at 37 ("The 'religious worship services' clause does not purport to prohibit use of the facility by a person or group of persons for 'worship.' "), but in any event they are excessively entangling themselves in religious matters. Because Defendants do not define either term, a religious organization may, according to its religious beliefs, honestly certify on a permit application that it will not use the Board's schools for "religious worship services" or as a "house of worship" yet nevertheless conduct some other form of "worship" not proscribed by Ch. Reg. D–180. As Brad Hertzog, Pastor of Reformation Presbyterian Church, points out:

> From my theological perspective, the Bible gives us a taxonomy of worship that includes different angles on this word. For example, there is a sense (from the Bible) that everything the Christian does is worship—including eating and drinking.... There is another aspect of worship which includes certain things that are more particularly set apart for God. For example, prayer can rightly be called worship, because it is an act of worship.

(Hertzog Decl. ¶ 11.)

Assuming Pastor Hertzog applied for an extended use permit for his congregation to hold Bible study meetings, certified that he was in compliance with Ch. Reg. D–180, and then distributed a leaflet that said, "Come worship the Bible with us Sunday mornings in P.S. 173," Defendants say they would be justified in revoking his permit for certifying his application falsely. (See Summ. J. Hr'g Tr. at 40 ("Well, you look at [the applicant's] leaflet. It says come worship with us. It sounds like worship to me. You don't have to go much further than that.").) But that would only mean the Board is substituting its own understanding of the congregation's faith for that of the congregation itself—even if the Board's officials only look to the congregants' own words—in clear violation of both the Establishment Clause (excessive entanglement) and the Free Exercise Clause (government interference with an internal

church decision).[24] Indeed, the Board's inquiry into the applicant's religious views alone suffices to violate Plaintiffs' First Amendment rights. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979) ("It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."); Bronx Appeal I, 127 F.3d at 221–22 (Cabranes, J., dissenting in part) ("There may be cases in which the parties dispute whether or not a proposed activity for which permission to use school premises is denied actually constitutes religious instruction or worship, and the very act of making such classifications may deeply-and unconstitutionally-entangle public officials in essentially theological determinations."); Colo. Christian Univ., 534 F.3d at 1261 ("Properly understood, the [excessive entanglement] doctrine protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices....").

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[24] Quaker "meeting for worship," in which attendees sit in communal silence and speak only when (and if) the "Holy Spirit" so moves them, presents a similar problem. A Quaker organization that applies for an extended use permit may certify compliance with Ch. Reg. D-180 because it does not consider its meetings to qualify under either of the regulation's worship-related provisions. Nevertheless, were the Board's officials to visit the organization's website and see the advertisement, "Come join our meeting for worship at P.S. 90 on Saturdays," Defendants say they would be justified in deeming the organization to have falsely certified its permit application. The Religion Clauses say otherwise.

The Court further finds the excessive government entanglement with religion that Ch. Reg. D–180 fosters to be congruent with that found by the court in Faith Center Church Evangelistic Ministries v. Glover, 2009 WL 1765974 (N.D.Cal. June 19, 2009). In that case, the plaintiff was a non-profit religious organization that challenged a county library policy that generally opened the library's meeting room "for educational, cultural, and community related meetings, programs, and activities" but prohibited the use of the room for "religious services." Id. at *1. The plaintiff had initially won a preliminary injunction against enforcement of the policy on free speech grounds. After the Court of Appeals for the Ninth Circuit reversed that ruling in part, see 480 F.3d 891, 918 (9th Cir.2007) ("[P]rohibiting Faith Center's religious worship services from the [library] meeting room is a permissible exclusion of a category of speech that is meant to preserve the purpose behind the limited public forum. Religious worship services can be distinguished from other forms of religious speech by the adherents themselves."), the plaintiff submitted a new application to use the library meeting room for "Prayer, Praise Wordshop [sic] Purpose to Teach Scripture and Encourage Salvation thru Jesus to Build–Up this Community Overall." 2009 WL 1765974, at *3. A county official approved the application but clarified that the plaintiff could use the library's meeting room "for any activity that does not violate the meeting room use policy including activities that express a religious viewpoint. In accordance with the Ninth Circuit's holding, you are responsible for distinguishing religious worship services from other

forms of religious speech." Id. (emphasis added). In response, the plaintiff's "leader" argued:

> "[I]t is impossible for [her] to distinguish between worship and any other aspect of Faith Center's meetings," because she understands "worship to be an outward expression of a relationship with God," and "any time [she is] doing something that is in accordance with what God would like [her] to do, that is an act of worship."

*Id.* at *4 (all but the first alteration in original).

The parties cross-moved for summary judgment, and the court first concluded that the religious use restriction did not violate the Free Speech Clause. See id. at *4–7. However, it found that the religious use restriction did violate the Establishment Clause based on the policy's fostering of excessive government entanglement.[25] The court noted:

> [T]he County has not defined what it means by "religious services." The County contends that the Library relies only on the applications to determine whether an event

[25] The Court notes that the procedural posture of Faith Center Church is also on par with this litigation's procedural history. That the Court of Appeals in that case reversed the district court's ruling on the plaintiff's Free Speech Clause claim did not prevent the district court from finding in the plaintiff's favor on its Establishment Clause claim. The same can be said here: the Court of Appeals' rejection of Plaintiffs' Free Speech Clause claim does not preclude this Court from granting Plaintiffs' requested relief on its Establishment Clause and Free Exercise Clause claims.

> would fall within the scope of the Religious Use restriction. However, the record demonstrates that if there are questions about whether activities are religious services, rather than other religious activities permitted in the Meeting Room, someone from the County reviews the application to make that determination.
>
> Indeed [there is] the likelihood that the County would be called upon to inquire into religious doctrine in order to determine whether a particular activity qualified as a religious service.

Id. at *9 (citations omitted). The same is true here.

First, the Board has refused to define the terms "religious worship services" and "house of worship." Second, the declarations filed in this case demonstrate that Board officials have reviewed permit applications to make the determination whether the applicant's proposed activities constitute these types of prohibited religious use. Third, even though Board officials look to the applicants in the first instance to decide whether their proposed activities fall within the proscribed worship-related provisions, the Board's verification method requires state officials to "inquire into religious doctrine"—as discussed above, because only the religious adherents themselves may shape their own faith, an outsider's interpretation of the adherents' own statements regarding their religious practices "does not lie within the [government's

regulatory] competence to administer." Widmar v. Vincent, 454 U.S. 263, 269 n. 6 (1981).

Accordingly, for all these reasons, the Court concludes that Ch. Reg. D–180 "call[s] for official and continuing surveillance leading to an impermissible degree of [government] entanglement" with religion, in violation of the Establishment Clause. *Walz,* 397 U.S. at 675, 90 S.Ct. 1409. Defendants are not immune from excessive entanglement once they begin to verify the qualitative nature of specific religious practices.[26] The Court thus grants Plaintiffs' motion for summary judgment on this additional ground.

## IV. CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment [Dkt. No. 148] is GRANTED, and Defendants' cross-motion for summary judgment [Dkt. No. 158] is DENIED. Defendants are permanently enjoined from enforcing Ch. Reg. D–180 so as to deny Plaintiffs' application or the application of any similarly-situated individual or

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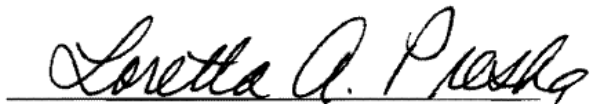
[26] Defendants even seemed to recognize as much at oral argument. (See Summ. J. Hr'g Tr. at 39 ("I think we sketched out—I mean, look, the plaintiffs have cited some e-mails or other communication[s] that said, you know, tell me in detail everything you're doing. I'm not going to say that was what we intended that they do. Rolling out a policy of this difficulty to 1500 schools, you may find somebody asking questions that might not be the way you would want to frame them." (emphasis added)).)

entity to rent space in the Board's public schools for meetings that include religious worship.[27]

SO ORDERED.

Dated: New York, New York
June 29, 2012



UNITED STATES DISTRICT JUDGE

[27] The Court incorporates by reference reasons why the preliminary injunction extended to any s larly-situated party as Plaintiffs. See Bronx III, 2012 WL 603993, at *20 n.17. The same reasons apply purposes of this permanent injunction.

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF NEW YORK

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



LORETTA A. PRESKA, Chief United States District Judge:

The Bronx Household of Faith, Robert Hall, and Jack Roberts ("Plaintiffs") are once again before this Court seeking a preliminary injunction against the Board of Education of the City of New York (the "Board")[1] and Community School District No. 10

[1] Not so far into this litigation the Board of Education was renamed the Department of Education. While this opinion remains faithful to the captioned name, references to the Board should be treated as synonymous with the Department of Education.

(collectively, "Defendants") so that Plaintiffs' Church may continue to hold Sunday religious worship services in a New York City public school, as it has done without interruption since this Court issued an initial preliminary injunction in 2002 barring Defendants from enforcing a regulation that would prohibit Plaintiffs from conducting their religious worship services in the Board's schools. In November 2007, this Court made the preliminary injunction permanent and granted Plaintiffs' motion for summary judgment. On June 2, 2011, the Court of Appeals reversed summary judgment and vacated the permanent injunction. After the Supreme Court denied Plaintiffs' petition for certiorari, the Court of Appeals issued its mandate on December 7, 2011. For the reasons stated below, Plaintiffs' latest request for a preliminary injunction is GRANTED.[2]

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[2] The Court has considered the following submissions in connection with Plaintiffs' motion: Memorandum of Law in Support of Motion for Preliminary Injunction; Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction; Reply Brief in Support of Plaintiffs' Motion for Preliminary Injunction; Defendants' Sur-Reply Memorandum; Declaration of Robert G. Hall, Co-Pastor of the Bronx Household of Faith, in Support of Plaintiffs' Motion for Preliminary Injunction, dated February 2, 2012 ("Hall Decl."); Declaration of Christopher F. Dito, Pastor of International Christian Center South, in Support of Plaintiffs' Motion for Preliminary Injunction, dated February 2, 2012; Declaration of Caleb Clardy, Pastor of Trinity Grace Church, in Support of Plaintiffs' Motion for Preliminary Injunction, dated February 3, 2012; Declaration of Bo Han, Board Member of New Frontier Church, in Support of Plaintiffs' Motion for Preliminary Injunction, dated February 3, 2012; Declaration of Brad Hertzog, Pastor of Reformation Presbyterian Church, in Support of Plaintiffs' Motion for Preliminary Injunction, dated

I. BACKGROUND[3]

The Bronx Household of Faith (the "Church") is a 37–year–old, "community-based" Christian church with approximately 85–100 congregants. (Hall Decl. ¶¶ 3, 6.) The Church has used the school auditorium in P.S. 15 in the Bronx, New York, on a weekly basis since 2002 for purposes of holding its Sunday worship services. (Id. ¶¶ 3, 5.) Defendants granted the Church permission to worship in P.S. 15 following this Court's July 3, 2002 order[4] enjoining Defendants from enforcing the Board's Standard Operating Procedure section 5.11 ("SOP § 5.11") so as to deny Plaintiffs' application or the application of any similarly-situated individual or entity to rent space in the Board's public schools for morning meetings that include religious worship. At the time this Court issued the preliminary injunction in 2002, SOP § 5.11 provided:

> No outside organization or group may be allowed to conduct religious services or

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February 15, 2012 ("Hertzog Decl."); Declaration of Jonathan Pines in Opposition to Motion for Preliminary Injunction, dated February 10, 2012; and Declaration of Jonathan Pines in Opposition to Plaintiffs' Notice of Filing of Supplemental Evidence, dated February 16, 2012.

[3] The history of this litigation, which dates back to 1995, has been recounted multiple times throughout the case's multiple movements between this Court and the Court of Appeals. Only those facts most pertinent to Plaintiffs' immediate request for relief are recited here. For a more in-depth recitation of the facts surrounding this litigation, see this Court's earlier opinions. 400 F. Supp. 2d 581, 585-89 (S.D.N.Y. 2005) ("Bronx II"); 226 F. Supp. 2d 401, 403-11 (S.D.N.Y. 2002) ("Bronx I").

[4] The July 3, 2002 order was issued pursuant to this Court's June 26, 2002 opinion in Bronx I.

> religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

Bronx II, 400 F.Supp.2d at 587.

This Court found that, in light of the Supreme Court's decision in Good News Club v. Milford Central School, 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001), Plaintiffs demonstrated a substantial likelihood of success in showing that this particular iteration of SOP § 5.11 violated their First Amendment free speech rights.[5] Bronx I, 226 F.Supp.2d at 413–15. After Good News Club, a school that opens its doors as a limited public forum may not prevent an organization from conducting activities in the school that are consistent with the defined purposes of the forum merely because those activities may be characterized as "quintessentially religious," such as Bible study or prayer. See Good News Club, 533 U.S. at 107–12, 121 S.Ct. 2093. Because the Board opened its schools' doors, inter alia, for the purposes of "holding social, civic and recreational meetings and entertainment, and other

[5] Prior to Good News Club's being on the books, this Court dismissed Plaintiffs' original complaint in the first phase of this litigation. The Court of Appeals affirmed. See Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207 (2d Cir. 1997) ("Bronx Appeal I"), cert. denied, 523 U.S. 1074 (1998). After Good News Club came down, Plaintiffs re-filed their complaint, and so began the second phase of the litigation.

uses pertaining to the welfare of the community" so long as "such uses [are] non-exclusive and open to the general public," Bronx I, 226 F.Supp.2d at 409, and because the Church's proposed uses on Sunday mornings—which included singing, Bible instruction, and prayer—were consistent with these defined purposes, this Court found the Board's excluding Plaintiffs from its schools likely would violate Plaintiffs' free speech rights. Id. at 413–15; see also id. at 422 ("I find it impossible to distinguish between, on one hand, activities proposed by the plaintiffs that are within the activities expressly permitted in this forum, viz., discussing religious material or material which contains a religious viewpoint and activities contributing to the welfare of the community and, on the other hand, an activity different in kind called worship."). The Court of Appeals affirmed the preliminary injunction but declined to review this Court's determination that Good News Club precludes meaningfully drawing a distinction between worship and other types of religious speech. *See* 331 F.3d 342, 353–55 (2d Cir.2003) ("Bronx Appeal II ").

In March 2005, the Board announced it planned to modify SOP § 5.11 ("Revised SOP § 5.11") to read as follows:

> No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship. Permits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this [regulation] on the

> same basis that they are granted to other clubs for students that are sponsored by outside organizations.[6]

Bronx II, 400 F.Supp.2d at 588. The Board informed Plaintiffs that the Church's use of P.S. 15 for Sunday worship services was prohibited under Revised SOP § 5.11 but did not enforce the new policy because of the preliminary injunction. Id. The parties then cross-moved for summary judgment, and Plaintiffs further sought to convert the preliminary injunction into a permanent one on the ground that Revised SOP § 5.11 was unconstitutional in the same manner as its previous incarnation. This Court granted Plaintiffs' motion for summary judgment, denied Defendant's cross-motion for summary judgment, and permanently enjoined Defendants "from enforcing [Revised] SOP § 5.11 so as to exclude Plaintiffs or any other similarly situated individual from otherwise permissible after-school and weekend use of a New York City public school." Id. at 601. This Court's reasons for granting the permanent injunction paralleled those underlying the grant of the preliminary injunction, viz., in the context of a limited public forum Revised SOP § 5.11 constituted impermissible viewpoint discrimination on the basis of religion in violation of Plaintiffs' free speech

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[6] Revised SOP § 5.11 has since been re-issued as part of Chancellor's Regulation D-180 ("Ch. Reg. D-180"). See Chancellor's Regulation D-180 §§ I.Q, I.S, Extended Use of School Buildings, http://schools.nyc.gov/NR/rdonlyres/023114D9-EA44-4FE0-BCEE-45778134EA14/0/D180.pdf (last visited February 24, 2012). References in this opinion to Revised SOP § 5.11 should be treated as synonymous with Ch. Reg. D-180.

rights, and such discrimination was not saved by the Board's perceived concern of violating the Establishment Clause. After the Court of Appeals vacated the permanent injunction on ripeness grounds, see 492 F.3d 89 (2d Cir.2007) (per curiam), the Board officially instituted Revised SOP § 5.11, the parties again cross-moved for summary judgment, and this Court reissued the permanent injunction for the reasons stated in Bronx I and Bronx II [Dkt. No. 99].

A. The Court of Appeals Reverses Summary Judgment and Vacates the Permanent Injunction

In June 2011, the Court of Appeals issued a split decision reversing summary judgment and vacating the preliminary injunction. *See* 650 F.3d 30 (2d Cir.2011) ("Bronx Appeal III "). The majority first concluded that "the challenged rule does not constitute viewpoint discrimination because it does not seek to exclude expressions of religious points of view or of religious devotion, but rather excludes for valid nondiscriminatory reasons only a type of activity-the conduct of worship services." Id. at 33. Further, "because Defendants reasonably seek by the rule to avoid violating the Establishment Clause," the majority held that "the exclusion of religious worship services is a reasonable content-based restriction, which does not violate the Free Speech Clause." Id.

The majority drew a line between the individual religious activities expressly permitted in Good News Club (*e.g.,* prayer, religious instruction,

expression of devotion to God, and the singing of hymns), which amount to "worship," and "worship services"—the former permitted under Revised SOP § 5.11 and the latter excluded. Id. at 36–37. The majority then defined worship services as "a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion." Id. at 37. Regarding the Board's concern of violating the Establishment Clause, the majority made clear that it was not deciding "whether use of the school for worship services would in fact violate the Establishment Clause." Id. at 40; see also id. at 49 ("The Supreme Court has never ruled on whether permitting the regular conduct of religious worship services in public schools constitutes a violation of the Establishment Clause, and we reach no conclusion on that question."). Rather, it concluded that the Board's concern was reasonably objective, which was sufficient to justify the ban. Id. at 40–43.

Finally, the majority considered Plaintiffs' Establishment Clause claim but was "not persuaded." Id. at 45. It did not believe a reasonable observer would perceive Revised SOP § 5.11's ban on religious worship services as being hostile to religion. Id. at 45–46. And it did not believe that enforcement of the policy causes excessive governmental entanglement with religion. Id. at 46–48.

1. Judge Walker's Dissent

In his dissent, Judge Walker disagreed with the majority on both of its conclusions relating to the free speech analysis. First, he concluded that Revised SOP § 5.11's ban on religious worship services constitutes impermissible viewpoint discrimination. Id. at 54–59. He did not find that the majority drew a workable distinction between "worship" and "worship services" and concluded that Good News Club foreclosed the Board from excluding worship services. Id. at 55–56. Moreover, Judge Walker found the majority's definition of religious worship services "leads to anomalous results: while a Catholic or Episcopal service would be shut out of the forum, a Quaker meeting service, Buddhist meditation service, or other religions worship convocation could be allowed because it would not follow a 'prescribed order' or because the leader is not 'ordained.' " Id. at 56.

Second, Judge Walker did not find the Board's professed Establishment Clause rationale to be reasonable. Id. at 59–64. Instead, he would hold that "the actions of Bronx Household, a private party, cannot transform the government's neutral action into an Establishment Clause violation." Id. at 59. In Judge Walker's opinion, an objective, fully informed observer would not perceive governmental endorsement of religion because the Board's schools are "open to a wide spectrum of participants," which "bespeaks the state's neutrality, not its favoring of religion or any other group." Id. at 61. Finally, Judge Walker indicated that Revised SOP 5.11 raises Free Exercise Clause concerns and would not withstand a free exercise challenge because the Board cannot demonstrate a compelling state interest that would

justify the policy's burdening of religious practices. Because Judge Walker found that the Board's Establishment Clause rationale is not even reasonable, he concluded that it could not be compelling. Id. at 58 n. 4.

B. Most Recent Developments

The Court of Appeals denied Plaintiffs' request for an en banc rehearing on July 27, 2011, and the Supreme Court denied Plaintiffs' petition for certiorari on December 5, 2011. 132 S.Ct. 816 (2011). That cleared the way for the Court of Appeals to issue its mandate on December 7, 2011. Despite vacatur of the injunction, Defendants agreed to adjourn enforcement of Revised SOP § 5.11 until February 13, 2012.

On December 14, 2011, Plaintiff Hall submitted a new application on behalf of the Church to continue using P.S. 15 on Sunday mornings for the period January 8, 2012 to February 12, 2012. (Hall Decl. ¶ 15, Ex. A.) In the space on the application entitled "Description of activities to be conducted" Hall wrote, "Hymn singing, prayer, communion, preaching, teaching, fellowship." (Id.) On the permit approving the application, however, the Board listed the activities as "WORHIP [sic] HYMN SINGING, PRAYER, COMMUNION, PREACHING." (Id. ¶ 16, Ex. B.)

On December 16, 2011, this Court ordered the parties to confer and propose how they wished to proceed in light of the mandate. Plaintiffs' counsel called chambers on January 10, 2012, to inform the

Court they had only that day received notice of the December 16 order but would confer with opposing counsel and report back to the Court as soon as practicable. On January 25, 2012, Plaintiffs' counsel wrote the Court that it intended to seek a new preliminary injunction based on claims that either remained undecided by the Court of Appeals or were revived by the Supreme Court's decision in Hosanna–Tabor Evangelical Lutheran Church & School v. EEOC, 132 S.Ct. 694 (2012).[7] The Court ordered the parties to confer on a proposed briefing schedule, which they worked out on an expedited basis.

Oral argument was held on February 14, 2012. At the conclusion of oral argument the Court asked the parties to confer as to whether they could arrange a temporary resolution for the coming weekend. That evening Defendants wrote the Court that they would not agree to suspend immediate implementation of Ch. Reg. D–180. The Court issued a temporary restraining order on February 16, 2012, enjoining Defendants from enforcing that part of Ch. Reg. D–180 that provides: "No permit shall be granted for

[7] Chambers faxed a copy of the December 16 order to the City of New York Law Department—counsel for Defendants—with instructions to distribute it to all parties involved. The fax apparently was addressed to an attorney who no longer works for the city. While the Court subsequently ordered that the case be designated for electronic filing, at the time the Court issued the December 16 order counsel for the parties could not receive electronic (cont'd on next page) (cont'd from previous page) notification of any case activity. Given these circumstances and the timing of the Supreme Court's decision in Hosanna-Tabor, the Court does not fault Plaintiffs for not writing the Court sooner.

the purpose of holding religious worship services, or otherwise using a school as a house of worship."[8] The Court indicated in the temporary restraining order that a written opinion would follow; this is that opinion, applicable both to the temporary restraining order and the preliminary injunction.

## II. STANDARD FOR PRELIMINARY INJUNCTION

Plaintiffs seek a preliminary injunction to preserve the status quo of meeting in P.S. 15 on Sunday mornings, which they have done since this Court issued its initial preliminary injunction in 2002. A court generally may grant a preliminary injunction when the moving party can establish both (1) irreparable harm and (2) either (a) a likelihood of success on the merits or (b) sufficient questions on the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in favor of the moving party. *E.g.,* Cacchillo v. Insmed, Inc., 638 F.3d 401, 405–06 (2d Cir.2011). When a party seeks a "mandatory" preliminary injunction that " 'alter[s] the status quo by commanding some positive act,' as opposed to a 'prohibitory' injunction seeking only to maintain the status quo," the moving party must make a " 'clear showing that [it] is entitled to the relief requested, or [that] extreme or very serious damage will result from a denial of preliminary relief.' " Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d

[8] Defendants immediately moved the Court of Appeals to stay the temporary restraining order. That motion was denied, although the Court of Appeals clarified that the temporary restraining order should be read as barring the Board from enforcing its policy against Plaintiffs only.

30, 35 n. 4 (2d Cir.2010) (quoting Tom Doherty Assocs., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 34–35 (2d Cir.1995)) (first alteration in original); see also Fifth Ave. Presbyterian Church v. City of N.Y., 293 F.3d 570, 574 n. 2 (2d Cir.2002) (noting the " 'clear or substantial likelihood of success' standard applicable to mandatory injunctions").

When this Court issued the initial preliminary injunction in 2002, it applied the higher burden of proof required for mandatory injunctive relief because at the time the Church was not meeting in the Board's schools; thus, Plaintiffs sought to alter the status quo. Bronx I, 226 F.Supp.2d at 411. This time around, Plaintiffs seek prohibitory injunctive relief because they wish to maintain the current status quo-*viz.,* meeting in P.S. 15 on Sunday mornings as they have for nearly ten years. As such, although the Court finds that they have done so,[9] Plaintiffs are not now required to meet the high standard of showing a substantial likelihood of success on the merits.

## III. DISCUSSION

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[9] Defendants argued before the Court of Appeals when they moved to vacate the temporary restraining order that the status quo is no injunction against enforcement of Revised SOP § 5.11. The Court does not have the benefit of Plaintiffs' response to this argument because Defendants did not argue the merits of Plaintiffs' motion for a preliminary injunction before this Court. Assuming Defendants are correct, Plaintiffs must meet the higher standard of showing a substantial likelihood of success on the merits of their claims. Because the Court finds that Plaintiffs have met that higher standard, this precise issue need not be resolved.

The Court finds that Plaintiffs have satisfied their burden of demonstrating irreparable harm and a likelihood of success on the merits of their Free Exercise Clause claim and Establishment Clause claim. Furthermore, the Court finds that these claims are not precluded by the doctrines of the law of the case, claim preclusion, and issue preclusion. Each of these findings is addressed below.

A. Plaintiffs Will Suffer Irreparable Harm

Plaintiffs claim that because Revised SOP § 5.11 prevents them from holding Sunday worship services in the Board's public schools—the only location in which they can afford to gather as a full congregation without having to curtail other of their religious practices—it prohibits their free exercise of religion in violation of their First Amendment rights. Plaintiffs assert the prohibitive cost of renting commercial space for the Church's worship services would force them "to reduce and/or eliminate ministries to [the Church's] members and ... local community." (Hall Decl. ¶ 9.) "[The] entire congregation could no longer worship together," which would "undermine the fellowship" that is a "vital aspect of [the Church's] religious ministry and calling." (Id. ¶ 11.) Being banned from using the Board's schools would also "undermine [the Church's] ability to engage in the duties of [the Church's] Christian faith-to corporately pray for one another, hear testimony, engage in collective praise, and serve the local community." (Id. ¶ 12.) "In addition, [the Church] will lose some [congregants] because they would not be able to participate in [the Church's] vital Sunday ministry. Many of these

individuals are elderly, disabled, or lack transportation, and traveling to another location is not an option." (Id. ¶ 13.)

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). Here, the alleged deprivation of Plaintiffs' free exercise rights results directly from the Board's implementation of Revised SOP § 5.11 so as to ban Plaintiffs from holding worship services in P.S. 15 on Sundays. "Where a plaintiff alleges injury from a rule or regulation that directly limits [First Amendment rights], the irreparable nature of the harm may be presumed." Bronx Appeal II, 331 F.3d at 349. Based on these principles and the Court's determination that Plaintiffs likely will prove an actual violation of their First Amendment free exercise rights-"rights that are the bedrock of our liberties," id.—Plaintiffs have demonstrated that they will suffer irreparable harm in the absence of an injunction.

B. Plaintiffs Are Likely to Succeed on the Merits

Unsurprisingly, the Court of Appeals did not address Plaintiffs' Free Exercise Clause claim when it reversed summary judgment for Plaintiffs and vacated the injunction. That is so because this Court granted summary judgment and the permanent injunction on free speech grounds only. Simply put, there was no need for the Court of Appeals to rule on the Free Exercise Clause claim because it was not immediately before the appellate panel. This Court has now fully considered the claim and finds

Plaintiffs have demonstrated a likelihood of success on the merits. In addition, new facts documenting how the Board's current policy fosters excessive governmental entanglement with religion and the Supreme Court's recent decision in Hosanna–Tabor persuade the Court that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim as well.

1. Free Exercise Clause Claim

The Free Exercise Clause of the First Amendment, as applied to the states through the Fourteenth Amendment, provides that "Congress shall make no law ... prohibiting the free exercise [of religion]." U.S. Const. amend. I. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993). While "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice[,] ... [a] law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." Id. at 531–32 (citing Emp't Div. v. Smith, 494 U.S. 872 (1990)); see also Fifth Ave. Presbyterian Church, 293 F.3d at 574 ("Government enforcement of laws or policies that substantially burden the exercise of sincerely held religious beliefs is subject to strict scrutiny.").

a) Revised SOP § 5.11 Raises Free Exercise Concerns and Is Not Neutral

There can be no doubt that Revised SOP § 5.11 implicates the protections of the Free Exercise Clause given that it "regulates or prohibits conduct because [the conduct] is undertaken for religious reasons." Lukumi, 508 U.S. at 532. The policy expressly bans "religious worship services"—conduct for which there is no secular analog. See Bronx Appeal *III,* 650 F.3d at 37 ("The 'religious worship services' clause does not purport to prohibit use of the facility by a person or group of persons for 'worship.' What is prohibited by this clause is solely the conduct of a particular type of event: a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion." (emphasis added)); Bronx Appeal I, 127 F.3d at 221 (Cabranes, J., concurring in part and dissenting in part) ("Unlike religious 'instruction,' there is no real secular analogue to religious 'services,' such that a ban on religious services might pose a substantial threat of viewpoint discrimination between religion and secularism.").

A law is not neutral if its object is to infringe upon or restrict practices because of their religious motivation. Lukumi, 508 U.S. at 533. Thus, on its face, Revised SOP § 5.11 is not neutral because it "refers to a religious practice without a secular meaning discernable from the language or context." Id.; see also Bronx Appeal III, 650 F.3d at 58 n. 4

(Walker, J., dissenting) ("Given the plain language of SOP § 5.11, the Board's persistent exclusion of outside organizations seeking to use school facilities for religious purposes, and the Board's repeated statements that SOP § 5.11 is aimed at the practice of religion, it is undisputable that SOP § 5.11 is not neutral.").

In addition, the policy also is not neutral because it discriminates between those religions that fit the "ordained" model of formal religious worship services, see Bronx Appeal III, 650 F.3d at 37 (defining worship services as "a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion"), and those religions whose worship practices are far less structured, see id. at 56 (Walker, J., dissenting) (noting that the majority's definition "leads to anomalous results: while a Catholic or Episcopal service would be shut out of the forum, a Quaker meeting service, Buddhist meditation service, or other religions worship convocation could be allowed because it would not follow a 'prescribed order' " or because the leader is not 'ordained').

Having concluded that Revised SOP § 5.11 raises Free Exercise Clause concerns[10] and is not neutral,

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[10] At oral argument, counsel for Defendants urged that there could be no Free Exercise Clause violation in this case because the cases cited by Plaintiffs in which the Supreme Court found such violations did not involve a defendant who was motivated by a desire to avoid violating the Establishment Clause. E.g., Lukumi, 508 U.S. 520. Because Revised SOP § 5.11 results

the policy may only be saved if it meets a strict scrutiny analysis. Defendants must show the policy serves a compelling state interest and is narrowly tailored to advance that interest. Throughout this litigation Defendants have maintained that the policy necessarily facilitates their mandate to avoid an unconstitutional establishment of religion. Defendants argue that allowing churches to hold worship services in the Board's public schools sends the message that Defendants are endorsing religion, which runs afoul of the second prong of the Supreme Court's test in Lemon v. Kurtzman for determining compliance with the Establishment Clause. See 403 U.S. 602, 612 (1971) (requiring that the "principal or primary effect [of the law in question] ... neither advance[ ] nor inhibit[ ] religion").[11] Defendants

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from the Board's balancing of competing constitutional mandates, Defendants argue Plaintiffs' Free Exercise Clause claim is precluded. The Court disagrees. That the Board may need to balance competing interests does not foreclose Plaintiffs' claim but rather speaks to whether Revised SOP § 5.11 meets strict scrutiny, i.e., whether the Board's interest in adopting the policy is compelling and whether the policy is narrowly tailored to advance that interest. Cf. Bronx Appeal III, 650 F.3d at 59 (Walker, J., dissenting) ("[T]he majority argues that my finding of viewpoint discrimination overlooks the Board's Establishment Clause rationale. . . . [E]ven if the Board were to have legitimate Establishment Clause concerns, those concerns could do nothing to undermine my conclusion that the Board engaged in viewpoint discrimination; at most, they could only serve as a potential justification for such discrimination." (citation omitted)). The Court discusses the strict scrutiny analysis infra Part III.B.1(b)-(c).

[11] As the Court of Appeals noted in Bronx Appeal III, "[a]lthough the Lemon test has been much criticized, the Supreme Court has declined to disavow it and it continues to

claim their concern over being perceived as endorsing religion drives the policy's ban on religious worship services.

The Court does not doubt that a desire to avoid an actual violation of the Establishment Clause can be a compelling state interest. *See* Widmar v. Vincent, 454 U.S. 263, 270–71 (1981) ("The University ... argues that it cannot offer its facilities to religious groups and speakers on the terms available to other groups without violating the Establishment Clause of the Constitution of the United States. We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling." (footnote omitted)). For example, in the context of free speech analysis, the Supreme Court has said that "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761–62 (1995); Good News Club, 533 U.S. at 112–13.

However, the Supreme Court has not decided whether a state's Establishment Clause rationale might be sufficiently compelling to justify viewpoint discrimination. See Good News Club, 533 U.S. at 113 ("[I]t is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination."). The Court in Good News Club avoided deciding that question

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govern the analysis of Establishment Clause claims in this Circuit." 650 F.3d at 40 n.9.

because it concluded that the defendant-school had no valid Establishment Clause concern. Id. at 113–19, 121 S.Ct. 2093. Because the majority in Bronx Appeal III found that Revised SOP § 5.11's ban on religious worship services qualifies as a content-based restriction in light of the defined purposes of the limited public forum and that it was reasonable for the Board to believe that permitting worship services in its schools would, in fact, violate the Establishment Clause, the Court of Appeals rejected Plaintiffs' free speech challenge. *See* Bronx Appeal III, 650 F.3d at 33 ("We also conclude that because Defendants reasonably seek by rule to avoid violating the Establishment Clause, the exclusion of religious worship services is a reasonable content-based restriction, which does not violate the Free Speech Clause." (emphasis added)).

Importantly, neither the Court of Appeals nor the Supreme Court has ruled whether permitting religious worship services in schools during non-school hours violates the Establishment Clause. See, e.g., Bronx Appeal III, 650 F.3d at 49 ("The Supreme Court has never ruled on whether permitting the regular conduct of religious worship services in public schools constitutes a violation of the Establishment Clause, and we reach no conclusion on that question."); id. at 43 ("To reiterate, we do not say that a violation has occurred, or would occur but for the policy."). The Court of Appeals determined that resolving that question was unnecessary in Bronx Appeal III because the Board only had to show its Establishment Clause rationale for banning religious worship services was reasonable. Because this Court concludes that strict scrutiny now applies

to the consideration of Plaintiffs' Free Exercise Clause claim, the question before the Court is whether the Board's Establishment Clause rationale is sufficiently compelling to justify burdening Plaintiffs' free exercise rights. The Court believes the answer to that question requires a definitive finding as to whether permitting religious worship services in schools during non-school hours violates the Establishment Clause. For the reasons stated below, the Court answers that question in the negative and concludes that Defendants do not meet their higher burden of demonstrating a compelling interest.

b) Board's Interest Is Not Sufficiently Compelling Because Allowing Religious Worship Services During Non–School Hours Does Not Violate the Establishment Clause

The Court credits the Board's word that in adopting Revised SOP § 5.11 the Board was motivated by a concern that allowing schools to be used during non-school hours for "religious worship services" could be perceived as violating the Establishment Clause. But from the perspective of the objective, fully informed observer, see Bronx Appeal III, 650 F.3d at 60 (Walker, J., dissenting) ("[T]he endorsement test asks whether 'an objective observer, acquainted with the text, legislative history, and implementation of the [challenged law or policy], would perceive it as a *state* endorsement of [organized religion] in public schools.' " (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000)) (second and third alterations in original)), no such violation would result. This Court considered

the Board's Establishment Clause rationale in Bronx I and concluded the following:

> As in Good News Club, there is a substantial likelihood that plaintiffs will be able to demonstrate here that defendants do not have a compelling state interest in avoiding an Establishment Clause violation by denying plaintiffs' request to rent space [in the Board's schools]. Plaintiffs' proposed meetings would occur on Sunday mornings—i.e., during nonschool hours. The meetings are obviously not endorsed by the School District. No [school] employee attends plaintiffs' Sunday morning meetings. Further, the meetings are "open to all members of the public" and "not closed to a limited group of people, such as church members and their guests." Nor is there any evidence that children are present around [the school] on Sunday mornings or that any ... students even attend plaintiffs' Sunday school or services. In short, it can hardly be said that plaintiffs' proposed meetings would so dominate [the school] that children would perceive endorsement by the School District of a particular religion.

226 F.Supp.2d at 426 (internal citations and footnote omitted); see also Bronx Appeal III, 650 F.3d at 61–62 (Walker, J., dissenting) ("Bronx Household's use of P.S. 15 takes place during non-school hours (actually on a day when there is no school), lacks school sponsorship, occurs in a forum otherwise

available for a wide variety of uses, and is open to the public"). The Court readopts all these reasons.

The Court also notes that the objective observer would know from the text of the regulation that the schools are open to all comers whose activities are consistent with the broad uses of the limited public forum prescribed therein. That observer would also know from the legislative history and implementation of the policy (including the lengthy judicial history) that the Board's actions betoken great effort to avoid establishing any religion. For all these reasons, the "objective observer, acquainted with the text, legislative history, and implementation of" Revised SOP § 5.11 would not perceive the Board's policy as an endorsement of religion in the public schools. Santa Fe Indep. Sch. Dist., 530 U.S. at 308, 120 S.Ct. 2266 (internal quotation marks omitted).

Furthermore, the Board's stated concern that allowing Plaintiffs' Sunday worship services to be held in P.S. 15 would effectively subsidize the Church given New York's otherwise expensive real estate market is contradicted both by precedent and the facts of this case. As the Supreme Court explained in Rosenberger v. Rector & Visitors of the University of Virginia:

> It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian

> activities, accompanied by some devotional exercises .... Even the provision of a meeting room ... involve[s] governmental expenditure, if only in the form of electricity and heating or cooling costs .... If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then [Supreme Court precedent] would have to be overruled.

515 U.S. 819, 842–43 (1995) (citations omitted). To accept the Board's argument would mean the Supreme Court has impermissibly sanctioned, again and again, state subsidization of religion when public schools open their doors as limited public forums. See, e.g., Good News Club, 533 U.S. 98 holding that public school could not exclude outside religious organization from meeting for Bible study, prayer, and devotion to God); Widmar, 454 U.S. 263 (holding that public university could not exclude student religious group from meeting for purposes of religious worship and religious discussion).

Here, whether religious student clubs meet in the Board's schools for Bible study (a permissive use under Revised SOP § 5.11) or Plaintiffs meet for Sunday worship services (an impermissible use under the policy), the result is the same: "the use of public funds to finance religious activities." DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397, 419 (2d Cir.2001) (internal quotation marks omitted). But the Supreme Court precedent cited

above makes clear that no valid Establishment Clause concern exists in this regard when a school grants access to its facilities "on a religion-neutral basis to a wide spectrum" of outside groups as Defendants do here. Rosenberger, 515 U.S. at 821. Thus, this misplaced concern does not make the Board's interest a compelling one, and the Court ultimately agrees with Judge Walker that "the actions of Bronx Household, a private party, cannot transform the government's neutral action into an Establishment Clause violation." Bronx Appeal III, 650 F.3d at 59 (Walker, J., dissenting).[12]

c) Revised SOP § 5.11 Does Not Advance the Board's Interest and Is Not Narrowly Tailored

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[12] The Court acknowledges that the majority in Bronx Appeal III found the Board's stated concern over subsidizing religion to be reasonable. See 650 F.3d at 41. To be sure, the majority found that the Board had a "strong basis" for its Establishment Clause concerns. Id. at 43. That conclusion, coupled with the (cont'd on next page) (cont'd from previous page) conclusion that the Board's ban on religious worship services is a content-based restriction, satisfied the Court of Appeals that Revised SOP § 5.11 does not raise free speech concerns.

However, the majority did not expressly state that it found the Board's Establishment Clause rationale to be a compelling state interest. Even assuming the Court of Appeals found that the Board's strong basis for concern of violating the Establishment Clause amounts to a compelling interest, Revised SOP § 5.11 survives Plaintiffs' free exercise challenge only if it is narrowly tailored to achieve that interest. For the reasons stated infra Part III.B.1(c), the Court finds that Revised SOP § 5.11 fails this second prong of Lukumi's strict scrutiny analysis.

Even assuming, arguendo, that the Board's Establishment Clause rationale may be characterized as compelling, the Board must show that Revised SOP § 5.11 is narrowly tailored to advance its interest of not appearing to endorse religion as proscribed by the Establishment Clause. Although the second prong of the strict scrutiny analysis generally focuses on the scope of the policy-i.e., whether the policy is narrowly tailored-it also requires that the policy, in fact, advance the state's interest. Because the Court finds that Revised SOP § 5.11's ban on religious worship services is ineffective in achieving the Board's stated concern of avoiding a violation of the Establishment Clause, the challenged policy does not advance the Board's interest. The Board also has not demonstrated that the policy is narrowly tailored. Revised SOP § 5.11 thus fails the second prong of Lukumi's strict scrutiny analysis.

i) Ban on Religious Worship Services Is Ineffective

Despite Defendants' claim that Revised SOP § 5.11's ban on religious worship services is necessary to avoid the perception of endorsement of religion, the policy does not serve that purpose. Because it singles out only those religions that conduct "ordained" worship services, the ban works against the informed observer's perception of neutrality that would otherwise result if all religions were treated on the same terms. See Good News Club, 533 U.S. at 114 ("Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, [the school district] faces an uphill battle in arguing

that the Establishment Clause compels it to exclude the Good News Club."); Bd. of Educ. v. Mergens, 496 U.S. 226, 248 (1990) ("[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.").

Indeed, "the fact that the [Board's schools are] open to a wide spectrum of participants bespeaks the state's neutrality, not its favoring of religion or any other group." Bronx Appeal III, 650 F.3d at 61 (Walker, J., dissenting). While Christian churches use the schools to worship on Sundays, Jewish and Muslim groups use the schools on Fridays and Saturdays. Bronx Appeal III, 650 F.3d at 62–63 (Walker, J., dissenting). The objective, fully informed observer who passes by the Board's schools and witnesses a wide variety of community groups meeting on weeknights, followed by a Jewish Friday night service, a Ramadan Saturday evening service, and finally a Sunday morning Christian worship service, could not reasonably infer that the Board was endorsing religion in its public schools. Rather, the informed observer would conclude that the Board opens its schools during non-school hours to a diverse group of organizations pursuant to a neutral policy generally aimed at improving "the welfare of the community." Revised SOP § 5.22's ban on religious worship services—which would exclude certain religions from worshiping in the schools but permit others—only weakens the perception of neutrality as between religion and non-religion.

Beyond this, Revised SOP § 5.11 expressly provides that "[p]ermits may be granted to religious

clubs for students that are sponsored by outside organizations."[13] As the Court of Appeals noted, following Good News Club, the Board may not exclude groups from using its schools for "[p]rayer, religious instruction, expression of devotion to God, and the singing of hymns." Bronx Appeal III, 650 F.3d at 36–37. Given the variety of religious practices that are permitted under Revised SOP § 5.11—as to which the Board makes clear there is no endorsement of religion—the Board fails to explain how the informed observer would view any differently the Board's permitting Plaintiffs' use of its schools for Sunday worship services. Because the individual elements of those services are expressly permitted, the policy's ban on "religious worship services" is entirely ineffective in dispelling any confusion in the mind of the objective observer over State endorsement of religion. The Board is just as likely to be perceived as endorsing religion with the ban in place as with it enjoined. In both instances, the observer would see "[p]rayer, religious instruction, expression of devotion to God, and the singing of hymns." Id. Whether the applicant or a Board bureaucrat deems those activities to constitute "worship services" or not does not change the objective observer's perception of whether or not the Board is endorsing religion. Accordingly, Revised SOP § 5.11 does not advance the Board's interest of avoiding an Establishment Clause violation.

ii) Revised SOP § 5.11 Is Not Narrowly Tailored

[13] See Chancellor's Regulation D-180 § I.S, supra note 6.

Because the Board has not shown that other, less restrictive measures would fail to advance the Board's stated interest, the Court finds that the regulation is not narrowly tailored. In Bronx Appeal III, Judge Walker explained why this

> While Bronx Household's four-hour use of P.S. 15 on Sundays hardly dominates the limited public forum the Board has created under [Revised SOP § 5.11], any concern over a given group's prolonged or dominant use of the forum can be addressed through reasonable time, place, and manner restrictions. For example, in order to ensure greater weekend availability of a particular school's facilities to more outside organizations, the Board could limit the number of times per year that any one outside organization may use school facilities. Likewise, the Board may revoke any organization's permit if it fails to adhere to neutral rules imposed by the Board, i.e., by failing to include the Board's sponsorship disclaimer in written materials or by actively creating an impression of school sponsorship.

650 F.3d at 64 n. 11 (Walker, J., dissenting). Additionally, in order to dispel any implication of endorsement, the Board could, for example, require groups to install signs outside the schools disclaiming endorsement. That Defendants have not even addressed the potential effectiveness of options such as these signals that Revised SOP § 5.11's ban

on religious worship services is not narrowly tailored to advance the Board's interest in avoiding a violation of the Establishment Clause. Thus, the lack of narrow tailoring is another reason why Revised SOP § 5.11 does not withstand Plaintiffs' free exercise challenge.

The interplay of Plaintiffs' free exercise rights and the Board's stated Establishment Clause concern warrants one final comment. The Court of Appeals acknowledged the difficult line the Board must toe in protecting Plaintiffs' First Amendment free speech rights so as not to cause a separate First Amendment violation by endorsing religion. See Bronx Appeal III, 650 F.3d at 46 (characterizing the Board's motivation in adopting Revised SOP § 5.11 as "a good faith desire to navigate successfully through the poorly marked, and rapidly changing, channel between the Scylla of viewpoint discrimination and the Charybdis of violation of the Establishment Clause"). While the Board may have struck the appropriate balance for free speech and Establishment Clause purposes, Revised SOP § 5.11 does not provide due consideration to Plaintiffs' First Amendment free exercise rights. Perhaps nothing short of a Herculean effort would permit the Board to sail unscathed through the constitutional strait that pits the Religion Clauses against one another, but Revised SOP § 5.11 operates to deprive the Board's constituents of their free exercise rights. In this Court's view, losing one's right to exercise freely and fully his or her religious beliefs is a greater threat to our democratic society than a misperceived violation of the Establishment Clause.

2. Establishment Clause Claim

Although the majority decided Bronx Appeal III on free speech grounds, it also addressed Plaintiffs' Establishment Clause claim. The majority indicated that Revised SOP § 5.11 likely satisfies the Lemon test for determining compliance with the Establishment Clause. See Bronx Appeal III, 650 F.3d at 45–48. Regarding the third prong of the Lemon test, which requires that the challenged regulation not foster an excessive entanglement with religion, see 403 U.S. at 613, Plaintiffs claimed that the Board cannot apply Revised SOP § 5.11 without excessively entangling itself in matters of religious doctrine because the policy requires the Board to determine which religious practices amount to "worship services." The majority found this argument to be a non-starter due to Plaintiffs' own admission to the Board:

> To begin with, whatever merit this argument may have in other types of cases, we do not see what application it has here. Bronx Household does not contest that it conducts religious worship services. To the contrary, it applied for a permit to conduct "Christian worship services," and the evidence suggests no reason to question its own characterization of its activities.

Bronx Appeal III, 650 F.3d at 47; see also id. at 52 n. 1 (Calabresi, J., concurring) ("Once an applicant says that what it wishes to do is 'worship,' no inquiry into whether the underlying or accompanying activities

actually constitute worship is required."). At oral argument on February 14, 2012, counsel for Defendants reiterated that Revised SOP § 5.11 does not raise excessive entanglement concerns because it asks the applicants themselves to certify whether their proposed permit use complies with the policy's ban on religious worship services and represented that the Board will not second-guess an applicant's own characterization of its proposed activities. Specifically, defense counsel maintained:

> I can represent to the Court, under the new policy, fellowship, singing hymns and other similar type[s] of activities will not be equal to worship .... We are certainly not going to purport to look under the tent and make those evaluations and say X, Y and Z equals worship .... [W]e are not going to do the X, Y, Z equals worship, even if [applicants] say it doesn't, so long as they certify that they are complying with the policy.

(Prelim. Inj. Hr'g Tr. at 22, 25–26, Feb. 14, 2012.) Factual and legal developments since the Court of Appeals decided Bronx Appeal III contradict these assertions and merit reconsideration of Plaintiffs' Establishment Clause claim.

First, the Board's handling of Plaintiffs' latest permit application belies the notion that the Board will take applicants' descriptions of their proposed activities at face value. Upon vetting Plaintiff Hall's December 2011 application to use P.S. 15 during the

"adjournment" period before the Board began enforcing Revised SOP § 5.11, the Board *sua sponte* wrote in "WORHIP [sic]" as one of the Church's activities when Hall had only listed "Hymn singing, prayer, communion, preaching, teaching, fellowship" on the application. (Hall Decl. ¶¶ 15–16, Exs. A–B.) Though the permit was granted for the adjournment period, the Board's conduct suggests that an identical application would be rejected should the Board begin enforcing Revised SOP § 5.11. The Board essentially tallied the individual activities listed by Plaintiffs and concluded that "X, Y and Z equals worship." Thus, despite Defendants' suggestion that any concern about excessive entanglement may only properly be considered in the "next case," Plaintiffs now raise a colorable inference of excessive entanglement in this case.

Second, the Declaration of Brad Hertzog, Pastor of Reformation Presbyterian Church, in Support of Plaintiffs' Motion for Preliminary Injunction ("Hertzog Decl.") [Dkt. No. 126], illustrates how Revised SOP § 5.11 compels the Board unconstitutionally to inject itself into matters of religious province. Reformation Presbyterian Church ("Reformation") had been holding weekly meetings in P.S. 173 in Queens since 2009. (Hertzog Decl. ¶ 4.) Hertzog describes those meetings as follows:

> Our weekly meetings in the auditorium of P.S. 173 include singing, prayer, reading and studying the Bible, and fellowship. The focus of the meeting is Bible study with some prayer and some singing. When we finish, we have some

> light snacks and socialize. Sometimes we break off for further Bible Study with kids and adults in different groups—though not at every meeting. Our time is probably split 50/50 between informal social time and the more structured singing, praying, and study.

(Id. ¶ 6.) In December 2011, after the Board informed Hertzog that Reformation's permit would expire on January 1, 2012, Hertzog applied for a new permit through June 2012. (Id. ¶ 7.)

On December 20, 2011, the Board's Yelena Kramer asked Hertzog to describe Reformation's proposed use of the new permit and asked, "Are you conducting religious worship services?" (Id. ¶ 8.) Hertzog answered that Reformation's meetings involve reading and studying the Bible, prayer, singing, and fellowship. (Id. ¶ 9.) Ms. Kramer responded that Hertzog did not answer her question directly and that she needed a "Yes or No" whether Reformation would be conducting religious worship services. (Id. ¶ 10.) Hertzog replied that he could not answer that question since he did not know how the Board defined "religious worship services." (Id. ¶ 11.) Soon thereafter, the Board's Lorenzo Arnoldo asked Hertzog for a detailed description of Reformation's meetings, and Hertzog responded in sum and substance with the description quoted above. (Id. ¶¶ 12–13.) Mr. Arnoldo wrote Hertzog on January 6, 2012, that Reformation's permit had been denied and provided the following explanation: "Chancellor's Regulation D–180, which governs the extended use of school buildings, prohibits a permit

from being granted for the purpose of holding religious worship services or otherwise using a school as a house of worship." (Id. ¶ 14.)

The email string attached to Hertzog's declaration reveals the improper manner in which the Board inquires into religious matters and ultimately determines whether particular sectarian practices amount to "worship services," a determination that only subscribers to the religions themselves may make. (See id. Ex. B.) In Bronx Appeal I, Judge Cabranes presciently voiced concern over this form of excessive governmental entanglement with religion that Revised SOP § 5.11 encourages. See 127 F.3d 207, 221 (Cabranes, J., concurring in part and dissenting in part) ("There may be cases in which the parties dispute whether or not a proposed activity for which permission to use school premises is denied actually constitutes religious ... worship, and the very act of making such classifications may deeply—and unconstitutionally—entangle public officials in essentially theological determinations."). The recent declarations submitted in this case illustrate that Plaintiffs' excessive entanglement concerns are real and ripe for reconsideration.

While Defendants submitted no declaration on behalf of a litigant with personal knowledge of the facts of this case, counsel for defendants submitted a counter declaration to that of Mr. Hertzog. (See Declaration of Jonathan Pines, dated February 16, 2012 [Dkt. No. 127].) Counsel asserts in his declaration, inter alia*:*

> [D]efendants' requirement that Mr. Hertzog's organization certify that it will not engage is [sic] religious worship services hardly 'targets' his, or any other organization's, religious viewpoint. Rather, as the [Court of Appeals] has permitted the [Board] to do, the permit process only seeks to ascertain, by the applicant's own representation, whether it will be engaging in proscribed religious worship services.

(Id. ¶ 9 (internal citation omitted).) As evidenced in the email string between Mr. Hertzog and the Board, this characterization of the certification process differs from counsel's hearsay description at oral argument. The Court understood the Board's new policy to require every applicant to certify that it would comply with the Board's entire policy governing the use of school buildings during non-school hours. For example, the certification requirement would be no different for the Boy Scouts than for a synagogue seeking to hold Torah study classes: each organization would have to certify that its activities comply with the Board's policy. But apparently the Board only asks those organizations that plan to use the schools for religious purposes to certify compliance with the ban against religious worship services. The Board may then conduct an independent evaluation of the religious applicant's activities to ensure compliance. These revelations certainly suggest that religious organizations are targeted throughout the application process.

Defendants argue that any perceived targeting of religious organizations' permit applications is expressly allowed under the majority's opinion in Bronx Appeal III*:*

> Without doubt there are circumstances where a government official's involvement in matters of religious doctrine constitutes excessive government entanglement. But it does not follow, as Bronx Household seems to argue, that the mere act of inspection of religious conduct is an excessive entanglement. The Constitution, far from forbidding government examination of assertedly religious conduct, at times compels government officials to undertake such inquiry in order to draw necessary distinctions.

650 F.3d at 47 (footnote and citations omitted) (first emphasis added). The Court does not dispute this proposition or the general characterization that "government officials cannot discharge their constitutional obligations without close examination of the particular conduct to determine if it is properly deemed to be religious and if so whether allowing it would constitute a prohibited establishment of religion." Id. (emphasis added). Essentially, the government may entangle itself with religion so long as that entanglement is not excessive.

The declarations recently filed in this case, however, demonstrate that the Board does not

engage in a "mere act of inspection of religious conduct" when enforcing Revised SOP § 5.11. Rather, the Board has evidenced a willingness to decide for itself which religious practices rise to the level of worship services and which do not, thereby causing the government's entanglement with religion to become excessive. The Supreme Court in Widmar explained that such conduct is impermissible:

> [E]ven if the distinction [between religious speech and religious worship] 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.

454 U.S. at 269 n. 6, 102 S.Ct. 269 (citations omitted). If such line-drawing is not within the judicial competence, so also it is not within the Board's.

Furthermore, the excessive entanglement is not diminished by what Defendants' counsel represented to be the Board's plan regarding certification, viz., to require all applicants to certify that their activities conform to the Board's policy. As set out above,

Pastor Hertzog listed the activities Reformation planned to engage in and was then asked whether those activities constituted religious worship services. Even assuming the Board asked him whether Reformation's proposed activities conformed to the policy, he could not respond because he did not know how the Board defined "religious worship services." These unchallenged facts demonstrate that implementation of Revised SOP § 5.11 as represented by counsel would require the Board to define worship-a task beyond its (and the Court's) competence.

Finally, that the entanglement required by the current policy, however implemented, is excessive is confirmed by the Supreme Court's recent decision in Hosanna–Tabor Evangelical Lutheran Church & School v. EEOC, 132 S.Ct. 694 (2012). There, in deciding that the Free Exercise Clause and Establishment Clause provide for a "ministerial exception" that bars a minister from bringing an employment discrimination suit against her church, the Court emphasized the wide berth religious institutions are to be given with respect to their core activities, including worship. See id. at 706 ("By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. 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.").

Indeed, that the Court of Appeals itself undertook to attempt to define worship in Bronx Appeal III merely illustrates the problem of excessive governmental entanglement with religion that led the Supreme Court to recognize the ministerial exception in Hosanna–Tabor. In light of the new facts documenting how the Board's current policy fosters excessive governmental entanglement and the Supreme Court's decision in Hosanna–Tabor, the Court finds that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim.

C. Plaintiffs' Claims Are Not Barred by the Doctrines of the Law of the Case, Claim Preclusion, and Issue Preclusion

In response to Plaintiffs' motion, Defendants do not argue the merits of Plaintiffs' claims but instead raise three procedural arguments. First, Defendants argue that the doctrine of the law of the case bars consideration of Plaintiffs' Free Exercise Clause claim and Establishment Clause claim. In support of this argument, Defendants point to the Court of Appeals' decision in Bronx Appeal III and the briefs Plaintiffs submitted on appeal in which they asserted both Free Exercise Clause and Establishment Clause claims. Defendants' second and third arguments rely upon the closely related doctrines of claim preclusion and issue preclusion; Defendants contend these doctrines bar relitigation of Plaintiffs' Free Exercise Clause claim because the Court of Appeals reached the merits of that claim in Bronx Appeal I. The Court disagrees.

1. Law of the Case

The law of the case doctrine incorporates two subsidiary rules, United States v. Ben Zvi, 242 F.3d 89, 95 (2d Cir.2001), only one of which pertains to this Court's obligations. The "mandate rule" describes the duty of the district court on remand. "When an appellate court has once decided an issue, the trial court, at a later stage of the litigation, is under a duty to follow the appellate court's ruling on that issue." United States v. Tenzer, 213 F.3d 34, 40 (2d Cir.2000) (internal quotation marks omitted) (emphasis added). "The mandate rule prevents re-litigation in the district court not only of matters expressly decided by the appellate court, but also precludes re-litigation of issues impliedly resolved by the appellate court's mandate." Yick Man Mui v. United States, 614 F.3d 50, 53 (2d Cir.2010). However, in certain circumstances such as "a dramatic change in controlling legal authority" or "significant new evidence that was not earlier obtainable through due diligence but has since come to light," a district court may depart from the dictates of the mandate. United States v. Webb, 98 F.3d 585, 587 (10th Cir.1996); see also Ben Zvi, 242 F.3d at 95 (citing Webb with approval for its discussion of "circumstances when departure from [the] mandate rule may be warranted").[14]

[14] The second subsidiary rule of the law of the case doctrine holds that "a court of appeals must usually adhere to its own decision at an earlier stage of the litigation" absent cogent or compelling reasons such as "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Tenzer, 213 F.3d at 39 (internal quotation marks omitted). This part of the

The mandate rule does not bar this Court from considering Plaintiffs' Free Exercise Clause and Establishment Clause claims. As an initial matter, the mandate reversed summary judgment and vacated the permanent injunction, both of which had been granted on free speech grounds only. With respect to the Free Exercise Clause claim, there can be no doubt that the Court of Appeals failed to rule on it. See, e.g., Bronx Appeal III, 650 F.3d at 58 n. 4 (Walker, J., dissenting) ("[T]his case was argued under the First Amendment's Free Speech and Establishment Clauses ...."). In fact, the majority mentions the Free Exercise Claim only twice in its twenty-page opinion-once in a parenthetical and once in the accompanying footnote. Id. at 47 & n. 15. Given the cursory treatment that the majority gives to the Free Exercise Clause it cannot be argued that the Court expressly rejected Plaintiffs' claim. Furthermore, the Court of Appeals did not state that it had considered Plaintiffs' other claims and found them to be without merit. Thus, there is no ruling on the free exercise issue that this Court is mandated to follow.[15]

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law of the case doctrine implicates the Court of Appeals' discretion only, not that of the district court.

[15] This Court's reading of the Court of Appeals' mandate would be different had this Court granted summary judgment and the permanent injunction on multiple grounds, including Plaintiffs' Free Exercise Clause and Establishment Clause claims, but the Court of Appeals had still issued the same opinion as in Bronx Appeal III reversing judgment and vacating the injunction. In that scenario, the Court of Appeals' failure to address any other issue besides the free speech analysis would signal an implied rejection of the other claims. But those are not the facts. Additionally, neither the Court of Appeals' refusal to rehear

As for Plaintiffs' Establishment Clause claim, the recent declarations submitted by Pastors Hall and Hertzog reflect "significant new evidence that was not earlier obtainable through due diligence but has since come to light." Webb, 98 F.3d at 587. This evidence was not obtainable when the Court of Appeals decided Bronx Appeal III because the facts alleged in the declarations occurred after the Court of Appeals issued its mandate. Because the Court finds that the facts alleged therein significantly alter the majority's excessive entanglement analysis, reconsideration of Plaintiffs' Establishment Clause claim is proper. This is especially so in light of the Court's preference for deciding cases on their merits.[16]

2. Claim Preclusion and Issue Preclusion

The doctrine of claim preclusion, or res judicata, precludes parties to a litigation or their privies from relitigating issues that were or could have been raised prior to a final judgment on the merits. *See*

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Bronx Appeal III en banc nor the Supreme Court's denial of certiorari indicates an implied rejection of Plaintiffs' Free Exercise Clause and Establishment Clause claims. Defense counsel at oral argument acknowledged that one "cannot read too much into" any such denial, (see Prelim. Inj. Hr'g Tr. at 16-17), and the Court itself is in no better position to do so.

[16] While the Supreme Court's decision in Hosanna-Tabor might not amount to "a dramatic change in controlling legal authority," it certainly strengthens Plaintiffs' excessive entanglement claim and speaks to the significance of the new evidence highlighted in the declarations. Therefore, Hosanna-Tabor also factors into this Court's determination that the mandate rule does not bar Plaintiffs' Establishment Clause claim.

Allen v. McCurry, 449 U.S. 90, 94 (1980); Monahan v. N.Y. City Dep't of Corr., 214 F.3d 275, 284–85 (2d Cir.2000). The factors a court may consider when deciding whether a final judgment on one claim has preclusive effect on a subsequent claim include whether the same series of transactions is at issue, whether the claims rely on common evidence, and whether facts essential to the subsequent claim were in play when the first claim was considered. *See* Monahan, 214 F.3d at 285. A party raising the affirmative defense of claim preclusion must show "(1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them; [and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action." Id.

Distinct from but related to the doctrine of claim preclusion is the doctrine of issue preclusion, or collateral estoppel. Issue preclusion holds that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." Allen, 449 U.S. at 94. A party raising the affirmative defense of issue preclusion must show "(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and actually decided, (3) there was full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits." Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 731 (2d Cir.1998) (quoting In re PCH Assocs., 949 F.2d 585, 593 (2d Cir.1991)).

Defendants argue that both these doctrines bar relitigation of Plaintiffs' Free Exercise Clause claim in this case because the Court of Appeals rejected Plaintiffs' Free Exercise Clause claim in the first litigation. In Bronx Appeal I, the Court of Appeals considered a free exercise challenge to Revised SOP § 5.11's predecessor—which prohibited outside organizations from using the Board's schools for "religious services or religious instruction"—and found it lacking in merit:

> [Plaintiffs] contend that "[t]he School District flagrantly violates the Free Exercise Clause by singling out religious services and instruction for exclusion from its forum." To support this contention, [Plaintiffs] cite Employment Division, Department of Human Resources v. Smith and Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah. Each of these cases involved specific religious practices-the ingestion of peyote in *Smith* and animal sacrifice in Church of the Lukumi. ...
>
> ....
>
> The state statute and SOP under consideration in this case do not bar any particular religious practice. They do not interfere in any way with the free exercise of religion by singling out a particular religion or imposing any disabilities on the basis of religion. The members of the Church here are free to

> practice their religion, albeit in a location separate from [the Board's public schools]. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." Smith, 494 U.S. at 877, 110 S.Ct. 1595. That right has not been taken from the members of the Church.

127 F.3d at 216 (citations omitted). Defendants argue that even though a different policy was at issue in Bronx Appeal I, since that policy prohibited more religious activity than the current policy, the Court of Appeals' free exercise analysis remains undisturbed and therefore precludes Plaintiffs from raising a free exercise challenge in this case.

Defendants' claim preclusion and issue preclusion arguments suffer from the same fatal flaw. Despite accurately stating the respective tests for each doctrine Defendants fail to show how each element is satisfied on the facts of this case, and they cannot do so. As to claim preclusion, Defendants cannot demonstrate that Plaintiffs raised or could have raised their current Free Exercise Clause claim, based on Revised SOP § 5.11, in the first litigation. With respect to issue preclusion, Defendants cannot demonstrate that the issues in both proceedings are identical. This is so because Defendants overlook a key aspect of Plaintiffs' free exercise challenge to the Board's current policy. Even though the former version of the policy arguably excluded more religious activities because it prohibited religious instruction, Revised SOP § 5.11's ban on "religious

worship services" discriminates among religions. Because only "ordained" religions are excluded under the "religious worship services" prong whereas religions with less formal worship practices are not, Plaintiffs argue that the current policy singles out certain religions in violation of the Free Exercise Clause. At the very least, Plaintiffs' modified free exercise challenge—the exact contours of which could not have taken shape under the old policy at issue in Bronx Appeal I—warrants analysis under the test outlined in Lukumi. Because the Court of Appeals has yet to weigh in on that analysis in light of the current policy's scope, Plaintiffs' Free Exercise Clause claim is not procedurally barred.

## IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction [Dkt. No. 114] is GRANTED. Defendants are enjoined from enforcing Ch. Reg. D–180 § I.Q so as to deny Plaintiffs' application or the application of any similarly—situated individual or entity to rent space in the Board's public schools for morning meetings that include religious worship.[17]

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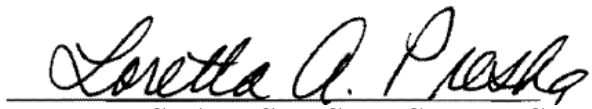
[17] The Court is, of course, aware of the Court of Appeals' order applying the temporary restraining order only to named Plaintiff Bronx Household of Faith. With respect, however, if a rule is unconstitutional, it is unconstitutional as to all similarly-situated parties. Defendants obviously recognized this in permitting many non-party congregations to meet during non-school hours during the pendency of the prior injunctions. Also, the Court of Appeals made no suggestion in any of the three full opinions it issued heretofore that the prior injunctions extended only to the named Plaintiffs. Thus, with

SO ORDERED.

Dated: New York, New York
February 24, 2012



UNITED STATES DISTRICT JUDGE

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respect, this order extends to the Bronx Household of Faith and, in addition, to any similarly-situated party.

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF NEW YORK

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



LORETTA A. PRESKA, Chief United States District Judge:

The Bronx Household of Faith, Robert Hall, and Jack Roberts ("Plaintiffs") have moved this court for a preliminary injunction against the Board of Education of the City of New York (the "Board") and Community School District No. 10 (collectively, "Defendants") so that Plaintiffs may continue to meet in New York City public school P.S. 15 for Sunday morning worship as they have without interruption since this Court issued an initial

preliminary injunction in 2002 barring Defendants from enforcing a regulation that would prohibit Plaintiffs from conducting their religious worship services in the Board's schools. In November 2007, this Court made the preliminary injunction permanent and granted Plaintiffs' motion for summary judgment.

On June 2, 2011, the Court of Appeals reversed summary judgment and vacated the permanent injunction. After the Supreme Court denied Plaintiffs' petition for certiorari, the Court of Appeals issued its mandate on December 7, 2011. The board intends to begin enforcing immediately section I.Q. of Chancellor's Regulation D-180, which would prevent Plaintiffs and other similarly situated religious organizations and their members from using the Board's schools for worship services as soon as this weekend.

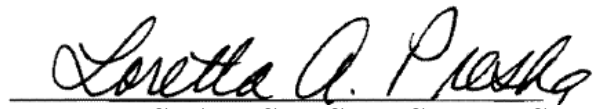
Because I find that Plaintiffs have demonstrated irreparable harm and a likelihood of success on the merits of their Free Exercise and Establishment Clause claims, the Court issues this temporary restraining order enjoining Defendants from enforcing that part of Chancellor's Regulation D-180 that provides: "No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship."[1] See Jackson v. Johnson, 962 F. Supp. 391, 392 (S.D.N.Y. 1997) ("In the Second Circuit, the standard for a

[1] Chancellor's Regulation D 180 § I.Q, Extended Use of School Buildings, ht ://schools.nyc.gov/NR/rdonlyres/023114D9 EA44-4FEO BCEE 45778134EA14/0/D180.pdf (last visi February 16, 2012).

temporary restraining order is the same as for a preliminary injunction.") This restraining order shall take effect immediately and remain in effect for ten days. A written opinion will follow.

SO ORDERED.

Dated: New York, New York
February 16, 2012



UNITED STATES DISTRICT JUDGE

07-5291-cv
Bronx Household v. Board of Education

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

August Term, 2010

(Argued: October 6, 2009 Decided: June 2, 2011)

Docket No. 07-5291-cv

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

*Plaintiff-Appellees*,

v.

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

*Defendant-Appellants.*

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Before: WALKER, LEVAL, and CALABRESI,
*Circuit Judges*.

Defendants appeal from an order of the United States District Court for the Southern District of New York (Preska, *C.J.*) granting summary judgment to Plaintiffs and entering a permanent injunction barring the Board of Education of the City of New York from enforcing a rule that prohibits outside groups from using school facilities after hours for "religious worship services." The Court of Appeals (Leval, *J.*) concludes that (1) because the rule does not exclude expressions of religious points of view or of religious devotion, but excludes for valid non-discriminatory reasons only a type of activity – the conduct of worship services, the rule does not constitute viewpoint discrimination; and (2) because Defendants reasonably seek by this rule to avoid violating the Establishment Clause, the exclusion of religious worship services is a reasonable content-based restriction, which does not violate the Free Speech Clause. Accordingly, the judgment of the district court is reversed and the injunction barring enforcement of the rule against Plaintiffs is vacated.

Judge Calabresi concurs in the opinion and has filed an additional concurring opinion.

Judge Walker dissents by separate opinion.

JANE L. GORDAN, Senior Counsel (Edward F.X. Hart, Lisa Grumet, Janice Casey Silverberg, *on the brief*), *for* Michael A. Cardozo, Corporation Counsel of the City of New York, New York, New York, *for Appellants*.

JORDAN W. LORENCE, Alliance Defense Fund, Washington, D.C. (Joseph P. Infranco, Jeffrey A.

Shafer, David A. Cortman, Benjamin W. Bull, *on the brief*), *for Appellees*.

Michael J. Garcia, United States Attorney for the Southern District of New York, New York, New York (David J. Kennedy, Assistant United States Attorney, Southern District of New York, Grace Chung Becker, Acting Assistant Attorney General, Dennis J. Dimsey, Eric W. Treene, Karl N. Gellert, Attorneys, Appellate Section, Civil Rights Division, U.S. Department of Justice, *on the brief*), *for Amicus Curiae* United States of America.

Mitchell A. Karlan, Gibson, Dunn & Crutcher LLP, New York, New York (Aric H. Wu, Farrah L. Pepper, Gibson, Dunn & Crutcher LLP, Carol Nelkin, Jeffrey P. Sinensky, Kara H. Stein, The American Jewish Committee, *on the brief*), *for Amicus Curiae* The American Jewish Committee.

Isaac Fong, Center for Law and Religious Freedom, Springfield, Virginia (Kimberlee Wood Colby, Gregory S. Baylor, *on the brief*), *for Amicus Curiae* The Christian Legal Society.

Eloise Pasachoff, Committee on Education and the Law, Association of the Bar of the City of New York, New York, New York (Jonathan R. Bell, Rosemary Halligan, Laura L. Himelstein, *on the brief*), *for Amicus Curiae* Association of the Bar of the City of New York.

LEVAL, *Circuit Judge*:

Defendants, the Board of Education of the New York City Public Schools and Community School

District No. 10 (collectively, "the Department of Education" or "the Board"),[1] appeal from an order of the United States District Court for the Southern District of New York (Preska, *C.J.*), which granted summary judgment to Plaintiffs the Bronx Household of Faith ("Bronx Household"), a Christian church, and its pastors Robert Hall and Jack Roberts, and permanently enjoined the Board from enforcing against Bronx Household a Standard Operating Procedure ("SOP") that prohibits the use of school facilities by outside groups outside of school hours for "religious worship services." We conclude that the challenged rule does not constitute viewpoint discrimination because it does not seek to exclude expressions of religious points of view or of religious devotion, but rather excludes for valid non-discriminatory reasons only a type of activity – the conduct of worship services. We also conclude that because Defendants reasonably seek by the rule to avoid violating the Establishment Clause, the exclusion of religious worship services is a reasonable content-based restriction, which does not violate the Free Speech Clause. Accordingly, we reverse the judgment of the district court and vacate the injunction.

## BACKGROUND

The relevant facts are familiar, and are not in dispute. *See Bronx Household of Faith v. Bd. of Educ. of the City of New York (Bronx Household III)*,

[1] The Board of Education of the City of New York has been reorganized and renamed the New York City Department of Education. *See, e.g.*, *D.D. ex rel V.D. v. New York City Bd. of Educ.*, 465 F.3d 503, 506 n.1 (2d Cir. 2006).

492 F.3d 89 (2d Cir. 2007). Under New York State law, a local public school district may permit its facilities to be used outside of school hours for purposes such as "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," as long as the uses are "nonexclusive and . . . open to the general public." N.Y. Educ. Code § 414(1)(c). Pursuant to this provision, New York City's Department of Education developed a written policy governing use of school facilities during after-school hours as part of its Standard Operating Procedures Manual. The policy, or SOP, permits outside groups to use school premises for the purposes described in the state law, when the premises are not being used for school programs and activities, but subject to limitations. In earlier stages of this litigation, SOP § 5.9 prohibited the use of school property for "religious services or religious instruction."[2] *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10 (Bronx Household I)*, 127 F.3d 207, 210 (2d Cir. 1997).

In 1994, Bronx Household applied to use space in the Anne Cross Mersereau Middle School ("M.S.

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[2] SOP § 5.9 provided:

> No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purposes of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

*Bronx Household I*, 127 F.3d at 210.

206B") in the Bronx, New York, for its Sunday morning "church service[s]." *Bronx Household of Faith v. Bd. of Educ. of the City of New York*, 226 F. Supp. 2d 401, 410 (S.D.N.Y. 2002) (quoting First Affidavit of Robert Hall). According to Bronx Household's application, its services would include "singing of Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion, [and] sharing of testimonies," followed by a "fellowship meal," during which attendees "talk to one another, [and] share one another's joys and sorrows so as to be a mutual help and comfort to each other." *Id.* The Board denied Bronx Household's application under SOP § 5.9. *Bronx Household I*, 127 F.3d at 211.

Plaintiffs brought suit, contending that the Board's denial of Bronx Household's application constituted viewpoint discrimination in violation of the Free Speech Clause of the First Amendment. The district court granted the Board's motion for summary judgment, and dismissed the suit. *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, No. 95 Civ. 5501, 1996 WL 700915 (S.D.N.Y. Dec. 5, 1996) (Preska, *J.*). We affirmed, concluding that the Department of Education had created a limited public forum by opening school facilities only to certain activities, and that the exclusion of religious services and religious instruction was viewpoint neutral and reasonable in light of the forum's purposes. *Bronx Household I*, 127 F.3d at 211-15, 217.

In 2001, however, the Supreme Court ruled in *Good News Club v. Milford Central School*, 533 U.S.

98 (2001), that it was unconstitutional for a public school district in Milford, New York, to exclude from its facilities "a private Christian organization for children," which had requested permission to use space in a school building after school hours to sing songs, read Bible lessons, memorize scripture, and pray. *Id.* at 103. The Milford district's policy, in accordance with New York state law, permitted school facilities to be used for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community." *Id.* at 102 (quoting N.Y. Educ. Code § 414(1)(c)). However, it prohibited use "by any individual or organization for religious purposes," which school district officials interpreted as prohibiting "religious worship" or "religious instruction." *Id.* at 103-04. The Supreme Court concluded that the Good News Club was seeking to "address a subject otherwise permitted [in the school], the teaching of morals and character, from a religious standpoint," and, therefore, the school district's denial of the club's application constituted impermissible viewpoint discrimination in the context of a limited public forum. *Id.* at 109.

After the Supreme Court's decision in *Good News Club*, Bronx Household applied again, and its application was again denied. *Bronx Household of Faith v. Bd. of Educ. of the City of New York (Bronx Household II)*, 331 F.3d 342, 346-48 (2d Cir. 2003). Plaintiffs brought a new action, and this time the district court, citing *Good News Club*, preliminarily enjoined the Board from denying the permit. *Bronx Household*, 226 F. Supp. 2d at 427. We affirmed the preliminary injunction, finding that the district

court did not abuse its discretion, and acknowledging the "factual parallels between the activities described in *Good News Club* and the activities at issue in the present litigation." *Bronx Household II*, 331 F.3d at 354. After the issuance of the preliminary injunction, Bronx Household applied for, and was granted, permission to use P.S. 15 in the Bronx for its Sunday "Christian worship service[s]." *Bronx Household III*, 492 F.3d at 94, 101 (Calabresi, J., concurring).

Bronx Household thereafter moved for summary judgment to convert the preliminary injunction into a permanent injunction, and the Board cross-moved for summary judgment. During the pendency of the motions for summary judgment, the Board wrote to the district court asking the court to adjudicate the issue under a revised SOP, numbered SOP § 5.11,[3] which was intended to replace the old standard. The Board advised that the new SOP § 5.11 had been "approved at the highest levels of the Department of Education" and that if Bronx Household were to reapply, its application would be rejected under the new SOP § 5.11. *Id.* at 95 n.2. The text of the new SOP § 5.11 prohibited use of school property for "religious worship services, or otherwise using a school as a house of worship."[4] The district court,

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[3] Before the revision of the standard was proposed, the old SOP § 5.9 was renumbered (without change in text) to § 5.11. To avoid confusion, in this opinion we use "SOP § 5.9" to refer to the standard utilized by the Board before revision of the text, and we use "SOP § 5.11" to refer to the new text quoted in footnote 4.

[4] SOP § 5.11 states:

after initially expressing doubt about its jurisdiction to rule on the constitutionality of a rule whose status was unclear and which had not been applied against Plaintiffs, nevertheless concluded that the question was justiciable and granted summary judgment in favor of Bronx Household, permanently enjoining the Board from enforcing the proposed SOP § 5.11. *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 400 F. Supp. 2d 581, 588, 601 (S.D.N.Y. 2005). The district court concluded that its decision was compelled by the Supreme Court's decision in *Good News Club*.

On appeal, a majority consisting of Judge Calabresi and me, over dissent by Judge Walker, vacated the permanent injunction, although we were divided as to the rationale for doing so. *Bronx Household III*, 492 F.3d at 91 (per curiam). Judge Calabresi would have reached the merits and would have ruled that the proposed SOP § 5.11 was a reasonable, viewpoint-neutral, content-based restriction. *Id.* at 100-06 (Calabresi, J., concurring). I concluded that litigation over the constitutionality of the proposed SOP § 5.11 was unripe for adjudication. *Id.* at 122-23 (Leval, J., concurring). This was because the proposed rule, although "approved at the

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> No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship. Permits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this chapter on the same basis that they are granted to other clubs for students that are sponsored by outside organizations.

highest levels," had not been promulgated by the Board, and Bronx Household had neither applied, nor been refused, under the new standard. *Id.* at 115, 122 n.8. Judge Walker wrote in dissent that he would have reached the merits and would have ruled that enforcement of the new SOP was barred by *Good News Club*, because in his view it constituted impermissible viewpoint discrimination. *Id.* at 123-24 (Walker, J., dissenting). We remanded the case to the district court for all purposes. *Id.* at 91 (per curiam).

In July 2007, shortly after our decision remanding the case, the Board adopted the proposed SOP and published it for the first time. Bronx Household applied to use P.S. 15 under the new rule, stating in its application that it planned to use the facilities for "Christian worship services," and the Board denied the application.[5] Both parties then

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[5] Previously, the Board's rules, which it published on its website, included no reference to the new SOP § 5.11; a person telephoning the Board to inquire whether there was a rule that governed use of school facilities after hours by religious groups was told no rule was in effect. In short, at the time we last heard this case, the new rule had not been promulgated, applied, or even disclosed to the public, and was not applied to Bronx Household. This led me to conclude, for reasons I explained in my concurring opinion, *see* 492 F.3d at 110-23, that there was no ripe controversy before the court as to the constitutionality of SOP § 5.11.

Judges Walker and Calabresi have authorized me to say that upon reconsideration of the circumstances that obtained when the case was last before us, they are now far less confident that the case was in fact ripe for adjudication at that time. Now that the new SOP has been adopted, published, and applied against Bronx Household, the controversy is unquestionably ripe for adjudication.

moved for summary judgment. The district court again granted summary judgment in favor of Bronx Household and permanently enjoined the Board from enforcing SOP § 5.11 against Bronx Household, adopting the reasoning of its previous opinion. *Bronx Household of Faith v. Bd. of Educ. City of New York*, No. 01 Civ. 8598 (S.D.N.Y. Nov. 1, 2007) (Preska, *J.*).

The case is now before us for the fourth time.

## DISCUSSION

P.S. 15 is a limited public forum. *See Bronx Household III*, 492 F.3d at 97-98 (Calabresi, J., concurring); *id.* at 125 (Walker, J., dissenting); *Bronx Household I*, 127 F.3d at 211-14. As explained in Judge Calabresi's opinion in *Bronx Household III*, a category of speakers or expressive activities may be excluded from a limited public forum only on the basis of "reasonable, viewpoint-neutral rules." *Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 626 (2d Cir. 2005). Thus, the operator of a limited public forum may engage in "content discrimination, which may be permissible if it preserves the purposes of that limited forum," but may not engage in "viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995); *see also Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2984 (2010); *Good News Club*, 533 U.S. at 106-07.

SOP § 5.11, on its face, prohibits use of school facilities for two types of activities. The rule

prohibits use of schools for "religious worship services," and prohibits also "otherwise using a school as a house of worship." Bronx Household stated in its application that it sought a permit to use P.S. 15 for "Christian worship services." While the Board did not explain its rejection of the application, it is clear that an application to use the school for "Christian worship services" falls under the words of SOP § 5.11 prohibiting use for "religious worship services." We therefore assume the Board relied, at least in part, on this clause of its rule in rejecting the application. (Accordingly, we need not, and this opinion does not, consider whether the Board could lawfully exclude Bronx Household under the second, less precise, branch of the rule proscribing use of a school "as a house of worship.")[6]

A.

The prohibition against using school facilities for the conduct of religious worship services bars a type of activity. It does not discriminate against any point of view. The conduct of religious worship services, which the rule excludes, is something quite different from free expression of a religious point of view,

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[6] Nor does this opinion express any views as to whether "worship" may be lawfully excluded. Judge Walker criticizes this opinion for "declining even to consider" the constitutionality of the second branch of SOP § 5.11, which prohibits "using a school as a house of a worship." Dissenting Op. 3. Because this opinion concludes that the Board's rejection of Bronx Household's application was lawful under the "religious worship services" branch of the rule, further inquiry into the whether the Board could also lawfully exclude Bronx Household under the "house of worship" branch of the rule is unnecessary to this ruling.

which the Board does not prohibit. The conduct of services is the performance of an event or activity. While the conduct of religious services undoubtedly *includes* expressions of a religious point of view, it is not the expression of that point of view that is prohibited by the rule. Prayer, religious instruction, expression of devotion to God, and the singing of hymns, whether done by a person or a group, do not constitute the conduct of worship services. Those activities are not excluded. Indeed SOP § 5.11 expressly specifies that permits will be granted to student religious clubs "on the same basis that they are granted to other clubs for students." The branch of the rule excluding religious worship services, as we understand it, is designed by the Board to permit use of the school facilities for all of the types of activities considered by the Supreme Court in *Good News Club*, *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 830 (1995). The "religious worship services" clause does not purport to prohibit use of the facility by a person or group of persons for "worship." What is prohibited by this clause is solely the conduct of a particular type of event: a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion. The conduct of a "religious worship service" has the effect of placing centrally, and perhaps even of establishing, the religion in the school.[7]

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[7] Judge Walker complains that our understanding of the

There is an important difference between excluding the *conduct of an event or activity* that includes expression of a point of view, and excluding the *expression* of that point of view. Under rules consistent with the purposes of the forum, schools

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meaning of the term "religious worship services" is "self-styled." Dissenting Op. 8. We have not found in any dictionary a definition of the compound term "religious worship services." Dictionaries define the verb to worship as "to honor or reverence as a divine being or supernatural power: VENERATE." *Webster's Third New International Dictionary* 2637 (1976); *see also Oxford English Dictionary* (Nov. 2010 online ed.), http://www.oed.com. (same). Worship, the noun, is defined as "an act, process, or instance of expressing such veneration by performing or taking part in religious exercises or ritual," and "a form or type of worship or religious practice with its creed or ritual." *Webster's Third New International Dictionary* 2637. The word service is defined as "[w]orship; esp. public worship according to form and order," "[a] ritual or series of words and ceremonies prescribed for public worship," *Oxford English Dictionary* (Nov. 2010 online ed.), and "the performance of religious worship esp. according to settled public forms or conventions," *Webster's Third New International Dictionary* 2075.

We believe the understanding we have put forth comports with common understanding and find nothing in dictionary definitions of the term's three component words that is inconsistent with our understanding. Nor does Judge Walker offer a better definition, whether derived from a dictionary or another source.

Furthermore, we do not understand why Judge Walker should concern himself with what we take SOP § 5.11 to mean by "religious worship services." According to his argument, no matter what SOP § 5.11 means by "religious worship services," it necessarily constitutes unlawful viewpoint discrimination because it excludes activity on the basis of the activity's religious nature. If Judge Walker is right as to the applicable test, SOP § 5.11 is void no matter what it means by "religious worship services."

may exclude from their facilities all sorts of activities, such as martial arts matches, livestock shows, and horseback riding, even though, by participating in and viewing such events, participants and spectators may express their love of them. The basis for the lawful exclusion of such activities is not viewpoint discrimination, but rather the objective of avoiding either harm to persons or property, or liability, or a mess, which those activities may produce. We think it beyond dispute that a school's decision to exclude martial arts matches would be lawful notwithstanding the honest claim of would-be participants that, through participating in the matches, they express their love of the sport and their character. The exclusion would nonetheless not represent viewpoint discrimination. While a school may prohibit the use of its facilities for such activities for valid reasons, it may not selectively exclude meetings that would celebrate martial arts, cow breeding, or horseback riding, because that would be viewpoint discrimination. When there exists a reasonable basis for excluding a type of activity or event in order to preserve the purposes of the forum, such content-based exclusion survives First Amendment challenge notwithstanding that participants might use the event to express their celebration of the activity. *See Rosenberger*, 515 U.S. at 829-30.

Similarly, SOP § 5.11 prohibits use of school facilities to conduct worship services, but does not exclude religious groups from using schools for prayer, singing hymns, religious instruction, expression of religious devotion, or the discussion of issues from a religious point of view. While it is true

without question that religious worship services *include* such expressions of points of view, the fact that a reasonably excluded activity includes expressions of viewpoints does not render the exclusion of the activity unconstitutional if adherents are free to use the school facilities for expression of those viewpoints in all ways except through the reasonably excluded activity. Under at least this branch of SOP § 5.11, the schools are freely available for use by groups to express religious devotion through prayer, singing of hymns, preaching, and teaching of scripture or doctrine. It is only the performance of a worship service that is excluded.

Nor is this rule of exclusion vulnerable on the ground that the activity excluded has some similarities to another activity that is allowed. To begin with, we reject the suggestion that because a religious worship service shares some features with activities such as a Boy Scout meeting, no meaningful distinction can be drawn between the two types of activities. *See* Dissenting Op. 11-12. Boy Scout meetings are not religious worship services. The fact that religion often encompasses concern for standards of conduct in human relations does not mean that all activity which expresses concern for standards of conduct in human relations must be deemed religion.

The argument might be made that, because the rule prohibits use of facilities for "*religious* worship services," it excludes religious worship services while permitting non-religious worship services. This argument is a canard. The presence of the word

"religious" in the phrase is superfluous and does not change the meaning. There is no difference in usage between a "worship service" and a "religious worship service;" both refer to a service of religious worship. *See Bronx Household I*, 127 F.3d at 221 (Cabranes, J., concurring in part and dissenting in part) ("Unlike religious 'instruction,' there is no real secular analogue to religious 'services,' such that a ban on religious services might pose a substantial threat of viewpoint discrimination between religion and secularism."). We think, with confidence, that if 100 randomly selected people were polled as to whether they attend "worship services," all of them would understand the questioner to be inquiring whether they attended services of *religious* worship. While it is true that the word "worship" is occasionally used in nonreligious contexts, such as to describe a miser, who is said to "worship" money, or a fan who "worships" a movie star,[8] the term "worship services" has no similar use; meetings of a celebrity's fan club are not described as "worship services." Worship services are religious; the rule describes the entire category of activity excluded. The meaning of the rule's exclusion of "religious worship services" would be no different if it identified the excluded activity as "worship services."

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[8]In the view of the author, such uses of the word are metaphorical. A statement that someone worships money or worships a movie star is intended to be understood as an assertion that the subject treats money or the movie star with the same devotion or reverence that a religious believer accords to God. (Judge Calabresi leaves open the question whether such statements are purely metaphorical or whether they too describe a form of worship. *See* Concurring Op. 1.)

The application of SOP § 5.11 to deny Bronx Household's request to use school facilities for worship services is thus in no way incompatible with the Supreme Court's decisions in *Good News Club*, *Lamb's Chapel*, and *Rosenberger*. In *Good News Club*, a school district had invoked a policy prohibiting after-hours use of a school for "religious purposes" to deny a Christian organization permission to use space in a school building for "religious instruction" of children aged 6 to 12. 533 U.S. at 103-04. The Supreme Court ruled that this exclusion violated the Free Speech Clause. *Id.* at 120. The denial constituted viewpoint discrimination, rather than content-based restriction, because the school district refused to allow the teaching of moral lessons from a religious perspective, while permitting the teaching of moral lessons from a secular perspective. *Id.* at 107-08.

Similarly, in *Lamb's Chapel*, the Court found unconstitutional a school district's rejection of a church's request to show a Christian film series about child rearing and family values, again on the basis of a policy prohibiting after-hours use of school property "for religious purposes." *Lamb's Chapel*, 508 U.S. at 387-89, 393. Like the moral lessons taught in the Good News Club, the film series "dealt with a subject otherwise permissible . . . [but] its exhibition was denied solely because the series dealt with the subject from a religious standpoint." *Id.* at 394. And in *Rosenberger*, the Court concluded that the University of Virginia discriminated on the basis of viewpoint, when, in accordance with its policy, it refused to reimburse the printing expenses of a student newspaper with a Christian editorial

perspective because the publication "promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." *Rosenberger*, 515 U.S. at 827, 831-32. Because the University's refusal resulted from the newspaper's "prohibited perspective, not the general subject matter," it violated the Free Speech Clause. *Id.* at 831.

In each of those cases, the policy being enforced categorically excluded expressions of religious content. Here, by contrast, there is no restraint on the free expression of any point of view. Expression of all points of view is permitted. The exclusion applies only to the conduct of a certain type of activity – the conduct of worship services – and not to the free expression of religious views associated with it. It is clear that the Board changed its rule in order to conform to the dictates of *Good News Club*, abandoning the prohibition of "religious instruction" (which involved viewpoint discrimination). Indeed, SOP § 5.11 expressly permits use of school facilities by "religious clubs for students that are sponsored by outside organizations" on the same basis as other clubs for students sponsored by outside organizations.

Accordingly, as SOP § 5.11's prohibition of "religious worship services" does not constitute viewpoint discrimination, it is a content-based exclusion, which passes constitutional muster so long as the exclusion is reasonable in light of the purposes of the forum.

B.

We therefore go on to consider whether this exclusion is "reasonable in light of the purpose served by the forum." *Rosenberger*, 515 U.S. at 829 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)). Precedent, furthermore, calls for giving "appropriate regard" to the Board's judgment as to which activities are compatible with its reasons for opening schools to public use. *Christian Legal Soc'y*, 130 S. Ct. at 2989. By excluding religious worship services, the Board seeks to steer clear of violating the Establishment Clause. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995) ("There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech."); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (noting that an interest in avoiding a violation of the Establishment Clause "may be characterized as compelling"). In order to determine whether the content restriction for this purpose is reasonable and thus permissible, we need not decide whether use of the school for worship services would in fact violate the Establishment Clause, a question as to which reasonable arguments could be made either way, and on which no determinative ruling exists. It is sufficient if the Board has a strong basis for concern that permitting use of a public school for the conduct of religious worship services would violate the Establishment Clause. *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 476 (2d Cir. 1999) ("[W]hen government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids

might not inevitably be determined to violate the Establishment Clause . . . ."); *cf. Ricci v. DeStefano*, 129 S. Ct. 2658, 2677 (2009) (race-based employment action violates Title VII unless the employer has a strong basis to believe it otherwise will be subject to disparate impact liability). We conclude that the Board has a strong basis to believe that allowing the conduct of religious worship services in schools would give rise to a sufficient appearance of endorsement to constitute a violation of the Establishment Clause.

The Supreme Court's decision in *Lemon v. Kurtzmann*, 403 U.S. 602 (1971), provides the framework for evaluating challenges under the Establishment Clause.[9] The Court instructed in *Lemon* that government action which interacts with religion (1) "must have a secular . . . purpose," (2) must have a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) "must not foster an excessive government entanglement with religion." *Id.* at 612-13 (internal quotation marks omitted). In discussing the second prong of the *Lemon* test, the Supreme Court has warned that violation of the Establishment Clause can result from *perception* of endorsement. "The Establishment

[9]Although the *Lemon* test has been much criticized, the Supreme Court has declined to disavow it and it continues to govern the analysis of Establishment Clause claims in this Circuit. *Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 634 (2d Cir. 2005); *see Skoros v. City of New York*, 437 F.3d 1, 17 n.13 (2d Cir. 2006) (noting that this Court is required to respect precedent applying the *Lemon* test "until it is reconsidered by this court sitting *en banc* or is rejected by a later Supreme Court decision").

Clause, at the very least, prohibits government from *appearing* to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *Cnty. of Allegheny*, 492 U.S 573, 593-94 (1989) (emphasis added) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (O'Connor, J., concurring)); *see also Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (observing that the second prong of the *Lemon* test "asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval"); *Skoros*, 437 F.3d at 17-18. It was certainly not unreasonable for the Board to conclude that permitting the conduct of religious worship services in the schools might fail the second and third prongs of the *Lemon* test, and that the adoption of the "worship services" branch of SOP § 5.11 was a reasonable means of avoiding a violation of the Establishment Clause.

The performance of worship services is a core event in organized religion. *See Bronx Household*, 226 F. Supp. 2d at 410 (quoting Pastor Hall describing Bronx Household's Sunday worship service as "the indispensable integration point for our church"); Mark Chaves, *Congregations in America* 227 (2004) (reporting results of survey finding that 99.3% of religious congregations hold services at least once per week). Religious worship services are conducted according to the rules dictated by the particular religious establishment and are generally performed by an officiant of the church or religion. When worship services are performed in a place, the nature of the site changes.

The site is no longer simply a room in a school being used temporarily for some activity. The church has made the school the place for the performance of its rites, and might well appear to have *established* itself there. The place has, at least for a time, become the church.

Moreover, the Board's concern that it would be substantially subsidizing churches if it opened schools for religious worship services is reasonable. The Board neither charges rent for use of its space, nor exacts a fee to cover utilities such as electricity, gas, and air conditioning.[10] The City thus foots a major portion of the costs of the operation of a church. It is reasonable for the Board to fear that allowing schools to be converted into churches, at public expense and in public buildings, might "foster an excessive government entanglement with religion" that advances religion. *See DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 419 (2d Cir. 2001) (concluding that a publicly funded private hospital whose employees coerced patients to participate in a religious support group would violate the Establishment Clause, noting that the Supreme Court's "'decisions provide no precedent for the use of public funds to finance religious activities,'" and that "neutral administration of the state aid program . . . is an insufficient constitutional counterweight to the direct public funding of religious activities" (quoting *Mitchell v. Helms*, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring in the judgment))).

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[10] The only fee charged is for the partial cost of custodial work, and for security services when provided by the Board.

The Board could also reasonably worry that the regular, long-term conversion of schools into state-subsidized churches on Sundays would violate the Establishment Clause by reason of public perception of endorsement. *Cf. Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009) (ruling that monument in public park was properly viewed as government speech because, among other reasons, the monument was permanent). Such a concern has been vindicated by the experience in the schools in the seven years since the district court granted the preliminary injunction. For example, Bronx Household has held its worship services at P.S. 15, and nowhere else, every Sunday since 2002. Under the injunction, at least twenty-one other congregations have used a school building on Sundays as their regular place for worship services.[11] During these Sunday services, the schools are dominated by church use. *See Capitol Square*, 515 U.S. at 777 (O'Connor, J., concurring in part and concurring in the judgment) ("At some point . . . a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval."). Because of their large congregations, churches generally use the largest room in the building, or multiple rooms, sometimes for the entire day. *See Cnty. of Allegheny*, 492 U.S. at 579, 599-600 (finding unconstitutional endorsement of religion where crèche was placed on the "Grand Staircase" of courthouse, the "main" and "most public" part of the

[11] The record in this regard has not been updated since 2005. At oral argument, counsel for the Board told us that the number of churches using schools for worship services has increased substantially since that time.

building, which was not available to other displays simultaneously). Church members post signs, distribute flyers, and proselytize outside the school buildings. In some schools, no other outside organizations use the space. Accordingly, on Sundays, some schools effectively become churches. As a result of this church domination of the space, both church congregants and members of the public identify the churches with the schools. The possibility of perceived endorsement is made particularly acute by the fact that P.S. 15 and other schools used by churches are attended by young and impressionable students, who might easily mistake the consequences of a neutral policy for endorsement. *Cf. Van Orden v. Perry*, 545 U.S. 677, 703 (2005) (Breyer, J., concurring) (distinguishing lawful display of Ten Commandments from cases in which display was "on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state"); *Skoros*, 437 F.3d at 24-25 ("A mature reasonable objective observer . . . would take into consideration that schoolchildren are the intended audience for the displays, that these children are being reared in a variety of faiths (as well as none), and that, by virtue of their ages, they may be especially susceptible to any religious messages conveyed by such displays.").[12]

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[12] The dissent maintains that *Good News Club* precludes the Board from relying on this concern, because the facts of this case present less reason to fear the appearance of endorsement than those of *Good News Club*. Dissenting Op. 22-23. We disagree with this assessment of the facts. In our view, Bronx Household's long-term weekly use of P.S. 15 for Christian

Furthermore, the fact that school facilities are principally available for public use on Sundays results in an unintended bias in favor of Christian religions, which prescribe Sunday as the principal day for worship services. Jews and Muslims generally cannot use school facilities for their services because the facilities are often unavailable on the days that their religions principally prescribe for services. At least one request to hold Jewish services (in a school building used for Christian services on Sundays) was denied because the building was unavailable on Saturdays. This contributes to a perception of public schools as Christian churches, but not synagogues or mosques.

Finally, the religious services Bronx Household conducts in the school are not open on uniform terms to the general public. Bronx Household acknowledges that it excludes persons not baptized, as well as persons who have been excommunicated or who advocate the Islamic religion, from full participation in its services. *See Bronx Household III*, 492 F.3d at 120 (Leval, J., concurring); *cf. Christian Legal Soc'y*, 130 S. Ct. at 2995 (upholding university's denial of Registered Student

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worship services at the Board's expense, and the effective exclusion of competing religious groups who would wish to hold services in schools on days other than Sunday but are effectively precluded by school-related activities from doing so, provides a substantially stronger basis for fearing an Establishment Clause violation than the after-school use of a single classroom by a religious group at issue in *Good News Club*.

Organization status to student group that refused to comply with non-discrimination policy for ideological reasons). The *de facto* favoritism of the Christian (Sunday service) religions over others, as well as the deliberate exclusion practiced by Bronx Household, aggravates the potential Establishment Clause problems the Board seeks to avoid.

In the end, we think the Board could have reasonably concluded that what the public would see, were the Board not to exclude religious worship services, is public schools, which serve on Sundays as state-sponsored Christian churches. For these reasons, the Board had a strong basis to be wary that permitting religious worship services in schools, and thus effectively allowing schools to be converted into churches on Sunday, would be found to violate the Establishment Clause. To reiterate, we do not say that a violation has occurred, or would occur but for the policy. We do find, however, that it was objectively reasonable for the Board to worry that use of the City's schools for religious worship services, conducted primarily on Sunday when the schools are most available to outside groups, exposes the City to a substantial risk of being found to have violated the Establishment Clause.

This conclusion is not, as the dissent maintains, foreclosed by the Supreme Court's precedents. We recognize that in *Good News Club*, *Widmar*, *Lamb's Chapel*, and *Rosenberger*, the Supreme Court rejected arguments that the rules in question, and their application to bar or disfavor particular activities, were justified by concern to avoid violating the Establishment Clause. But those rulings were

based on their particular facts, which are significantly different from those here. In none of those cases did the Supreme Court suggest that a reasonable concern to avoid violation of the Establishment Clause can *never* justify a governmental exclusion of a religious practice. In arguing that the Supreme Court's precedents forbid our ruling, the dissent relies on broad statements of principle, often from opinions that did not command a majority of the Court, and contends that, taken together, they show the invalidity of the reasons the Board proffers for fearing an Establishment Clause violation. However, neither the Supreme Court nor this court has considered the constitutionality of a policy that allows the regular use of public schools for religious worship services. Indeed, the Court in *Good News Club* expressly declined to address the lawfulness of a policy that excludes "mere" religious worship, a category of activity which is substantially broader than the "religious worship services" covered by the first branch of SOP § 5.11. *Good News Club*, 533 U.S. at 112 n.4.

In any event, the reasonableness of the Board's concern to avoid creating a perception of endorsement resulting from regular Sunday conversion of schools into Christian churches, together with the absence of viewpoint-based discrimination, distinguishes this case from the Supreme Court's precedents striking down prohibitions of the use of educational facilities or funds by religious groups. All of those cases involved rules or policies which broadly suppressed religious viewpoints and which, in their particular applications, disfavored activities which had far less

potential to convey the appearance of official endorsement of religion. In *Widmar*, the challenged policy prohibited the use of university facilities for religious worship or even discussion. In *Rosenberger*, the challenged policy prohibited the reimbursement of expenses incurred by university student groups for activities that "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." 515 U.S. at 825. And in *Lamb's Chapel* and *Good News Club*, the challenged policies prohibited the use of school district property for any and all "religious purposes." *See Good News Club*, 533 U.S. at 103; *Lamb's Chapel*, 508 U.S. 387. In each case, the policy being enforced, unlike SOP § 5.11, was broadly categorical in its exclusion of religious content. In addition, the activities disallowed or disfavored under those policies – meetings of Christian clubs for students (in *Widmar* and *Good News Club*), the publication of a newspaper with a Christian editorial viewpoint (in *Rosenberger*), and the showing of a Christian film series (in *Lamb's Chapel*) – were much less likely than the conduct of Sunday worship services to evoke an appearance of endorsement of religion by public school authorities. In determining that there was no danger of an Establishment Clause violation in these cases, the Supreme Court relied on the fact that facilities and funds were available to and used by numerous and diverse private groups. *See Lamb's Chapel*, 508 U.S. at 395 (observing that school district's property "had repeatedly been used by a wide variety of private organizations"); *Rosenberger*, 515 U.S. at 842 (student activity funds were distributed to "a wide spectrum of student groups"); *Widmar*, 454 U.S. at 277 (university provided

benefits to "over 100 student groups of all types"); *Good News Club*, 533 U.S. at 113 (district "made its forum available to other organizations"). In finding insufficient risk of the perception of endorsement, the Court observed in *Widmar* that university students are "young adults," who are "less impressionable than younger students" and can therefore appreciate that a policy permitting religious student groups to use meeting space on the same basis as other types of student groups was neutral toward religion. 454 U.S. at 275-75 & n.14. And in *Lamb's Chapel* and *Good News Club*, the Court found it significant that the proposed film exhibition and club meetings would be open to the public, not just to the members of the Christian groups sponsoring the events. *See Good News Club*, 533 U.S. at 113; *Lamb's Chapel*, 508 U.S. at 395.

The use of P.S. 15 and other schools for Sunday worship services is more likely to promote a perception of endorsement than the uses in those cases. A worship service is an act of organized religion that consecrates the place in which it is performed, making it a church. Unlike the groups seeking access in those cases, Bronx Household and the other churches that have been allowed access under the injunction tend to dominate the schools on the day they use them. They do not use a single, small classroom, and are not merely one of various types of groups using the schools; they use the largest rooms and are typically the only outside group using a school on Sunday. They identify the schools as their churches, as do many residents of the community. The students of P.S. 15 are not the "young adults" of *Rosenberger* and *Widmar*, but

young children who are less likely to understand that the church in their school is not endorsed by their school. The fact that New York City's school facilities are more available on Sundays than any other day of the week means that there is a *de facto* bias in favor of Christian groups who want to use the schools for worship services, compounded by the exclusionary practices of churches like Bronx Household.

Furthermore, the Board's prohibition on the use of school facilities for "religious worship services" is far less broad than the exclusions of use for "religious purposes" or "religious discussion" in the earlier cases, which included in their sweep activities that are similar to secular activities. The broad scope of the exclusions considered in the other cases resulted in viewpoint discrimination, rather than mere content restriction. The exclusions also disfavored more religious activity than necessary to avoid an actual Establishment Clause violation. In contrast, the "religious worship services" clause of SOP § 5.11 is narrowly drawn to exclude a core activity in the establishment of religion – worship services – and thereby avoid the perceived transformation of school buildings into churches.

It is not our contention that the Supreme Court's precedents compel our conclusion. On the other hand, we cannot accept Judge Walker's contention that the Court has effectively decided this case. This case is terra incognita. The Supreme Court's precedents provide no secure guidelines as to how it should be decided. The main lesson that can be derived from them is that they do not supply an

answer to the case before us. Precedent provides no way of guessing how the Supreme Court will rule when it comes to consider facts comparable to these. By hunting and pecking through the dicta of various opinions, one can find snippets that arguably support a prediction either way. Judge Calabresi and I believe that the Board's exclusion of Bronx Household's conduct of worship services is viewpoint-neutral and justified by the Board's reasonable concern that permitting use of school facilities for worship services would violate the Establishment Clause.

* * *

Bronx Household contends that SOP § 5.11 is not a measure reasonably designed to avoid an Establishment Clause violation but is instead itself a violation of that clause. Bronx Household argues that SOP § 5.11 fails the *Lemon* test because it sends a message of official hostility to religion and because its enforcement fosters excessive government entanglement with religion. We are not persuaded.

As emphasized above, SOP § 5.11 prohibits worship services in schools, but permits the expression of religious points of view through activities such as prayer, singing of hymns, preaching, and teaching or discussion of doctrine or scripture. Given the broad range of expressive religious activity that the policy does allow, we do not think a reasonable observer would perceive hostility to religion in the enforcement of SOP § 5.11.

Bronx Household also argues that SOP § 5.11 not only conveys the appearance of official hostility, but is in fact motivated by such hostility. We find no basis for this contention. Of course, "government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. However, we do not understand why Bronx Household attributes the Board's position to hostility rather than a good faith desire to navigate successfully through the poorly marked, and rapidly changing, channel between the Scylla of viewpoint discrimination and the Charybdis of violation of the Establishment Clause.

The Board has by no means been alone in the belief that the Establishment Clause requires governmental educational institutions to be cautious of harboring or sponsoring religious activities. The Supreme Court's rulings in *Rosenberger*, *Lamb's Chapel*, and *Good News Club* deviated from a previously widespread governmental and judicial perception of the scope of the Establishment Clause's prohibitions. In each of those three cases, the school administrators and the lower court judges believed that the challenged policies, which were intended to keep religion at a distance from public institutions, were mandated by the Establishment Clause, or at least consistent with the Constitution. And in two of the cases, a number of Supreme Court justices did as well.

There is no better reason to believe, as Bronx Household suggests, that the Board was motivated

by hostility toward religion than there is to believe that such hostility has motivated other school authorities throughout the country, the lower court judges and dissenting Supreme Court justices in *Lamb's Chapel*, *Rosenberger*, and *Good News Club*, or Judge Calabresi and me. We see no sound basis for concluding that the Board's actions have been motivated by anything other than a desire to find the proper balance between two clauses of the First Amendment, the interpretation of which by the Supreme Court has been in flux and uncertain.[13]

Bronx Household also argues that SOP § 5.11 cannot be applied without unconstitutionally entangling the Board in matters of religious doctrine. *See Agostini v. Felton*, 521 U.S. 203, 232-33 (1997). According to Bronx Household, any attempt by the Board to distinguish between religious activity that falls under the exclusion of "worship services," and religious activity that does not, necessarily places the Board in violation of the duty

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[13] Judge Walker similarly asserted in his dissent in *Bronx Household III* that the Board's adoption of SOP § 5.11 was motivated by "long-standing hostility to religious groups." *See Bronx Household III*, 492 F.3d at 127 ("The Board's avowed purposed in enforcing the regulation in this case . . . and its long-standing hostility to religious groups, leads ineluctably to the conclusion that the Board, in fact, has undertaken to exclude a particular viewpoint from its property."). Judge Walker has not repeated that assertion in his present opinion, but neither has he retracted it.

imposed by *Lemon* to avoid "excessive government entanglement with religion." 403 U.S. at 613.[14]

To begin with, whatever merit this argument may have in other types of cases, we do not see what application it has here. Bronx Household does not contest that it conducts religious worship services. To the contrary, it applied for a permit to conduct "Christian worship services," and the evidence suggests no reason to question its own characterization of its activities. *Cf. Christian Legal Soc'y*, 130 S. Ct. at 2982-84; *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 918 & n.18 (9th Cir. 2007), *abrogated on other grounds by Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008).

This argument, furthermore, overlooks the nature of the duties placed on government officials by the Establishment Clause (as well as the Free Exercise of Religion Clause). As we outlined above, while other clauses of the First Amendment prohibit government officials from discriminating on the basis of religious viewpoint, the Establishment Clause prohibits them from taking action that would constitute establishment of religion. In various circumstances, especially when dealing with initiatives for the conduct of undoubtedly religious

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[14] Judge Walker has also made this argument. *See Bronx Household III*, 492 F.3d at 131 (Walker, J., dissenting) (arguing that the Board would "flout[] the Establishment Clause" by trying to distinguish worship because it would "no doubt have to interpret religious doctrine or defer to the interpretations of religious officials in order to keep worship, and worship alone, out of its schools" (internal quotation marks omitted)).

exercises on public property, government officials cannot discharge their constitutional obligations without close examination of the particular conduct to determine if it is properly deemed to be religious and if so whether allowing it would constitute a prohibited establishment of religion. Bronx Household's argument, if valid, would effectively nullify the Establishment Clause.[15]

Without doubt there are circumstances where a government official's involvement in matters of religious doctrine constitutes excessive government entanglement. *See, e.g.*, *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 427 (2d Cir. 2002). But it does not follow, as Bronx Household seems to argue, that the mere act of inspection of religious conduct is an excessive entanglement. The Constitution, far from forbidding government examination of assertedly religious conduct, at times *compels* government officials to undertake such inquiry in order to draw necessary distinctions.[16] *See Lee v. Weisman*, 505 U.S. 577, 598 (1992) ("Our jurisprudence in this area is of necessity one of line-drawing, of determining at what point a dissenter's rights of religious freedom are

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[15] The Free Exercise of Religion Clause also at times compels government officials to examine conduct of an undoubtedly religious nature to determine whether it constitutes exercise of religion, and is thus entitled to the clause's protection, or does not, and is thus subject to regulation.

[16] Applying such a rule would, for example, mean that every claim of entitlement under the Religious Land Use and Institutionalized Persons Act (RLIUPA), 42 U.S.C. § 2000cc *et seq.*, would be immune from court inquiry into whether the use is in fact a religious use.

infringed by the State."); *Cnty. of Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring in part and concurring in the judgment) ("We cannot avoid the obligation to draw lines, often close and difficult lines, in deciding Establishment Clause cases . . . ."). It was just such inspection which permitted the Supreme Court to allow the display of arguably religious symbols in certain public contexts while prohibiting it in others. *Compare Van Orden*, 545 U.S. at 703 (Breyer, J., concurring), *and Cnty. of Allegheny*, 492 U.S. at 620, *with McCreary*, 545 U.S. at 881, *and Cnty. of Allegheny*, 492 U.S. at 601-02.

C.

Judge Walker's dissenting opinion criticizes our ruling on a number of grounds. We believe his criticisms are not well founded.

1) Judge Walker's primary argument is that, because SOP § 5.11's exclusion of religious worship services depends on their religious nature, which we do not dispute, it necessarily discriminates illegally on the basis of viewpoint. *See* Dissenting Op. 10 ("The Board cannot lawfully exclude the conduct of an event based solely on the religious viewpoints expressed during the event."). He concludes that there is "no doubt that it is 'religious services' and 'worship' that the Board is targeting for exclusion" because "[t]he Board is otherwise unconcerned with comparable ceremonial speech occurring on school premises." Dissenting Op. 9. According to his analysis, the governing test should be "whether Bronx Household is engaging in speech that fulfills the purposes of the forum and is consistent with non-

religious speech occurring on school premises." Dissenting Op. 9. If Bronx Household is engaging in such speech and is excluded because of the religious nature of its activity, the exclusion is necessarily illegal viewpoint discrimination.

The problem we find with Judge Walker's analysis is that it either ignores the crucial role of the Establishment Clause in motivating the Board's decision or it simply reads that clause out of the Constitution. The general effect of the Establishment Clause is to prohibit government from taking actions which have the effect of establishing *religion*. Assuming that the Establishment Clause has some meaning – that is to say, assuming there are some forms of activity which government may not conduct (or may not permit) by reason of the Establishment Clause – any such prohibitions necessarily depend on the *religious* nature of the particular activity. If the activity is not of religious nature, it does not fall within the purview of the Establishment Clause.

This feature is evident throughout the Supreme Court's Establishment Clause jurisprudence. In *Lee v. Weisman*, 505 U.S. 577 (1992), for example, the Supreme Court held that the Establishment Clause prohibited a public high school from including the recitation of a prayer in its graduation ceremony. The prayer was unquestionably an expressive act, and the prohibition by the Court under the Establishment Clause unquestionably depended on the religious nature of prayer. Had the school administration sought to include instead of a prayer a non-religious affirmation of patriotism, or of love of

learning, that would not have been prohibited by the Establishment Clause.

In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Court held that the Establishment Clause prohibited the display of a crèche in the Grand Staircase of the Allegheny County Courthouse, but upheld against Establishment Clause challenge another display which included an 18-foot menorah, a 45-foot Christmas tree, and a sign declaring devotion to liberty. Both displays conveyed an expressive message. What distinguished them was the fact that the crèche "sent an unmistakable message that [the county] supports and promotes the Christian praise to God," *id.* at 600, while the menorah, tree, and sign celebrated the holiday season on a non-sectarian basis, *id.* at 617-18.

In the companion cases of *McCreary County v. ACLU*, 545 U.S. 844 (2005), and *Van Orden v. Perry*, 545 U.S. 677 (2005), the Court distinguished between two public displays of the Ten Commandments based on whether they conveyed a message of governmental support or endorsement of religion. In *McCreary*, the Court upheld an injunction prohibiting a display of the Ten Commandments in two courthouses, because the displays had a "predominantly religious purpose." *McCreary*, 545 U.S. at 881. By contrast, Justice Breyer's controlling opinion in *Van Orden* found that the display of the Ten Commandments in the Texas State Capitol did not violate the Establishment Clause because, when viewed in context, it conveyed a predominantly secular message of the importance

of law. *Van Orden*, 545 U.S. at 701-02 (Breyer, J., concurring). The religious (or non-religious) nature of the two displays again determined whether their presence on public property was lawful.

In light of such decisions, Judge Walker's view of the question seems to us not compatible with the Establishment Clause. Inevitably, whatever expressive conduct is prohibited by the Establishment Clause is prohibited by reason of its religious nature and would not be prohibited if what it expressed were not related to religion.

We do not suggest for a moment that any and all expressive activity with religious content must be excluded from government property or from government-controlled enterprise, such as the administration of a school system. The Supreme Court has unquestionably ruled otherwise in *Rosenberger*, *Good News Club*, and other cases. Our point is only that the test cannot be as Judge Walker views it. The mere fact that government does not permit an expressive activity, which it would permit if the activity were not religious, does not compel the conclusion that it is engaging in unconstitutional viewpoint discrimination. Whatever forms of governmental action are prohibited by the Establishment Clause are prohibited in part because of their religious nature and would not be prohibited if they were not religious.

Where government excludes a category of activity involving religious expression out of concern for the limitations imposed on government by the Establishment Clause, the lawfulness of the

exclusion (notwithstanding that the religious content motivates the exclusion) will turn on whether allowing the activity would either violate the Establishment Clause or place the government entity at a reasonably perceived risk of violating the Establishment Clause. The Supreme Court has never ruled on whether permitting the regular conduct of religious worship services in public schools constitutes a violation of the Establishment Clause, and we reach no conclusion on that question. As discussed above, considering all the circumstances, we think the risk that permitting the regular conduct of worship services in public schools would violate the Establishment Clause is sufficiently high to justify the Board's adoption of a content restriction that prohibits the performance of such services but does not otherwise limit the expression of religious viewpoints.

2) Judge Walker maintains that our ruling approves the exclusion of the very sort of conduct that the Supreme Court ruled in *Good News Club* could not be excluded. Dissenting Op. 10. We respectfully disagree. The application of the Good News Club, which the school district denied, was for a Christian group to hold after-school meetings for children between the ages of six and twelve, where they would have "a fun time of singing songs, hearing a Bible lesson and memorizing scripture." *Good News Club*, 533 U.S. at 103. The club later gave an expanded description by letter to the effect that

> Ms. Fournier tak[es] attendance. As she calls a child's name, if the child recites a

> Bible verse the child receives a treat. After attendance, the Club sings songs. Next Club members engage in games that involve, *inter alia*, learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization.

*Id.*

Without doubt there is some overlap between Bronx Household's conduct of Christian worship services and the children's club meetings that were the subject of *Good News Club*, in that worship services generally include song, prayer, and scripture. Nonetheless, we doubt that objective observers employing ordinary understandings of the English language would describe Ms. Fournier's club meetings as worship services. Judge Walker seeks to discern the meaning of the Supreme Court's majority opinion from the emphatic objections to it expressed in Justice Souter's dissenting opinion. He bases his assertion that the activities of the Good News Club were "religious worship services" on Justice Souter's dissenting statement that what the majority allowed into a public school was in effect "an evangelical service of worship." 533 U.S. at 138. It is axiomatic that a dissenting opinion is generally the least reliable place to look to discern the meaning of a majority opinion. Dissenters commonly exaggerate what they see as inevitable, appalling consequences of the majority's ruling, a phenomenon which led Judge Friendly to observe that dissenting opinions

are "rarely a safe guide to the holding of the majority." *United States v. Gorman*, 355 F.2d 151, 155 (2d Cir. 1965). Regardless of whether the dissenting justices believed the activities of the Good News Club were equivalent to "an evangelical service of worship," there is no indication that the majority shared that view. Indeed, rejecting the argument advanced by the school district in *Good News Club* "that the Club's activities constitute 'religious worship,'" the majority expressly noted that the court below had "made no such determination," emphasizing that it was not addressing what ruling it would make if the excluded activity were religious worship. *Id.* at 112 n.4.

We do not mean to imply that we think the Supreme Court somehow indicated in *Good News Club* that it would rule as we do on the exclusion of worship services. Our point is only that the Supreme Court has neither ruled on the question, nor even given any reliable indication of how it would rule.

3) Judge Walker argues that we err to the extent that we rely on the heavy predominance of the use of schools for *Christian* worship services (as opposed to services of other religions) because of the greater availability of the schools on the Christian day of worship. He argues that the greater availability of schools for use by Christian organizations is of no constitutional concern, because "[a]n Establishment Clause violation does not result from either private choice or happenstance." Dissenting Op. 24.

The greater availability of schools for use on the Christian day of worship is certainly not "happenstance." From the first, schools throughout the United States were closed on Sundays precisely because Sunday is the Christian day of worship – the day when schoolchildren were expected to attend church services with their parents. The tradition of closing schools, post offices, courts, and other government buildings on Sunday is no more happenstance than the fact that, until recently, many state laws required businesses to close on Sundays. *See* Alan Raucher, *Sunday Business and the Decline of Sunday Closing Laws: A Historical Overview*, 36 J. Church and State 13 (1994). That choice has origins in the government's solicitude for Christianity, in what was once widely viewed as "a Christian nation." *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892).

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In rejecting a multitude of Judge Walker's arguments, we do not imply that his conclusion (as to the constitutional invalidity of the religious worship services branch of SOP § 5.11) is frivolous or even necessarily wrong. The Supreme Court's rulings have laid down no principles that compel a decision one way or the other on these facts. Nor has the Supreme Court given any reliable indication of how it will rule if and when it confronts these facts. As Judge Calabresi and I view the facts, the use of New York City public schools for religious worship services – with a heavy predominance of Christian worship services because school buildings are most available for non-school use on Sundays – would

create a very substantial appearance of governmental endorsement of religion and give the Board a strong basis to fear that permitting such use would violate the Establishment Clause. Because the "religious worship services" clause of SOP § 5.11 is a content restriction that excludes only a type of activity, does so for a reason that is either constitutionally mandated or at least constitutionally reasonable, and does not otherwise curtail free expression of religious viewpoints, we conclude that the restriction does not violate the Constitution.

## CONCLUSION

For the foregoing reasons, the judgment of the district court is REVERSED, and the injunction barring enforcement of SOP § 5.11 against Bronx Household is VACATED.

CALABRESI, Circuit Judge, concurring:

I join Judge Leval's opinion in full because it states a correct alternative ground upon which to decide this case. But I write separately to emphasize that I continue to adhere to the position I took in my earlier opinion in this case, that worship is *sui generis*. *See Bronx Household III*, 492 F.3d at 100 (Calabresi, J., concurring). And I especially wish to reaffirm my view there stated:

> A holding that *worship* is only an agglomeration of rites would be a judicial finding on the nature of worship that would not only be grievously wrong, but also deeply insulting to persons of faith.

*Id.* at 103. Worship is something entirely different. *See id.*; *see also Bronx Household I*, 127 F.3d at 221 (Cabranes, J., concurring in part and dissenting in part) ("Unlike religious 'instruction,' there is no real secular analogue to religious 'services,' such that a ban on religious services might pose a substantial threat of viewpoint discrimination between religion and secularism."). State rules excluding all "worship" from a limited public forum, therefore, are based on content, not viewpoint.

In the context of the rule before us, there is one particular problem: the rule seems to prohibit *religious* worship. *See* SOP § 5.11 ("No permit shall be granted for the purpose of holding religious worship services . . . ."). And if it be the case that *non-religious* worship also exists, then the prohibition of *religious* worship would be viewpoint

discrimination, and most likely unconstitutional. The question of whether there is a category of nonreligious worship, or whether worship is inherently religious and thus "religious worship" is redundant, is interesting and difficult, but we do not need to decide it in this case. The majority opinion does not need to decide the issue because it concludes that there is no such thing as a non-religious worship *service*. Maj. Op. at **[15-16]**. I also need not decide the issue because the rule before us prohibits "using a school as a house of worship," as well as the holding of "religious worship services." SOP § 5.11. No one questions that what Appellees seek to do in the instant case is to use the school as a house of worship. And since both religious worship and nonreligious worship (if there be any) are subject to the clause barring use of a school as "a house of worship," the prohibition here is content- and not viewpoint-based.

We also do not need to be concerned with whether in some other case it might be hard to say whether what the Appellees wish to do is to use the school as "a house of worship." Nor need we worry that, in attempting to answer that question, we (or the Appellants) might become unconstitutionally "entangle[d] with religion," *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). For Appellees admitted in their permit request, *see* J.A. at 3586, and in their briefs before this court, *see* Appellees' Br. at 1, that they seek to use school facilities for "worship." When a group tells the government that what it wishes to do is "worship," the government is entitled to take the group at its word. *See Bronx Household I*, 127 F.3d at 221-22 (Cabranes, J., concurring in part and

dissenting in part) ("There may be cases in which the parties dispute whether or not a proposed activity for which permission to use school premises is denied actually constitutes religious instruction or worship . . . . However, this issue does not arise in the instant case, as the parties have stipulated that plaintiff seeks to use a school gymnasium for 'religious worship services.'"). That is all the Appellants did when they enforced SOP § 5.11,[1] and it is all a court needs to do here. This case does not, therefore, present an appropriate occasion for deciding how to resolve a dispute over whether something actually is "worship."

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[1] Whatever the Appellants may have done in deciding whether to grant previous permit applications not governed by the revised SOP § 5.11 is not before us. Under SOP § 5.11, the Appellants denied the Appellees' permit application four days after it was submitted, because it described the activities to be conducted on school premises as "Christian worship services." *See* J.A. at 3586, 3588. It also does not matter that the permit application included the words "as we have done in the past," J.A. at 3586, or that it might have been worded explicitly to include, in addition to worship, other activities that, if conducted separately from worship, could not constitutionally be excluded from the limited public forum. Once an applicant says that what it wishes to do is "worship," no inquiry into whether the underlying or accompanying activities actually constitute worship is required.

JOHN M. WALKER, JR., Circuit Judge, dissenting:

The Board's Standard Operating Procedure ("SOP") § 5.11 withholds otherwise broadly available school-use permits from religious groups seeking to use school facilities during non-school hours "for the purpose of holding religious worship services, or otherwise using a school as a house of worship." Without addressing the "house of worship" ban, the majority concludes that the ban on "religious worship services" does not offend the First Amendment's Free Speech Clause because it is a neutral, content-based restriction that is reasonably implemented to avoid an Establishment Clause violation. I disagree: SOP § 5.11 is impermissible viewpoint discrimination against protected speech and is unsupported by a compelling state interest. In this case, Bronx Household's worship services fit easily within the purposes of the Board's broadly available forum and may not be the object of discrimination based upon the religious viewpoint expressed by the services' participants. The Board's purported Establishment Clause concerns are insubstantial: they are not reasonable, much less a compelling reason for the Board to shut the door on Bronx Household's protected speech.

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When this panel split in 2007, Judge Calabresi indicated that he would uphold SOP § 5.11 as a reasonable content-based restriction on the unique subject of "worship," Judge Leval expressed no opinion on the merits of the case due to ripeness concerns, and I indicated that I would strike down

the application of SOP § 5.11 as unconstitutional viewpoint discrimination. See generally Bronx Household of Faith v. Bd. of Educ., 492 F.3d 89, 100-106 (Calabresi, J.), 110-123 (Leval, J.), and 123-32 (Walker, J.) (2d Cir. 2007). At that time, I compared the purpose of Bronx Household's proposed use of school property with the purposes for which the Board opened its limited forum to the public under SOP § 5.6.2, and, after inquiring searchingly of the government's motives, concluded that the Board had engaged in impermissible viewpoint discrimination by rejecting permit applicants under SOP § 5.11. Id. at 123-25. In response to Judge Calabresi's willingness to uphold the Board's prohibition on religious worship, I countered that Judge Calabresi had not engaged in any real analysis of the purpose of Bronx Household's proposed expressive activity in light of the purposes of the forum and in comparison to the purposes of the activities the Board had allowed, pointing out that he had erred by simply comparing the speech already permitted on school premises with "worship," which he declared to be sui generis and thus readily excludable from the forum. See id. at 127-130; cf. Op. of J. Calabresi at 1.

Now, in this latest iteration of what is effectively the same facial challenge to the Board's exclusions under SOP § 5.11, the majority opinion breaks with Judge Calabresi's earlier analysis that "worship" is a separate category of speech that is readily excludable from the Board's expansive community use policy, declining even to consider either the second part of SOP § 5.11 (which prohibits "using a school as a house of worship") or whether "worship" may be lawfully excluded from the forum. Compare

Maj. Op. at 11 & 11 n.6 (expressly avoiding a decision on "worship"), with Op. of J. Calabresi at 1-3 (readily excluding "worship").[1] Rather, the majority adopts a position not argued below or advanced by the Board by focusing solely on the Board's restriction against "religious worship services," characterizing SOP § 5.11 as merely the exclusion of "the conduct of an event or activity that includes expression of a point of view," Maj. Op. at 13. The majority does not disagree that Bronx Household's services fall squarely within the purposes of the limited public forum; it holds, however, that SOP § 5.11's exclusion of services is both viewpoint-neutral and justified by Establishment Clause concerns. Because I believe that neither conclusion is correct, I would affirm the district court's injunction.

## I. SOP § 5.11's Ban on Religious Worship Services Constitutes Viewpoint Discrimination

As the majority recognizes, the Board has created a limited public forum by opening its schools for "uses pertaining to the welfare of the community." SOP § 5.6.2. When the state creates such a forum, it "is not required to and does not allow persons to engage in every type of speech." Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001). The government may, for example, reserve the limited

[1] While I disagree with Judge Calabresi's analysis and conclusions, he at least recognizes that the two parts of SOP 3 § 5.11 operate in tandem to effectively preclude worship and the practice of religion from school premises during non-school hours.

public forum "for the discussion of certain topics." Id. (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995)). Any restrictions on speech in a limited public forum must, however, be both viewpoint neutral and "reasonable in light of the purpose served by the forum." Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985). SOP § 5.11 is neither.

Here, the Board opened its schools to the public for purposes of "maximiz[ing] educational, cultural, artistic and recreational opportunities for children and parents," Cahill. Decl. ¶ 13, "assist[ing] in . . . development generally," id., "expand[ing] enrichment opportunities for children," Farina Decl. ¶ 9, and "enhanc[ing] community support for the schools," id. The parties agree, and the majority does not contest, that Bronx Household's intended use of P.S. 15 for "Christian worship services"—which include prayer, the reading and singing of psalms, Bible lessons, personal testimony, communion, preaching, fellowship, and conversation—falls within the purposes of the forum. See, e.g., Transcript of Oral Argument, 10/6/2009 ("Tr."), at 10:7-8, 21:20-21, & 22:20-22 (each statement conceding that Bronx Household's intended use advances the forum's purposes). The majority nevertheless finds that the restriction on religious services is content discrimination that is reasonable in light of the purposes of the limited public forum. I disagree and conclude that the Board's discrimination against Bronx Household is based on its religious viewpoint.

The Supreme Court has consistently held that the exclusion of private speakers from open fora or limited public fora on the basis of their religious message constitutes viewpoint discrimination. In Widmar v. Vincent, for example, the Supreme Court reaffirmed that "religious worship and discussion" are "forms of speech and association protected by the First Amendment." 454 U.S. 263, 269 (1981). On this basis, the Court rejected a university's attempt to prevent a student organization from using an open forum to hold meetings, similar to those at issue here, that included "prayer, hymns, Bible commentary, and discussion of religious views and experiences." Id. at 265 n.2. Significantly, the Court rejected a distinction between protected religious speech and "a new class of religious speech act[s] constituting worship." Id. at 269 n.6 (alteration in original) (citation and internal quotation marks omitted). The Court explained that this proposed distinction lacked "intelligible content" and would not "lie within the judicial competence to administer." Id.

The Supreme Court first addressed private religious speech in a limited public forum in Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993). There, a church sought to use a school's limited public forum, after hours, to show a six-part film series that dealt with "family and child-rearing issues" from a Christian perspective. Id. at 387-89. The Court found that the school district had engaged in viewpoint discrimination by "permit[ting] school property to be used for the presentation of all views about family issues and child rearing except those dealing with

the subject matter from a religious standpoint." Id. at 393. Similarly, in Rosenberger v. Rector & Visitors of the University of Virginia, the Court rejected the University of Virginia's refusal to fund a student newspaper on the basis that the newspaper "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." 515 U.S. 819, 823 (1995). The Court explained that viewpoint discrimination is a subset of content discrimination and that while it is "something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought," religion nevertheless "provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." Id. at 830-31. For that reason, the University's refusal to fund a student publication because of its Christian perspective, while continuing to fund publications with other (secular) perspectives, was impermissible viewpoint discrimination. Id. at 831-32.

More recently, in Good News Club v. Milford Central School, 533 U.S. 98 (2001), the Supreme Court applied its holdings in Lamb's Chapel and Rosenberger to activities that could be labeled "worship." Milford had created a limited public forum that, like SOP § 5.6.2 here, opened its school for purposes "pertaining to the welfare of the community." Good News Club, 533 U.S. at 102. The Good News Club, a private Christian organization, sought to use this forum for weekly meetings, at which participants would "sing[] songs, hear[] a Bible lesson and memoriz[e] scripture." 533 U.S. at 103. In finding Milford's exclusion of these meetings

unconstitutional, the Court explained that "something that is 'quintessentially religious' or 'decidedly religious in nature' can[] also be characterized properly as the teaching of morals and character development from a particular viewpoint." Id. at 111. While declining to challenge Justice Souter's characterization of the Club's activities as "an evangelical service of worship," the Court wrote that "what matters is the substance of the Club's activities," which the Court found to be "materially indistinguishable from the activities in Lamb's Chapel and Rosenberger." Id. at 112 n.4. Because non-religious groups were permitted to teach morals and character development from a secular viewpoint, excluding the Good News Club's efforts to do the same from a religion viewpoint was impermissible.

The majority argues in this case that the Board has not discriminated on the basis of viewpoint and tries to distinguish these prior Supreme Court decisions by focusing narrowly on the Board's exclusion of "religious worship services." The Board, however, has not differentiated these services from religious worship or the practice of religion. Indeed, how could it do so? Nor has the Board offered a definition of religious worship services. Rather, the majority offers its own self-styled definition of "religious worship services," without reference to the record or briefs, as "the conduct of a particular type of event: a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion," the conduct of which "has the effect of placing centrally, and perhaps even of establishing,

the religion in the school." Maj. Op. at 12. The majority's formulation of "religious worship services," including its shoe-horning of a supposed Establishment Clause problem, is conveniently tailored to support its arguments, but leaves no doubt that it is "religious services" and "worship" that the Board is targeting for exclusion. The Board is otherwise unconcerned with comparable ceremonial speech occurring on school premises.[2] The majority's definition, it bears noting, leads to anomalous results: while a Catholic or Episcopal service would be shut out of the forum, a Quaker meeting service, Buddhist meditation service, or other religions worship convocation could be allowed because it would not follow a "prescribed order" or because the leader is not "ordained." Ultimately, the majority's definition also obscures the central issue, barely discussed in the majority opinion, of whether Bronx Household is engaging in speech that fulfills the purposes of the forum and is consistent with non-religious speech occurring on school premises.

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[2] Indeed, the majority's attempt to differentiate between the "conduct of services," which it defines as "the performance of an event or activity," Maj. Op. at 11, and the conduct of "religious worship services" as two distinct categories of activity relies explicitly on the religious nature of the latter activity. Whereas a Boy Scouts merit badge service constitutes "a collective activity characteristically done according to an order prescribed by and under the auspices of an organized [civic group]" and is "typically . . . conducted by an . . . official of the [group]," Maj. Op. at 12, Bronx Household's weekly "event or activity" is barred solely because it is performed under the auspices of an organized religion and conducted by an ordained official of the religion. Thus, these purportedly distinguishing criteria squarely depend on the fact that religion is the underlying motivation for the expressive activity.

The core of the majority's argument is that by prohibiting "religious worship services," the Board has only prohibited "the conduct of an event or activity that includes expression of a point of view," rather than "excluding the expression of that point of view." Maj Op. at 12. The majority's attempt to differentiate between the conduct of an event, here labeled "services," and the protected viewpoints expressed during the event is futile because the conduct of "services" is the protected expressive activity of the sort recognized in Good News Club and, earlier, in Widmar. The majority turns its back on the Supreme Court's holding in Good News Club that it is viewpoint discrimination for a school to exclude what is effectively "an evangelical service of worship" from a limited public forum that in every material respect is identical to the forum that the Board established in this case. Compare Good News Club, 533 U.S. at 112 n.4, with id. at 137-38 (Souter, J., dissenting). The Board cannot lawfully exclude the conduct of an event based solely on the religious viewpoints expressed during the event.

Indeed, in rejecting the claim that religious worship is not protected speech in Widmar, Justice Powell explained that a carve-out of worship from protected religious speech does not have intelligible content and likely would not "lie within the judicial competence to administer." 454 U.S. at 269 n.6. The carve-out, Justice Powell wrote, also lacks "relevance" because there is "no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts

than for religious worship by persons already converted." Id. (citation omitted).

Fixing upon the label "services" for the program of worship at issue here as a carve-out from protected speech–as opposed to other characterizations such as "meeting," "gathering," "prayer group," or "time of worship"–does nothing to resolve the underlying carve-out problems identified by Justice Powell in Widmar. The same concerns–lack of intelligible content, judicial manageability, and relevance–persist. While the majority tries to address these concerns through its own definition of services, the concerns raised in Widmar adhere in the application of the majority's definition. It is as difficult for a court to ascertain when it is dealing with "services" as with "worship" generally and to manage any such distinction. And ultimately, any distinction between "services" and protected religious speech is irrelevant because, regardless of labels, "what matters is the substance of the [group's] activities." Good News Club, 533 U.S. at 112 n.4.

Moreover, that SOP § 5.11 exclusively targets religious viewpoints is evident from the fact that, as in Good News Club, only "religious" services are shut out of the forum. No similar restriction is placed on secular gatherings that are materially indistinguishable from Bronx Household's use of P.S. 15. While the Board denies Bronx Household a space to celebrate its ideals, it permits other outside organizations, such as the Legionnaire Greys Program and the Boy Scouts, to meet on school premises to further their secular ideals of "military

leadership," or "character building, citizenship, and personal and physical fitness." The Board permits these secular uses despite the fact that these groups also meet according to a prescribed order of conduct that they consider integral to the accomplishment of their goals. See, e.g., 1st Aff. of David Laguer, at ¶¶ 3, 4, & 6 (describing Legionnaire Greys Program meetings as "structured and ordered," each consisting of, inter alia, a ceremonial flag presentation, trumpets playing the national anthem, flag salutes, unit lessons, leadership training, and character building); Aff. of Jeffrey G. Fanara, at ¶¶ 5, 6, & 8 (describing Boy Scout troop meetings as consisting of a "pre-opening, a half-hour gathering period, . . . a formal opening ceremony . . . with a flag ceremony and [ ] a recitation of the Pledge of Allegiance and the Scout Oath or Law," and a "closing ceremony" that "includes a motivational message . . . based on Scouting's values"). There can be little doubt that the Board would similarly allow the use of its facilities by fraternal organizations, such as the Elks or the Freemasons, with comparable missions and ceremonies.

Just as each of these groups meets to address and discuss universal concerns while advancing its organizational mission, so too does Bronx Household's "Sunday morning meeting [act as] the indispensable integration point for [the group]. It provides the theological framework to engage in activities that benefit the welfare of the community." First Aff. of Robert Hall ("1st Hall Aff."), at ¶ 7. Further, it is during Bronx Household's gatherings that participants are taught "to love their neighbors as themselves, to defend the weak and

disenfranchised, and to help the poor regardless of their particular beliefs. It is a venue where people . . . come to talk about their particular problems and needs."[3] Id. Plainly, there can be no claim that Bronx Household's gatherings fail to address subjects that are otherwise permitted in the forum or that they differ from secular groups' meetings in any way other than their invocation of religious doctrine.[4]

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[3] For this reason, the majority errs by distinguishing Good News Club on the basis of the Supreme Court's statement that the Club meetings in that case did not involve "mere religious worship." 533 U.S. at 112 n.4; see Maj. Op. at 25, 38. The majority, however, omits a critical modifier: the Court made clear that it did not consider the Club's activities to be "mere religious worship, divorced from any teaching of moral values." Id. (emphasis added). The same is true here: Bronx Household's worship services cannot be divorced from the teaching of moral values that are part and parcel of those services, which include Bible lessons and instruction. Indeed, how can the majority's conception of religious worship services ever be divorced from promoting moral values?

[4] While this case was argued under the First Amendment's Free Speech and Establishment Clauses, the Board's action also raises Free Exercise Clause concerns. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993); see also Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 877 (1990). Thus, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." Church of the Lukumi Babalu Aye, 508 U.S. at 533 (internal citation omitted). Given the plain language of SOP § 5.11, the Board's persistent exclusion of outside organizations

The majority also relies on a number of hypothetical activities to argue that the Board could deny a permit application in order to avoid "either harm to persons or property, or liability, or a mess, which those activities may produce." Maj. Op. at 13. Irrespective of the Board's power to deny permits for such hypothetical uses out of a concern for safety, sanitation, and non-interference with other uses of the schools, see Capitol Square Review & Adv. Bd. v. Pinette, 515 U.S. 753, 758 (1995), none of these concerns has ever been present in this case. Strikingly, while quick to proffer these hypothetical uses, the majority never comes to grips with the significant fact that the Board allows most outside organizations to access its facilities for uses that "pertain[ ] to the welfare of the community" and "promot[e] [children's] development generally," so long, of course, as those organizations' activities do not amount to religious worship services or transform the school into a "house of worship." Despite the majority's arguments to the contrary, it is readily apparent that the Board singles out religious worship for disfavored treatment. The majority's argument that SOP § 5.11 is nothing more

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seeking to use school facilities for religious purposes, and the Board's repeated statements that SOP § 5.11 is aimed at the practice of religion, it is undisputable that SOP § 5.11 is not neutral. See Smith, 494 U.S. at 877-78. Because SOP § 5.11 specifically burdens religious practices, it must advance a compelling government interest to pass constitutional muster. See id. at 894-95 (O'Connor, J., concurring). Such a compelling interest is absent in this case for the reasons stated in Part II.

than a content-based restriction on a specific type of activity, albeit a religious one, plainly fails.[5]

Finally, the majority argues that my finding of viewpoint discrimination overlooks the Board's Establishment Clause rationale. Maj. Op. at 33-37. As an initial matter, I disagree that the Board's Establishment Clause concerns are reasonable, for the reasons discussed in Part II. Nevertheless, even if the Board were to have legitimate Establishment Clause concerns, those concerns could do nothing to undermine my conclusion that the Board engaged in viewpoint discrimination; at most, they could only serve as a potential justification for such discrimination.

Thus, whether the Board's actions under SOP § 5.11 are properly characterized as the exclusion of worship, the exclusion of "religious worship services," or the exclusion of "the conduct of an event or activity that includes expression of a [religious] point of view," Maj. Op. at 13, the Board has

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[5] The Board's separate reliance on Faith Center Church Evangelistic Ministries v. Glover, 480 F.3d 891 (9th Cir. 2007), to argue that SOP § 5.11 is content, not viewpoint, discrimination is misplaced. In Faith Center, the Ninth Circuit concluded that Contra Costa County's exclusion of a religious congregation from its library meeting space was content, not viewpoint, discrimination because the congregation's intended use of the space during normal operating hours for "Praise and Worship" services was incompatible with (a) the purpose for which the meeting room forum had been created, and (b) the "library's primary function as a sanctuary for reading, writing, and quiet contemplation . . . available to the whole community." Id. at 902, 909-11. No such incompatibility in either purpose or facility is present here.

discriminated against Bronx Household on the basis of religious viewpoint. The group's proposed use of P.S. 15 fits plainly within the purpose of the limited public forum created under SOP § 5.6.2; is not incompatible with any time, place, and manner restrictions imposed by the Board; and has been denied solely because Bronx Household wishes to address otherwise permissible subjects from a religious viewpoint through its conduct of religious "worship services."

## II. Bronx Household's Intended Use of P.S. 15 Raises No Legitimate Establishment Clause Concerns

After concluding that SOP § 5.11 is content discrimination, the majority next considers the reasonableness of SOP § 5.11. However, it does so not in light of the forum's stated purposes, but rather in light of the Board's stated concern that allowing the conduct of "religious worship services" in schools would give rise to a sufficient appearance of endorsement to constitute a violation of the Establishment Clause. See Maj. Op. at 19. Unlike my colleagues in the majority and the Board, I am not prepared to shut out constitutionally-protected speech from a neutral forum on the sole basis that it is "quintessentially religious." Good News Club, 533 U.S. at 111. I would hold that the actions of Bronx Household, a private party, cannot transform the government's neutral action into an Establishment Clause violation. The Board's fear of being perceived as establishing a religion is therefore not reasonable, if the exclusion is viewed (erroneously) as content discrimination, much less sufficiently compelling to

justify the viewpoint discrimination that I believe is occurring.

Just like the defendants in Widmar, the Board and the majority "misconceive[] the nature of the case." 454 U.S. at 273. The Board has not created a forum open only to religious speech. Rather, "it has opened its facilities for use by [the community], and the question is whether it can now exclude groups because of the content of their speech." Id. In fact, the Supreme Court has "[m]ore than once . . . rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." Rosenberger, 515 U.S. at 839 (citing Lamb's Chapel, 508 U.S. at 393-94; Bd. of Educ. of Westside Cmty. Sch. (Dist. 66) v. Mergens, 496 U.S. 226, 248, 252 (1990)). Because the Establishment Clause looks only to the government's role, if any, in establishing religion and not the private speaker's choice in exercising his free speech rights, I reach the opposite conclusion from the majority as to whether a reasonable person would perceive the Board's grant of the neutral-forum permit sought here to be an endorsement of religion.

The Board and the majority invoke Lemon v. Kurtzman, 403 U.S. 602 (1971), to demonstrate that SOP § 5.11 is reasonable, but they misapply the Lemon test, thereby reaching several conclusions that directly contradict controlling Supreme Court precedent. In particular, the majority offers five bases for concluding that SOP § 5.11 is reasonably based on the Board's supposed concern that granting

Bronx Household a permit for "Christian worship services" might have the "principal or primary effect" of endorsing religion, see id. at 612, thereby violating the Establishment Clause.[6] The battle that the majority and the Board wish to fight, however, has already been lost. The Supreme Court has rejected Establishment Clause concerns, including those raised by the majority, in this context because they are premised on the mistaken belief that permitting religious groups to use school facilities for religious purposes on a non-school day in a neutral forum creates a realistic danger that the public will perceive the Board as endorsing religion.

The relevant question to be asked is not whether any person might mistakenly perceive the Board as conveying a message of endorsement or disapproval; rather, the endorsement test asks whether "an

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[6] The five bases the majority cites are as follows: (1) after-hours use of school premises for "religious worship services" transforms the school into a church because "[t]he church has made the school the place for the performance of its rites," Maj. Op. at 20; (2) the Board might reasonably fear that allowing access for "religious worship services" results in the Board's substantial subsidization of religion, Maj. Op. at 21; (3) granting access for "religious worship services" might permanently convert a school on Sundays into a state-subsidized church "by reason of public perception of endorsement" that "is made particularly acute by the fact that P.S. 15 and other schools used by churches are attended by young and impressionable students," Maj. Op. at 22-23; (4) increased availability of Sunday permits would favor Christian groups over other denominations, see Maj. Op. at 23-24; and (5) deliberate exclusion of certain members of the general public, such as persons excommunicated from the church who advocate the Islamic religion, by a religious organization aggravates existing Establishment Clause concerns, see Maj. Op. at 24.

objective observer, acquainted with the text, legislative history, and implementation of the [challenged law or policy], would perceive it as a state endorsement of [organized religion] in public schools." Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (emphasis added) (quoting Wallace v. Jaffree, 472 U.S. 38, 73, 76 (1985) (O'Connor, J., concurring)). Thus, the majority confuses its analysis when it emphasizes the private speaker's conduct, rather than the government's role, in establishing religion. The fact that a community member might witness an outside organization using a school during non-school hours to further its religious cause does not in itself raise a legitimate concern that the government has acted in contravention of the Establishment Clause. See Capitol Square, 515 U.S. at 767 (Scalia, J., for the plurality) ("By its terms th[e] [Establishment] Clause applies only to the words and acts of government. It was never meant, and has never been read by this Court, to serve as an impediment to purely private religious speech connected to the State only through its occurrence in a public forum." (emphasis in original)).

For these reasons, the majority's focus on the "religious nature" of the speech, without regard to the nature of the speaker, is misplaced. The majority cites McCreary County v. ACLU, 545 U.S. 844 (2005); County of Allegheny v. ACLU, 492 U.S. 573 (1992); and Lee v. Weisman, 505 U.S. 577 (1992), as foundational to its Establish Clause analysis, and of course they would be highly relevant to this case were we dealing with religious speech by the government. In McCreary and County of Allegheny, the government's placement of the Ten

Commandments and a nativity creche, respectively, in county courthouses violated the Establishment Clause, as did the government in Lee v. Weisman when a school official invited a rabbi to give an invocation and benediction at a middle-school commencement exercise. In the case before us, however, the most the government has done is to open up a neutral public forum limited by its laudable educational and community-building purposes. Unlike in these three cited cases, it has neither promoted nor endorsed a religious message.

Also, "a significant factor in upholding government programs in the face of Establishment Clause attack is their neutrality towards religion." Good News Club, 533 U.S. at 114 (quoting Rosenberger, 515 U.S. at 839). Indeed, the Free Speech Clause's requirement of viewpoint neutrality by the government in opening a forum tends to undermine, if not preclude, a finding of school sponsorship in the Establishment Clause context. See Good News Club, 533 U.S. at 114 ("Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, [the school district] faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club.").[7] To an objective, fully informed

[7] Indeed, it bears noting that it was, at least in part, the Second Circuit's previous approval of the Board's rejection of Bronx Household's permit application pursuant to an earlier formulation of the religious-use prohibition ("No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school.") that prompted the Court to grant certiorari in Good News Club. See 533 U.S. at 105-106 (citing Bronx Household I

observer, the fact that the forum is open to a wide spectrum of participants bespeaks the state's neutrality, not its favoring of religion or any other group.

In any event, even if a private actor's conduct could somehow transform a neutral forum into a state endorsement of religion, Bronx Household's services would not do so here. Just as in Lamb's Chapel and Good News Club, Bronx Household's use of P.S. 15 takes place during non-school hours (actually on a day when there is no school), lacks school sponsorship, occurs in a forum otherwise available for a wide variety of uses, and is open to the public. See 1st Hall Dep. at 30 ("Worship services are always open to the public."); 1st Hall Aff., ¶ 5 ("Our Sunday morning meetings are open to all members of the public. The meetings are not closed to a limited group of people, such as church members and their guests.").[8] And while the

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as one of a number of circuit court cases contributing to a circuit conflict "on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech"). It would not have been unreasonable for the Court to have expected that its Good News Club decision would end this case as well.

[8] While Bronx Household, in accordance with its religious tenets, limits communion to church members who have been baptized, all members of the public are free to attend its Sunday worship services and there is no evidence that Bronx Household has ever refused admission to anyone. The majority's statement that Bronx Household "excludes. . . persons who have been excommunicated or who advocate the Islamic religion from full participation in its services," Maj. Op. at 23, rests on Pastor Robert Hall's answers to hypothetical questions posed to him by the Board during his deposition that

majority in this case cites the "particularly acute" danger that young and impressionable students will perceive the weekend use of their schools by religious groups as the Board's endorsement of religion or certain religious denominations, see Maj. Op. at **[23]**, the Supreme Court rejected this same argument in Good News Club, where it was presented with facts less favorable to Good News Club than those the majority cites to here. See, e.g., Good News Club, 533 U.S. at 117-18. Specifically, the Good News Club's activities took place directly after school and catered to children ages 6-12, id.; here, by contrast, Bronx Household's services occur on Sundays, when the only children present at the school are those attending the services, presumably with their parents.

The majority argues at some length that permitting weekly worship services at P.S. 15 transforms the school into a church. See, e.g., Maj. Op. at 20 ("When worship services are performed in a place, . . . [t]he place has, at least for a time, become the church."). The majority then equates permitting worship services to "subsidizing churches" and "allowing schools to be converted into churches." Maj. Op. at 21**.** The "church" reference appears no less than twelve times in the majority opinion. Such an argument–that somehow a neutral forum is physically (or perhaps metaphysically) transformed into a non-neutral forum by the private activity undertaken there–has the feel of rhetoric.

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specifically addressed church membership, not public attendance at Sunday worship services. See 2nd Hall Dep. at 35-42.

The same claim could have been made in Widmar and Good News Club, in which decidedly church-related activities were permitted to occur on a regular basis. Bronx Household's services do not convert P.S. 15 into a church any more than the Boy Scout's meetings convert it into a Boy Scout lodge.

The majority also errs in relying on the fact that some outside religious organizations may more easily obtain school-use permits because they worship on Sundays, not Fridays and Saturdays. See Maj. Op. at 23-24. An Establishment Clause violation does not result from either private choice or happenstance. See Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002); Good News Club, 533 U.S. at 119 n.9; Harris v. McRae, 448 U.S. 297, 319 (1980) ("[I]t does not follow that a statute violates the Establishment Clause because it happens to coincide or harmonize with the tenets of some or all religions." (internal quotation marks omitted)). Moreover, that an increasing number of Christian groups have sought Sunday-use permits under SOP § 5.6.2 does not equate to permit unavailability for other religious groups. Indeed, while the majority states that "Jews and Muslims generally cannot use school facilities for their services because the facilities are often unavailable on the days that their religions principally prescribe for services," Maj. Op. at 23-24, the record is clear that Jewish and Muslim groups have been granted weekend access to school premises across the city under the community use policy. See, e.g., J.A. at 88 (Friday permit for Downtown Synagogue's "religious services"); id. at 185 (Saturday permit for Downtown Synagogue's "religious services"); id. at 179 (Saturday permit for

Hope of Israel's "fellowship meetings"); id. at 183 (Saturday permit for Khal Bais Yitzchok's "religious fellowship meetings"); id. at 229 (Saturday permit for Muslimmah of NA's "religious services").[9] Finally, the majority's reliance on County of Allegheny v. ACLU, 492 U.S. 573 (1989), and Lynch v. Donnelly, 465 U.S. 668 (1984), is misplaced because those cases "neither hold[ ] nor even remotely assume[ ] that the government's neutral treatment of private religious expression can be unconstitutional." Capitol Square, 515 U.S. at 765 (Scalia, J., for the plurality).

Supreme Court caselaw also refutes the Board's argument that granting Bronx Household Sunday access to P.S. 15 constitutes direct aid to religion because it allows Bronx Household to bypass the expensive New York City real estate market that

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[9] The majority relies on the Board's denial of one group's request to hold Jewish services on Saturdays in a school generally used for Christian services on Sundays in support of its argument that permits are unavailable to Jewish and Muslim groups. See Maj. Op. at 24. While the Board implies that there is a lack of availability of Friday and Saturday permits for use of its 1,197 buildings, its own evidence demonstrates that approximately 750 buildings are available for after-school use on Fridays, that 400 buildings are available for Saturday use, and that 900 buildings are available for Sunday use. See Appellant's Br. at 13-14. Thus, that some religious denominations use school premises more often than others may simply indicate their lack of other adequate meeting space in the community and not any increased ability on their part to secure a permit. See 2nd Hall Dep. at 105-06. That some religious groups utilize the extended use policy more than others simply does not give rise to a legitimate perception that the Board grants permits to particular denominations to the exclusion of others.

might otherwise preclude it from establishing a congregation. Cf. Maj. Op. at 21. The Board's argument runs afoul of Rosenberger:

> It does not violate the Establishment Clause for a [school] to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises. . . . The government usually acts by spending money. Even the provision of a meeting room, as in Mergens and Widmar, involved governmental expenditure, if only in the form of electricity and heating or cooling costs. The [analytical] error . . . lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient. If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then Widmar, Mergens, and Lamb's Chapel would have to be overruled.

515 U.S. at 842-43 (emphasis added). Even Justice Souter, who dissented in Rosenberger, agreed that the government does not provide impermissible direct aid to religion each time a non-government speaker utilizes a limited public forum for private religious speech. See id. at 888 (Souter, J., dissenting). Thus, established Supreme Court

precedent effectively forecloses the argument that permitting Bronx Household access to P.S. 15 for the purpose of engaging in private religious speech results in the Board's unlawful provision of direct aid to a religious group.

In sum, while the majority argues that allowing Bronx Household weekly use of P.S. 15 for "religious worship services" would force the Board to render direct aid to religion, convey a message that the Board endorses religion over non-religion, and exhibit a preference for certain religious denominations over others, these arguments are without merit. Rather, the neutrality of the forum is preserved when religious speech, like non-religious speech, is allowed. Accordingly, if Lemon v. Kurtzman is to apply,[10] I would hold that the Board has failed to demonstrate that granting Bronx Household Sunday access to P.S. 15 for worship services would have the principal or primary effect of advancing religion or otherwise conveying a message of endorsement.[11] While I would require the Board to

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[10] The Supreme Court recently noted that many of its Establishment Clause cases "have not applied the Lemon test," while others "have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test." Van Orden v. Perry, 545 U.S. 677, 686 (2005).

[11] The majority cites Capitol Square for the proposition that a private religious group may so dominate a forum so as to convey a message of governmental approval. See Maj. Op. at 21. While Bronx Household's four-hour use of P.S. 15 on Sundays hardly dominates the limited public forum the Board has created under SOP § 5.6.2, any concern over a given group's prolonged or dominant use of the forum can be

demonstrate some sort of government endorsement (an uphill task, to say the least, given the Free Speech Clause's requirement of forum neutrality) before allowing it to restrict the viewpoint advanced by private religious speech that otherwise falls within the purposes of the forum, the lack of a basis in law for the Board's establishment concerns undermines any holding that SOP § 5.11 is reasonable, even under the majority's flawed analysis that SOP § 5.11 is mere content discrimination, much less a compelling justification for the Board's viewpoint discrimination.

* * * * * *

I have no doubt that this case stirs deep feelings and carries implications far broader than the Board's exclusion of Bronx Household's "Christian worship services" under SOP § 5.11. This case also presents important doctrinal considerations worthy of the Supreme Court's attention. In the meantime, however, as a result of the majority's decision that "religious worship services" can be barred from the neutral limited public forum the Board created under SOP § 5.6.2, numerous religious groups that

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addressed through reasonable time, place, and manner restrictions. For example, in order to ensure greater weekend availability of a particular school's facilities to more outside organizations, the Board could limit the number of times per year that any one outside organization may use school facilities. Likewise, the Board may revoke any organization's permit if it fails to adhere to neutral rules imposed by the Board, i.e., by failing to include the Board's sponsorship disclaimer in written materials or by actively creating an impression of school sponsorship. The majority's reliance on Pleasant Grove City, see Maj. Op. at 20, is similarly misplaced.

provide recognized benefits to the people and their communities, consistent with the forum's purposes, will be denied access to otherwise available school space simply because their private speech is intertwined with their standard devotional practices and deeply-held religious beliefs. Others will be chilled. Because SOP § 5.11's ban on religious worship services violates the Free Speech Clause, I respectfully dissent.

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF NEW YORK

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

LORETTA A. PRESKA, U.S.D.J.

For the reasons set forth in my decisions in Bronx Household of Faith v. Board of Educ. of City of New York, 400 F.Supp.2d 581 (S.D.N.Y. 2005), vacated 492 F.3d 89 (2d Cir. 2007) (per curiam), and Bronx Household of Faith v. Board of Educ. of City of New York, 226 F.Supp.2d 401 (S.D.N.Y. 2002), Plaintiffs' motions for summary judgment and for a permanent injunction are granted, and Defendants' cross motion for summary judgment is denied. Defendants are hereafter enjoined from enforcing the New York City Department of Education's revised Standard

Operating Procedures Manual ("SOPM") § 5.11 so as to deny Plaintiff or any other similarly situated individual or entity a permit to hold religious worship services in a New York City public school during non-school hours.

SO ORDERED:

DATED: New York, New York
November l, 2007

LORETTA A. PRESKA, U.S.D.J.

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF NEW YORK

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

LORETTA A. PRESKA, U.S.D.J.:

## INTRODUCTION

The liberty afforded by the First Amendment of the Bill of Rights to pursue religious expression free of government molestation was presciently observed by the Framers of the Constitution to be among the most divisive and factious to imperil societal harmony. See The Federalist No. 10, at 41-42 (James Madison) (Terence Ball ed., 2003) ("A zeal for different opinions concerning religion . . . ha[s] . . . divided mankind into parties, inflamed them with

mutual animosity, and rendered them much more disposed to vex and oppress each other than to cooperate for their common good."); U.S. Const. amends. I, XIV. In fact, this inherent tension recently was evidenced by the Supreme Court's seemingly divergent rulings regarding public display of the Ten Commandments. McCreary County, Ky. v. ACLU of Ky., 125 S. Ct. 2722, 2733 n.10 (2005) (prohibiting display of the Ten Commandments in county courthouses and noting that "Establishment Clause doctrine lacks the comfort of categorical absolutes"); Van Orden v. Perry, 125 S. Ct. 2854 (2005) (permitting display of the Ten Commandments in public space outside the Texas State Capitol).

Thus, it is perhaps not surprising that the Supreme Court's jurisprudence has evolved throughout our history from sometimes unabashed support of religion, see, e.g., Church of the Holy Trinity v. United States, 143 U.S. 457, 458, 471 (1892) (holding that a statute making it unlawful for any person "in any manner whatsoever, to prepay the transportation" or otherwise import an alien "to perform labor or service of any kind in the United States" could not have been intended to apply to a church's contracting for a pastor from England: "If we pass beyond these [historical] matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth . . . that this is a Christian nation."), toward a requirement of neutrality toward religion, see, e.g., Everson v. Bd. of Educ. of the Twp. of Ewing, 330 U.S. 1, 18 (1947) (permitting government funding for

children's transportation to school, both public schools and religious schools: "Th[e First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.") and Agostini v. Felton, 521 U.S. 203, 231 (1997) (reversing its earlier decision and finding no Establishment Clause violation in a federally funded program providing remedial instruction to children on a neutral basis: "[W]here the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis . . . the aid is less likely to have the effect of advancing religion."). It is that requirement of neutrality that prescribes the outcome in this case.

The Bronx Household of Faith, Robert Hall, and Jack Roberts ("Plaintiffs") brought this action against the Board of Education of the City of New York (the "Board") and Community School District No. 10 (the "School District," collectively, "Defendants"), alleging that Defendants' refusal to rent space in a New York City public middle school to the Bronx Household of Faith (the "Church"), a Christian church, for Sunday morning meetings that include worship violated the First Amendment, the Equal Protection Clause, and Sections 3, 8, and 11 of Article I of the New York Constitution. Plaintiffs and Defendants now cross-move for summary judgment. For the reasons set forth below, Plaintiffs' motion for

summary judgment is granted, and Defendants' motion is denied.

## BACKGROUND

The factual and procedural history of this action is set forth in detail in my June 26, 2002 Opinion granting Plaintiffs' motion for a preliminary injunction. 226 F. Supp. 2d 401 (S.D.N.Y. 2002) ("Bronx II"). Accordingly, only those facts relevant to the instant motions are set forth below.

In September 1994, the School District denied the request of the Church to rent space in Public School M.S. 206B, Anne Cross Merseau Middle School ("M.S. 206B" or the "School") for Sunday morning meetings that include religious worship. The denial was based on the Board's Standard Operating Procedure § 5.9 (1993) ("Former SOP § 5.9") and New York Education Law Section 414 (McKinney 2000), both of which prohibited rental of school property for the purpose of religious worship. In 1995, Plaintiffs brought an action in this Court challenging the School District's denial on constitutional grounds. See Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, No. 95 Civ. 5501 (LAP), 1996 WL 700915 (S.D.N.Y. Dec. 5, 1996). I found that the School District had created a limited public forum and that its regulations were reasonable and related to a legitimate government interest. Thus, I denied Plaintiffs' motion for summary judgment and granted Defendants' cross-motion for summary judgment. In 1997, the Court of Appeals affirmed the judgment, 127 F.3d 207 (2d

Cir. 1997) ("Bronx I"), and in 1998, the Supreme Court denied certiorari. 523 U.S. 1074 (1998).

Employing reasoning similar to its reasoning in Bronx I, the Court of Appeals affirmed the District Court's grant of summary judgment in favor of the defendant school district in The Good News Club v. Milford Cent. Sch., 202 F.3d 502 (2d Cir. 2000). The Good News Club is "a community-based Christian youth organization" that sought to use Milford Central School facilities for after-school meetings of children involving "'singing songs, hearing Bible lesson[s], and memorizing scripture.'" Id. at 504, 507. The majority found that the Good News Club is "focused on teaching children how to cultivate their relationship with God through Jesus Christ[,]" a pursuit that is "quintessentially religious" "under even the most restrictive and archaic definitions of religion." Id. at 510. Thus, the Court concluded, the Milford School District properly excluded the Good News Club on the basis of "content, not viewpoint." Id. at 511.

In a dissenting opinion, Judge Jacobs faulted the majority for distinguishing between groups that teach secular morality and those that teach morality that stems from religious beliefs. "The fallacy of this distinction is that it treats morality as a subject that is secular by nature, which of course it may be or not, depending on one's point of view." Id. at 515 (Jacobs, J., dissenting). Furthermore, Judge Jacobs observed, "[e]ven if one could not say whether the Club's message conveyed religious content or religious viewpoints on otherwise-permissible content, we should err on the side of free speech. The

concerns supporting free speech greatly outweigh those supporting regulation of the limited public forum." Id.

The Supreme Court granted certiorari, 531 U.S. 923 (2000), and reversed the decision of the Court of Appeals, 533 U.S. 98 (2001). The majority accepted the parties' agreement that the school had created a limited public forum but disagreed with the Court of Appeals' characterization of the Good News Club's activities, particularly its characterization of religious activities as different from other activities in the school relating to the teaching of moral values. Id. at 106, 110-11. The Court noted:

> Despite our holdings in Lamb's Chapel and Rosenberger, the Court of Appeals, like Milford, believed that its characterization of the Club's activities as religious in nature warranted treating the Club's activities as different in kind from the other activities permitted by the school.

Id. at 110-11 (citation omitted).

The Court went on to reject definitively the treating of "quintessentially religious" activities as different in kind from the teaching of character and morals from a particular viewpoint:

> We disagree that something that is "quintessentially religious" or "decidedly religious in nature" cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint. See 202 F.3d at 512

> (Jacobs, J., dissenting) ("When the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters"). What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons.

Id. at 111.

The Court further disagreed with the Court of Appeals' implicit finding that "reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not." Id. Ultimately, the Court held that "Milford's exclusion of the Club from use of the school, pursuant to its community use policy, constitute[d] impermissible viewpoint discrimination." Id. at 112.

Shortly after the Supreme Court issued its opinion in Good News Club, Plaintiffs in this case contacted the School District to renew their request to meet at M.S. 206B from 10:00 a.m. to 2:00 p.m. each Sunday to engage in singing, the teaching of adults and children from the viewpoint of the Bible, and social interaction among members of the Church to promote their welfare and that of the community. Pagliuca Decl., Ex. A.[1] On August 16, 2001, an

[1] "Pagliuca Decl." refers to the Declaration of Frank Pagliuca sworn to on December 5, 2001.

attorney for the Board informed Plaintiffs' counsel that Defendants "were denying [the application] because the meetings would violate the defendants' policy prohibiting religious services or instruction in the school buildings." Compl. ¶ 15.[2] The policy to which the Board referred was SOP § 5.11 (2001) ("Enjoined SOP § 5.11") (precedently Former SOP § 5.9), which provided:

> No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

Enjoined SOP § 5.11.

Shortly after receiving Defendants' refusal letter, Plaintiffs filed the Complaint on September 24, 2001. On July 3, 2002, in light of the Supreme Court's decision in Good News Club, I granted Plaintiffs' motion for a preliminary injunction. I found the deprivation of Plaintiffs' First Amendment rights to constitute irreparable harm. 226 F. Supp. 2d at 412. Turning to Plaintiffs' likelihood of success on the merits, I found that Plaintiffs' proposed activities amounted to more than "mere religious worship" in that they included singing, teaching, socializing, and eating--"activities benefitting the welfare of the

[2] "Compl." refers to the Complaint filed on Sept. 24, 2001.

community, recreational activities and other activities that are consistent with the defined purposes of the limited public forum." Id. at 414-15. I also found that Defendants' argument that worship is different in kind from other activities was precluded by Good News Club. Id. at 416. Even if, arguendo, there were discernible categories of worship and non-worship, it would be futile to attempt to distinguish "religious content from religious viewpoint where morals, values and the welfare of the community are concerned." Id. at 418. Moreover, "the government may not, consistent with the First Amendment, engage in dissecting speech to determine whether it constitutes worship." Id. at 423. In response to Defendants' claim that their viewpoint discrimination was justified in light of their asserted compelling interest in avoiding an Establishment Clause violation, I held that permitting Plaintiffs to use space in the School would not lead to such a violation because Plaintiffs meet during nonschool hours, the meetings are obviously not endorsed by the School District, and the meetings are "open to all members of the public." Id. at 426.

The Court of Appeals affirmed the preliminary injunction on June 6, 2003, acknowledging "the factual parallels between the activities described in Good News Club and the activities at issue in the present litigation." 331 F.3d 342, 354 (2003) ("Bronx III"). The Court of Appeals

> f[ou]nd no principled basis upon which to distinguish the activities set out by the Supreme Court in Good News Club from the activities that the Bronx Household of

> Faith has proposed for its Sunday meetings at Middle School 206B. Like the Good News Club meetings, [Plaintiffs intended to] . . . combine preaching and teaching with such "quintessentially religious" elements as prayer, the singing of Christian songs, and communion.

Id. Because the Board opened its schools for other social, civic, and recreational meetings so long as those uses are nonexclusive and open to the public, the Court found a substantial likelihood that Plaintiffs would be able to demonstrate that Defendants' refusal of Plaintiffs' permit application constitutes unconstitutional viewpoint discrimination. Id. The Court again noted the similarity of the instant facts to those in Good News Club and upheld the finding in Bronx II that Defendants were not justified in refusing Plaintiffs' application because allowing Plaintiffs to conduct their activities in the School would not give rise to an Establishment Clause violation. Id. at 356. The Court of Appeals did not reach the further determination that worship cannot be treated as a distinct activity, noting that this view contradicts the Court's position as expressed in Bronx I and was not explicitly rejected in Good News Club. Id. at 355.

Plaintiffs thereafter applied for, and were granted, permission to use P.S. 15 located at 2195 Andrews Avenue, Bronx, New York ("P.S. 15"), on Sundays from 10:00 a.m. to 2:00 p.m. See Grumet

Decl. I, Ex. F.[3] On March 23, 2005, the Board of Education announced its plans to modify Enjoined SOP § 5.11 to read as follows:

> No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship. Permits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this chapter on the same basis that they are granted to other clubs for students that are sponsored by outside organizations.

Pl. Rule 56.1 Stmt. ¶ 53.[4]

To clarify that the revised policy presents an actual case or controversy, on August 17, 2005, Defendants notified Plaintiffs that

> Plaintiffs' use of P.S. 15 for the Bronx Household of Faith's regular worship services is prohibited under the revised section 5.11. Defendants are not currently enforcing the revised section 5.11 (or advising the field of this change) because of the preliminary injunction Order that was entered in this case. Should defendants prevail in their motion for summary

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[3] "Grumet Decl." refers to the Declaration of Lisa Grumet executed on April 11, 2005.

[4] "P1. Rule 56.1 Stmt." refers to Plaintiffs' Local Rule 56.1 Statement of Material Facts dated April 8, 2005.

> judgment and the preliminary injunction Order be vacated, then any future application by plaintiffs to hold their worship services at P.S. 15 or any other school will be denied.

Letter from Lisa Grumet to Jordan Lorence and Joseph Infranco (August 17, 2005).

On March 18, 2005, the parties were granted permission to cross-move for summary judgment, and they have done so. Amicus briefs were filed by the United States in support of Plaintiffs' motion and by The Association of the Bar of the City of New York in support of Defendants' motion. In addition, Agudath Israel of America previously filed an amicus brief in support of Plaintiffs' position.

Plaintiffs seek to convert the July 2002 preliminary injunction into a permanent injunction by way of their motion for summary judgment and contend that the present SOP § 5.11 (2005) ("Present SOP § 5.11") is unconstitutional in the same manner as was the Enjoined SOP.

Defendants argue that their refusal to rent space to Plaintiffs for Sunday morning meetings does not violate Plaintiffs' First Amendment rights and that, even if such refusal infringes on the First Amendment rights of Plaintiffs, the infringement is necessary so that Defendants can avoid a violation of the Establishment Clause.

## DISCUSSION

### I. Summary Judgment Standard and Record

Summary judgment is appropriate when the pleadings, depositions, interrogatories, admissions, and affidavits demonstrate that there are no genuine issues of material fact in dispute and that one party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Because summary judgment searches the record, Bayway Ref. Co. v. Oxygenated Mktg & Trading A.G., 215 F.3d 219, 225 (2d Cir. 2000), the affidavits submitted on the preliminary injunction motion also may be considered. "[A] party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). "Factual disputes that are irrelevant or unnecessary" cannot defeat a motion for summary judgment. Id. at 248. All ambiguities must be resolved, and all reasonable inferences drawn, against the moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1982)). Only if it is apparent that no rational finder of fact "could find in favor of the nonmoving party because the evidence to support its case is so slight" should summary judgment be granted. Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1224 (2d Cir. 1994).

I note at the outset that despite Defendants' repeated urging that the facts have changed since the preliminary injunction was entered, the record reflects otherwise. The record is larger, but much of the material submitted is speculative, that is, based

on what might (or might not) happen in the future. For example, Defendants contend that disclaimers are difficult to enforce and people "who are not part of a congregation may have contact with congregation members . . .," Def. Mem. in Support at 19[5] (emphasis added); "worship in schools can be highly visible . . .," Def. Mem. in Support at 21 (emphasis added); "community members may hold school officials responsible for the congregation's actions . . .," Def. Mem. In Support at 25 (emphasis added). Much of the material in the now-larger record also is irrelevant to the issues at hand. For example, at oral argument, Defendants' counsel stated:

> The situation we have here is based on the past two to three years. Most of the groups that we know have come in after the Second Circuit decision, and plaintiffs themselves have expressed an interest in having churches in all 1,200 of the city's public schools. They have talked about the importance of this for church planting and for establishing new churches.

Tr. 33:24-34:6[6] (emphasis added).

I am unable to appreciate the legal relevance of Plaintiffs' statements about church planting and

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[5] "Def. Mem. in Support" refers to Defendants' Memorandum of Law in Support of their Motion for Summary Judgment dated April 11, 2005.

[6] "Tr." refers to the transcript of the oral argument held on August 11, 2005.

establishing additional churches operating out of schools in the future. Just as the Supreme Court did in Good News Club, I look past any labels, see 533 U.S. at 112, n.4 ("Regardless of the label Justice S[outer] wishes to use, what matters is the substance of the Club's activities . . . .") and motivations. Instead, I look to the substance of the Church's activities which, it is undisputed, consist of: "(1) singing of songs and hymns to honor and praise the Lord Jesus Christ, (2) teaching and preaching from the Bible, (3) sharing of testimonies from people attending the meeting, (4) fellowship and social interaction with others, (5) celebrating the Lord's supper (communion), in which the members share bread and grape juice which reminds them of the body and blood of Christ given to them on the Cross," Pl. Rule 56.1 Stmt. ¶ 44 (citing First Affidavit of Robert Hall, sworn to on December 13, 2001, ¶¶ 3-4 ("First Hall Aff.")), the same activities that were proposed at the preliminary injunction stage. Thus, with the exception of the modification of Enjoined SOP § 5.11, which is discussed below, the record appears to be substantially the same as it was at the preliminary injunction stage. Although not dispositive, I note that the parties concede that there are no material facts in dispute. Tr. 6:12-7:20.

II. Free Speech

A. The Forum

The first step in analyzing the constitutionality of a state's restriction on private speech in a public forum is to determine the nature of the forum. Good News Club, 533 U.S. at 106 (citing Perry Educ. Ass'n.

v. Perry Local Educators' Ass'n., 460 U.S. 37, 44 (1983)). In Bronx I, the Court of Appeals confirmed that the Board had created a limited public forum by restricting access to school buildings to certain speakers and subjects. 127 F.3d at 212, 214. While Plaintiffs argue that the Board has created an open or designated forum, Pl. Br. 18-19,[7] the Board argues that Plaintiffs are precluded from relitigating the issue of the type of forum created by the Board, see Def. Mem. in Support at 4.

Just like the facts regarding Plaintiffs' activities during their Sunday meetings, the facts supporting the Court's characterization of the forum opened by the Board as a limited public forum have not changed.[8] The Board continues to offer school space

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[7] "Pl. Br." refers to Plaintiffs' Brief in Support of Motion for Summary Judgment dated April 8, 2005.

[8] Defendants argue that the individual school at issue, here M.S. 206B that plaintiffs applied to use or P.S. 15 which they actually use, is the appropriate forum to be considered, not the School District or the City. E.g., Tr. 14:23; 15:11-12; 22:4-5. While each school has its own students within a geographic boundary, the proximity of schools to each other within the City certainly makes other schools relevant to the present analysis. Tr. 30:21-23 ("[W]ithin 1.9 miles of P.S. 15 . . . there are 149 schools available."). The policies at issue are the policies of the Board applicable citywide. Compl. ¶¶ 9, 20. Permits are applied for and ultimately issued by the Board based on those citywide policies. Grumet Decl., Ex. F. Also, Defendants do not seem to suggest that the Board's policy should be litigated on a school-by-school basis (or that the policy differs from one school to another) and, indeed, Defendants have submitted citywide data in support of their motion in addition to anecdotal data relating to schools other than P.S. 15. While consideration of evidence relating to individual schools, including but not limited to M.S. 206B and P.S. 15, is appropriate, cabining consideration only to

for use by student and community groups, permitting "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community, so long as these uses are non-exclusive and open to the public." Bronx III, 331 F.3d at 354; see SOP 5.6.2. Accordingly, there is no reason to depart from the prior holding that the Board has established a limited public forum.

B. Viewpoint Discrimination

It is well established that in a limited public forum such as that presented here, the Board may not impose restrictions on private speech that discriminate on the basis of viewpoint. Good News Club, 533 U.S. at 106-07 (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)). Defendants' pertinacious argument that Present SOP § 5.11 (and Defendants' prior exclusion of Plaintiffs pursuant to Enjoined SOP § 5.11) does not amount to unconstitutional viewpoint discrimination is astonishing in light of the Supreme Court's clear holding in Good News Club. 533 U.S. at 112 ("[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."). The Court squarely held that "teach[ing] moral lessons from a Christian perspective through live storytelling and prayer," id. at 110, characterized by the Court of Appeals as

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a single school is not appropriate. Thus, I also have considered citywide evidence. Whether limited to evidence as to M.S. 206B or P.S. 15 or expanded to evidence of citywide statistics, there is no question that the forum opened by the Board is a limited public forum.

"quintessentially religious," 202 F.3d at 510, and by Justice Souter as "an evangelical service of worship," 533 U.S. at 138 (Souter, J., dissenting), also may constitute "the teaching of morals and character development from a particular viewpoint," id. at 111. The Supreme Court in Good News Club expressly found that "the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values." Id. at 112 n.4. Thus, the Supreme Court "conclude[d] that Milford's exclusion of the Club from use of the school . . . constitutes impermissible viewpoint discrimination." Id. at 112. In Bronx III, the Court of Appeals "f[ou]nd no principled basis upon which to distinguish the activities set out by the Supreme Court in Good News Club from the activities that the Bronx Household of Faith has proposed for its Sunday meetings at Middle School 206B," Bronx III, 331 F.3d at 354,[9] and, as noted above, the activities proposed

[9] The Court of Appeals' discussion on this topic in Bronx III is as follows:

> We find no principled basis upon which to distinguish the activities set out by the Supreme Court in Good News Club from the activities that the Bronx Household of Faith has proposed for its Sunday meetings at Middle School 206B. Like the Good News Club meetings, the Sunday morning meetings of the church combine preaching and teaching with such "quintessentially religious" elements as prayer, the singing of Christian songs, and communion. The church's Sunday morning meetings also encompass secular elements, for instance, a fellowship meal during which church members may talk about their problems and needs. On these facts, it cannot be said that the meetings of the Bronx Household of

are the activities actually undertaken. The Sunday activities of the Church do not fall within a separate category of speech, are not "mere religious worship," 533 U.S. at 112 n.4, and, accordingly, may not constitutionally be prohibited from the limited public forum the Board has established.

Defendants argue that I should define the nature of the expression engaged in by the Bronx Household on Sundays not based on the descriptions of the substance of the activities in the record but by relying on the Church members' characterization of their activities as "services." Def. Mem. in Support at

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> Faith constitute only religious worship, separate and apart from any teaching of moral values. 533 U.S. at 112 n.4.
>
> Because the Board of Education has authorized other groups, like scout groups, to undertake the teaching of morals and character development on school premises, there is a substantial likelihood that plaintiffs would be able to demonstrate that the Board cannot exclude, under Supreme Court precedent, the church from school premises on the ground that the church approaches the same subject from a religious viewpoint. Additionally, the defendants' school building use policy permits social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community, so long as these uses are non-exclusive and open to the public. Therefore, there is a substantial likelihood that plaintiffs would be able to demonstrate that the defendants cannot bar the church's proposed activities without engaging in unconstitutional viewpoint discrimination.

Bronx III, 331 F.3d at 354.

10. As I held at the preliminary injunction stage, this argument is precluded by Good News Club. Bronx II, 226 F. Supp. 2d at 416. The majority in Good News Club responded to Justice Souter's characterization of the Club's activities as "an evangelical service of worship" by saying: "Regardless of the label Justice S[outer] wishes to use, what matters is the substance of the Club's activities, which we conclude are materially indistinguishable from the activities in Lamb's Chapel and Rosenberger." Good News Club, 533 U.S. at 112 n.4. Accordingly, Defendants' evidence regarding labels applied to Plaintiffs' activities is irrelevant. As noted above, the substance of the Church's activities remains the same as it was at the preliminary injunction phase: singing songs and hymns; teaching from the Bible; sharing testimonies from people in attendance; socializing; eating; engaging in prayer; and communion. Bronx II, 226 F. Supp. 2d at 414; Pl. Rule 56.1 Stmt. ¶ 44; First Hall Aff. ¶¶ 3-4. The record is clear that Plaintiffs are not engaged in "mere religious worship, divorced from any teaching of moral values." See Good News Club, 533 U.S. at 112 n.4. Accordingly, I cannot adopt a conclusion contrary to that reached in Good News Club and Bronx III, viz., Plaintiffs seek to continue using the School to engage in activities that, while in part quintessentially religious, amount to the teaching of moral values from a religious viewpoint. Defendants' discrimination against Plaintiffs on the basis of this religious viewpoint is, therefore, a violation of Plaintiffs' First Amendment rights.

III. The Establishment Clause

Defendants attempt to excuse their viewpoint discrimination by arguing that it is necessary to avoid the kind of excessive entanglement that violates the Establishment Clause. See Def. Mem. in Support at 23; Tr. 11:23-12:5. However, the Establishment Clause is not violated where the policy at issue has a secular purpose, and does not, in its principal or primary effect, advance or inhibit religion or foster an excessive government entanglement with religion. Widmar v. Vincent, 454 U.S. 263, 271 (1981) (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).

A. Secular Purpose

The policies of the Board regulating the use of school space are set out in its SOPs and are clearly secular in purpose. SOP § 5.3 provides: "The primary use of school premises must be for Board of Education programs and activities." Grumet Decl., Ex. A.[10] Similarly, SOP § 5.5 provides: "After Board of Education programs and activities, preference will be given to use of school premises for community, youth and adult group activities." Grumet Decl., Ex. A. SOP § 5.6.2 allows school premises to be used "[f]or holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such uses shall be non-exclusive and open to the general public." Grumet Decl., Ex. A.

[10] "Grumet Decl." refers to the Declaration of Lisa Grumet, dated April 11, 2005, in support of Defendants' motion for summary judgment.

The policies are neutral toward religion. The object of the Board quite clearly is to provide a forum for Board programs and activities and for students and community members to engage in a variety of social, civic, recreational, and entertainment activities and "other uses pertaining to the welfare of the community." SOP § 5.6.2. The policies of the Board are, by any reading, secular in their purpose.

B. Primary or Principal Effect

The primary or principal effect of allowing the Church to meet in P.S. 15 is ascertained by asking "whether an objective observer, acquainted with the text, legislative history, and implementation of the [SOP allowing community groups to use the School], would perceive it as a state endorsement of" religion. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000). Similar to the concept of the reasonable person in tort law, the reasonable observer spoken of frequently by Justice O'Connor in this context must be deemed "aware of the history and context of the community and forum" and must "recognize the distinction between speech the government supports and speech that it merely allows in a place that traditionally has been open to a range of private speakers." Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780, 782 (1995) (O'Connor, J., concurring); see also Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 65 (2004) ("the relevant viewpoint is that of a reasonable observer, fully cognizant of the history, ubiquity, and context of the practice in question") (O'Connor, J., concurring); Elewski v. City of Syracuse, 123 F.3d 51, 54 (2d Cir. 1997). The Supreme Court has recently cautioned

that "the world is not made brand new every morning." McCreary County, Ky. v. ACLU of Ky., 125 S. Ct. 2722, 2736 (2005). "[R]easonable observers have reasonable memories, and [the Court's] precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the Church's use of the School] arose.'" Id. at 2737 (quoting Santa Fe, 530 U.S. at 315).

Here, a reasonable observer of Plaintiffs' activities would observe the following undisputed facts:

1. the School space is offered to all student and community groups only when regular classes are not in session;

2. after giving preference to "Board of Education programs and activities," the School is available for "community, youth and adult group activities" on a first-come first served basis, SOP § 5.5; see Def. Reply Mem. at 2 n.2;

3. the Plaintiffs' activities take place only on Sunday mornings when classes are not in session;

4. not only does the Board not endorse Plaintiffs' activities, but it has actively opposed them for close to a decade;

5. employees of the School do not attend Plaintiffs' activities in their official capacities;[11]

[11] Although Defendants note that a parent from P.S. 89 is the main Pastor at Mosaic, a church that meets in P.S. 89,

6. like other groups using the School, Plaintiffs engage in ritual, storytelling, teaching of character and morals, eating, socializing, recreation and "other uses pertaining to the welfare of the community," SOP § 5.6.2; Bronx II, 226 F. Supp. 2d at 414;

7. Plaintiffs' meetings are non-exclusive and open to the public; and

8. Defendants require groups using schools to include on all public notices and other materials that mention the school's name or address a disclaimer noting that the activity is not sponsored by the Board and that the views of the sponsoring organization do not necessarily reflect those of the Board, Farina Decl. ¶ 20 and Ex. A.[12]

See also Bronx II, 226 F. Supp. 2d at 425-26 (similar findings at the preliminary injunction stage). On these undisputed facts, the reasonable observer would conclude that Plaintiffs' meetings constitute speech that the Board merely allows, under protest, in a forum where other groups engage in similar speech and that the principal effect is neutrality toward religion. Allowing Plaintiffs' speech does not advance or inhibit religion but merely allows it on

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there is no indication that he does so in any capacity other than as a member of the community, viz., not in any official, Board of Education capacity, see Declaration of Thomas Goodkind dated April 15, 2005 ("Goodkind Decl."), and there is no evidence suggesting that any special attention is drawn to the coincidental connection.

[12] "Farina Decl." refers to the Declaration of Carmen Farina dated April 7, 2005.

the same neutral basis as similar speech in the same forum.

Defendants have argued that their policies respond to the complaints about Plaintiffs' speech from members of the public. The Supreme Court has ruled, however, that the government may not use the opposition of listeners--the "heckler's veto"--to silence unpopular speakers or to exclude them from a forum. "Listeners' reaction to speech is not a content-neutral basis for regulation. Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 134-35 (1992) (citations omitted). Indeed, it is the unpopular speech that generally needs protection, not popular speech. See, e.g., Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Twp. Sch. Dist., 386 F.3d 514, 527 (3d Cir. 2004) ("To exclude a group simply because it is controversial or divisive is viewpoint discrimination. A group is controversial or divisive because some take issue with its viewpoint.") (Alito, J.)).

The Supreme Court also rejected the "heckler's veto" to censor private religious speakers from a forum where supposedly impressionable youth are present, writing: "We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive." Good News Club, 533 U.S. at 119 (citing Capitol Square, 515 U.S. at 779-80) (emphasis added). Despite this clear authority, Defendants

contend that the child who happens to be at or near P.S. 15 on a Sunday when the Church is using space in that school is the reasonable observer whose assessment is relevant to the Establishment Clause analysis. See, e.g., Goodkind Decl. at 3.[13] This argument is squarely precluded by the Supreme Court's holding in Good News Club, 533 U.S. at 119, and its prior discussions of the reasonable observer, see, e.g., Capitol Square, 515 U.S. at 765 ("erroneous conclusions do not count").

Defendants also rely on an incident where children on their lunch period entered the public park across the street from M.S. 51 and received hot chocolate from members of the Sovereign Grace City Church who had set up a tent in the park and who handed the children pamphlets and informed them that their church "meets in your school." Tr. 9:11-19; see Declaration of Gail Rosenberg dated April 7, 2005 ("Rosenberg Decl."). This encounter is irrelevant; the speech of adults in a public park directed toward children in a public park has no bearing on the School Board's alleged endorsement of religion. In any event, those expressing their discomfort at that church's meeting in M.S. 51 are not the reasonable

[13] "I know from conversations I have had with my younger daughter that she associates Mosaic [a church that meets in P.S. 89,] with P.S. 89, and is confused by the relationship between the Church and the School. The main Pastor at Mosaic is a parent at P.S. 89, who my daughter has seen in the School and at School events as a parent. For her, it is unclear where her School ends and the Church begins. I also know from my conversations with her that, in addition to being confused, she feels uncomfortable about the relationship between the Church and the School because my family does not share the Church's religious beliefs."

observers contemplated by the Supreme Court but rather uninformed observers whose "erroneous conclusions do not count." Capitol Square, 515 U.S. at 765; see, e.g., Rosenberg Decl. & Declaration of Daniel R. Schaffer dated March 25, 2005. In any event, "even if [I] were to inquire into the minds of schoolchildren in this case, [I] cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the [Church] were excluded from the public forum." Good News Club, 533 U.S. at 118.

Defendants make much of the fact that the schools are otherwise occupied with regular classes and student activities on Fridays and school-related groups on Saturdays, rendering them generally unavailable for religious groups that hold services or religious instruction on Fridays and Saturdays. For example, at oral argument Defendants cited an incident where "a Jewish group that requested to use a Brooklyn high school for services on Saturday was denied permission because of the school's Saturday academic programs," Tr. 8:4; 8:20-22, as evidence that the forum is not equally open for other religious groups. This argument is without merit.

First, the Establishment Clause "mandates governmental neutrality between religion and religion, and between religion and nonreligion." McCreary, 125 S. Ct. at 2733 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)). Here, the Board's application process is neutral toward religious and secular groups; that the Church takes advantage of

the neutral benefit program to use P.S. 15 on Sundays and that P.S. 15 is unavailable for use on most Fridays and Saturdays is incidental. See Zelman v. Simmons-Harris, 536 U.S. 639, 655, 658 (2002) (that 46 of 56 private schools participating in voucher programs were religious and 96% of voucher students were attending religious schools did not render neutral program unconstitutional). Second, where a school is a limited public forum "available for use by groups presenting any viewpoint," there is no Establishment Clause violation merely because only groups with religious viewpoints have sought to use the forum. Good News Club, 533 U.S. at 119 n.9. "[I]t does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'" Harris v. McRae, 448 U.S. 297, 319 (1980) (citing McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

At oral argument, Defendants emphasized the concern raised by Justice O'Connor in Capitol Square that a forum may become so dominated by a private religious group "that a formal policy of equal access is transformed into a demonstration of approval." Capitol Square, 515 U.S. at 777 (O'Connor, J., concurring) (citing Widmar, 454 U.S. at 275). Here, however, as noted above, Defendants have not identified any evidence of such domination--either in P.S. 15, in the School District, or in the City. Indeed, according to the Board, Def. Mem. in Opp. At 16,[14]

[14] "Def. Mem. in Opp." refers to Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Further Support of their Motion for Summary Judgment dated May 10, 2005.

9,804 non-government, non-construction contractor permits were issued for use of school property in the 2003-2004 school year. By comparison, in the 2004-2005 school year, approximately "23 congregations held regular worship services in public schools." Def. 56.1 Stmt. ¶ 57.[15] Only 13 congregations have held services in a school for more than one year, and three, including Bronx Household, have held worship services for more than two years on Sundays. Def. 56.1 Stmt. ¶ 58. In comparison, as of February 2005 for the 2004-2005 school year, "school-sponsored" activities occur in approximately 300 school buildings on Sundays, 450 buildings on Friday nights, and 800 school buildings on Saturdays. Def. 56.1 Stmt. ¶ 7. By any measure, the data reflecting the use by religious congregations of schools cannot be deemed dominant in the Capitol Square sense. And even if a religious organization such as Bronx Household were, under some measure, considered the "dominant" user numerically, the later Zelman case suggests that that is "irrelevant" to establishing a First Amendment violation. See Zelman, 536 U.S. at 658 ("we have recently found it irrelevant even to the constitutionality of a direct aid program that a vast majority of program benefits went to religious schools") (citing Agostini v. Felton, 521 U.S. 203, 229 (1997)).

It is of no moment that organizations serving children may meet on school premises at the same time as the Church and that some children might

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[15] "Def. 56.1 Stmt." refers to Defendants' Local Civil Rule 56.1 Statement of Undisputed Facts dated April 11, 2005.

thereby become aware of the religious nature of the Church's activities. See Good News Club, 533 U.S. at 115 ("[W]e have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present."). As noted above, the Supreme Court has proscribed the use of a "modified heckler's veto" to exclude religious speech from a public forum based on the perceptions of the youngest audience members. See Good News Club, 533 U.S. at 119. Thus, the Board may not engage in unconstitutional viewpoint discrimination to avoid the difficulty perceived by the Board that might arise when private speakers in a limited public forum espouse views and engage in religious activities that engender discomfort among other members of the community, either children or adults. "Dealing with misunderstandings--here, educating the students in the meaning of the Constitution and the distinction between private speech and public endorsement--is . . . what schools are for." Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1299 (7th Cir. 1993).

It appeared at oral argument that some of Defendants' Establishment Clause concerns stem not from the fact that churches meet in schools but from the manner in which some churches communicate the fact of their meeting to the community or from modifications made by churches to school buildings. Examples of the problems Defendants identified at oral argument include: at a PTA event in 2003, a church came and distributed church literature and balloons, which had crosses on them, to the children

in attendance; a church advertises its services by distributing postcards, posting signs by the school, and mass mailing. Tr. 10:1-18; compare Declaration of Francis Rabinowitz dated March 29, 2005, Ex. A (postcard advertising Sovereign Grace City Church (without disclaimer)), and Declaration of Veronica Najjar dated April 11, 2005, Ex. B and ¶ 5 (banner in front of P.S. 89 announcing "Mosaic Manhattan [the Church] meets here"), with Declaration of William Fraenkel, Esq., dated April 11, 2005, Ex. A (postcard advertising Community Christian Church (with disclaimer: "This activity is not sponsored nor [sic] endorsed by the New York City Department of Education. The views and opinions expressed by the sponsoring organization do not necessarily state or reflect those of the New York City Department of Education"));[16] see also Declaration of Sandy Brawer dated April 6, 2005, ¶¶ 2, 4 (regarding allegation that Christ Tabernacle Church had installed a satellite dish on the roof of Bushwick High School without obtaining approval and had requested permission to install a T-1 line--a high-speed internet connection--within the school).

In each of these situations, however, any appearance of endorsement can be minimized with neutral time, place, and manner restrictions, for example, regulating use of banners or signs outside of the school, requiring Board permission for permanent installation of equipment or alteration of

[16] As set out in the Farina Decl. ¶ 20 and Ex. A, the Board "requires that outside organizations include with materials that mention the school's name a disclaimer that states that [the Department of Education] does not sponsor or endorse the organization's activities."

buildings, or enforcing disclaimer requirements. After all, government "may impose reasonable, content-neutral time, place, or manner restrictions . . ., but it may regulate expressive content only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest." Capitol Square, 515 U.S. at 761.

In sum, on this record, the undisputed facts demonstrate that permitting the Church to meet in P.S. 89 neither advances nor inhibits religion.

C. Excessive Entanglement

Finally, because SOP § 5.11 requires the Board to identify "religious services" (Enjoined SOP § 5.11) or "religious worship services" (Present SOP § 5.11), the Board's policy fosters an excessive government entanglement with religion. Just as the dissent did in Widmar, Defendants' policies "seem[] to attempt a distinction between the kinds of religious speech explicitly protected by [the Supreme Court's] cases and a new class of religious 'speech [acts]' constituting 'worship.'" Widmar, 454 U.S. at 270 n.6 (citation omitted). The Widmar Court explicitly rejected that distinction, concluding that there is no "intelligible content" or other basis to determine when "'singing hymns, reading scripture, and teaching biblical principles,' cease to be 'singing, teaching, and reading,'--all apparently forms of 'speech,' despite their religious subject matter--and become unprotected 'worship.'" Id. (citation omitted). "The fact is that the line which separates the secular from the sectarian in American life is elusive." Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S.

203, 231 (1963) (Brennan, J., concurring). No litmus test can be applied to determine when worship ends and when religious teaching or instruction begins. And the Supreme Court expressly has "not excluded from free-speech protections . . . acts of worship." Capitol Square, 515 U.S. at 760. Thus, the distinction Defendants seek to make in both Enjoined and Present SOP § 5.11 between constitutionally protected speech relating to religion and a separate, different-in-kind category of unprotected speech or speech acts called "worship" has been expressly rejected by the Supreme Court.

Even if the Board (and, inevitably, the courts) were competent to parse through hymns, verses, teaching, and ritual to separate "mere worship" from the teaching of character and morals, doing so would require government actors to scrutinize and dissect religious practice and doctrine, leading to a level of government involvement in religious matters that offends the First Amendment principles Defendants supposedly seek to honor. In Widmar, after observing that the distinction between religious worship and protected religious speech lacked "intelligible content," the Court stated that even were such a distinction possible, it would violate the non-entanglement prong of the Establishment Clause:

> Merely to draw the distinction would require the university--and ultimately the court--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.

454 U.S. at 270 n.6; see also Good News Club, 533 U.S. at 127 (Scalia, J., concurring) (even if "courts (and other government officials) were competent, applying the distinction would require state monitoring of private, religious speech with a degree of pervasiveness that we have previously found unacceptable") (citing Rosenberger, 515 U.S. at 844-46).[17] As Justice Souter explained in his concurring opinion in Lee v. Weisman, "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible" than "comparative theology." 505 U.S. 577, 616-17 (1992) (Souter, J., concurring).

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[17] In Rosenberger, the Court concluded that the University's denial of funding for a student-run Christian public policy magazine constituted viewpoint discrimination. The Court held that government actors' parsing religious expression implicated both the Free Speech Clause and the Establishment Clause:

> [t]he viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.

515 U.S. at 845-46.

Here, the Board's SOP § 5.11, both Enjoined and Present, requires it to distinguish "religious services" (Enjoined SOP § 5.11) and "religious worship services" (Present SOP § 5.11) from the teaching of character and morals from a religious viewpoint as described in Good News Club. Undertaking that distinction would entangle state actors with religion by requiring them "to dissect and categorize the substance of plaintiffs' speech during their four-hour meeting and determine, inter alia, 'when "singing hymns, reading scripture, and teaching biblical principles" cease to be "singing, teaching, and reading" . . . and become unprotected "worship."'" Bronx II, 226 F. Supp. 2d at 424 (quoting Widmar, 454 U.S. at 270 n.6); see Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 675 (1970) (excessive entanglement may result when the involvement between government and religion "is a continuing one calling for official and continuing surveillance"). Such excessive entanglement is offensive to the Constitution.

IV. The New Policy

As noted above, the Board adopted its Present SOP § 5.11:

> No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship. Permits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this chapter on the same basis that they are

> granted to other clubs for students that are sponsored by outside organizations.

Pl. Rule 56.1 Stmt. ¶ 53. The Board is quite candid in acknowledging its intent to "reinstitute a policy that would prevent any congregation from using a public school for its worship services." Def. Mem. in Support at 8. Recognizing the holding of Good News Club, based as it was on a similar policy grounded on the same state statute upon which the Board's SOPs are based, Good News Club, 533 U.S. at 102 (school board policy based on N.Y. Educ. Law § 414 (McKinney 2000) and providing that district residents may use the school for, inter alia, "'social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community'"), the Board's Present SOP § 5.11 expressly permits religious clubs for students. The Board argues that the distinction the Present SOP § 5.11 seeks to draw between student religious speech and nonstudent religious speech is permitted based on the identity of the speaker, citing Widmar. Def. Mem. in Support at 9; Def. Mem. in Opp. at 5-10.[18] At oral argument, counsel for the Board

[18] Defendants imply that groups like Plaintiffs' might crowd out other activities, e.g., "If [P]laintiffs' reasoning should become law, school officials would have no ability to reserve school space for, or give preference to, after school programs for children attending the school." Def. Mem. in Opp. at 5. First, there is no evidence in the record of the activities of groups like Plaintiffs' crowding out other activities. Second, the remedy for such crowding out, were it to occur, is not to ban speech from a religious viewpoint but to amend the SOPs to create a neutral distinction based on the speaker, e.g., Board activities given first preference, student activities next, community activities next, etc.

acknowledged that the policy was clarified "in order to make clear that we are--we are complying with the Good News Club decision." Tr. 66:2-3. When asked whether the policy reflects the facts of Good News Club but not the principles, counsel responded, "We think that this is consistent with the principle of the Good News Club, which is that when you have different student groups, as you have in the Good News Club, that are meeting, that you need to allow religious student groups also. We think that this is something different." Tr. 66:6-10. This approach suffers from several infirmities.

First, the Board has already distinguished between and among speakers. As set out in Bronx II, SOP § 5.3 provides that "[t]he primary use of school premises must be for Board of Education programs and activities." 226 F. Supp. 2d at 409. SOP § 5.5 then provides that "[a]fter Board of Education programs and activities, preference will be given to use of school premises for community, youth and adult group activities." Id. There is no separate category for "student" activities. Thus, the neutral Board policy already provides for preference to Board of Education programs and activities followed by community, youth and adult group activities. The Board's Present SOP § 5.11 permits "religious clubs for students that are sponsored by outside organizations," that is, non-Board of Education programs and activities, but prohibits "holding worship services" or using a school as a "house of worship," presumably events also involving community speakers. Under SOP §§ 5.3 and 5.5, however, these non-Board of Education activities are at the same level of priority, viz., behind Board of

Education-sponsored programs and activities. Thus, the Present SOP, as explained by Defendants, is inconsistent with SOP §§ 5.3 and 5.5.

Second, the principles of Good News Club instruct that if community groups teach character and morals or engage in other social, educational, or recreational activities for the benefit of the community, other community groups like Plaintiffs must be permitted to do so from a religious perspective. The new policy, as interpreted by Defendants, would not do so, but instead would treat Plaintiffs' speech differently from similar speech of other community groups based on religious perspective and thus is inconsistent with Good News Club.

Third, just as in McCreary, 125 S. Ct. at 2722, a

reasonable observer cognizant of the history of this matter would recognize the Board's new policy as a post hoc attempt to avoid the prior holdings in this case and the holding in Good News Club. Having not "turn[ed] a blind eye to the context in which [the Board's Enjoined SOP § 5.11] arose," McCreary, 125 S. Ct. at 2737, the reasonable observer would recognize that the Board's new policy attempts, yet again, to prohibit the teaching of character and morals from a religious viewpoint, clearly a government attempt to prefer nonreligion over religion, id. at 2733 ("The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between . . . religion and nonreligion.'").

Finally, even if the Board were permitted to distinguish among speakers in the manner Defendants interpret Present SOP § 5.11 to require, the activities at issue here may not be prohibited because they are not "mere religious worship, divorced from any teaching of moral values." See Good News Club, 533 U.S. at 112.

Accordingly, I find unconstitutional the enforcement of Present SOP § 5.11 to bar Plaintiffs from holding Sunday morning meetings that include worship in P.S. 15 or any other New York City public school.

## CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment [dkt. no. 41] is granted, and Defendants' cross-motion [dkt. no. 45] is denied. Defendants are permanently enjoined from enforcing Present SOP § 5.11 so as to exclude Plaintiffs or any other similarly situated individual from otherwise permissible after-school and weekend use of a New York City public school. Counsel shall confer and submit a proposed order.

SO ORDERED:

Dated: New York, New York
November 16, 2005

LORETTA A. PRESKA, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of June, two thousand and fourteen.

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Bronx Household of Faith, Robert Hall, Jack Roberts,

Plaintiffs-Appellees,

v.

Board of Education of the City of New York, Community School District Number 10,

Defendants-Appellants.

**ORDER**
Docket No. 12-2730

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Appellees Bronx Household of Faith, Robert Hall and Jack Roberts filed a petition for panel rehearing, or in the alternative for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition DENIED.

For the Court:

Catherine O'Hagan Wolfe, Clerk

**UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK**



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

Plaintiffs,

01 **CIVIL** 8598 (LAP)

-against-

**JUDGMENT**

BOARD OF EDUCATION OF THE CITY OF NEW YORK and COMMUNITY SCHOOL DISTRICT NO. 19,

Defendants.

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Whereas on June 1, 2012 the Court having heard oral argument on the cross-motions for summary judgment, and the matter having come before the Honorable Loretta A. Preska, United States District Judge, and the Court, on June 29, 2012, having rendered its Opinion and Order granting plaintiffs' motion for summary judgment, denying defendants' cross-motion for summary judgment, and permanently enjoining defendants from enforcing Ch. Reg. D-180 so as to deny plaintiffs' application or the application of any similarly-situated individual or entity to rent space in the Board's public schools for meetings that include religious worship, it is,

**ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated June 29, 2012, plaintiffs' motion for summary judgment is granted; and defendants' cross-motion for summary judgment is denied; defendants' are permanently enjoined from enforcing Ch. Reg. D-180 so as to deny plaintiffs' application or the application of any similarly-situated individual or entity to rent open space in the Board's public schools for meetings that include religious worship.

Dated: New York, New York
July 3, 2012

RUBY J. KRAJICK
Clerk of Court
BY:
Deputy Clerk

**D-180**
**EXTENDED USE OF SCHOOL BUILDINGS**
**03/24/10**

## DEFINITIONS

**Beacon Programs:**

Programs funded by the NYC Department of Youth and Community Development ("DYCD"). Beacon Community Centers operate a minimum of six (6) days and 42 hours a week in the afternoons and evenings, on weekends, during school holidays and vacation periods, and during the summer. Myriad community programs are offered to students and residents free of charge.

**Custodial Payroll System ("CPS"):**

An online, automated system, which is used to calculate and process the cost of custodial services based upon the amount of space used, the nature of the space and day/time of usage.

**Custodial Entity:**

A school's Custodial Engineer/Building Manager or his/her designee(s).

**Extended Use:**

The use of a school building by the School, Outside Organizations and/or Community Based Organizations ("CBOs"), i.e., the "User," outside normal school hours and days when school is not

in session (mornings prior to the start of classes or a recognized breakfast program, late afternoons, evenings, weekends and holidays) consistent with this regulation.

**Extended Use Permit:**

A permit must be obtained to reserve space for activities occurring outside normal school hours and days when schools are not in session. The permit application can be accessed through the Extended Use web application by school personnel and completed online. The User must complete and sign the permit when applying for space to be reserved.

**Extended Use Application Process:**

An online system that allows Organizations/Users to formally request the use of a school building. See Attachment No. 1 for additional details.

**Integrated Service Centers ("ISCs")**

The sources of operational support for schools and programs in the DOE. Their focus is to align services and resources with instructional priorities and School-based need to support teaching and learning.

**OST – Out of School Time:**

Programs funded by the NYC Department of Youth and Community Development ("DYCD"). OST programs offer a range of activities for young

people during the hours they are not in school, i.e., after school, weekends and holidays, and during up to twenty (20) days of school and summer vacations, to support their social, emotional, and academic development while providing a safe and supportive environment while their parents work.

**Space Fees:**

The cost for the Custodial Entity to prepare and clean the actual space required by a User to carry out the functions of its programs.

**Space Sheet:**

A form prepared by the School's Custodial Entity and validated by the User for the purpose of reporting the actual space and/or services used (sometimes referred to as the *Report of Authorized Space and Custodian Services Rendered Form)*. This report is used to determine the actual contractual costs incurred for usage and to generate the appropriate custodial payments to cover the additional labor services, referencing the approved Permit Application. See Attachment No. 2 for additional details.

**User:**

Any individual, Community Based Organization ("CBO"), or other group using a school building during extended use time.

## ABSTRACT

This regulation governs the extended use of school buildings. It establishes the procedures for organizations and individuals to follow in order to use NYC public school buildings outside normal school hours and on days when school is not in session, including weekends and holidays. It supersedes the Standard Operating Procedures chapter on this topic.

## INTRODUCTION

The Department of Education ("DOE") encourages the use of its public schools for purposes consistent with this Extended Use policy. School building principals, custodial engineers/building managers ("Custodial Entity"), the group, individual and/or organization wishing to use the school (the "User"), the Division of School Facilities ("DSF"), the Division of Financial Operations ("DFO"), and the Integrated Service Centers ("ISCs") are the principal entities with key roles in the Extended Use process.

## I. USE OF SCHOOL BUILDINGS

A. The Extended Use of School Buildings is subject to this regulation, New York State Education Law § 414 and all other applicable federal, state and local laws.

B. The primary use of a school's premises must be for DOE programs and activities. After DOE programs and activities,

preference will be given to use of school premises for community, youth and adult group activities.

C. Responsible adults must be in attendance at all times when youth groups are using school premises.

D. Events which are personal in nature (e.g., weddings, showers, engagement parties) are strictly forbidden.

E. Permits may be granted for the purpose of instruction in any branch of education, learning, or the arts.

F. Permits may be granted for civic forums and community centers in accordance with applicable law.

G. Permits may be granted for recreation, physical training and athletics, including competitive athletic contests of children attending nonpublic, not-for-profit schools.

H. Permits may be granted for holding social, civic, and recreational meetings and entertainment, and other uses pertaining to the welfare of the community. All such uses shall be non-exclusive and open to the general public.

I. Permits may be granted for holding PTA/PA meetings. Such meetings must be non-exclusive and open to the general

public, pursuant to New York State Education Law § 414.

J. Athletic fields, gymnasiums, auditoriums, swimming pools and other large areas shall not be scheduled in a way that creates an unreasonable restriction of use by others.

K. "Take the Field."
Take the Field athletic fields are available free of charge to certain CBOs/Users that demonstrate a financial hardship. Outside usage must be consistent with DOE policies and procedures and must be allowed only when the field is not being utilized by the respective school. This arrangement applies only to the athletic field, not the use of any space within the confines of the school building. If the User wishes to use space within the building including, but not limited to, lavatories, if applicable, usage fees must be paid. Many refurbished fields under the "Take the Field" program have portable lavatories in the athletic field area. Before a User applies for the athletic field and begins the permit process, it must first contact the "Take the Field" organization at 212-521-2232. A representative will guide the User through the process to determine if the organization/user is eligible to have the applicable fees waived.

L. School premises may not be used for commercial purposes except for flea market

operations authorized pursuant to Chancellor's Regulations A-650.

M. Permits may be granted for such other uses as may be authorized by law.

N. Gambling is not permitted on school premises.

O. The sale, use, consumption and/or possession of any alcoholic beverage in any school building by youth or adults are strictly prohibited.

P. The selling of refreshments on school premises is prohibited unless specifically approved on the permit.

Q. No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship.

> Due to pending litigation entitled Bronx Household of Faith v. Bd. of Education, the DOE is currently enjoined from enforcing Section I.Q of Chancellor's Regulation D-180. Permits may not be denied solely because a User seeks a permit for the purpose of holding religious worship services or otherwise using a school as a house of worship. Contact the DOE Office of Legal

Services at 212-374-6888 with any questions concerning this provision.

R. No group or organization, which invites members of the public to a meeting in a school facility, may exclude persons on the basis of any impermissible discriminatory reason as set forth in Chancellor's Regulation A-830.

S. Permits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this regulation on the same basis that they are granted to other clubs for students that are sponsored by outside organizations.

T. Any User who obtains a permit to use a NYC public school building may not use the school premises as a mailing or business address.

U. The DOE, in light of the inherent risk of injury to participants, reserves the right in its sole discretion to decline permission for any event.

V. The Chancellor reserves the right to waive this regulation or any portion(s) thereof, that is not otherwise required by law, if he determines it to be in the best interests of the school system. Requests for waivers from the Chancellor shall be directed to the

Deputy Chancellor for Infrastructure and Planning.

## II. REVIEW AND APPROVAL OF PERMIT APPLICATION

A. Every User must have an approved permit to use a school's premises (see Attachment No. 1 for the Procedures for Processing and Completing an Extended Use Application).

B. The permit is required to be completed by each User wishing to use the school building during extended use time regardless of whether the User is paying the required space and/or security fees (if applicable) or not.

C. In order to use the school building during times other than normal school hours or days when the school is not in session, a public charter school must submit a permit application.

D. Principals are responsible for making the decision to approve or deny a permit application, based on a determination as to whether the space is available for use and the User has satisfied the requirements of this regulation. Principal approval is subject to review by the ISC and Central DOE.

E. Before a Principal approves a permit for an outside organization to use a school

building, a thorough check of the potential User should be made.

F. No permit shall be considered approved unless it bears the approval of the User representative, Principal, Custodial Entity, and ISC Director (or their designees).

G. Permits are not transferable. A User receiving a permit may not transfer any portion of the premises covered by the permit to another User.

H. Permits cannot be extended beyond midnight unless special permission has been granted by the ISC.

I. No Permit Application may be approved where the scheduled duration exceeds that for which payment is made. Renewal requires a new application. The longest permissible time period for a permit shall be twelve months, i.e., one fiscal year from July 1 through June 30. Permits may not cross fiscal years.

J. A permit must be initiated <u>at least 30 days prior to the scheduled event</u>. If a permit is not used, the ISC or User must delete it, because such a permit will remain in the system until action is taken. <u>This does not apply to construction vendors responsible for repairs and/or refurbishing to a school/site</u>. Such construction vendors must file a permit to enter the building after school hours. Once authorized by the

Principal and Custodial Entity, these permits with payment are submitted directly to the DSF.

K. The User must agree to the following when signing an Extended Use Permit Application:

- that the information provided on the Permit Application is complete and accurate to the best of the User's knowledge;

- that rates are subject to change by DOE;

- to observe all of the rules and regulations contained in this regulation and in the Permit Application;

- to conform to all applicable laws and regulations governing the Extended Use of School Buildings;

- to provide adequate supervision of the activity at all times;

- to complete a User Organization Incident Report when safety/criminal incidents occur and return it to the Principal/designee and/or the School Safety Agent ("SSA") if on duty; and,

- to save the DOE harmless from any claim, loss or damage by reason of any act on the part of the applicant, its members, officers, agents, or any person using the premises invitation or with permission of the User.

L. Providing incorrect, incomplete, or misleading information on the Permit Application or the failure to conform to any of the guidelines and/or limitations contained in this regulation, as well as any other applicable laws and regulations governing the use of school buildings and grounds, may lead to the revocation of the permit, the denial of future Permit Applications and other legal actions by the DOE.

M. DOE may terminate any permit at any time when it is in the best interest of the DOE. Absent an emergency, a minimum of one week notice will be provided. In the event of termination, DOE shall refund a pro-rated portion of the permit amount.

N. Appropriate number of <u>restrooms</u> must be included in every Permit Application. Where possible, separate restrooms should be made available for male/female adults <u>and</u> male/female children.

O. If special services are required, the User must request approval for the provision of

such services from the principal. The user is responsible for these additional costs. Examples of such services may include, but are not limited to the following:

- utilizing a certificate of fitness holder to operate air conditioning equipment when required;

- having a trained and knowledgeable individual to operate stage equipment, including lighting, sound and stage sets.

## III. CARE OF SCHOOL PREMISES AND PROPERTY

A. Users must exercise the utmost care in the use of school premises and property; make good any damage arising from the occupancy of any part of school premises; and save harmless the DOE from any claim, loss, or damage by reason of any act on the part of the permit holder, its members, officers, employees and agents, or any person using or coming upon the premises by invitation or with the permission of the permit holder.

B. Classrooms and offices must be left in the same condition in which they were found. Displays, papers, etc. must not be disturbed. If desks are moved, they should be returned to the original location before vacating the room.

C. Modification or alteration, whether permanent or temporary, to the physical plant systems (i.e., electrical, heating, ventilation, air conditioning (HVAC), plumbing, or architectural) is prohibited unless written approval from DSF is secured.

D. The following shall apply regarding the use of signs, banners and posters:

1. Signs, banners, posters or other notices of the permitted activity shall not be posted on school property including, but not limited to, walls, gates, columns, doors, windows, floors, elevators, building exteriors, sidewalks, emergency telephones, light standards and trees, except that they may be posted to indoor or outdoor notice boards, display cases or in other locations designated by the Principal at the time of the activity, only for the purpose of identifying the room where the activity is held.

2. Unless the activity is sponsored or supported by the school, the DOE, or New York City, the following disclaimer is required to be made by the User on all public notices or any other material, including media or internet use, that mentions the school name or school address in connection with the activity to be held on school grounds, and on any

signs posted inside or outside the school at the time of the activity.

> "This activity is not sponsored or endorsed by the New York City Department of Education or the City of New York."

3. The disclaimer must be clearly displayed in typeface of similar size as used in the public notice or materials. Use of the school name is restricted to identifying the location of the activity and may not create an impression of sponsorship or endorsement by the DOE, the school and/or school personnel.

4. Other considerations:

   - Approval of the school's Principal must be obtained prior to the posting of any material.

   - The individual or organization responsible for disseminating the information shall be identified on all materials posted on school property.

   - Material posted on school property may not demean or expose any individuals or groups to ridicule.

- Advertising related to private, commercial activities is not permitted on school property.

## IV. PASS-ALONG CONTRACTUAL COSTS/ FEES FOR USING SCHOOL SPACE

A. While the DOE imposes no excess charge (profit or overhead) on extended use of its schools, there are pass-along contractual costs (determined through a collective bargaining agreement between the DOE and Custodial Engineers Local 891), i.e., costs incurred in schools for custodial services when the use is outside of normal school hours on school days and anytime on weekends, holidays and when school is not in session. These costs may vary depending on several factors such as type of space required, time of day of usage, and number of days required. Extended use fees can be less costly if activities are planned during timeframes that minimize the use of additional labor (e.g., between 3:00 and 6:00 p.m. on school days, when there is no fee applied for usage.) Contractual costs for security services provided by school safety agents, generally after 4:00 p.m., are passed along to the Users at all schools.

B. Except as otherwise provided in this regulation, fees for using school space are required to be paid with respect to use by all organizations and individuals, e.g.,

unions, Community Based Organizations ("CBOs"), other government entities, elected officials that conduct an allowable activity that shall not have been directly engaged by the school or the DOE, even if the activity involves students, staff, or parents from the school. The fee is applicable to schools managed by both custodial engineers and building managers. The DOE's automated CPS system calculates the cost of custodial services based upon the amount of space used, the nature of the space and day/time of usage."

C. No part of any fee shall directly or indirectly benefit or be deposited into an account which inures to the benefit of the Custodial Entity.

D. Cancellation and Refunds

If cancellation of a scheduled school usage is necessary, the User must notify the ISC and respective school Custodial Entity of such cancellation at least one week in advance of the scheduled activity. The User could reschedule the event, which is the preferred alternative, or request a refund from the respective ISC. Failure to provide one week notice of cancellation will result in a 15% charge of the fee for the date when the activity was scheduled. In order for any refund to be issued, the payee must complete a W-9 Form which can be found at

https://a127-pip.nyc.gov/LoginExternal/Forms/Substitute_W_9_Certification_Form.pdf

and submit it to the Comptroller's Office by fax or mail as indicated on the form. In addition, the school or ISC must enter the adjustments to the permit and forward a request for refund to DFO's Bureau of Financial Management and Reporting for issuance.

## V. USE OF SPECIALIZED ROOMS AND EQUIPMENT

A. Where services by DOE employees are required by this regulation, the User is responsible for all charges incurred. ISCs and respective schools will calculate the charges based on the current contractual per session pay rates for the concerned employee.

B. When shop rooms, home economics rooms, or similar rooms with special equipment are required, licensed DOE staff must be assigned. A DOE teacher and/or Custodial Entity/designee must be used for the operation of school equipment such as stage lighting and audio/visual apparatus. Prior approval of the Principal must be obtained in writing, with a copy of the approval affixed to the Permit Application.

C. Where kitchen equipment is to be used in the preparation of food, an Office of School Food employee must be assigned.

D. For the use of swimming pools, one DOE-licensed swimming teacher or a licensed DOE teacher with current American Red Cross Water Safety Instructor's Certification must be assigned for every 25 pool participants. All pool participants involved in non-instructional pool time activities (except for Scuba Diving instruction – see below) must have their heads and shoulders above the water at the shallow end of the pool. No more than 40 persons may utilize the pool at any one time. All applicable New York State Department of Health and New York City Dept. of Health and Mental Hygiene regulations regarding the use and operation of swimming pools must be adhered to at all times. Such regulations include but are not limited to the following:

- All DOE swimming pools must have Level IIa aquatic supervision; and,

- Aquatic supervisory staff shall be at poolside providing direct supervision of pool participants. Aquatic supervisory staff on duty shall be engaged only in activities that involve direct supervision of pool participants.

- When instructional activities occur including, but not limited to, learn to swim programs, physical education classes and swim team activities, and the required supervisory staff provide the instruction, at least one additional staff member meeting at least Supervision Level III must be supplied for each aquatic supervisory staff member engaging in instructional activities.

- When a Supervision Level III staff member is used to assist a Supervision Level II staff member with direct supervision of pool participants during instruction, the Supervision Level III staff member must possess certification in aquatic injury prevention and emergency response as set forth in 10 N.Y.C.R.R. § 6-1.31(c)(2).

- Each school's written pool policy safety plan must describe the duties, positioning at poolside, and interaction between the Supervision Level II and III staff members which ensures adequate bather supervision and emergency response.

- With each extended use Permit Application for swimming pool use, the applicant must submit photocopies of

the above required certifications and photo identification of the supervisory staff members whom the applicant will use as required above. As supervisory personnel changes, the permit holder must provide updated copies of the above required certifications and photo identification. All supervisory staff must have photo identification cards on their persons while performing their duties at DOE swimming pools.

- Scuba Diving instructors must hold a license or certificate indicating special training. One instructor must be provided for every eight (8) pool participants engaging in Scuba Diving instruction.

## VI. SECURITY

A. All DOE sponsored events must have security provided by the New York Police Department School Safety Division (NYPDSSD). (See Section VI.C below).

B. All non-DOE sponsored events must have adequate security to provide for the safety and well-being of the attendees at the function and the integrity of school property. Prior to approving a permit, the Principal must determine whether the proposed security is adequate for the nature of the activity. A Principal may

determine that in circumstances where there is an increased security risk, the User must provide and pay for security by the NYPDSSD (e.g., where a large crowd is expected).

C. A comprehensive guide entitled, "Request for After School Security Coverage," published by the NYPDSSD sets forth the procedures to follow for obtaining an NYPD SSA. The guide may be obtained from the Commanding Officer, NYPDSSD, Administration Operations Unit at 718-730-8528.

Questions regarding security coverage should be addressed to either to the ISC or External Program Coordinators.

Please see Attachment No. 1 for details on how to process a request for SSA coverage and Attachment No. 2 for details on how to pay for the required services.

## VII. INSURANCE

A. The DOE has established mandatory insurance requirements for the following events and activities:

**Summer Camps** - See Section XIII.A

**Carnivals** – See Section XIII.B

**Flea Markets** – See Section XIII.C

**Boxing, Wrestling and Martial Arts** – See Section XII.C

**Contact Sports Instruction or Activities** – See Section XIII.D

B. The DOE may require that a User seeking a permit to conduct an activity or event other than that listed in VII.A. above, maintain and pay all premiums on a Commercial General Liability insurance policy with a limit of not less than $1,000,000 per occurrence. Such policy shall list the DOE and the City of New York, including their respective officials and employees, as additional insureds. The organization applying for the permit must inform its insurance broker that such additional insured coverage is to comply with Insurance Services Office (ISO) Form CG 20 26, a standard insurance industry-wide form. Prior to and as a condition to any event, the User shall provide a certificate of insurance evidencing such insurance to the principal.

## VIII. FEES PAID BY THE CENTRAL DOE (AGAINST CENTRAL BUDGETARY ACCOUNTS

A. No fees should be charged to:

1. Reimbursable program or grants that directly provide full funding for Extended Use of school space.

2. Activities which are authorized by the school, conducted on behalf of the school or operated in partnership with the school. Such activities include, but are not necessarily limited to, the following:

   - Parent meetings or forums;
   - Activities connected with Open School Week or Parent/Teacher Conferences;
   - Public meeting of the Community/Citywide Education Councils;
   - Beacon Programs;
   - Out-of-School Time (OST) activities; and,
   - School clubs and other school-sponsored events.

3. PTAs/PAs are entitled to free use of school buildings, including school safety or security coverage for one hundred ten (110) hours per year outside of school

hours. These hours apply twelve (12) months per year and are not transferable. If more than one PA is in a given school building, each is entitled to the full one hundred ten (110) hours per year. See Chancellor's Regulation A-660.

4. In rare situations, an extended use fee to an outside organization may be subsidized from the school's budget when the school's Principal authorizes the charge of these fees to his/her school budget for an activity that provides a direct educational service to students and parents of the concerned school and community by supplementing or complementing the existing curriculum at the school.

5. For extenuating circumstances, a request by the User to centrally fund the pass-through costs may be granted by the Executive Director of DFO at 65 Court Street, Room 1801, Brooklyn, NY 11201.

   Before submitting this request, outside organizations should ensure that the following questions have been addressed:

   - Is the User/organization a not-for-profit, § 501 (c)(3), entity?

- Can the activity be performed between the hours of 3:00 p.m. and 6:00 p.m.?

- Has the activity/organization been approved in writing by the Principal of the concerned school?

- Does the activity provide a direct educational service to students and parents of the concerned school and community by supplementing or complementing the existing curriculum at the school?

- Does the activity/organization provide an in-kind service, which is equal to or greater than the Extended Use costs/fees?

- Can the User provide historical precedents which will assist in evaluating its subsidy request?

- Can the User prove (providing financial statements and other supporting documentation) that paying the fee will result in severe financial hardship to that organization?

## IX. FIRE REGULATIONS

The number of tickets sold or the number of persons admitted must not exceed the capacity listed on the fire regulations for the area.

## X. FUND RAISING/DONATIONS/ ADMISSION FEE

A. The following applies if a User is charging admission (and/or has pre-sold tickets to an event), or is accepting or collecting money, or soliciting donations or conducting fund-raising activities of any kind (including, but not limited to, the sale of refreshments):

1. The net proceeds (revenues less actual production costs) must be expended for the benefit of a charitable or educational purpose except that the proceeds may not be applied for the benefit of a society, association or organization of a religious sect or denomination, or a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firefighters or volunteer ambulance workers.

2. The Permit Application must indicate the admission fee (if applicable); and the name of the organization designated as beneficiary of the proceeds resulting

from admission fees, solicitations or donations.

3. The following must be attached to the Permit Application prior to final approval, and retained by the appropriate ISC:

   - A letter on official stationery from the charitable or educational organization that is to receive the proceeds stating that it approves of the fund-raising function and will use the proceeds for recognized charitable or educational purposes. The letter must be specific about the nature of these purposes (e.g., providing a Senior Citizens' Program);

   - A brief listing of expenditures and projected net proceeds by the user; and,

   - A § 501(c)(3) Tax Exempt Approval Form (for non-DOE organizations) from the organization which is to receive the proceeds.

**XI. POLITICAL AND ELECTION ACTIVITIES (See Chancellor's Regulation D-130** which sets forth the procedures which

must be followed regarding the use of a school building for political purposes.)

A. School buildings and other DOE facilities **may** be used for:

   1. Polling places for holding primaries, general elections and special elections for the registration of voters; and

   2. Conducting candidate forums, provided, **all** candidates are invited to participate. Permit applications for such forums must include a written representation that all candidates have been invited to participate. Once the permit, with the above written statement attached, has been approved by the school and the ISC, it must be submitted to the Office of Public Affairs, 52 Chambers Street, New York, NY 10007, 212-374-4947.

B. School Buildings may **not** be used for conducting **political events**, activities or meetings, unless the purpose is for a candidate's forum as indicated above.

C. The use of any school during extended hours by any person, group, organization, committee, etc., on behalf of, or for the benefit of any elected official, candidate, candidates, slate of candidates, or political organization/committee is **prohibited** except as indicated in Section XI.A.2.

D. No rallies, forums, programs, etc., on behalf of, or for the benefit of any elected official, candidate, candidates, slate of candidates, or political organization/committee may be held in a school building after school/business hours except as indicated in Section XI.A.2 above.

E. No candidate for public office or elected official seeking re-election may use any DOE school building after school business hours during the 60 calendar days prior to a primary and/or general election, except if directly related to the elected official's public duties and responsibilities.

## XII. OTHER CONSIDERATIONS

A. Those participating in athletic activities in the gymnasium must wear appropriate footwear and apparel.

B. Tips shall not be solicited or accepted on school premises.

C. CBOs and other User organizations wishing to conduct boxing, wrestling, or martial arts programs on school premises must meet the following criteria:

1. The activity is sanctioned by a recognized organization established to conduct such events. As an example, Golden Glove Boxing is a nationally

sanctioned event under the auspices of the U.S. Olympic Committee.

2. The sponsoring organization for any boxing, wrestling or martial arts event shall maintain and pay all premiums on a Commercial General Liability insurance policy with a limit of not less than $1,000,000 per occurrence, and an excess or umbrella liability policy (or policies) with a limit of not less than $5,000,000 per occurrence. All such policies shall list the DOE and the City of New York, including their respective officials and employees, as additional insureds with coverage at least as broad as provided by Insurance Services Office (ISO) Form CG 20 26. Prior to and as a condition to any event, the sponsoring organization shall provide a certificate of insurance evidencing such insurance to the principal.

3. Sponsors understand and accept that they will pay for the full cost of security provided by DOE School Safety Officers (SSAs). The number of SSAs will be determined by the DOE School Security Office. Payment for the estimated cost of security must be paid in advance.

4. The event may not be for-profit and all proceeds (i.e., admission fees, charges, etc.) must go to a recognizable

charitable or educational organization as set forth in Section X.

D. The DOE, in light of the inherent risk of injury to participants, reserves the right in its sole discretion to decline permission for any event.

E. The use of a school yard or other school property for parking privileges by outside organizations/Users is prohibited.

## XIII. SUMMER DAY CAMPS, CARNIVALS, FAIRS, FLEA MARKETS AND CONTACT SPORTS INSTRUCTION/ACTIVITIES

A. Summer Day Camps

The operation of Summer Day Camps is permitted as set forth below:

1. Camp operations must:

- be not-for-profit;
- be community oriented;
- be open to all eligible children of the community; and,
- maintain necessary insurance.

2. The User shall maintain and pay all premiums on a Commercial General Liability insurance policy with a limit of not less than $1,000,000. per occurrence, and an excess or umbrella liability policy (or policies) with a limit of not less than $5,000,000 per occurrence. All such policies shall list the DOE and the City of New York, including their respective officials and employees, as additional insureds with coverage at least as broad as provided by Insurance Services Office (ISO) Form CG 20 26. Prior to and as a condition to any event, the User shall provide a certificate of insurance evidencing such insurance to the principal.

3. The camp shall obtain and maintain all licenses, permits, etc., required by applicable laws and regulations for the operation of summer day camps.

4. The camp shall advise the parents or guardians of the campers by means of a written statement on all applications and/or registration forms that:

> THE (Name of the Camp) IS NOT A PROGRAM OF, OR OTHERWISE SPONSORED BY, THE NEW YORK CITY DEPARTMENT OF EDUCATION.

5. The books and records of summer day camp operations shall be available for inspection and duplication by the Chancellor or his designee within five (5) days of written notification.

B. Carnivals and Fairs

Carnivals and fairs are permitted as set forth below:

1. The User shall maintain and pay all premiums on a Commercial General Liability insurance policy with a limit of not less than $1,000,000 per occurrence. Such policy shall list the DOE and the City of New York, including their respective officials and employees, as additional insureds with coverage at least as broad as provided by Insurance Services Office (ISO) Form CG 20 26. In the event the carnival or fair includes "rides," "moonwalks" or other facilities provided by a commercial company, the User shall assure that such company maintains a Commercial General Liability insurance policy with a limit of not less than $1,000,000 per occurrence, and an excess or umbrella liability policy (or policies) with a limit of not less than $5,000,000 per occurrence, naming the User, DOE and the City of New York as additional insureds with coverage at least as broad as provided by ISO Form CG 20 26. Prior to and as a

condition to any event, the User shall provide certificate(s) of insurance evidencing such insurance to the principal.

2. Licenses/permits from the Department of Health and Mental Hygiene (with respect to serving of food) and the Department of Consumer Affairs (with respect to rides) must be presented to the ISC at the time of application.

3. The User is responsible for ensuring that any equipment brought onto school property is erected in accordance with law and its design, and that full consideration has been given to equipment weight load, height and clearance limitations.

4. No rides or equipment will be permitted that require the excavation or penetration of the ground surface to secure any such equipment or rides.

C. Flea Markets (see **Chancellor's Regulation A-650** which sets forth the conditions under which flea markets and certain other flea market-type programs may be initiated and conducted on DOE property).

1. Regardless of the flea market's duration, all monies raised as a result of a flea market operation **must be for**

**the primary purpose of raising funds to benefit the educational, social and cultural programs at the respective school.**

2. The Parent Association/PTA (sponsoring organization) must secure an Extended Use Permit approved by the Principal and Custodial Entity of the concerned school in order to use the school during extended hours. The permit process is the same for flea markets as it would be for any other User wishing to use DOE schools when they are not in session. Applicable opening and space fees for the event must be affixed to the approved permit and forwarded to the ISC which oversees the business operations of the school at which the event will be held.
3. The user will be required to obtain adequate security to ensure the safety of those attending the flea market and the integrity of school property.

4. The User shall maintain and pay all premiums on a Commercial General Liability Insurance Policy with a coverage limit not less than $1,000,000 per occurrence and an excess or umbrella liability policy of not less than $3,000,000 per occurrence. Such policies shall list the DOE and the City of New York, including their respective officials and employees, as additional insureds

with coverage at least as broad as provided by Insurance Services Office (ISO) Form CG 20 26. Prior to and as a condition to any event, the User shall provide certificate(s) of insurance evidencing such insurance to the principal.

D. Contact Sports Instruction or Activities

1. The sponsoring organization for any contact sports instruction or activities shall maintain and pay all premiums on a Commercial General Liability insurance policy with a limit of not less than $1,000,000 per occurrence and an excess or umbrella liability policy of not less than $3,000,000 per occurrence. Such policies shall list the DOE and the City of New York, including their respective officials and employees, as additional insureds with coverage at least as broad as provided by Insurance Services Office (ISO) Form CG 20 26. Prior to and as a condition to any event, the User shall provide certificate(s) of insurance evidencing such insurance to the principal.

E. The DOE reserves the right to require additional types, levels, or terms of insurance as it deems appropriate for any of the events or activities set forth in XIII.A.-D. above.

## XIV. INQUIRIES

Inquiries pertaining to this regulation should be addressed to the ISC that oversees the business operations of the concerned school. All paperwork pertaining to Extended Use Permits for Children's First Network Schools is handled by the geographical ISC. Please click on the following link to access CONTACT INFORMATION for each of the ISCs.

**ISC Contact Information**

**New York Education Law § 414**
**Use of Schoolhouse and Grounds**
Effective: June 30, 2009

1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all portions thereof, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for such other public purposes as are herein provided; except, however, in the city of New York each community school board shall be authorized to prohibit any use of schoolhouses and school grounds within its district which would otherwise be permitted under the provisions of this section. Such regulations shall provide for the safety and security of the pupils and shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes:

(a) For the purpose of instruction in any branch of education, learning or the arts.

(b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

(c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public. Civic meetings shall include, but not be limited to, meetings of parent associations and parent-teacher associations.

(d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firefighters or volunteer ambulance workers.

(e) For polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no meetings sponsored by political organizations shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the

board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

(f) For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civic forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be non-exclusive and open to the general public.

(g) For classes of instruction for mentally retarded minors operated by a private organization approved by the commissioner of education.

(h) For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school.

(i) To provide child care services during non-school hours, or to provide child care services during school hours for the children of pupils attending the schools of the district and, if there is additional space available, for children of employees of the district, and, if there is further additional space available, the Cobleskill-Richmondville school district shall provide child care services for children ages three and four who need child care assistance due to lack of sufficient child care spaces. Such determination shall be made by each district's board of education, provided that the cost of such care shall not be a school district charge but shall be paid by the person responsible for the support of such child; the local social services district as authorized by law; or by any other public or private voluntary source or any combination thereof.

(j) For licensed school-based health, dental or mental health clinics. (i) For the purposes of this subdivision, the term "licensed school-based health, dental or mental health clinic" means a clinic that is located in a school facility of a school district or board of cooperative educational services, is operated by an entity other than the school district or board of cooperative educational services and will provide health, dental or mental health services during school hours and/or non-school hours to school-age and preschool children, and that is: (1) a health clinic approved under the provisions of chapter one hundred ninety-eight of the laws of nineteen

hundred seventy-eight; or (2) another school-based health or dental clinic licensed by the department of health pursuant to article twenty-eight of the public health law; or (3) a school-based mental health clinic licensed or approved by the office of mental health pursuant to article thirty-one of the mental hygiene law; or (4) a school-based mental health clinic licensed by the office of mental retardation and developmental disabilities pursuant to article sixteen of the mental hygiene law.

(ii) Health professionals who provide services in licensed school-based health, dental or mental health clinics shall be duly licensed pursuant to the provisions of title eight of this chapter unless otherwise exempted by law and shall be authorized to provide such services to the extent permitted by their respective practice acts.

(iii) Except where otherwise authorized by law, the cost of providing health, dental or mental health services shall not be a charge upon the school district or board of cooperative educational services, and shall be paid from federal, state or other local funds available for such purpose. Building space used for such a clinic shall be excluded from the rated capacity of the school building for the purpose of computing building aid pursuant to subdivision six of section thirty-six hundred two of this chapter or aid pursuant to subdivision five of section nineteen hundred fifty of this chapter.

(iv) Nothing in this paragraph shall be construed to justify a cause of action for damages against a school district or a board of cooperative educational services

by reason of acts of negligence or misconduct by a school-based health, dental or mental health clinic or such clinic's officers or employees.

(k) For graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed.

The board of education in the city of New York may delegate the authority to judge the appropriateness for uses other than school purposes to community school boards.

2. The trustees or board of education shall determine the terms and conditions for such use which may include rental at least in an amount sufficient to cover all resulting expenses for the purposes of paragraphs (a), (b), (c), (d), (e), (g), (i), (j) and (k) of subdivision one of this section. Any such use, pursuant to paragraphs (a), (c), (d), (h) and (j) of subdivision one of this section, shall not allow the exclusion of any district child solely because said child is not attending a district school or not attending the district school which is sponsoring such use or on which grounds the use is to occur.

**First Amendment**
**to the**
**United States Constitution**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.