UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE BRONX HOUSEHOLD OF FAITH, *et al.*,

Plaintiffs,

v.

BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

Defendants.

No. 01-CV-08598 (LAP)
ECF Case

MEMORANDUM OF LAW OF *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

INTRODUCTION

In most courts, a regulation permitting after-hours use of public school buildings for a wide variety of nonreligious meetings, but not for "religious worship services," would be struck down as a violation of the Free Speech Clause. *See Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001). There would be no need to reach additional claims under the Free Exercise or Establishment Clauses. But due to the Second Circuit's decision in *Bronx Household of Faith* v. *Bd. of Educ. of City of New York*, 650 F.3d 30 (2d Cir. 2011) ("*Bronx Appeal III*"), those claims are now squarely presented here.

They are not difficult. The Board's Policy violates the Religion Clauses in multiple, separately sufficient ways. Rather than set the facts before the Court—a job Plaintiffs have already done ably—this memorandum offers a doctrinal overview of the multiple, independent legal theories on which Plaintiffs are entitled to prevail. Any one of these theories would suffice to support summary judgment for Plaintiffs. Taken together, the case is overwhelming. The Court should therefore grant Plaintiffs' motion for summary judgment (Dkt No. 148) and enter a permanent injunction against the Defendants.

INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around

the world. The Becket Fund has frequently represented religious people and institutions in cases involving the Religion Clauses. For example, The Becket Fund represented the successful Petitioner in *Hosanna-Tabor Evangelical Lutheran Church and Sch.* v. *EEOC*, 132 S. Ct. 694 (2012), the first ministerial exception case to reach the Supreme Court. The Becket Fund is concerned that the Board's policy of singling out "religious worship services" for exclusion from public school facilities is a manifest violation of both the Free Exercise and Establishment Clauses.

ARGUMENT

I. The Policy violates the Free Exercise Clause.

The Free Exercise Clause, as applied to the states via the Fourteenth Amendment, provides: "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. The Supreme Court has recognized two different types of free exercise claims. One involves government interference with an "internal church decision"—such as a church's selection of its ministers. *Hosanna-Tabor*, 132 S. Ct. at 707. A law burdening an internal church decision is unconstitutional even if it is a "neutral law of general applicability." *Id.*

The second type involves government interference with "outward physical acts"—such as "an individual's ingestion of peyote," *id.*, or the religious sacrifice of animals, *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993). A law burdening outward acts is unconstitutional only if it is "not neutral or not of general application" and does not satisfy "strict scrutiny." *Id.* at 546.

The Revised SOP fails in both ways. It violates *Hosanna-Tabor* because it regulates an "internal church decision"—namely, the way in which a church organizes the content of its religious meetings. And the Policy violates *Lukumi* because it is neither neutral nor generally applicable and cannot satisfy strict scrutiny.

A. The Policy violates the right of a church to control the nature of its worship under *Hosanna-Tabor*.

In the Supreme Court's most recent free exercise decision, *Hosanna-Tabor*, the Court unanimously held that religious organizations have a free exercise right to select their "ministers," broadly understood to include all persons who speak for, teach, and lead the church. 132 S. Ct. at 706. Although *Hosanna-Tabor* involved an employment dispute within a church, its reasoning extended much more broadly. The Court drew a distinction between "outward physical acts," which can be regulated pursuant to neutral and generally applicable laws, and "internal church decision[s]," which are outside the regulatory authority of government. *Id.* at 706-07. The Court based its decision on a long line of cases involving "the internal governance of the church." 704-06 (citing *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1872); *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952); and *Serbian E. Orthodox Diocese for U.S. and Can.* v. *Milivojevich*, 426 U.S. 696 (1976)).

Under these cases, churches have a First Amendment right "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116. For example, courts cannot reverse religious tribunals on "questions of discipline, or of faith, or ecclesiastical rule, cus-

tom, or law." *Watson*, 80 U.S. (13 Wall.) at 727. They cannot "resolve a religious controversy." *Jones* v. *Wolf*, 443 U.S. 595, 604 (1979). And they "have no power to revise or question ordinary acts of church discipline, or of excision from membership." *Bouldin* v. *Alexander*, 82 U.S. (15 Wall.) 131, 139 (1872).

The Revised SOP, as authoritatively interpreted by the Second Circuit, directly trenches on the free exercise rights declared in *Hosanna-Tabor*. Under the Policy, churches are free to engage in a wide variety of religious activities in public school buildings—including prayer, religious instruction, and the singing of hymns. But they are prohibited from engaged in one particular activity—"religious worship services"—which the Second Circuit defined 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. The Policy thus grants or withholds access to a generally available public benefit based purely on internal church decisions, in two respects: whether meetings are conducted "according to an order prescribed by" the church, rather than spontaneously or in accordance with the wishes of those gathered on the occasion; and whether the meeting is under the auspices of "an organized religion," which according to the Second Circuit typically involves being conducted by "an ordained official of the religion."

Whether religious meetings are conducted in accordance with a set liturgy, and whether the particular religious gathering is under the auspices of an "organized religion" with an "ordained official," *Bronx Appeal III*, 650 F.3d at 37, are precisely

the sorts of "internal" decisions that the First Amendment leaves to private groups of believers, with no allowance for governmental second-guessing. Consider two different meetings, both involving prayer, religious instruction, and singing. In one, the participants offer spontaneous prayers, in their own words; in the other, the participants follow the Book of Common Prayer or some other prescribed liturgy. In the one, a lay teacher reads from scripture and offers her opinion about how the participants might apply the passage to their personal lives; in the other, a man in vestments delivers a prepared homily. In one meeting, participants bring guitars and the group sings praise songs, as the spirit moves them; in the other, the group sings the same hymns that persons of their denomination are singing all over the country on that day. Under the Revised SOP, the first group would apparently be permitted to meet (so long as they are careful not to use the forbidden word "worship"), and the second group would not. We submit that how prayers are formulated, who teaches the group about scripture, and what songs are sung are "strictly ecclesiastical" decisions. *Hosanna-Tabor*, 132 S. Ct. at 709. Governmental action may not be predicated on such distinctions.

It is similarly an "internal church decision" whether to conduct meetings under the "auspices" of an "organized religion," *Bronx Appeal III*, 650 F.3d at 37, or under some other form of organization. One group may be affiliated with the Methodist Church, which is an organized religion; another may be part of the Fellowship of Christian Athletes, the Muslim Students Association of Brooklyn, or an interdenominational scripture study group, which are not. How believers organize themselves

for religious meetings is none of the government's business. *Hosanna-Tabor* makes that clear.

B. The Policy is not neutral under *Lukumi*.

The Board's Policy is also unconstitutional under *Lukumi*. Under *Lukumi*, a law is not "neutral," and is therefore subject to strict scrutiny, if (1) it "lacks facial neutrality"; (2) it "targets religious conduct for distinctive treatment"; or (3) it provides "differential treatment" of various religions. *Lukumi*, 508 U.S. at 533, 534, 536. The Revised SOP is unconstitutional for all three reasons.

1. The Policy is not facially neutral.

As the Supreme Court explained in *Lukumi*, the first and "minimum requirement" of neutrality is "that a law not discriminate on its face." *Id.* at 533. A law discriminates on its face "if it *refers to a religious practice without a secular meaning* discernible from the language or context [of the law]." *Id.* (emphasis added). In *Lukumi*, for example, the ordinances referred to "'sacrifice' and 'ritual,'"—words with "strong religious connotations." *Id.* at 533-34. But the Court nevertheless held that the ordinances were facially neutral because those terms also had "secular meanings" and were defined by the ordinances "in secular terms, without referring to religious practices." *Id.* at 534.

Here, the Policy prohibits "religious worship services." Unlike the terms "sacrifice" and "ritual," the term "religious worship services" does not have a "secular meaning" and is not defined in "secular terms." *Id.* Indeed, in its ruling on viewpoint discrimination, the Second Circuit emphasized just the opposite, stating that "the term 'worship services' has *no [nonreligious] use*." *Bronx Appeal III*, 650 F.3d at

38-39 (emphasis added). Thus, the Policy is a textbook case of facial discrimination against religion, and must satisfy strict scrutiny.

2. The Policy targets religious conduct.

Even assuming the Policy were somehow facially neutral, mere facial neutrality is not sufficient. *Lukumi*, 508 U.S. at 534. A facially neutral law is subject to strict scrutiny when, through a pattern of exemptions or prohibitions, it "targets religious conduct for distinctive treatment." *Id.* In *Lukumi*, for example, the ordinances were not neutral because the "pattern of exemptions" and "pattern of narrow prohibitions" meant that "the burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others." *Id.* at 536-37.

The same is true here. The Policy broadly opens the public schools to almost any uses "pertaining to the welfare of the community." SOP § 5.6.2. The only exceptions are for certain "commercial purposes," SOP § 5.10, certain "political events," SOP §§ 5.6.4, 5.7, and "religious worship services," SOP § 5.11. But in practice, the prohibition on "commercial purposes" has been ignored, Lorence Affidavit, Dkt. No. 43, at Bates Stamp 573-604 (noting frequent commercial uses), and the prohibition on "political events" has been defined narrowly to include little more than electioneering, while permitting a wide variety of "civic" and other meetings discussing political subjects. *See* SOP § 5.7 (defining "political events"). In other words, "the burden of the [Policy], in practical terms, falls on [religious worship services] but almost no others." *Lukumi*, 508 U.S. at 536.

3. The Policy discriminates *among* religions.

Finally, the Policy is not neutral under *Lukumi* because it provides "differential treatment of [various] religions." 508 U.S. at 536. As the Supreme Court has said, the "clearest command" of the Religion Clauses is that "one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). In *Lukumi*, for example, the ordinances prohibited Santeria sacrifice, but exempted kosher slaughter. 508 U.S. at 536. The Supreme Court suggested that this "differential treatment of two religions" might be "an independent constitutional violation." *Id.*; *see also Stormans, Inc.* v. *Selecky*, C07-5374RBL, 2012 WL 600702, *52 (W.D. Wash. Feb. 22, 2012).

As authoritatively defined by the Second Circuit, the typical components of a worship service—"[p]rayer, religious instruction, expression of devotion to God, and the singing of hymns"—"do not constitute the conduct of worship services." *Bronx Appeal III*, 650 F.3d at 36. Instead, these activities become a "worship service" *only* when they are "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. This discriminates between "organized religions" and other religious groups, and between those that conduct their meetings in accordance with a prescribed order and those that conduct their meetings in a more spontaneous manner.

This plainly discriminates against religious groups. Some religious groups have "ordained officials" and some do not. *See Hosanna-Tabor*, 132 S. Ct. at 711 (Alito, J.,

concurring) ("[T]he concept of ordination as understood by most Christian churches and by Judaism has no clear counterpart in some Christian denominations and some other religions."). Some follow a prescribed liturgy, and some do not. For example, Quakers and Buddhists, who run afoul of neither criterion, would be permitted to meet, as might Sikhs (who have no ordained clergy), and many low-church Protestants (who follow no particular "order" of worship). But Episcopalians, Roman Catholics, and most Jewish congregations would be out of luck. This violates the "clearest command" of the Religion Clauses, which is that "one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244.

4. The Policy is not justifiable under *Locke*.

Despite the Policy's obvious lack of neutrality, the Board may attempt to argue that it is justified under *Locke* v. *Davey*, 540 U.S. 712 (2004). There, the Supreme Court upheld a Washington state law offering scholarships for higher education, but excluding students who were pursuing a degree in "devotional theology." *Id.* at 717. Although the Court recognized that the scholarship program was not facially neutral, it upheld it based on "the historic and substantial state interest" in "not funding the religious training of clergy." *Id.* at 725, 722 n.5. In other words, a "mild[]" form of facial discrimination was justified because, as a historical matter, "procuring taxpayer funds to support church leaders . . . was one of the hallmarks of an 'established' religion." *Id.* at 720, 722.

Locke is distinguishable for several reasons. The first and most obvious is that, as *Locke* explained, the scholarship program involved a direct subsidy—"not a fo-

rum for speech." *Id.* at 720-21 n.4. It thus fell within the category of cases where the government has great discretion to grant or withhold subsidies, without heightened scrutiny into possible discrimination. The Revised SOP unquestionably pertains to a forum. *See Bronx Appeal III*, 650 F.3d at 36 ("P.S. 15 is a limited public forum.").

Second, *Locke* involved "funding *the religious training of clergy*." 540 U.S. at 722 n.5 (emphasis added). The religious training of clergy is unique, the Court emphasized, because "procuring taxpayer funds to support church leaders . . . was one of the hallmarks of an 'established' religion." *Id.* at 713. This meant that the state's interest in *Locke* was particularly "historic and substantial." *Id.* at 725; *see also* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 184 (2004) ("There is much to suggest . . . that the opinion [in *Locke*] is confined to the training of clergy.").

By contrast, governments have no comparable "historic and substantial" interest in excluding "religious worship services" from government property. History proves the opposite. President Washington permitted religious groups to conduct worship services in the U.S. Capitol building as early as 1795. 1 Wilhelmus Bogart Bryan, *A History of the National Capital from Its Foundation Through the Period of the Adoption of the Organic Act* 260 (1914); James H. Hutson, *Religion and the Founding of the American Republic* 84 (1998). 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. *Id.* at 89. Even the Supreme Court chamber was occasionally used for worship services. *Id.* at 91. 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." 19 *The Writings of Thomas Jefferson* 414-17 (Memorial ed., 1904). In short, unlike government funding for clergy in *Locke*, there is no "historic and substantial" state interest in excluding "religious worship services" from public buildings.

Third, the funding restriction in *Locke* was required by the Washington state constitution, "which ha[d] been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry." 540 U.S. at 719. Thus, the state was not merely preventing conduct that *might* be perceived (incorrectly) as an Establishment Clause violation; it was preventing conduct that definitively violated the state constitution. Here, the Board cites only an interest in potential misperceptions about the Establishment Clause.

Finally, the Policy here creates two problems that were not present in *Locke*: (1) It discriminates among religions (Part I.B.3, *supra*), and (2) it requires intrusive determinations regarding religious questions (Part II, *infra*). Based on the same two problems, the Tenth Circuit distinguished *Locke* in *Colorado Christian University* v. *Weaver*, 534 F.3d 1245, 1256 (10th Cir. 2008). There, the state of Colorado provided scholarships to eligible students who attended any accredited school in the state—

secular or religious—except for schools that the state deemed "pervasively sectarian." *Id.* at 1250. The state argued that this facial discrimination was justified under *Locke*.

But the Tenth Circuit disagreed. "[T]he Colorado exclusion . . . has two features that were not present in *Locke* and that offend longstanding constitutional principles." *Id.* at 1256. First, it "expressly discriminates *among* religions, allowing aid to 'sectarian' but not 'pervasively sectarian' institutions." *Id.* Second, it requires "intrusive governmental judgments" about whether an institution is "pervasively sectarian" or not. *Id.* Thus, *Locke* did not control.

The same is true here. As explained above, the Policy discriminates among religions by excluding groups that use prescribed orders of worship or meet under the auspices of an "organized religion," *Bronx Appeal III*, 650 F.3d at 37, while welcoming religious groups that conduct the same sorts of prayer, teaching, and singing in a more spontaneous or less denominational manner. And as explained in Part II below, the Policy entangles the government in an "intrusive inquiry" about what constitutes a "worship service." Thus, *Locke* is inapplicable.

C. The Policy is not generally applicable under *Lukumi*.

Not only is the Policy non-neutral under *Lukumi*, it also fails the requirement of "generally applicability." Although "[n]eutrality and general applicability are interrelated," *Lukumi* treats them as distinct requirements. 508 U.S. at 531. "Neutrality" focuses on whether a law "targets religious conduct," *id.* at 534, while "general

applicability" focuses on whether a law is "underinclusive" for its purported ends. *Id.* at 543; *see also Stormans*, 2012 WL 600702, at *34.

The Board attempts to justify its Policy by saying it is necessary to avoid the perception or reality of an Establishment Clause violation. Even assuming the legitimacy or coherence of those justifications (which we address below), the Revised SOP is plainly underinclusive with respect to them, because Establishment Clause jurisprudence does not distinguish between religious activities such as prayer, religious teaching, and hymn singing, which are permitted under the Policy, and "worship services," which are not. *See Widmar*, 454 U.S. at 269 n.6, 271 n.9 (The distinction between "worship" and other religious activities "lacks a foundation in either the Constitution or in our cases, and . . . is judicially unmanageable."); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 845 (1995) (quoting *Widmar*) ("There is no indication when 'singing hymns, reading scripture, and teaching biblical principles' cease to be 'singing, teaching, and reading' . . . and become unprotected 'worship.'"). Indeed, most of the leading Establishment Clause cases involve religious activities conducted by persons such as public school teachers, who are not "ordained officials" and do not act under the auspices of any "organized religion" or in accordance with a prescribed "order" of worship.[1] *Bronx Appeal III*, 650 F.3d at 37.

[1] *See, e.g.*, *Engel* v. *Vitale*, 370 U.S. 421 (1962) (prayer in public schools); *Sch. Dist. of Abington Twp., Pa.* v. *Schempp*, 374 U.S. 203 (1963) (Bible reading in public schools); *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000) (prayer before public school football game).

A member of the public who heard the prayers, religious teachings, or singing of a religious group in one of the Board's properties would have no way of knowing (or reason to care) whether the group was meeting under the auspices of an "organized religion," or was following a "prescribed order." Either this hypothetical eavesdropper would understand (correctly) that the Establishment Clause is not violated when a religious group uses public property on neutral terms, or, as the Board says it fears, would entertain the (incorrect) perception that such use violates the Establishment Clause. But either way, the line drawn by the Revised SOP would not affect the matter. Nor would it affect the disposition of a hypothetical case where the constitutionality of the meeting is challenged in court.

In light of this near-total underinclusiveness, the Revised SOP is not "generally applicable" within the meaning of *Lukumi*.

D. The Policy cannot satisfy strict scrutiny.

Because the Policy is neither neutral nor generally applicable, it must satisfy strict scrutiny. This means the Board must prove that the Policy (1) "advance[s] interests of the highest order" and (2) is "narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (quotations omitted). This is "the most demanding test known to constitutional law," *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997), and the Board cannot even begin to satisfy it.

1. The Policy does not advance a compelling interest.

The Board has offered two possible interests underlying its Policy: (1) avoiding the "perception" of an Establishment Clause violation; and (2) avoiding an actual

Establishment Clause violation. The first interest is not compelling. The second is not advanced by the Policy.

First, no court has held that avoiding the mere "perception" of an Establishment Clause violation—rather than an actual violation—is a compelling governmental interest. The Supreme Court rejected a similar argument in *Good News Club*. There, a public school refused to allow a Christian club to use school facilities after hours. It claimed that this policy was justified because young schoolchildren might "perceive that the school [wa]s endorsing the Club," even if the school did not actually violate the Establishment Clause. 533 U.S. at 113.

The Supreme Court rejected that argument: "We cannot operate, as [the school] would have us do, under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club's religious activity." *Id.* at 119. If anything, said the Court, it was just as likely that children "would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum." *Id.* at 118. Thus, avoiding the mere "perception" of an Establishment Clause is not a compelling interest. *See also Rosenberger*, 515 U.S. at 838 (rejecting Establishment Clause defense).

That leaves the Board's alleged interest in avoiding an *actual* Establishment Clause violation. To be sure, complying with the Establishment Clause is a compelling governmental interest. *Widmar*, 454 U.S. at 271. But as this Court and Judge Walker have recognized, *Bronx*, 2012 WL 603993, at *10-*11; *Bronx Appeal III*, 650 F.3d at 59-64 (Walker, J., dissenting), the Policy does not advance that interest

because permitting worship services in a neutral speech forum does not violate the Establishment Clause.

Time and again, the Supreme Court has rejected Establishment Clause concerns leveled at an "equal access" policy—where both religious and nonreligious speech are equally permitted in a government forum. *See Widmar*, 454 U.S. at 270-75; *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394-95 (1993); *Rosenberger*, 515 U.S. at 837-46; *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 761-69 (1995) (plurality); *Good News Club*, 533 U.S. at 112-19. Not only is an equal access policy *not forbidden* under the Establishment Clause, it is often *required* under the Free Speech Clause. *Id.* Thus, were the Board to permit "worship services" on equal terms with nonreligious speech, a reasonable observer would not perceive endorsement; she would merely conclude that the Board was adopting an equal access policy that might well be required by the Free Speech Clause.

Indeed, the use of public school buildings for worship services is widespread in this country. In *Fairfax Covenant Church* v. *Fairfax County School Board*, for example, the school board received approximately fifty applications from churches seeking to lease its facilities each year. 17 F.3d 703, 708 (4th Cir. 1994). And according to a 2007 study of evangelical Protestant congregations, approximately 12% of all new congregations met in schools in their first year—second only to meeting in homes (18%) and church buildings (13%). Ed Stetzer & Phillip Connor, *Church Plant Survivability and Health Study 2007*, at 7,

http://www.edstetzer.com/2011/07/18/RESEARCH_REPORT_SURVIVABILITY_HEALTH.pdf. Yet despite the widespread practice of churches meeting in public school buildings, the Board has not cited a single case striking that practice down as a violation of the Establishment Clause. The only authority is to the contrary. *See, e.g.*, *Gregoire* v. *Centennial Sch. Dist.*, 907 F.2d 1366 (3d Cir. 1990) (allowing religious worship in an open forum would not violate the Establishment Clause); *Fairfax Covenant Church*, 17 F.3d at 704 (same). And there is not a scrap of precedent suggesting that the line drawn by the Policy between religious activities and "worship services" relates in any way to the Establishment Clause. *See* Part I.C, *supra*.

If anything, the real Establishment Clause concerns cut the other way. As explained in Part II below, the ban on "religious worship services" impermissibly discriminates among religions, entangles the government in religious questions, and regulates the content of religious services—all in violation of the Establishment Clause, as the Supreme Court said more than thirty years ago in *Widmar*, 454 U.S. at 269 n.6, 271 n.9. Thus, far from advancing the government's interest in avoiding an Establishment Clause violation, the Policy undermines it.

2. The Policy is not narrowly tailored.

Nor is the Policy "narrowly tailored" in pursuit of its alleged interests. *Lukumi*, 508 U.S. at 546. As this Court has pointed out, the Board could employ less restrictive alternatives for reducing the alleged risk of perceived endorsement: It could limit the number of times per year that any organization can use the building; it could require churches (or school buildings) to post signs disclaiming endorsement;

or it could revoke a permit if an organization intentionally fosters an impression of endorsement. *Bronx*, 2012 WL 603993, at *11 (quoting *Bronx Appeal III*, 650 F.3d at 64 n.11 (Walker, J., dissenting)). Because the Board has not considered these alternatives, it cannot satisfy strict scrutiny.

II. The Policy violates the Establishment Clause.

The Policy also violates the Establishment Clause in three different ways. First and second, as already explained, the Policy violates the Establishment Clause prohibition on government involvement in internal church decisions (Part I.A) and on discrimination among religions (Part I.B.3). We will not repeat those arguments here, but incorporate them by reference. Third, the Policy runs afoul of the Establishment Clause's ban on entanglement between church and state. The City cannot raise a strict scrutiny affirmative defense to the first or third violations. *Hosanna-Tabor*, 132 S. Ct. 694 (no strict scrutiny analysis); *Colo. Christian Univ.*, 534 F.3d at 1266. Government involvement in ecclesiastical decisions, and entanglement of church and state are absolutely banned. The City can raise a strict scrutiny defense to a discrimination-among-religions claim, *id.*, but that defense fails for the reasons described in Part I.E, *supra*.

The entanglement doctrine prohibits the government from making "intrusive judgments regarding contested questions of religious belief or practice." *Colo. Christian Univ.*, 534 F.3d at 1261. But the Policy requires just such intrusive judgments about the activities, affiliations, and beliefs of religious institutions that seek to use public school buildings. For example, the only way a City official can determine

whether a group is engaged in forbidden worship is to inquire whether the group is acting "according to an order prescribed by and under the auspices of an organized religion" and then to monitor the group's activities for compliance. *Bronx Appeal III*, 650 F.3d at 37. This is just the sort of government "trolling through a person's or institution's religious beliefs" that the First Amendment prohibits. *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000). *See also NLRB* v. *Catholic Bishop*, 440 U.S. 490, 502–03 (1979) (government cannot base decisions on intrusive questions regarding religious practice).

The Board may argue that it avoids entanglement by simply relying on an applicant's certification about "religious worship services," *Bronx*, 2012 WL 603993, at *16, but that is not how it has worked in practice. Rather, the Board has "conduct[ed] an independent evaluation of the religious applicant's activities" to determine whether, in the Board's view, they involve religious "worship services." *Id.* at *15. That is precisely the sort of intrusive meddling in religious matters that courts have held violates the Establishment Clause. *Colo. Christian Univ.*, 534 F.3d at 1261-66.

CONCLUSION

The Board's Policy is not in a constitutional gray zone. It is baldly unconstitutional, resulting in multiple violations of the Religion Clauses. The Court should strike it down on the basis of each of the separate violations described above.

Respectfully submitted.

Dated: April 20, 2012

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