No. 12-2730

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE BRONX HOUSEHOLD OF FAITH, ROBERT HALL, AND JACK ROBERTS,
Plaintiffs-Appellees,
v.
BOARD OF EDUCATION OF THE CITY OF NEW YORK,
AND COMMUNITY SCHOOL DISTRICT NUMBER 10,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York, Hon. Loretta A. Preska
No. 1:01-CV-08598-LAP

Brief *Amicus Curiae* of The Becket Fund for Religious Liberty in Support of Plaintiffs-Appellees and Affirmance

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a non-profit, public-interest legal and educational institute that protects 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 School* v. *EEOC*, 132 S. Ct. 694 (2012), the first ministerial exception case to reach the Supreme Court.

The Becket Fund is concerned that the New York City Department of Education's policy of singling out "religious worship services" for exclusion from public school facilities is a manifest violation of both the

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[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

Free Exercise and Establishment Clauses and an invitation to unnecessary strife between Church and State. In the Becket Fund's view, religious citizens should not be viewed with suspicion, but treated equally to other citizens: no better and no worse.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Since this Court last had occasion to consider this case, the Supreme Court rendered a decision that fundamentally recast how courts are to decide Religion Clause claims brought by religious groups. Whether hailing the decision or bewailing it, legal commentators have characterized *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC* as the most significant Religion Clauses decision since the *Lukumi* decision in 1993.[2] As relevant to this appeal, *Hosanna-Tabor* marks at least two fundamental changes to the law.

First, *Hosanna-Tabor* clarified that the Religion Clauses provide an additional class of protections to religious groups that religious individuals do not enjoy. Under the rule of *Smith* and *Lukumi*, an individual or a group may bring a Free Exercise claim if it is either "not neutral" or "not of general application" and the government cannot

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[2] *See* Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception* 35 Harv. J.L. & Pub. Pol'y 839 (2012); Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 Harv. J.L. & Pub. Pol'y 821 (2012); Caroline Mala Corbin, *The Irony of* Hosanna-Tabor Evangelical Lutheran Church and School *v.* EEOC, 106 Nw. U. L. Rev. 951 (2012); Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 Ind. L.J. (forthcoming 2013), available at http://ssrn.com/abstract=2026046.

satisfy "strict scrutiny." But after *Hosanna-Tabor*, religious groups have an additional protection available under the Religion Clauses: even a neutral and generally applicable law cannot interfere with certain "internal church decision[s]."

Second, in *Hosanna-Tabor* the Supreme Court for the first time struck down a law under the Establishment Clause because it interfered with the autonomy of a religious group. Until *Hosanna-Tabor* was decided, the Court had held government action unconstitutional only for *encouraging* religion. But now governments cannot treat the Establishment Clause as a one-way street empowering them to disfavor religious groups.

In this appeal, the New York City Department of Education ("Department") has responded to *Hosanna-Tabor* by whistling past the graveyard. According to the Department, "*Hosanna-Tabor* represents the Supreme Court's recognition of a ministerial exception as a defense to an employment discrimination claim, which is irrelevant to this matter." Dept. Br. 31. Yet *Hosanna-Tabor* on its own terms contemplates that it will apply in other contexts, including contract claims and tort claims. *See Hosanna-Tabor*, 132 S. Ct. at 710. And the

rule of *Hosanna-Tabor* is by no means limited to employment matters. *See id.* at 707 (contrasting "government regulation of only outward physical acts" with "government interference with an internal church decision that affects the faith and mission of the church itself"). Any government interference with internal church decisions—such as decisions about how to order worship or to ordain ministers—must be evaluated in light of *Hosanna-Tabor*, regardless of whether an employment matter is involved.

The Department has good reason to hope this Court will not look too closely at *Hosanna-Tabor*. First, under *Hosanna-Tabor*, the Department's decision to regulate religious groups based on criteria such as whether the group follows a prescribed order of worship or whether it ordains its leaders is a gross interference with the internal affairs of religious groups. Indeed, it is hard to imagine why the Department should even care whether a religious group ordains ministers or follows an order of worship unless it is seeking to exclude specific disfavored religious groups from its school buildings.

Second, even apart from *Hosanna-Tabor*, the Department's Policy is not "neutral and generally applicable" under *Smith* and *Lukumi*. The

Policy is not neutral because it singles out religious practices for disfavor on its face, because it "targets religious conduct for distinctive treatment," and because it provides "differential treatment" to particular religious groups. The Policy is not generally applicable because it is radically underinclusive with respect to its purported purpose of preventing an appearance of favoring religion.

Finally, the Department's affirmative defense that it has a compelling governmental interest in preventing an appearance of an Establishment Clause violation cannot survive *Hosanna-Tabor*. The Policy doesn't avoid an appearance of an Establishment Clause violation for the simple reason that it *is* an Establishment Clause violation.

The Department's Policy picks a fight exactly where America doesn't need one. Church-state relations are already charged enough in our religiously diverse society without unnecessary government intrusion into the internal affairs of religious groups. The strong form of church-state separation embraced by the unanimous Supreme Court in *Hosanna-Tabor* is the best way to deal with religious pluralism, and that requires that the judgment below be affirmed.

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's recent decision in *Hosanna-Tabor* fundamentally changed how courts are to decide free exercise claims. In *Hosanna-Tabor*, the Supreme Court recognized that, at the highest level of generality, there are at least two different analyses for Free Exercise Clause claims. One category of analysis 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 that burdens an internal church decision is unconstitutional even if it is a "neutral law of general applicability." *Id.* (rejecting application of *Smith/Lukumi* line of precedent to internal church decisions). By its nature, this analysis applies only to religious groups.

The second category of analysis 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 that burdens outward acts violates the Free Exercise Clause if it is either "not neutral" or "not of general application" and the government cannot satisfy "strict scrutiny." *Id.* at 546. This form of analysis applies to both religious individuals and religious groups.

The revised Policy at issue in this appeal fails under *both* analyses. 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 interferes with the Church's internal affairs under *Hosanna-Tabor* by regulating the nature of its worship.

In *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 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." *Id.* at 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, custom, 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 Policy, as authoritatively interpreted by this Court, directly trenches on the free exercise rights recognized 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 engaging in one particular activity—"religious worship services"—which this Court defined in the last appeal 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 Household of Faith* v. *Bd. of Educ. of City of N.Y.*, 650 F.3d 30, 37 (2d Cir. 2011) ("*Bronx IV*"). The Policy thus grants or withholds access to a generally available government benefit based purely on internal church decisions, in two respects: (1) 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 (2) whether the meeting is under the auspices of "an organized religion," which according to this Court 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 IV*, 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, a Siddur, or some other prescribed liturgy. In the one, a lay teacher reads from scripture and offers his opinion about how the participants might apply the passage to their personal lives; in the other, a woman in vestments delivers a prepared homily. In one meeting, participants bring guitars and the group sings songs, as the spirit moves them; in the other, the group sings the same songs that persons of their denomination are singing all over the country on that day. Under the revised Policy, the first group would be permitted to meet (so long as they are careful not to use the forbidden word "worship"), and the second group would not. But 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. Governments have no stake in such distinctions, and governmental action may not be predicated on them.

It is similarly an "internal church decision" whether to conduct meetings under the "auspices" of an "organized religion," *Bronx IV*, 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. After *Hosanna-Tabor* it is clear—if it was not before—that how believers organize themselves for religious meetings is none of the government's business.

In its opening brief, the Department tries to make the organization of churches' religious meetings into an external matter, claiming that its interest "is 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." Dept. Br. at 39. But it never explains how a Church's decision about how to

organize its gatherings—a presumptively internal matter—affects third parties. Put another way, the Policy is a poor means to the Department's purported ends. *See Lukumi*, 508 U.S. at 538 (regulations unconstitutional because they "proscribe[d] more religious conduct than is necessary to achieve their stated ends").

In its most comprehensive list of purported goals for the Policy, the Department says that it has interests in preventing "forum domination, subsidy, exclusive (and at times pre-emptive) church use of school space, and public perception of government sponsorship of religion." Dept. Br. at 46. But each of those supposed perils will exist regardless of whether a particular religious group calls the activity "worship" or not, whether the group uses a liturgy or not, and whether an ordained minister presides over the service or not. Quakers can "dominate" a school building just as easily as Episcopalians. Sikhs will receive the same purported "subsidy" as evangelical Presbyterians (though that "subsidy" is a figment of the Department's imagination). Nor has the Department introduced any evidence showing that a minyan is more likely to create a "public perception of government sponsorship of religion" than is a free-wheeling Pentecostal meeting. How religious

groups organize their meetings has no logical connection to the Department's purported concerns regarding an external appearance of governmental endorsement. A religious group's decision to use a liturgy or not, or to ordain its ministers or not, is an entirely internal affair under *Hosanna-Tabor*, and therefore not subject to government regulation.[3]

B. The Policy is neither neutral nor generally applicable under *Smith* or *Lukumi*.

The Department's Policy also violates *Smith* and *Lukumi* in two ways: The Policy is not neutral and the Policy is not generally applicable. These are separate requirements. Although "[n]eutrality and general applicability are interrelated," *Lukumi* treats them as distinct. 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*

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[3] Indeed, the Department's failure to draw a connection between the Policy's interference with internal Church decisions and the external effects gives rise to an inference of the Policy's true purpose: Keeping certain disfavored groups out of public schools.

Stormans, Inc. v. *Selecky*, 854 F. Supp. 2d 925, 989-90 (W.D. Wash. 2012).

1. The Policy is not neutral 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 Policy is unconstitutional for all three reasons.

a. 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 ruling on viewpoint discrimination in the previous appeal, this Court emphasized just the opposite, holding that "the term 'worship services' has *no [nonreligious] use*." *Bronx IV*, 650 F.3d at 38-39 (emphasis added). Thus, the Policy is a textbook case of facial discrimination against religion, and must therefore satisfy strict scrutiny.

b. The Policy targets religious conduct.

Even were the Policy 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." JA A226. The only exceptions are for certain "commercial purposes," JA A227, certain "political events," JA 233, and "religious worship services," JA A227. But in practice, the prohibition on "commercial purposes" has been ignored, Lorence Affidavit, Dist. Ct. Dkt. No. 43 (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* JA 233 (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.

c. 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*, 854 F. Supp. 2d at 988.

As authoritatively interpreted by this Court, 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 IV*, 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 distinction 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 more spontaneously.

Some religious groups have "ordained officials" and some do not. *See Hosanna-Tabor*, 132 S. Ct. at 711 (Alito and Kagan, JJ., 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 Pentecostals and other 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.

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

The Department argues that the Policy is justified under *Locke* v. *Davey*, 540 U.S. 712 (2004). Dept. Br. 34-37. There, the Supreme Court upheld a Washington state law that offered scholarships for higher education, but specifically excluded students who were pursuing a degree in "devotional theology." 540 U.S. 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, at

the time of the Founding, "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 forum for speech." *Id.* at 720-21 n.3. It thus fell within the category of cases where the government has discretion to grant or withhold subsidies, without heightened scrutiny into possible discrimination. By contrast, the revised Policy unquestionably pertains to a forum. *See Bronx IV*, 650 F.3d at 36 ("P.S. 15 is a limited public forum.").[4]

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[4] The Department oddly relies on *Christian Legal Society* v. *Martinez*, 130 S. Ct. 2971 (2010), for the novel proposition that resolution of a Free Speech claim with respect to a particular set of facts means that no Free Exercise claim can succeed. Dept. Br. at 37 ("It also makes no sense to apply strict scrutiny to plaintiffs' Free Exercise claim when their related First Amendment claim, based on the same facts, has already been analyzed under a less restrictive standard."). Thus in the Department's view, because this Court has already undertaken forum analysis, the stricter Free Exercise standard should not be applied. But *Christian Legal Society* in fact supports exactly the opposite rule: the Court analyzed the Free Exercise claim separately from the Free Speech claim. *Id.* at 2995 n.27.

The Department argues that the rental of public school buildings at uniform rates constitutes a form of subsidy to the Church and every other entity to rent from the Department. Dept. Br. 54-55. But the only money that changes hands goes from the Church to the City, not from the City to the Church. If it counts as a direct subsidy at all, this is very unlike the subsidy at issue in *Locke*, where the plaintiff sought to obtain scholarship funding from Washington State.

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. In fact, 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 Department cites only an interest in potential misperceptions about the federal Establishment Clause. Dept. Br. 39.

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 IV*, 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.

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

The Policy separately violates the requirement of general applicability under *Lukumi*. Under *Lukumi*, a law is not generally

applicable when it is substantially "underinclusive" for its stated ends. 508 U.S. at 543.

Here, the Department claims that the Policy serves the end of avoiding the perception or reality of an Establishment Clause violation. But even assuming the legitimacy of that end (which we address below), the revised Policy is plainly underinclusive with respect to it, 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* v. *Vincent*, 454 U.S. 263, 269 n.6, 271 n.9 (1981) (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.'").

A member of the public who heard prayers, religious teachings, or singing in one of the Department's properties would have no way of

knowing (or reason to care) whether the group was meeting under the auspices of an "organized religion," was following a "prescribed order," or met the Department's definition of a "worship service." 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 Department says it fears, would entertain the (incorrect) perception that such use violates the Establishment Clause. But either way, the distinction between "worship services" and other gatherings involving prayer, teaching, and singing 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 Policy is not "generally applicable" within the meaning of *Lukumi*.

C. The Policy cannot satisfy strict scrutiny.

Because the Policy is neither neutral nor generally applicable, it must satisfy strict scrutiny.[5] This means the Department must prove

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[5] Under *Hosanna-Tabor*, the government can raise no strict scrutiny affirmative defense to an "internal church decision" claim. *Hosanna-*

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 Department cannot even begin to satisfy it.

1. The Policy does not advance a compelling interest.

According to the Department, the interests the Policy advances are very limited: "The Department's interest is 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." Dept. Br. 39. This is not enough. The Department's interest in avoiding the "appearance" of government endorsement is not compelling. And its interest in avoiding the fact of government endorsement 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

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Tabor, 132 S. Ct. at 710 (balance struck by First Amendment does not allow consideration of admittedly "important" "interest of society in the enforcement of employment discrimination statutes").

compelling governmental interest for purposes of strict scrutiny. The Supreme Court rejected a similar argument in *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001). 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. *Id.* 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).

The Department nevertheless argues that this Court already found the Department's interest in avoiding the perception of endorsement to be "compelling." Dept. Br. 45 (citing *Bronx IV*, 650 F.3d at 40). But this

Court did no such thing. Rather, it specifically held that the revised Policy was a form of content discrimination in a limited public forum, which is *not* subject to strict scrutiny; thus, it rejected the application of strict scrutiny in the free speech context. *Bronx IV*, 650 F.3d at 39-40. In fact, the *only* time this Court used the word "compelling" was in two parentheticals:

> *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").

Bronx IV, 650 F.3d at 40. But those citations are to cases that *rejected* Establishment Clause defenses offered by the government defendants, because there *was no Establishment Clause violation*. *See Pinette*, 515 U.S. at 762-63; *Widmar*, 454 U.S. at 270-75. Thus, *Pinette* and *Widmar* stand for exactly the opposite of what the Department cites them for—namely, that a perceived-but-not-actual Establishment Clause violation is *not* a compelling governmental interest.

Without the invalid "appearance" argument, what remains is the Department'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; *Pinette*, 515 U.S. at 761–62. But 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; *Pinette*, 515 U.S. at 761; *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 Department to permit "worship services" on equal terms with nonreligious speech, a reasonable observer would not perceive endorsement; she would merely conclude that the Department 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 Department 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*.

Indeed, this interest *cannot* be advanced because the Policy *violates* the Establishment Clause. 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. Moreover, under *Hosanna-Tabor*, government interference in internal church decisions about whether to follow an order of worship or ordain ministers violates the Establishment Clause. *See* Part I.A above. Thus, far from advancing the government's interest in avoiding an Establishment Clause violation, the Policy violates 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 Department 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. Because the Department 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 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 Department 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 IV*, 650 F.3d at 37. This is just the sort of inquisitorial "trolling through a person's or institution's religious beliefs" that the First Amendment prohibits. *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality op.). *See also NLRB* v. *Catholic Bishop*, 440 U.S. 490, 502–03 (1979) (government cannot base decisions on intrusive questions regarding religious practice).

In its brief, the Department no longer claims that it relies only on an applicant's certification about "religious worship services," but now admits that it will also conduct "reasonable inquiry" into whether applicants like the Church are engaged in forbidden worship services. Dept. Br. 49. 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.

* * *

In its efforts to win litigation more than a decade old, the Department has arrived at a Policy that requires it to inquire into and discriminate against religious groups that follow a prescribed order of worship or ordain ministers. But under the Religion Clauses, these are quintessential church decisions that the Department has no business interfering with. True church-state separation demands that the Policy be struck down.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,426 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on October 10, 2012.

I certify that all participants in the case have been served a copy of the foregoing by the appellate CM/ECF system or by other electronic means.

October 10, 2012

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