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.

01-CV-08598-LAP

NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on February 14, 2012, or as soon thereafter as this matter can be heard at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York 10007, Plaintiffs, by and through counsel, will and hereby does, move this Court for a preliminary injunction against Defendants.

This motion for a preliminary injunction is made pursuant to Fed. R. Civ. P. 65, and on the grounds specified in this notice of motion and motion, the Plaintiffs' memorandum in support of this motion, the pleadings, brief, declarations, affidavits, testimonies, transcripts, and evidence of record in this action, and such other and further evidence as may be presented to the Court at the time of the hearing.

Pursuant to this notice, Plaintiffs hereby move for a preliminary and/or permanent injunction against the Defendants, their agents, servants, employees, officials, or any other person acting in concert with them or on their behalf, invalidating and restraining them from

enforcing customs, procedures, codes, practices and/or policies as they pertain to the conduct made the subject of this Verified Complaint, specifically:

1. New York City Department of Education Chancellor's Regulation D-180 (formerly, Standard Operating Procedure § 5.11), which bans "religious worship services" in Defendants' school facilities or "using a school as a house of worship"; and
2. To allow the status quo to continue—i.e., to allow churches and religious speakers to use the Defendants' school facilities on an equal basis with all other users, and to permit previously approved uses, such as Plaintiffs', to continue pending any change in Defendants' regulations governing the use of the schools.

Plaintiff requests waiver of any bond requirement as these issues involve the free exercise of religion, there is no money at stake in issuance of the injunction, and no financial impact on the Defendants. *Pharmaceutical Soc'y of State of N.Y., Inc. v. N.Y. State Dep't of Soc. Servs.*, 50 F.3d 1168, 1174 (2d Cir. 1995); *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003).

Respectfully submitted this 3d day of February, 2012.

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs Bronx Household of Faith, Jack Roberts, and Robert Hall (the "Church") move this Court to immediately issue a preliminary injunction to preserve the ability of the Church to meet in public school facilities operated by the New York City Department of Education ("Department" or "Defendants"). Unless this Court issues a preliminary injunction, on February 13, 2012, the Department will terminate the Church's permit to use P.S. 15 in the Bronx. The Department will undertake these actions pursuant to Chancellor Regulation D-180 (formerly, Standard Operating Procedure ("SOP") § 5.11), which authorizes the use of school facilities for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," but which prohibits the use of these facilities for "religious worship services, or otherwise using a school as a house of worship."

Absent a preliminary injunction to allow it to continue meeting in P.S. 15 after February 12, 2012, the Church will suffer irreparable injury, namely the loss of its First Amendment right to free exercise of religion and freedom from excessive government entanglement with religion. The Church uses the Department's facilities because it cannot afford to rent other space in the community and does not yet have a permanent building of its own. Approximately 85-100 people that attend the Church will be displaced and have nowhere to attend church if the Department's policy is enforced. Because most people walk to church in the City, if forced out of the facilities, the Church will lose members and be unable to provide vital services to the community. It has been unable to locate an affordable and adequate alternative location to meet.

Religious services make up a small minority of the nearly 10,000 uses annually allowed in the Department's schools. Thus, preserving the status quo and allowing the Church to continue to rent P.S. 15 past February 12, 2012 will not have a noticeable impact on District facilities. But it will have a noticeable impact on the Church, which will be able to continue its ministry

and serve its members and the surrounding community.

The Church is likely to succeed on its claim that Regulation D-180 violates the Free Exercise and Establishment clauses of the First Amendment. While the Second Circuit ruled in June 2011, that the Department's policy did not violate the Free Speech Clause of the First Amendment, neither this Court nor the Second Circuit have ever analyzed the Department's policy under the Free Exercise Clause. The Department's policy violates free exercise jurisprudence, especially as recently buttressed by the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, __ S. Ct. __, 2012 WL 75047, at *1 (Jan. 11, 2012), because it prohibits conduct undertaken for religious reasons. Further, that decision also requires new analysis of the Church's Establishment Clause claim because it excessively entangles the government with religion. As the Church is likely to succeed on these claims and is suffering irreparable injury, the Court should issue a preliminary injunction that enjoins enforcement of Chancellor Regulation D-180.

STATEMENT OF FACTS

The Department owns and controls 1,197 individual school facilities, and authorizes the use of school facilities after school hours for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community." *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.* ("*Bronx IV*"), 650 F.3d 30, 33 (2d Cir. 2011); Defs.' L.R. 56.1 Stmt. Material Facts ¶ 24, Docket No. 45. The policy permits a broad range of community uses of its facilities after school hours. *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.* ("*Bronx II*"), 226 F. Supp. 2d 401, 409, 424-25 (S.D.N.Y. 2002); Decl. of Lisa Grumet Ex. A at SOP § 5, Apr. 11, 2005, Docket No. 62. In fact, in one school year alone, the Department approved nearly 10,000 community uses for its facilities. (Defs.' Resp. to Pls.' L.R. 56.1 Stmt.

Material Facts ¶ 10(c), Docket No. 68).

While the Department permits a broad range of activities, it has consistently excluded users from exercising their religious faith. In July 2007, it instituted SOP § 5.11, which states:

> 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.

Bronx IV, 650 F.3d at 35 n.4. The Department recently renamed and renumbered SOP § 5.11 to Chancellor's Regulation D-180(I)(Q).[1] (Letter from Jonathan Pines to Judge Preska at 1 n.1, Jan. 26, 2012, Docket No. 112.)

The Church has rented P.S. 15 in the Bronx since this Court issued an injunction in 2002. (Decl. of Robert Hall ¶ 5, Feb. 2, 2012, filed herewith.) However, due to the Second Circuit's ruling in June 2011, the Department will no longer permit the Church to meet in P.S. 15 after February 12, 2012. (*Id.* ¶ 17.) The Church has been meeting weekly on Sunday mornings. (*Id.* ¶ 5.). About 85–100 people attend on any given Sunday morning. (*Id.* ¶ 3.) The Sunday meetings are an important part of the Church's spiritual community. They provide an indispensable integration point and meeting place for the church members and others from the neighborhood to provide for each others' needs and to encourage one another. (Decl. of Robert Hall ¶¶ 6–9, Dec. 13, 2001, Docket No. 18.) Church members have provided food, clothing, toys, and money to those in need. (*Id.*) They have provided emotional and social support to help people escape welfare dependence, to lead productive lives, to escape addiction, and to leave a life of crime. (*Id.*)

The Church's Sunday meetings consist of singing songs and hymns of praise, teaching and

[1] N.Y.C. Dep't of Educ., Chancellor Regulation D-180, Extended Use of School Buildings, *available at* http://schools.nyc.gov/NR/rdonlyres/023114D9-EA44-4FE0-BCEE-45778134EA14/0/D180.pdf (last visited Feb. 3, 2012).

preaching from the Bible, sharing testimonies, fellowship, and celebrating the Lord's Supper (communion). (*Id*. ¶¶ 3–4.) Worship is a critical element of the Church's religious faith, and is called for in the Bible. During worship, which can vary in format and length from one meeting to another, members express their devotion and admiration to God. Those attending are taught many lessons from the Bible, such as how to live, to love their neighbors as themselves, to defend the weak, to help the poor, and to share their needs and problems. (*Id*. ¶¶ 3–4.)

The Church needs to meet in a public school because it does not have a building of its own and cannot afford to rent other locations nearby. (Hall Decl. ¶ 9, Feb. 2, 2012.) Allowing the members of the Church and others to gather and worship together in a large enough location is critical to the Church's religious faith because it allows members to pray for one another, hear testimony, engage in collective praise, and serve the local community—all duties of the Church's Christian faith. (Hall Decl. ¶¶ 3–4, Dec. 13, 2001.) The public schools currently provide the only avenue to achieve that religious need. Without the ability to meet in P.S. 15, the Church will not be able to meet together collectively, will lose members who cannot travel to these alternate locations, and will no longer be able to minister to the local community. (Hall Decl. ¶¶ 10–14, Feb. 2, 2012.) In short, it will be unable to function as one body meeting together.

ARGUMENT

The Church urgently requests a preliminary injunction from this Court to stop enforcement of Chancellor Regulation D-180. "The purpose of a preliminary injunction is to preserve the status quo pending the final determination of a dispute." *Arthur Guinness & Sons, PLC v. Sterling Publ'g Co.*, 732 F.2d 1095, 1099 (2d Cir. 1984). The status quo here is the Church meeting in the facilities for the last nine years. The Church requests that the Court issue the preliminary injunction on or before February 17, 2012 so that the Church may continue to use P.S. 15.

A court may issue a preliminary injunction under Federal Rule of Civil Procedure 65 when

the moving party demonstrates "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010); *see also id.* at 38 (ruling the "serious questions" standard remains viable after *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008)).

The threshold showing of "irreparable harm" is of particular significance under Rule 65, regardless of the strength of the movant's case on the merits. *See, e.g., Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990) ("a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction") (quotation marks and citation omitted). Accordingly, "[i]rreparable harm must be shown by the moving party to be imminent, not remote or speculative, and the alleged injury must be one incapable of being fully remedied by monetary damages." *Id.* The movant is required to establish not a mere possibility of irreparable harm, but that it is "likely to suffer irreparable harm if equitable relief is denied." *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir. 1990).

The Church satisfies the factors necessary for a preliminary injunction because absent relief the Church will suffer irreparable injury, namely ejection from their current meeting facilities in the Department's school facilities, with the attendant loss of its free exercise of religion. The Church is likely to succeed on the merits of its claims that Chancellor Regulation D-180 violates the First Amendment's Free Exercise and Establishment clauses.

I. The Church Will Suffer Irreparable Injury Absent a Preliminary Injunction.

Without a preliminary injunction from this Court enjoining enforcement of Chancellor Regulation D-180, the Church and its parishioners will have nowhere to meet for Sunday worship and nowhere to provide their vital community services. Violations of First Amendment

rights are presumed irreparable. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Bery v. City of New York*, 97 F.3d 689, 693–94 (2d Cir. 1996) ("Violations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction."); *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002) (finding irreparable harm for restriction on free exercise of religion).

Absent an immediate preliminary injunction from this Court, on February 13, 2012, the Church will no longer be able to rent P.S. 15, which it has used under this Court's injunction since August 2002. The P.S. 15 meeting location is vital to the Church's continued outreach to the community. Each week about 85–100 people participate in the Sunday meetings. (Hall Decl. ¶ 3, Feb. 2, 2012.) Many of these people live nearby. If forced to cease its activities at P.S. 15, the Church will be unable to meet with and serve these people. (*Id*. ¶¶ 10–14.) In a city where most people walk to church, even if the Church was able to find another location (which it has not), it will prevent many people from attending. Many of these individuals are elderly, disabled, or lack transportation, and traveling to another location is not a viable option. (*Id*.) As a result, the Church will lose members and significantly impede its ability to do its ministry to others. (*Id*.) A preliminary injunction is warranted to preserve the status quo—the Church's ability to use P.S. 15 on Sundays.

The Department's policy will not only irreparably injure the Church, it will exclude all churches from the public schools after school hours.[2] "By the very nature of their allegations,

[2] In addition, other churches face the same ouster if equitable relief does not issue. For example, International Christian Center, a multi-ethnic Christian church, meets weekly on Staten Island in two public high schools: Curtis High School and New Dorp High School. (Decl. of Christopher F. Dito ¶¶ 4–5, Feb. 2, 2012, filed herewith.) Nearly 260 people attend the church's services at New Dorp High School. (*Id*. ¶ 6.) It provides children's program, classes for families with special needs children, drug and alcohol abuse counseling, divorce counseling, parenting classes, financial assistance, food drives, clothing drives for the homeless, and clothing and diaper drives for a crisis

then, [Plaintiffs] have met the first prong of the test" for a preliminary injunction. *Bery*, 97 F.3d at 693–94.

II. The Church Is Likely to Succeed on the Merits of this Action.

The Church is likely to succeed on the merits of this case because D-180's ban on "religious worship services" in the public schools or "otherwise using a school as a house of worship" violates the Free Exercise Clause by prohibiting religious conduct undertaken for religious reasons. It also violates the Establishment Clause by excessively entangling the Department with religion because the Department will have to determine which activities are prohibited "worship" and which are permitted expression.

A. Defendants' Policy Violates the Free Exercise Clause.

The Department's policy violates the Church's right to free exercise of religion—a claim preserved, but never decided by this Court or the Second Circuit. With resolution of the Church's free speech claim complete, adjudication of its free exercise claim is now appropriate because that claim was left open by the Second Circuit's mandate. *See In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895) (stating the well-established principle that a court "may consider and decide any matters left open by the mandate."). Chancellor Regulation D-180

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pregnancy center. (*Id*. ¶ 8-10.) Absent an injunction, the church will be unable to meet in this neighborhood. (*Id*. ¶¶ 11–15.) People who attend the church's high school locations will no longer be able to attend. (*Id*. ¶ 14.) Being forced to move will tear the congregation apart, and impede the church from putting its faith into practice by serving its neighbors. (*Id*. ¶ 16.)

New Frontier Church, a Korean-American church in Chelsea, will also be forced to shut down its services. (Decl. of Bo Han ¶¶ 3, 18–21, Feb. 3, 2012, filed herewith.) The church meets in P.S. 11. (*Id*. ¶ 3.) The church serves the homeless by distributing clothing and serving hot meals. (*Id*. ¶ 17.) Without the ability to meet in P.S. 11, the church will have nowhere to meet, especially given that about 700 people regularly attend its services, and will not be able to continue its ministry to the homeless and Chelsea community. (*Id*. ¶¶ 5, 18, 20.) If the church is unable to meet it will lose members. (*Id*. ¶¶ 20-21)

Trinity Grace Church meets weekly at Middle School 51 in Brooklyn. (Decl. of Caleb Clardy ¶ 6, Feb. 3, 2012, filed herewith.) Approximately two hundred people attend the church, mostly from the surrounding community. (*Id*. ¶¶ 7, 15.) During its services a farmer's market and youth basketball league also use the building. (*Id*. ¶ 13.) The Sunday services are a crucial aspect of the church's life as a community of faith, as they give members an opportunity to reframe their vision and reform their hearts to live in line with the faith they share in God. (*Id*. ¶ 14.) It has looked for alternative locations, but none of them are suitable or are too expensive. (*Id*. ¶ 18.) If it is forced to leave M.S. 51 and find another neighborhood to meet in, it will lose one quarter of its congregation. (*Id*. ¶ 20.)

simply cannot withstand scrutiny under the Free Exercise Clause because it prohibits conduct—worship—undertaken for religious reasons, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), and the Supreme Court's recent decision in *Hosanna-Tabor*, 2012 WL 75047, at *1, underscores the force of the Church's free exercise claim.

The Department's policy violates the Free Exercise Clause because it disqualifies the Church from using the schools because it engages in worship. "At 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. When 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." *Id*. at 533. The object of a law can be determined by examining its text and operation. *Id*. at 534–35.

1. The policy is not neutral toward religion.

The Department's policy of banning "religious worship services" from its school facilities is not facially neutral. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id*. at 533. The Department's policy refers to a religious practice on its face: worship. As the Second Circuit found, the "exclusion applies only to the conduct of a certain type of activity—the conduct of worship services." *Bronx IV*, 650 F.3d at 39; *see also id*. at 41 ("The performance of worship services is a core event in organized religion."). And because worship, according to the Second Circuit, has no secular analog, the law is not neutral on its face. *Id*. at 38–39.

Throughout this litigation the Department has continuously stressed that worship is a unique form of speech and the policy's ban on "religious worship" targets only religious conduct. (*See* Appellants' Br., 2d Cir. Case No. 07-5291, at 39 ("worship is the practice of religion that is a *sui*

generis subject that DOE has reasonably decided should not take place in the City's public schools"); and at 42 ("Religious worship services are distinct activities that have 'no real secular analogue'").)

The Department's policy is even worse that one the Fourth Circuit struck down in *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703, 707 (4th Cir. 1994). There, the court declared unconstitutional a school district's policy that required churches conducting worship services to pay more than nonreligious groups renting school buildings for their expression. The court held that this violated the Free Exercise Clause because it "interferes with or burdens the Church's right to speak and practice religion." *Id*. By contrast, the Department's policy does not merely charge churches more rent, it completely bars them from renting the schools. Thus, D-180's prohibition on "religious worship services" facially targets religious expression and conduct, in clear violation of the Free Exercise clause.

2. Not only does the policy target religion, it exacerbates the Free Exercise violation by targeting certain religions.

The lack of neutrality in the Department's policy is evident also from its operation, which is to target some Judeo-Christian religions for exclusion from public facilities, but permit nontraditional religions to use the facilities. "Apart from the text, the effect of a law in its real operation is strong evidence of its object," and unconstitutionality. *Lukumi*, 508 U.S. at 535. Policy D-180 is nothing more than "an impermissible attempt to target [the Church] and their religious practices." *Id*. In 2002, the Department's policy started as a ban on "religious services or religious instruction." *Bronx II*, 226 F. Supp. 2d at 409. But as this Court and the Second Circuit struck down that policy, the Department revealed their real motivation: to eliminate "worship services" from equal use of school facilities after hours. Indeed, as the Second Circuit noted, the only conduct subject to the Department's ban is "worship." The Department does not

ban the components of a worship service, such as prayer, singing, and teaching; it bans what it calls "religious worship." *Bronx IV*, 650 F.3d at 36. That is, a religious group who desires to hold a concert or silent meditation may do so freely, but a church that wants to engage in singing, prayer, and teaching in a devotional way and in reverence of their God—in other words, worship—may not.

Indeed, some religious groups can use the facilities more freely than others. Quakers may use the facilities for a communal silence event or a discussion leading to consensus, both religious practices of the group that are equivalent to Catholic worship, but which would be permitted under Defendants' policy because they are not labeled "worship" by the Quakers or the Department. *Badger Catholic v. Walsh*, 620 F.3d 775, 781 (7th Cir. 2010); *see also Bronx IV*, 650 F.3d at 56 (Walker, J., dissenting) ("[W]hile 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.'"). The lack of denominational neutrality in the Department's policy bespeaks of a Free Exercise Clause violation. *See Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (analyzing a free exercise claim and noting that "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."); *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (declaring unconstitutional under Free Exercise Clause an ordinance that permitted Catholic Mass and Protestant services in a public park, but prohibiting a meeting of Jehovah's Witnesses); *see also Lukumi*, 508 U.S. at 532 (citing *Fowler* as an example of a Free Exercise Clause violation that preferred some religions to others).

As in *Lukumi*, the effect of the Department's policy is to target religious practices. There, a city banned animal sacrifice after a Santeria church bought land and sought to develop it into a center for its religious practices. *Lukumi*, 508 U.S. at 525–28. The Supreme Court found the ordinance not facially neutral because its operative terms were "sacrifice" and "ritual," terms not typically associated with secular meanings. *Id*. at 534. But in practice, it was clear that the object of the ordinance was to exclude the "religious exercise of Santeria church members." *Id*. at 535. For example, the ordinance exempted from its prohibition almost all killings of animals, except for religious sacrifice. *Id*. at 536. The Court called this a "religious gerrymander," an impermissible attempt to target [the church] and their religious practices." *Id*. at 535.

Like *Lukumi*, the Department's policy exempts from its reach "prayer, singing hymns, religious instruction, expression of religious devotion, or the discussion of issues from a religious point of view," *Bronx IV*, 650 F.3d at 38, but prohibits religious worship services. All of those components are merely parts of a religious worship service. That is nothing less than a "religious gerrymander" and demonstrates the lack of neutrality, because religious worship has no secular analog according to the Second Circuit. *Id*. at 38–39.

Nor does it make any difference that Regulation D-180 is one that governs access to a government facility. In *Lukumi*, the Santeria church was in the process of developing land within the city. The city sought to exclude it from doing so by banning the church's core religious practices. In *Fowler*, 345 U.S. at 69, the Court struck down a city regulation that banned religious services in a public park because it violated the Free Exercise Clause. In *McDaniel v. Paty*, 435 U.S. 618 (1978), the Court invalidated a law that disqualified clergy from holding certain public offices because it violated the Free Exercise Clause.

Hosanna-Tabor buttresses the Church's Free Exercise Claim. There, the Supreme Court

reaffirmed that the uniqueness of worship deserves special protection under the First Amendment. The case involved a school operated by the Lutheran Church, which fired a teacher for violating the school's commitment to internal dispute resolution. *Hosanna-Tabor*, 2012 WL 75047, at *6. The teacher sued and claimed the school fired her in violation of the Americans with Disabilities Act. *Id*. The school successfully argued her suit was barred by the First Amendment's "ministerial exception," which prohibits the government from interfering with the internal governance of a church. *Id*. at *6, 11.

The nature of the teacher's duties as a church minister and worship leader led the Court to conclude that the government could not regulate the church's activities. Particularly, the teacher

> taught her students religion four days a week, and led them in prayer three times a day. Once a week, she took her students to a school-wide chapel service, and—about twice a year—she took her turn leading it, choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible. During her last year of teaching, [the teacher] also led her fourth graders in a brief devotional exercise each morning. As a source of religious instruction, [she] performed an important role in transmitting the Lutheran faith to the next generation.

Id. at *13. A concurring opinion further pointed out that "[t]he First Amendment protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith." *Id*. at *17 (Alito, J., concurring) (emphasis added). "Applying the protection of the First Amendment to roles of religious leadership, *worship*, ritual, and expression focuses on the objective functions that are important for the autonomy of any religious group, regardless of its beliefs." *Id*. at *18 (Alito, J., concurring) (emphasis added).

In other words, when the government targets a distinctly ministerial activity of a church, like worship, even through a neutral and generally applicable non-discrimination law, like the ADA, the government must justify its actions and policy under strict scrutiny. The Department's policy of discriminating against religious exercise is not neutral toward religion, but prohibits conduct

undertaken for religious reasons.

3. The policy is not generally applicable because it targets religious exercise.

The Department's policy also lacks general applicability. "The Free Exercise Clause protects religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi*, 508 U.S. at 542–43 (internal quotation marks and citation omitted). Laws lack general applicability when they are underinclusive. *Id*. at 543.

In *Lukumi*, the Court said that the underinclusiveness of city's ban on animal sacrifice was "substantial" because it "fail[ed] to prohibit nonreligious conduct that endangers these interests [in public health and preventing animal cruelty] in a similar or greater degree than Santeria sacrifice does." *Id*. And the "ordinances have every appearance of a prohibition that society is prepared to impose upon Santeria worshippers but not itself." *Id*. at 545. "This precise evil is what the requirement of general applicability is designed to prevent." *Id*. at 545–46.

Similarly, the Department's policy is substantially underinclusive. The policy's allowance of prayer, singing hymns, and religious teaching and devotion does not prohibit conduct that endangers the city's interests in confusing youth in a similar or greater degree than the Church's worship does. A church can, for all intents and purposes, "worship" in the Department's facilities by engaging in the components of such an activity but by simply not calling those activities "worship." This underinclusiveness demonstrates the policy lack of general applicability.

4. The policy is not justified by any narrowly tailored compelling interest.

In addition to lacking neutrality and general applicability, the Department's policy cannot be justified by a compelling state interest and that the policy is narrowly tailored to that interest. *Id.* at 546. "A law that targets religious conduct for distinctive treatment or advances legitimate

governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Id*. The Department's policy cannot survive this scrutiny.

While the Department proffers interests in avoiding an Establishment Clause violation, this interest is neither compelling nor narrowly tailored. In *Fairfax Covenant Church*, 17 F.3d at 706-07, the school district claimed that its policy of charging churches higher rent and prohibiting long-term use was justified by the Establishment Clause, because it prevented the school from advancing religion. *Id*. at 706. The Fourth Circuit held this was not a compelling interest that would justify infringement of the church's right to free exercise of religion. *Id*. at 706-07. Thus, the court held that the policy violated the Free Exercise Clause. Moreover, as will be explained below, the Department's policy does not avoid an Establishment Clause violation, but is itself a violation of that Clause.

In addition, the Department attempts to justify its Establishment Clause defense by argued that the policy helps avoid public perception of endorsement, especially by young people. (Appellants' Br., 2d Cir. Case No. 07-5291, at 58-61.) But Regulation D-180(I)(S) explicitly permits the use of student-led religious activities, including worship, during the day and after school hours, which completely undermines Defendants' interest. *See Bronx IV*, 650 F.3d at 35 n.4 ("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.")

In *Gregoire v. Centennial School District*, 907 F.2d 1366, 1373 (3d Cir. 1990), a public school permitted student-led religious activities immediately after school, but prohibited "religious services" and "worship" after school by non-school and non-student groups. The school argued it had a compelling interest under the Establishment Clause to appear neutral and

avoid confusing the impressionable youth at the school. *Id*. at 1380. The Third Circuit rejected the school's argument and held that the Establishment Clause did not justify its actions because the school already permitted worship. *See id*. at 1382 (finding that by opening its facilities to student worship "Centennial cannot, therefore, rely on the impressionability of these same students as the basis for" excluding worship "from its facilities in the evening hours or as the basis for an establishment clause defense."). Like *Gregoire*, the Department's allowance of student-led worship eviscerates the Department's interest in avoiding perception of endorsement and excluding worship on the weekend.

Second, the Department's policy is not narrowly tailored. As stated above, the policy is substantially underinclusive because it permits people to engage in the components of worship, but not call their activity worship. Moreover, the objectives of the policy are not pursued against religious and nonreligious uses, or against all religious uses alike. Chancellor's Regulation D-180 disables the free exercise of religion in a government program generally open to the community. The Court should issue a preliminary injunction against this policy for violating the Church's First Amendment rights.

B. Defendants' Policy Violates the Establishment Clause.

Chancellor Regulation D-180 violates the Establishment Clause by inhibiting religion and excessively entangling the government with religion. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court established the test for analyzing government policies or conduct under the Establishment Clause. To survive the test, the government conduct must (1) have a secular purpose, (2) not advance or inhibit religion, and (3) not foster excessive government entanglement with religion. *Id*. at 612-13. To be constitutional, the government conduct must survive all three prongs of the test. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

The Department's policy fails the second prong of *Lemon*. As stated above, the policy

prohibits the religious practice of worship in public school facilities. This has the direct result of inhibiting religion. Without the ability to rent P.S. 15, the Church will be unable to do its ministry. It will have to stop its services to the community and will be unable to meet collectively, both of which violate the Church's Biblical call to serve the needy and meet together.

The Department's policy also fails the third prong, which prohibits excessive government entanglement with religion, and "seeks to minimize the interference of religious authorities with secular affairs and secular authorities in religious affairs." *Cammack v. Waihee*, 932 F.2d 765, 780 (9th Cir. 1991) (citing L. Tribe, American Constitutional Law § 14-11, at 1226 (2d ed. 1988)). The Second Circuit's June 2011 opinion attempts to establish a caveat from the ban on excessive entanglement, stating that 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." *Bronx IV*, 650 F.3d at 47. This is completely at odds with the Supreme Court's recent decision in *Hosanna-Tabor*.

In *Hosanna-Tabor*, the EEOC argued that the government, in pursuing a policy of nondiscrimination, could define what constitutes a religious minister for a church. Essentially, the government argued that it, not the church, defined the employment relationship between church and minister. The Supreme Court rejected that argument. "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." 2012 WL 75047, *11. "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.* Because ministers are responsible for conducting church worship, which itself is an ecclesiastical decision, worship is entitled to First Amendment protection. Thus, the Plaintiffs' Establishment Clause claim must be reassessed in light of *Hosanna-Tabor*'s rejection of the Second Circuit's conclusion that the government may itself draw distinctions between religion and nonreligious conduct.

Importantly, in *Faith Center Church Evangelistic Ministries v. Glover*, No. C 04-03111-JSW, 2009 WL 1765974, at *9-10 (N.D. Cal. June 19, 2009), the district court struck down a library's use policy that prohibited religious services and religious worship because it excessively entangled the government with religion in violation of the Establishment Clause. Defendants relied heavily upon the Ninth Circuit's preliminary injunction ruling in *Faith Center Church Evangelistic Ministries v. Glover*, 480 F.3d 891 (9th Cir. 2007), to justify the free speech restrictions imposed by their policy. (Appellants' Br., 2d Cir. Case No. 07-5291, at 27–30, 39.) But after the Ninth Circuit's ruling on the free speech claim, the case returned to the district court where the church prevailed in showing that a ban on religious worship in a government facility was unconstitutional under the Establishment Clause. Even though the library argued that it relies only on the use applications to determine whether an event would fall within the ban on religious worship (as Defendants do here), the library failed to define "religious services" and worship, and the evidence showed that if there are questions about whether an activity is religious, the library makes the final decision as to whether it is or is not. *Faith Center*, 2009 WL 1765974, at *9. The court concluded that making a distinction between religious worship and all other forms of religious speech "is one that the government and the courts are not competent to make." *Id.* (citing *Faith Center*, 480 F.3d at 918 and *Widmar v. Vincent*, 454 U.S. 263, 270 n.6 & 272 n.11 (1981) (noting that University "would risk 'greater' entanglement by

attempting to enforce its exclusion of 'religious worship' and 'religious speech'" because it would require the University to "determine which words and activities fall within 'religious worship'")).

Just like the government could not define what constitutes a minister or interfere with the selection of ministers in *Hosanna-Tabor*, and just like the government could not define religious worship in *Faith Center*, the Department here cannot define a "religious worship services" without running afoul of the Establishment Clause. When analyzing excessive entanglement, courts ask "whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 675 (1970).

Chancellor Regulation D-180 requires the Department to define internally what it means by "religious worship services." Does it include a Catholic Mass? Quaker communal silence? A praise and religious devotion concert? Once defined, the Department must analyze each application for use of its facilities to determine whether the activity constitutes a "religious worship service." "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids." *Lemon*, 403 U.S. at 620; *see also Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008). (striking down a Colorado statute that distinguished between "sectarian" and "pervasively sectarian" schools).

The Department claims that it relies solely on what applicants like the Church write on the use applications, but this is not its practice. When Pastor Hall applied for space in December 2011, he described the Church's activities as "hymn singing, prayer, communion, preaching, teaching, [and] fellowship." (Hall Decl. ¶ 15 & Ex. A, Feb. 2, 2012.) The Department rewrote

the description of the activity on the approved permit to state: "worhip [sic] hymn singing, prayer, communion, preaching." (*Id.* ¶ 16 & Ex. 2 at 2.) Moreover, during this litigation, the Department demonstrated the extreme detail it seeks to determine whether an activity is "worship." The Department's attorneys listened to sermons, asked Pastor Hall excruciatingly detailed questions about his prayers, sermons, the identity of church donors, church flyers, the Church's website, the purpose of Sunday meetings, and Church doctrine, just to name a few. (*See, e.g.*, Dep. of Robert Hall 69–70, 74–76, 96–97, 103–07, Jan. 24, 2005, Docket No. 62, Ex. B.)

Regardless of what the Church wrote on its application and how the Department applied the policy to that application, the policy is facially unconstitutional because other religious users will undoubtedly write that they want to use the Department's schools for prayer and singing or meditation or a meeting that leads to consensus. All of these things may or may not be "religious worship services," and it would be up to Department officials to make that determination. *Badger Catholic*, 620 F.3d at 781; *Bronx IV*, 650 F.3d at 56 (Walker, J., dissenting). That is excessive government entanglement.

The government cannot be in the business of defining what is worship and what is not. Just as the church in *Hosanna-Tabor* had the right to define what constitutes a minister, not the government. The Church in this case has the right to define what is worship, not the Department. The Department's current policy entangles the State with religion.

CONCLUSION

Plaintiffs respectfully request that the Court issue a preliminary injunction enjoining Defendants from enforcing Chancellor's Regulation D-180(I)(Q).

Respectfully submitted this the 3d day of February, 2012.

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