12-2730

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York Civil Case No. 01-cv-08598 (Judge Loretta A. Preska)

APPELLEES' BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, The Bronx Household of Faith states that it is a nonprofit corporation in the State of New York, does not have a parent corporation, and is not publicly held.

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INTRODUCTION

This case involves the New York City Department of Education's ("Department") misguided attempt to exclude the Bronx Household of Faith ("Church"), and others who hold traditional Judeo-Christian services, from renting Department buildings by prohibiting "religious worship services" and using a building as a "house of worship" during time periods of community use. The Department allows community groups to pay to meet in its facilities pursuant to an extended facilities use program, which allows thousands of these groups to rent its buildings for extended periods of time, including years on end. A small minority of community groups – 5% – are religious, and represent religions of every kind: Buddhists, Hindus, Quakers, Jainists, Jews, Muslims, Christians, and Jehovah's Witnesses. One of these groups, the Church, as part of its Christian mission to serve the community around Public School 15, seeks to meet collectively in P.S. 15's auditorium until it can raise the funds necessary to construct a building nearby. But according to the Department, the Church is holding prohibited "religious worship services" and may be excluded under the policy.

A "religious worship service" is a distinctly religious practice, which, as the Department concedes, has "no secular analogue." *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.* (*Bronx IV*), 650 F.3d 30, 41 (2d Cir. 2011); Appellants' Br. 38. This policy violates the Free Exercise Clause by singling out religious exercise

for exclusion from the program. In addition, the Department's policy, by its terms, requires the government to define "religious worship services" and does not hinder the devotional activities of many religions nor student worship during the school day, which occurs freely and frequently. The result is that the Department excludes Christian churches from its buildings, but not religious groups who do not worship, and not student groups who worship. This disparity violates both the Free Exercise Clause and the Establishment Clause.

To enforce the policy, Department employees review church rental applications with suspicion, search church websites, listen to church sermons, interrogate pastors, and even attend religious meetings, all so the Department can determine if a proposed activity is a "religious worship service." Even when the Church and other religious groups want to meet in the public schools only to engage in "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, which this Court ruled were permissible activities under the policy, the Department still conducts these invasive searches to see if they label their meetings as "worship services," as their particular theology requires. The Department violates the First Amendment by assuming that a religious group using the term "worship" to describe its activities defines the term the same way as the Department's legal terms in its policy. This unconstitutionally entangles the

Department with religion by making the Department officials arbiters of religious theology.

There is no dispute that there is a final judgment on the Church's free speech claim. The Department interpreted this to mean that the entire case is over, but as the Church demonstrated below, its Free Exercise Clause and Establishment Clause claims were unresolved. Indeed, the Department's policy, which singles out particular religious practices of particular religious groups for discrimination, is a gross intrusion on the Religion Clauses of the First Amendment of a type that has never been upheld. The District Court soundly rejected the Department's arguments in favor of this unconstitutional policy, and this Court should as well.

STATEMENT OF THE ISSUES

1. The Department allows community groups to rent its public buildings for devotional meetings, except if those same meetings are labeled, or deemed by the Department to be, a "religious worship service." Does the ban on "religious worship services" violate the Free Exercise Clause?
2. Only religions that use "religious worship services" as a devotional exercise may not use Department buildings for their devotional meetings. The Department determines whether a religious group's application involves a "religious worship service" by scrutinizing the details of church meetings, listening to sermons, attending church meetings, and scouring church

websites, as well as looking to see if the group ever uses the term "worship" in its public materials, no matter how the group defines that term. Does the ban on "religious worship services" violate the Establishment Clause?

STATEMENT OF THE CASE

The Church challenges the Department's policy of banning "religious worship services" and "house[s] of worship" from public buildings under the Free Exercise and Establishment Clauses of the First Amendment. Prior proceedings in this case focused exclusively on the Church's free speech claim. *Bronx IV*, 650 F.3d at 33-36. The Department began enforcing its policy after the Court issued a mandate in December 2011. A1801. On February 3, 2012, the Church moved for a preliminary injunction against the policy based on the unresolved Free Exercise Clause and Establishment Clause claims. A67. The District Court issued a temporary restraining order on February 16, 2012, and a preliminary injunction on February 24, 2012. SPA2-3, 60. The Department moved to stay the preliminary relief, but this Court refused and instructed the parties to prepare dispositive motions. Order 2, No. 12-605 (2d Cir. Feb. 17, 2012); Order 2, No. 12-751 (2d Cir. Feb. 29, 2012).

On June 29, 2012, the District Court granted summary judgment in the Church's favor. SPA60. The court held that the Department's policy violated the Free Exercise Clause because it was not neutral and generally applicable, targeted

religiously motivated conduct, and failed strict scrutiny. SPA13-48. The court also held that the policy violated the Establishment Clause because it inhibited religion and excessively entangled the government with religion. SPA48-59. A Judgment issued on July 3, 2012. SPA62.

STATEMENT OF FACTS

I. The Department's Program Allowing Community Groups to Rent Its Facilities.

The Court will recall the basic facts. The Department owns and controls 1,197 individual school facilities. A1771. Community organizations may rent these facilities on a weekly basis for extended periods of time over a series of months, A1772-75, for "social, civic, and recreational meetings and entertainment, and other uses pertaining to the welfare of the community." A226. The Department formerly prohibited rental for "religious services or religious instruction." *Bronx IV*, 650 F.3d at 33; A42. But the Department changed that policy in 2007 and instituted Chancellor's Regulation D-180(I)(Q), which prohibits "holding religious worship services, or otherwise using a school as a house of worship," A227, though these terms are undefined, A351, A1808 ¶89.

All extended use permit holders pay a rental amount based on a uniform fee schedule. A993. The Department may waive the rent for an outside organization, A1779 ¶23, and considers such a fee waiver to be a subsidy, A232, A1779-80 ¶24. The Department has never granted such a subsidy to the Church or any other

religious group conducting a "worship service." The Department chooses to charge a lower fee than it otherwise could to "maximize after-school opportunities available to students and their families." Appellants' Br. 10. All renters must post a disclaimer that the Department does not sponsor their activities. A229, A1780 ¶25.

Many types of community organizations, including many different religions, rent Department facilities. In fiscal year 2011, the Department issued over 122,000 rental permits. A1193 ¶25. Of these, over 22,900 were issued to unions and community organizations, including churches. A1195 ¶33, A1230-1511.[1] But only 5% of the 22,900 permits went to religious organizations, A1196 ¶40, representing many different religions. For example, Buddhists, Hindus, Quakers, Jainists, Jews, Muslims, Christians, and Jehovah's Witnesses rented Department buildings in 2011. A827 ¶20, A1792 ¶51.

D-180 allows students to engage in expression very similar to that of the weekend worship services in the schools during the school day and after school when state compulsory attendance laws require other students to attend school. A227. At least one such club, Seekers Fellowship, holds meetings where students engage in worship. A713; A1164-65. Jewish and Muslim student organizations likewise meet in the schools for devotional activity. A1165. And a Zen Buddhist

[1] The Church can provide a more legible version of this exhibit upon request.

center provides meditation opportunities for students in five Department schools. A708. There is no evidence of school officials having to deal with minors confused by the presence of religious activities in their schools, or concerns that the public schools are subsidizing student religious activities by allowing them to meet for free in school buildings.[2]

II. The Church's Desired Use of Public School 15.

The Church has met in the Bronx for forty years and wants to rent P.S. 15 for weeknight and weekend meetings because it cannot afford commercial rental facilities in the area and feels a religious calling to serve the community surrounding P.S. 15. A70-72. When the Church meets on Sundays, attendees sing hymns, pray, take communion, hear teaching, and fellowship.[3] A1802 ¶¶76-77. The Department's policy permits these activities. *See Bronx IV*, 650 F.3d at 36 ("Prayer, religious instruction, expression of devotion to God, and the singing of hymns, whether done by a person or a group, do not constitute the conduct of worship services. Those activities are not excluded."). The Church's theology

[2] The Department and Amici rely on factual assertions made in the 2005 summary judgment proceedings. Those fact, however, were only valid for those proceedings. *F.A.R. Liquidating Corp. v. Brownell*, 209 F.2d 375, 380 n.4 (3d Cir. 1954); *Begnaud v. White*, 170 F.2d 323, 327 (6th Cir. 1948) (citing *Walling v. Richmond Screw Anchor Co.*, 154 F.2d 780, 784 (2d Cir. 1946)). Thus, the Church filed new responses to the Department's 2005 facts, some of which are now in dispute or untrue, including those concerning subsidy and youth confusion. A1565-1621.

[3] The Christian "church" is not a building, but refers to a body of people who gather to worship Jesus Christ. A building is not transformed or consecrated because of a church's presence. A1147 ¶9, A1182 ¶¶7-8.

calls these activities "worship," which the policy also permits. *See id*. at 37 ("The 'religious worship services' clause [in D-180] does not purport to prohibit use of the facility by a person or group of persons for 'worship.'"). But the Department sees this label and refuses to rent P.S. 15 to the Church for its devotional meetings because the Department concludes these meetings are "religious worship services." A72.

The Church desires to rent P.S. 15 because it is still raising money for its own building, which takes time in the expensive New York City property market.[4] A779-80. The Church is not dependent on public facilities, but simply needs more time to raise funds to complete its own building. *Id*. Even when the Church finishes its building, it will continue to rent P.S. 15 for occasional activities and devotional meetings that can only be accommodated by a large public auditorium. A807.

III. The Expert Report.

The expert witness, Dr. Gerald McDermott, concluded that any useful definition of religion must be broad enough to include religions that do not worship deities, but which nevertheless function as systems of belief that express reverence for ultimate reality and answer the basic questions of life for its devotees. A733.

[4] The Department and Amici fail to recognize that D-180 allows groups to rent the schools on a weekly basis year in and year out. Some groups, like the Boy Scouts, have rented schools for decades. A556.

Not all worship is done collectively; not all worship is done according to a prescribed order or liturgy; and not all worship is led by an ordained official. A741. In fact, some Christians and Buddhists do not follow a prescribed order or liturgy. *Id*. Mormons and Jehovah's Witnesses have no seminaries or ordained officials; their worship services are led by laymen. *Id*. Plymouth Brethren and Muslim services, and some Jewish services, have non-ordained leaders. A741-42.

Many world religions contain sects that do not worship and sects that do worship, with differences in worship even among the sects of the same religion. For example, Classical (Advaita Vedanta) Hindus do not worship, but other Hindu sects do worship. A737-38. Zen and Theravada Buddhists are non-theistic, but Tibetan and Mahayana Buddhists do believe in deities. A738-39. Philosophical Daoism is considered a religion, but does not involve worship. Some Daoists are theists, but philosophical Daoists are not. A739-40. Other non-theistic religions include Nontheistic Friends (Quakers), Patanjali Yoga, and Jainism, and these religions do not worship. A741.

The determination of whether a particular action is religious in nature – that is, whether the action is really "prayer," "worship," or "sacrifice" – turns solely on the religious belief and motivation of the person engaging in the act. A732-33; A740-41. The Bible offers a taxonomy of worship that includes different perspectives. A822. For example, there is a sense that everything the Christian

does is worship – including eating and drinking. There is another aspect of worship which includes certain things that are more particularly set apart for God, like prayer. *Id*. What constitutes worship varies even between Christian denominations.

IV. The Department's Enforcement of the Policy Since December 2011.

The Department began enforcing its no-worship policy in December 2011. A1801. The Department alludes to "tremendous challenges" in implementing D-180 at that time, especially against churches. Appellants' Br. 16. But the record, however, tells a different tale, one of a methodical, premeditated plan to oust churches from the schools through an undefined, ad hoc policy, even if they were engaging in expression this Court ruled was constitutionally permitted.

The Department concedes that in December 2011 it instructed staff to seek clarification on unclear and "suspicious" rental applications. A268; Appellants' Br. 14. Through internal communications, the Department told principals to gather as much detail as possible from church rental applicants. A314-15, A1001-02, A1805. As a result, Department staff routinely asked church applicants to "clarify what is taking place from the moment you enter until the moment you leave." A290-92. Staff examined church websites, A871, listened to church sermons, A1143-44, were authorized to attend church meetings, A1786-87 ¶¶42-43, and reviewed all other available documents, A1806 ¶84. Even if activity descriptions

appeared non-religious, like "leadership training," "annual meeting," or "youth gym night," the Department contacted the church and asked if it would be conducting "worship services." A297, A400-02, A464-67, A1826 ¶125.

Religious leaders read this Court's June 2011 decision, and concluded that they could continue meeting on weekends because their meetings consisted only of "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, which this Court ruled was constitutionally permitted. A823. Therefore, they began describing their meetings according to this list, assuming that the label their church ascribed to their meetings would make no difference if they were engaging only in these permitted expressive activities.

In December 2011, the Church applied to rent P.S. 15 from January to February 2012. The Church's application said that it intended to use P.S. 15 for "Hymn singing, prayer, communion, preaching, teaching, fellowship." A72, A75. When the Department returned the approved permit, it changed this description to: "WORHIP [sic] HYMN SINGING, PRAYER, COMMUNION, PREACHING." A72, A76. In other words, Department staff changed the label provided and interpreted the Church's activity to be "forbidden" worship.

At the same time, Pastor Hertzog of Reformation Presbyterian Church, applied to rent P.S. 173 for an "informational meeting."[5] A133. The Department responded to his application by telling him to describe the church's activities and asking, "Are you conducting religious worship services?" *Id.* Hertzog told the Department that the church intended to read and study the Bible, pray, sing, and fellowship, *id.*, following what this Court ruled were constitutionally permitted activities, *Bronx IV*, 650 F.3d at 38. The Department rejected this answer, said Pastor Herzog did not answer its question, and asked again if his activities were a "religious worship service." A133. Hertzog asked the Department to define "religious worship service." *Id.* Hertzog even asked Department staff what he should change in his meeting to get a permit under the policy, because he understood that by limiting their expression to a certain list found in *Bronx IV* his church would be in a constitutional safe harbor and could continue meeting in the schools. A134. The Department refused to answer and instead denied his rental application because it interpreted these activities to be a "religious worship service." *Id.* Hertzog later learned that Department staff had visited his church's website, which refers to "worship," to determine whether his church would conduct a worship service in the schools. A822. The Department assumed that the

[5] Contrary to the Department's unsubstantiated allegation, Appellants' Br. 22, Pastor Hall did not tell Pastor Hertzog or other pastors what to write on their rental applications. He met regularly with other pastors to discuss his ministry, including the effect of Department's unlawful policy. A1182 ¶11.

church's definition of worship was the same as the Department's use of the term in D-180.

In February 2012, Marilyn Cole of Unbroken Chain Church applied to use a school for a Wednesday night prayer meeting and a Friday night Bible study. A1150-51. She did not consider these activities to be a religious worship service, though she believed worship would be taking place. *Id*. After receiving more information from Ms. Cole on what its church members did at each of those meetings, the Department determined that the Bible study was not a worship service, so it was permitted to meet, but that the prayer meeting could not continue to meet because the Department determined it to be a prohibited "religious worship service." A1151. The record contains other examples of the Department scrutinizing church rental applications and providing inconsistent responses to churches. A397-477.

SUMMARY OF THE ARGUMENT

The Church's claims are not precluded by prior decisions of this Court. The litigation between these parties in *Bronx Household of Faith v. Community School District No. 10* (*Bronx I*), 127 F.3d 207 (2d Cir. 1997), was a separate case from the one at bar and involved a different policy (SOP 5.9). It does not preclude the Church's current claims or serve as law of the case. Similarly, prior iterations of this case focused at first on a different policy (SOP 5.11), and then on the Church's

free speech claim only. No one disputes that *Bronx IV* resolved the Church's free speech claim. But neither *Bronx IV*, nor any earlier ruling, resolved the Church's claims against the current policy under the Religion Clauses.

The Department's policy of prohibiting "religious worship services" violates the Church's rights under the Free Exercise Clause because it is neither neutral nor generally applicable, prohibits conduct undertaken for religious reasons, favors some religions over others, and is not narrowly tailored to a compelling government interest. The policy also violates the Church's rights under the Establishment Clause because it prefers some religions over others, excessively entangles the Department with religion, and inhibits religion. The District Court correctly held D-180 unconstitutional under the Free Exercise and Establishment Clauses. This Court should affirm that judgment.

STANDARD OF REVIEW

The Court reviews *de novo* an order granting summary judgment, *Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012), including application of preclusion doctrines, *O'Connor v. Pierson*, 568 F.3d 64, 69 (2d Cir. 2009).

ARGUMENT

I. The Church's Claims Are Not Barred by the Law of the Case Doctrine or *Res Judicata*.

The Department's argument that the Church's claims are barred is easily refuted. As this Court said in February, "[i]n the twelfth year of this litigation, the

district court has granted a new preliminary injunction *adjudicating grounds previously not addressed*." Order 1, No. 12-751, (2d Cir. Feb. 29, 2012) (emphasis added). The grounds not previously addressed are whether D-180 – not some previous policy – violates the Free Exercise and Establishment Clauses. The District Court did not err by resolving these claims.

A. The Law of the Case Doctrine Did Not Preclude the District Court from Granting the Church's Motion for Summary Judgment.

"Where a case has been decided by an appellate court and remanded, the court to which it is remanded must proceed in accordance with the mandate and such law of the case as was established by the appellate court." *United States v. Fernandez*, 506 F.2d 1200, 1202 (2d Cir. 1974). But "law of the case is not an inviolate rule in this Circuit." *United States v. Birney*, 686 F.2d 102, 107 (2d Cir. 1982). It is a "presumption" that "varies with the circumstances," not a "straightjacket." *Avitia v. Metro. Club of Chi., Inc.*, 49 F.3d 1219, 1227 (7th Cir. 1995). "[A]t best, [it is] a discretionary doctrine which does not constitute a limitation on the court's power but merely expresses the general practice of refusing to reopen what has been decided." *Birney*, 686 F.2d at 107 (quotation marks omitted). Thus, "application of the doctrine remains a matter of discretion, not jurisdiction." *United States v. Becker*, 502 F.3d 122, 127 (2d Cir. 2007). And, of course, a court "may consider and decide any matters left open by the mandate." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895). There is no law of the

case on the Church's free exercise and establishment claims, and in any event the District Court acted within its discretion to resolve these claims.

1. The Free Exercise Clause claim is not barred.

This Court has never expressly or implicitly ruled on the Church's Free Exercise Clause claim. Order 1, No. 12-751 (2d Cir. Feb. 29, 2012). Throughout this litigation, the Church argued that the Department's policy violated several clauses of the First Amendment, but neither this Court nor the District Court ever addressed the free exercise claim. As the District Court said:

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

A176. The only live issue in earlier stages of this case was whether D-180 violated the Free Speech Clause. *Bronx IV*, 650 F.3d at 51. This Court never expressly or impliedly rejected the Church's other claims and the Department cites no authority to the contrary.[6] As such, there is no law of the case on the Church's free exercise claim.

[6] The Department suggests that the free exercise ruling in *Bronx I* is law of the case. Appellants' Br. 29. But *Bronx I* involved a different policy and different facts. *See infra* Part I.B. It has no preclusive effect on this case.

2. The Establishment Clause claim is not barred.

The Church's Establishment Clause claim also is not barred by the law of the case for two reasons. First, when an earlier court addresses a peripheral issue that was not the focus of the controversy in the course of deciding a different issue, applying law of the case to the peripheral issue is inappropriate. *Fenster v. Tepfer & Spitz, Ltd.*, 301 F.3d 851, 858 (7th Cir. 2002). In prior proceedings, both the District Court and this Court discussed the Establishment Clause insofar as it responded to the Department's assertion that its policy is required by that clause. *Bronx IV*, 650 F.3d at 45-48; *Bronx Household of Faith v. Bd. of Educ. of the City of N.Y.*, 400 F. Supp. 2d 581, 592-99 (S.D.N.Y. 2005). This Court recognized as much when it said the February 2012 preliminary injunction "adjudicate[d] grounds previously not addressed." Order 1, No. 12-751 (2d Cir. Feb. 29, 2012). Unlike the earlier proceedings, the claim is now squarely before the Court.

Second, an intervening change in law, availability of new evidence, or the need to correct a clear error or prevent manifest injustice, permit a court to exercise its discretion to reconsider an issue it previously decided. *Johnson v. Holder*, 564 F.3d 95, 99-100 (2d Cir. 2009); *see Hemstreet v. Greiner*, 378 F.3d 265, 269 (2d Cir. 2004) (reconsidering prior decision in the same case upon disclosure of new evidence).

New evidence came to light after this Court's December 2011 remand, and shows that D-180 results in denominational preference, inhibits religion, and entangles the government with religion. The Department is implementing D-180 on an ad hoc basis, A72, A133-34, A1150-51; listening to church sermons and scouring church websites for evidence of worship, A871, A1143-44; scrutinizing Christian church applications, but not applications from other religious groups, A290-92; and rejecting rental applications for prayer or singing, A1150-51, which this Court said were permitted, *Bronx IV*, 650 F.3d at 36. The new facts also undercut the Department's establishment concerns and show that most churches do not use the Department's facilities for the long term, A1172 ¶20; many churches share Department buildings with other groups, A86 ¶13, A92 ¶14; many different religions use the buildings, A825-28; and 95% of all rentals by community groups are for non-religious activities, A1197 ¶40. This Court instructed the District Court to "proceed[] without delay to grant the parties the opportunity to present their evidence expeditiously and to render a final judgment." Order 2, No. 12-751 (2d Cir. Feb. 29, 2012). The District Court followed this order.

In addition, the Church's Establishment Clause claim must be reassessed in light of the Supreme Court's rejection of the idea that the government may itself draw distinctions between religious and non-religious conduct. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694 (2012). In *Bronx*

IV, this Court said the "Constitution, far from forbidding government examination of assertedly religious conduct, at times compels government officials to undertake such inquiry in order to draw necessary distinctions." 650 F.3d at 47.

But in *Hosanna-Tabor*, the Supreme Court ruled that the Establishment Clause "prohibits government involvement in such ecclesiastical decisions," 132 S. Ct. at 706, such as what constitutes a "religious worship service" and what does not. *Hosanna-Tabor* has "major ramifications" and represents a doctrinal "shift in Religion Clauses jurisprudence," because it is "the first time the Court used the Establishment Clause to protect religious organizations or activities from intrusive regulation," and "is the first real indication in a Court opinion that the separation between church and state is a two-way street, protecting the autonomy of organized religion and not just prohibiting governmental 'advancement' of religion." Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 Harv. J.L. & Pub. Pol'y 821, 833-36 (2012). The District Court concurred that *Hosanna-Tabor* "strengthens Plaintiffs' excessive entanglement claim and speaks to the significance of the new evidence." A207.

Surely this Court's order, new facts, old facts proven untrue, and a landmark Supreme Court decision are "cogent" and "compelling" reasons to reassess the Church's Establishment Clause claim. *Hemstreet*, 378 F.3d at 269. The law of the case doctrine does not preclude the Church's claims.

B. The Church's Claims Are Not Precluded by *Res Judicata*.

It is well-settled that "stating an issue without advancing an argument" does not suffice to preserve an issue for appeal. *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998). The Department makes passing reference to a *res judicata* argument, but never develops it. Appellants' Br. 24-30, 33. To the extent it fails to do so, the Department has waived this argument.[7]

In any event, there is no preclusion here because the facts, the law, and the Department's policy have changed. The doctrine of "res judicata, or claim preclusion, holds that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Monahan v. N.Y.C. Dep't of Corr.*, 214 F.3d 275, 284 (2d Cir. 2000) (quotation marks omitted).

The Department asserts that *Bronx I*, 127 F.3d 207, precludes the Church's claims, but that was a separate case from the one at bar. There, this Court considered whether a policy banning "religious services or religious instruction on school premises after school" violated the Free Exercise Clause. At the time, the Department sought to eliminate all religious *speech* from its schools. After that was declared unconstitutional in *Good News Club v. Milford Central School*, 533

[7] The Department abandons its collateral estoppel argument on appeal. *See LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995) (holding failure to raise issue on appeal waives it).

U.S. 98 (2001), and a decade later in 2007, the Department created a new, more narrow policy prohibiting "religious worship services" and "using a school as a house of worship," which focuses on religious *exercise*. *Bronx IV*, 650 F.3d at 34-35. The narrowing substantively changed the Department's policy, such that now it targets only religious conduct undertaken for religious reasons, rather than religious speech in general. *See id*. at 36-40 (discussing why the policy language matters). In fact, the 2007 policy change was so significant that this Court remanded for further factual development. *Id*. at 35 n.5. And, in any event, precluding the Church's claims would be unjust because it will foreclose judicial review of a policy that is injuring the Church. The Church's claims are not precluded.

II. The Department's Policy Violates the Free Exercise Clause.

"The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993). "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id*. at 532.

To that end, "if [a] law is not neutral (i.e., if it discriminates against religiously motivated conduct) or is not generally applicable (i.e., if it proscribes particular conduct only or primarily when religiously motivated), strict scrutiny applies" and the law "violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002).

A. The Church Does Not Need to Show a Substantial Burden.

The Department argues wrongly that *Lukumi* and strict scrutiny do not apply to D-180 because the policy does not burden the Church's exercise of religion since it may practice it elsewhere. Appellants' Br. 32 & 34. But "one is not to have the exercise of his liberty of [religious exercise] in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939); *see Tenafly*, 309 F.3d at 169 (rejecting idea that Free Exercise Clause does not apply when one can engage in the religious practices elsewhere); *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 299 (5th Cir. 1988) (same).

The protections of the Free Exercise Clause apply not only to criminal laws, *Emp't Div. v. Smith*, 494 U.S. 872 (1990), but also non-criminal laws, *Lukumi*, 508 U.S. 520, government funding programs, *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), and denial of access to public property, *Tenafly*, 309

F.3d at 169. A party need not show a substantial burden when the government discriminates against religious conduct. *See Lukumi*, 508 U.S. at 531-47 (finding Free Exercise Clause violation without considering whether the law substantially burdened religious exercise); *Tenafly*, 309 F.3d at 170 (same); *Fifth Ave. Presbyterian Church v. City of N.Y.*, 293 F.3d 570, 574 (2d Cir. 2002) (same). "Instead, the plaintiffs need to show only a sufficient interest in the case to meet the normal requirement of constitutional standing." *Tenafly*, 309 F.3d at 170 (citation and quotation marks omitted). The inability to rent Department buildings due to the religious nature of the activity easily satisfies this standard.

B. The Policy Is Not Neutral Toward Religion on its Face.

The Department's policy of banning "religious worship services" from its facilities is not neutral. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Lukumi*, 508 U.S. at 533; *see also Blackhawk v. Pennyslvania*, 381 F.3d 202, 209 (3d Cir. 2004) ("A law is 'neutral' if it does not target religiously motivated conduct either on its face or as applied in practice.").

In *Lukumi*, a municipality attempted to exclude a Santeria church from locating within city limits by adopting ordinances prohibiting "ritualistic animal sacrifices," a significant feature of the church's religious beliefs and practices. 508 U.S. at 550-51. While the Court found that the terms "ritual" and "sacrifice" could

have secular meanings, the context and effect of the laws made it clear that the city was targeting religious animal sacrifice, specifically the practice of animal sacrifice of the Santeria religion. *Id*. at 533-35.

Similarly, in *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703, 705 (4th Cir. 1994), a school board policy conditioned church use of school property on paying higher rents than other nonprofit organizations. The Fourth Circuit found that the policy was not neutral, because it targeted churches' religious conduct on its face and as applied. *Id*. at 707.

Here, D-180 refers to religiously motivated conduct on its face – "religious worship services" – conduct that does not have secular meaning. The policy's "exclusion applies only to the conduct of a certain type of activity – the conduct of worship services," *Bronx IV*, 650 F.3d at 39, which "is a core event in organized religion," *id*. at 41, and has "no real secular analogue," *id*. at 38. In fact, the Department concedes worship is unique and D-180 targets only religious conduct. *See* Appellants' Br. 43 ("only those religious practices for which there is no secular analogue … remain prohibited.").

As in *Lukumi*, the Department has not banned a certain activity that had both secular and religious connotations, like singing. If the Department had excluded users who planned to sing in public buildings, it could theoretically apply equally to religious and non-religious users. Instead, it prohibits "religious worship

services," and because worship, according to this Court, has no secular analogue, the law is not neutral on its face. *Bronx IV*, 650 F.3d at 38.

Like *Lukumi*, which exempted all animal killings (including kosher slaughter) except for religious sacrifice, 508 U.S. at 536, the Department's policy exempts from its reach similar actions—"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 only a particular action undertaken for religious reasons – "religious worship services." The "Free Exercise Clause's mandate of neutrality toward religion prohibits government from deciding that secular motivations are more important than religious motivations." *Tenafly*, 309 F.3d at 165 (citation and quotation marks omitted). One thing alone transforms mere prayer, singing, and religious teaching to a "religious worship service": the religious motivation of the adherent. A732-33, A740-41, A1835 ¶143. An actor in a theater production in a Department school building may say the words of the Lord's Prayer—but it is merely a recitation, not a prayer. The actor may close her eyes, fold her hands, and bow her head – but this action cannot be considered "prayer" if the actor has no intention to communicate with God. The determination of whether a particular action is religious in nature – whether a physical action is really "prayer," "worship," or "sacrifice" – turns solely on the religious belief and motivation of the person doing so. *Id*.

When a policy requires government officials to evaluate "the reasons underlying a violator's conduct, [it] contravene[s] the neutrality requirement if [it] exempts some secularly motivated conduct but not comparable religiously motivated conduct." *Tenafly*, 309 F.3d at 165-66. In *Lukumi*, the city's laws allowed the killing of animals—they allowed slaughterhouses to operate, shelters to euthanize unwanted animals, farmers to kill a hog for supper, and even kosher butchers to kill animals in virtually the same way the Santeria church would. The city targeted only the killing of animals for religious or devotional reasons—"ritual sacrifice"—for prohibition. *Lukumi*, 508 U.S. at 536. The Court called this a "religious gerrymander," an "impermissible attempt to target [the church] and their religious practices." *Id*. at 535 (citation and quotation marks omitted). Here too, the Department has "gerrymandered" its policy to exclude only "religious worship services." A law singling out conduct undertaken for religious reasons in this way violates the Free Exercise Clause unless it satisfies strict scrutiny.

C. The Policy Is Not Neutral Toward Religion as Applied Because it Targets Certain Religions.

"Apart from the text, the effect of a law in its real operation is strong evidence of its object," and unconstitutionality. *Id*. When a law creates exceptions for some religiously motivated conduct, but not for other religious conduct, it is not neutral. *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953); *Tenafly*, 309 F.3d at 167.

A large variety of religious groups utilize the Department's facilities: Jehovah's Witnesses, Buddhists, Hindus, Quakers, Jainists, Muslims, Jews, Christians, gurus, swamis, and spiritual teachers. A825-28, A1792 ¶51. The Department's policy targets some of these groups for exclusion from public facilities, but permits others to use the facilities, making the lack of neutrality in the Department's policy evident from its operation. *Tenafly*, 309 F.3d at 167. The Department does not ban the typical components of a worship service, such as prayer, singing, and teaching, even done together; it bans what it calls a "religious worship service." *Bronx IV*, 650 F.3d at 36. But the concept of a "religious worship service" does not apply equally to all religions and denominations, resulting in another "religious gerrymander" in violation of *Lukumi*, 508 U.S. at 534-36.

1. Because it singles out "religious worship services" for exclusion, the Department's policy favors non-theistic religions over theistic religions.

This Court found that the Department's exclusion of "religious worship services" prohibits "solely the conduct of a particular type of event: a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion." *Bronx IV*, 650 F.3d at 37. The wording of the policy and its interpretation clearly contemplate a specific type of religious

exercise – that of Judeo-Christian worship – singling it out for exclusion. But scholars of religion disagree as to what is "religious," and what constitutes a religious worship service. A732-33. This specific exclusion means that some religious groups can use the facilities for their ceremonies and religious exercise more freely than others, since the activities of countless religious groups, many of which have met in Department schools, do not fit neatly into this interpretation. A733-37, A1791-92 ¶¶50-51.

Some groups one would normally think of as "religions" do not believe in a God or gods; they are non-theistic. A737-41; *see Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."). Indeed, even within religions, there are differences between sects as to the existence of God. For example, Zen and Theravada Buddhists are non-theistic, but Tibetan and Mahayana Buddhists do believe in deities. A738-39. Most Hindus acknowledge an array of deities, but some sects, including classical Hinduism (Advaita Vedanta) do not. A737-38. Some Daoists are theists, but philosophical Daoists are not. A739-40.

Also, there are groups that scholars consider to be religious, yet do not consider themselves to be a religion. For instance, a group called Sathya Sai Baba

meets in the Department's facilities. A826, A835-36. Devotees gather weekly to sing group devotional songs, pray, and meditate, yet this group does not consider itself to be a religion. A845. Regardless of whether groups like this are theistic, or even believe they are religions, they are decidedly religious based on a workable definition of that term. A733; *see Malnak v. Yogi*, 592 F.2d 197, 200-15 (3d Cir. 1979) (Adams, J., concurring) (discussing at length how religion may be defined for purposes of the First Amendment, especially in light of certain groups' denial that they are, in fact, "religious").

Because religious groups do not believe in a God or gods, the sacred ceremonies and devotional exercises of these religions would not fall under the category of a "religious worship service" or "house of worship" since they do not venerate a deity. Thus, under the Department's policy, Theravada Buddhists may meet in the schools for teaching, chanting and meditation, A738-39, A827-28, adherents of Ethical Culture may meet for Sunday gatherings and be taught regarding their beliefs by trained graduates of theological institutions, *Washington Ethical Soc'y v. District of Columbia*, 249 F.2d 127, 128 (D.C. Cir. 1957), and a "Fellowship of Humanity" made up of Secular Humanists may assemble in schools for Sunday meetings involving the singing of fellowship songs, humanist teaching, and meditation, *Fellowship of Humanity v. Alameda Cnty.*, 315 P.2d 394, 397-98

(Cal. Dist. Ct. App. 1957), but Christian churches like Bronx Household of Faith may not use the schools for their devotional exercises.

Just as the government cannot "constitutionally pass laws or impose requirements which aid … those religions based on a belief in the existence of God as against those religions founded on different beliefs," *Torcaso*, 367 U.S. at 495, it also may not do the reverse, and discriminate against theistic religions. But the Department's policy operates in just that way, favoring religious groups who do not embrace a theistic point of view or consider themselves "religious" in a traditional sense.

2. The Department's policy favors religions with less traditional devotional activities because it excludes formal worship services.

The Department's policy, by interpretation, contemplates a collective activity taking place pursuant to an established order and usually led by an ordained official. *Bronx IV*, 650 F.3d at 37. These factors result in favoritism toward less traditional religious groups. Individuals may conduct a worship service in the schools, since the Department's policy only prohibits services by groups. *Id.* Some religious groups, such as Quakers, do not perform religious services in a traditional sense. A741-42, A1837 ¶¶147, A1841 ¶155. Quakers instead have communal silence during their meetings or a discussion leading to consensus, both religious practices of the group that are equivalent to Catholic

worship, but which are permitted under Defendants' policy because they are not labeled "worship" by the Quakers or the Department.[8] *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 781 (7th Cir. 2010), *cert. denied* 131 S. Ct. 1604 (2011).

Non-liturgical worship is common in both Western and Eastern traditions. A1837 ¶146. These types of worship services are allowed, while a more formal service following a set order of events is excluded under D-180. *Bronx IV*, 650 F.3d at 37. Moreover, many religious groups are not led in worship by an ordained minister. Jehovah's Witnesses, Mormons, Plymouth Brethren, and Muslims have services led by laypeople. A1837 ¶147. Some Jewish services are also led by lay people. *Id*.

The lack of denominational neutrality in the Department's policy gives rise to a Free Exercise Clause violation. *See Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) ("If 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*, 345 U.S. at 69 (declaring unconstitutional under Free Exercise Clause an ordinance permitting Catholic Mass and Protestant services in a public park, but prohibiting a meeting of Jehovah's Witnesses). Free exercise is protected

[8] The Department's assertion that some Quakers do worship, A1625, proves the Church's point: D-180 favors some religious denominations over others in violation of the Free Exercise Clause.

only if government officials are required to give equal treatment to all religions, whether small or large, traditional or non-traditional, Eastern or Western, popular or unpopular. *Larson v. Valente*, 456 U.S. 228, 245 (1982). The Department's policy fails to do this and is therefore not neutral toward religion, invoking strict scrutiny.

D. The Policy Is Not Generally Applicable Because It Targets Religious Exercise.

The underinclusiveness of D-180 shows that it also lacks general applicability. *Lukumi*, 508 U.S. at 543. "Neutrality and general applicability are interrelated," and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id*. at 531. "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." *Id*. at 542–43 (citation and quotation marks omitted).

In *Lukumi*, the Court said that the underinclusiveness of the 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*. at 543. And the "ordinances have every appearance of a prohibition that society is prepared to impose upon Santeria worshippers but not itself." *Id*. at 545 (citation

and quotation marks omitted). "This precise evil is what the requirement of general applicability is designed to prevent." *Id*. at 545-46.

The Third Circuit's decision in *Blackhawk v. Pennsylvania* provides another example of underinclusiveness. There, the commonwealth required a permit to keep wildlife in captivity, but exempted zoos and nationally recognized circuses. 381 F.3d at 205. When a Lakota Indian sought an exemption from the permit rule to keep two bears on his property, the state denied the request. *Id*. But the Third Circuit held that the law was "substantially underinclusive" because Pennsylvania failed to explain how exemptions for nationally recognized circuses and zoos served "the Commonwealth's asserted goal of discouraging the keeping of wild animals in captivity except where doing so provides a 'tangible' benefit" for wildlife. *Id*. at 211. Thus, the law was not generally applicable.

Similarly, D-180 is substantially underinclusive. The Department's stated interest behind the regulation is in avoiding a potential Establishment Clause violation and protecting impressionable youth. But the policy's allowance of prayer, singing hymns, and religious teaching, *Bronx IV*, 650 F.3d at 36, of non-theistic religions and even of students during the school day, creates the possibility of confused youth or a perception of endorsement in a similar or greater degree than the Church's worship does. Furthermore, as illustrated *supra* in Part II.B, the

Department's facilities are open to some religious groups for devotional activities but not others.

Indeed, D-180 is so underinclusive that the Department permits religious student clubs to engage in Christian worship as a group and Buddhist meditation during the school day, A708-10, A713-15, A718-20, A1164-66, while it claims that impressionable youth may be confused. Yet it is inconceivable that students would perceive government establishment of religion by religious entities using the schools for religious devotion on weekends when children are at home, but not perceive such alleged establishment of religion when their own peers do the same during the school day. *See Good News Club*, 533 U.S. at 115 (rejecting such confusion). The Department is pursuing its stated interests by excluding only particular religious conduct—"religious worship services" of Judeo-Christian community groups. This underinclusiveness demonstrates the policy's lack of general applicability and underscores the applicability of strict scrutiny.

E. *Lukumi* Controls this Case, Not *Locke*.

The Department argues that *Locke v. Davey*, 540 U.S. 712 (2004), not *Lukumi*, controls this case and the Church's claim is subject to only rational basis review. Appellants' Br. 34-39. In *Locke*, the State of Washington denied a student a "Promise Scholarship" because he chose to pursue a degree in what his school termed "devotional theology." 540 U.S. at 715. The student challenged this denial

under the Free Exercise Clause, among other constitutional provisions. The Court rejected the student's claim because of the historic interest in avoiding the use of "taxpayer funds to support church leaders, which was one of the hallmarks of an 'established religion.'" *Id*. at 722. But *Locke*'s reasoning, which was tied to a "historic and substantial state interest" in states declining to directly subsidize clergy, is inapplicable to this case. *Id*. at 725.

First, the Supreme Court declared that *Locke*'s reasoning does not apply to cases involving access to government property, as we have in this case. *See id*. at 720 n.3 ("the Promise Scholarship Program is not a forum for speech."). The Department's policy is not a targeted scholarship "to assist students from low- and middle-income families with the cost of postsecondary education," *id*., but is a program to accommodate the needs of the community, Appellants' Br. 10. Nor is it a subsidy to community groups as all groups pay to rent Department buildings. A229-30, A1777-78 ¶¶19-21. *See Fairfax Covenant Church*, 17 F.3d at 708 (finding no subsidy when users pay rent).

Second, *Locke* stands alone in free exercise jurisprudence, because of the "historic and substantial state interest" of states declining to use tax dollars to directly support the clergy. 540 U.S. at 725. The Court noted that the prohibition on scholarships for devotional theology was relatively "minor," especially as compared with the historic interest in not supporting ministers directly with tax

money, because students attending religious schools, and even studying religion, were not excluded from the program. *Id.* at 724-25. But excluding "religious worship services" from public buildings is *not* a historic practice.

Churches have met in public buildings for worship since the founding of the Republic.[9] Thomas Jefferson and James Madison regularly attended Christian church services at the U.S. Capitol, which were held consistently until after the Civil War.[10] In New York, churches used the capitol building in Albany, and even the federal district court in New York City, for prayer and revival gatherings during the Great Awakening of 1857-1858.[11] This historic practice continues today across the country in countless public school districts. And here, there is no direct money payment to religion, as all groups pay to meet in Department buildings, A1778 ¶21, and receive only the "incidental benefit" of temporary use – for a fee –of a widely available government facility, *Widmar v. Vincent*, 454 U.S. 263, 273 (1981).

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[9] James H. Hutson, *Religion and the Founding of the American Republic* 84 (1998).

[10] *See* Library of Congress, "Religion and the Founding of the American Republic," at http://www.loc.gov/exhibits/religion/rel06-2.html (last accessed Oct. 2, 2012).

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

Third, *Locke* did not impose a requirement for "animus" against religion in order for strict scrutiny to apply, as the Department argues.[12] Appellants' Br. 36. In *Colorado Christian University v. Weaver*, the Tenth Circuit cogently addressed this argument and rejected it:

> There is no support for this in any Supreme Court decision, or any of the historical materials bearing on our heritage of religious liberty. Even in the context of race … the Court has never required proof of discriminatory animus, hatred, or bigotry. The "intent to discriminate" forbidden under the Equal Protection Clause is merely the intent to treat differently … Similarly, the Court has made clear that the First Amendment prohibits not only laws with "the object" of suppressing a religious practice, but also "[o]fficial action that targets religious conduct for distinctive treatment." *Lukumi*, 508 U.S. at 534….
>
> …[T]he constitutional requirement is of government neutrality, through the application of "generally applicable law[s]," not just of governmental avoidance of bigotry. *Smith*, 494 U.S. at 881. If First Amendment protections were limited to "animus," the government could favor religions that are traditional, that are comfortable, or whose mores are compatible with the State, so long as it does not act out of overt hostility to the others. That is plainly not what the framers of the First Amendment had in mind.

534 F.3d at 1260 (some internal citations omitted).

[12] Even though animus is not a requirement for strict scrutiny, D-180 shows the same level of animus found unconstitutional in *Badger Catholic*, 620 F.3d at 780. There, in distinguishing *Locke*, the Seventh Circuit said that a public university showed animus toward religion because it excluded student "prayer, [worship], or religious instruction" from a student fee funding program. *Id*. Here, the evidence of animus is even greater given the long history of the Department's repeated attempts to restrict religious expression and exercise in the schools.

Fourth, the Department argues whenever competing interests arise under the Free Exercise and Establishment Clauses, the Free Exercise Clause yields. Yet precedent disagrees. *See Widmar*, 454 U.S. at 276 (holding free exercise claim trumped establishment defense); *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (same); *Tenafly*, 309 F.3d at 177 (same); *Fairfax Covenant Church*, 17 F.3d at 707 (same). The proper "balance" between the two interests is application of strict scrutiny. Thus, *Locke*'s reasoning does not apply to policies like the one at issue here.

Finally, the Department relies on *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2985 (2010), to argue that since this Court applied a reasonableness standard to the free speech claim in *Bronx IV*, it must use the same standard for the free exercise claim. Appellants' Br. 37-38. But *Martinez* applied a reasonableness standard to both speech and association claims because the claims were "intertwined" under the Free Speech Clause; one derived from the other. 130 S. Ct. at 2985. By contrast, this is no longer a speech case; the Free Exercise Clause is an independent constitutional provision with different jurisprudence. *See*, *e.g.*, *Tenafly*, 309 F.3d at 165 & 177 (upholding city policy under Free Speech Clause, but striking it down under Free Exercise Clause strict scrutiny). Moreover, the free speech and free exercise claims do not merge here because D-180 is not a neutral policy of general applicability.

Simply put, as a non-neutral policy that targets a particular religious practice, there is no question that strict scrutiny applies to D-180.

F. The Policy Is Not Justified by Any Narrowly Tailored Compelling Interest.

"To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (citation omitted). "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.

1. The Department's exclusion of "religious worship services" is not justified by a compelling interest because allowing such activity does not violate the Establishment Clause.

While the Department proffers an interest in avoiding a potential Establishment Clause violation, this interest is neither compelling nor narrowly tailored, as allowing "religious worship services" during non-school hours, along with a vast array of other uses, does not violate the Establishment Clause. 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. Government conduct violates the Establishment Clause if it (1) lacks a secular

purpose, (2) advances or inhibits religion, or (3) fosters excessive government entanglement with religion. *Id*. at 612-13.

It is well-settled that merely granting equal access for religious groups to generally available government buildings, programs, or funding does not have as its primary purpose the advancement of religion and can be said to merely provide an incidental benefit to religion, which does not violate the *Lemon* test. *See*, *e.g*., *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (funding); *Good News Club*, 533 U.S. at 112-17 (buildings); *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (funding); *Agostini v. Felton*, 521 U.S. 203, 234-35 (1997) (assistance program); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 489 (1986) (funding); *Widmar*, 454 U.S. at 274-75 (buildings). All of these cases rejected Establishment Clause defenses by the government.

The present case is not the first time a government defendant has similarly tried – and failed – to carve out an exception to the protection of religious exercise by claiming that such exercise would violate the Establishment Clause. In *McDaniel*, Tennessee prohibited members of the clergy from becoming state legislators or delegates at the state constitutional convention. 435 U.S. at 621. Certainly, the clergy does not have a secular analogue – it is a distinctly religious occupation. *Hosanna-Tabor*, 132 S. Ct. 694. But the Supreme Court found that

such a prohibition violated the Free Exercise Clause, and that the Establishment Clause did not justify such discrimination. *McDaniel*, 435 U.S. at 628-29.

Similarly, in *Fairfax Covenant Church*, 17 F.3d at 707, a school district charged churches conducting worship services more rent than nonreligious groups because it was concerned about subsidizing religion through below-market rental rates, *id*. at 708, and thought "any long-term church use of school property might constitute an establishment of religion," *id*. at 704. The Fourth Circuit held this was not a compelling interest that justified infringement of the church's right to free exercise of religion because all renters paid the same rate and there was no evidence of forum domination. *Id*. at 706-07.

Like *Fairfax Covenant Church*, there is no evidence of forum domination or subsidy here, because any community group may rent Department buildings, all renters pay the same rate, and even though long-term use is explicitly endorsed by the "extended use" policy, churches do not rent indefinitely. Here, religious groups represent only a small percentage of all users. Of the 22,943 permits issued in 2011 to unions and community-based organizations, only 5% went to religious users. A1196-97 ¶¶39-40. In other words, 95% of all union and community-based organization permits were not for religious activity. *Id*. Moreover, churches do not rent long term. Only 4 of the 23 churches that used school facilities in 2005 are still meeting there today, including the Church. A1170 ¶8; A1172 ¶20.

Neither do the churches dominate individual schools. Many of the churches that the Department complained about in prior proceedings of this case – for meeting too often, too long, or in too many rooms; for having too many people attend; or for having children attend – no longer rent public schools. A1604-21. Religious users also regularly share school property with farmer's markets and athletic leagues. A86 ¶13, A92 ¶14.

Nor is there any concern about government subsidy. Every religious group pays money to the Department to meet in the schools; none receive money from the Department. A1777-79. Indeed, all groups using the schools pay the same rates based on a uniform fee schedule, and those charges cover much of the Department's costs. *Id*. The Department has offered no evidence that its building costs rise when a religious group rents a school or that they drop when the religious groups stop meeting, because the Department must still spend money to maintain the schools even during nonschool hours. The policy authorizes the Department to subsidize some activities in their entirety, but it has never subsidized the Church. A1779. There is no domination or subsidy here.

The Department's Establishment Clause concern is also undercut by its allowance of student worship during the day. In *Gregoire v. Centennial School District*, 907 F.2d 1366, 1373 (3d Cir. 1990), a public school permitted student-led worship 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 impressionable youth. *Id*. at 1380. The Third Circuit disagreed and held that the Establishment Clause did not justify its actions because the school already permitted worship by students. *Id*. at 1382. 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.

Looking at the situation through the lens of the endorsement test rather than *Lemon* does not yield a different result. The endorsement test asks whether "an objective observer, acquainted with the text, legislative history, and implementation of the [challenged policy], would perceive it as a state endorsement of [religion] in public schools." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (citation and quotation marks omitted). An observer acquainted with the huge variety of uses taking place in the New York City public schools – over 122,000 permits per year – would not interpret granting equal access to religious groups as "endorsement" of religion, especially since equal access is already granted to religious student groups without an Establishment Clause problem. A227, A1164-66, A1194 ¶29; A1776-77 ¶17. *See Bronx IV*, 650 F.3d at 35 n.4 (noting permits may be granted to religious clubs for students for

worship). Given that students engage in the very same activities as the churches during school hours, and that these activities—especially to a reasonable observer—are functionally and substantively equivalent to "religious worship services," an objective observer could not perceive endorsement. Moreover, the Department's requirement that users post disclaimers undercuts its endorsement concern because an objective observer will understand that renters are not conducting city business. A1780 ¶25. Allowing the churches to use the facilities on an equal basis with other users, whether their use constitutes a "religious worship service" in the eyes of the Department or not, does not violate the Establishment Clause according to established precedent.

The fact that this case involves "religious worship services" makes no difference for purposes of the Establishment Clause. The Department may not exclude groups from using its schools for "[p]rayer, religious instruction, expression of devotion to God, and the singing of hymns." *Bronx IV*, 650 F.3d at 36. But according to the expert witness and the Supreme Court, as well as the theology of many religious groups, these expressive activities are the sum total of what many religious groups do in what they call a "worship service." A733; *Widmar*, 454 U.S. at 269 n.6. The term "worship service" is merely the religious adherent's label for those components; it is not a distinct action. A822, A1147. If allowing the components of worship services does not violate the Establishment

Clause according to the Supreme Court and this Circuit, neither does allowing the service itself. Thus, the Department's Establishment Clause concerns are not compelling in light of the fact that those concerns are underinclusive.

Finally, the Department believes that merely asserting a fear of violating the Establishment Clause is a trump card that always wins over other constitutional rights. But there is no support for this idea in *Locke*, or any other case. Fear of violating that clause, in light of the foregoing facts diffusing that fear, is not a compelling interest. *Tenafly*, 309 F.3d at 172-73; *Fairfax Covenant Church*, 17 F.3d at 708. Obviously, the sometimes competing interests of the Free Exercise Clause and the Establishment Clause must be balanced – but the appropriate balancing test is strict scrutiny. Whatever test *Locke* applied to the scholarship provision there, the Court neither articulated it as a new test or one with applicability outside the circumstances present in *Locke*, nor overruled any of the previous free exercise cases applying strict scrutiny. Nor does *Locke* apply in a case like this, where the policy results in denominational preference and entanglement with religion, themselves violations of the Establishment Clause. *Colo. Christian*, 534 F.3d at 1256. Fear of an Establishment Clause violation, especially in light of facts proving that fear to be unfounded, is not a compelling reason to discriminate against religious exercise in an otherwise open government program.

2. The Department's policy is not narrowly tailored.

The Department's policy is not narrowly tailored because it prohibits any activity the Department considers religious worship – a religious activity that enjoys the highest level of protection under the Free Exercise and Establishment Clauses. *Hosanna-Tabor*, 132 S. Ct. at 707. The objectives of the policy are not pursued against all religious uses alike – thus, the policy does not even serve the Department's interests, let alone narrowly address them. "It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest of the "highest order"… when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Lukumi*, 508 U.S. at 547 (citation omitted).

The Department has not attempted to achieve its interests with any less restrictive alternatives, which weighs against a finding of narrow tailoring. Under strict scrutiny, if a less restrictive alternative would serve the government's purpose, it must use that alternative. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). To address the Department's fear of forum domination and the appearance of endorsement, for example, the Department could limit the number of times per year that any single outside organization may lease school facilities. *Fairfax Covenant Church*, 17 F.3d at 708. Likewise, the Department could revoke any organization's permit if it fails to adhere to neutral rules imposed by the Department, such as failing to include the Department's sponsorship

disclaimer in written materials. It could also require that users post disclaimer signs outside the building to lessen any appearance of endorsement of the activities in the facilities. But it has attempted to do none of these things. Because the policy is underinclusive, fails to serve the Department's interests, and because the Department has not attempted to address its concerns with less restrictive means, it lacks the narrow tailoring necessary to satisfy strict scrutiny.

The Department believes that a "religious worship service" is a small, distinct category of religious activity, and that because it has no secular analogue, it can be targeted for discrimination as an exception to normal Free Exercise guidelines. But this is simply inaccurate. If a particular practice is inherently religious, that does not make it an open target for discrimination. The opposite must instead be true, if the Free Exercise Clause is to mean anything. The Free Exercise Clause protects religious practice from government interference or discrimination – it was designed to give extra protection to religious activity by private citizens, not less. *Hosanna-Tabor*, 132 S. Ct. at 706.

The District Court correctly held that D-180 violates the Free Exercise Clause.

III. The Department's Policy Violates the Establishment Clause.

For over sixty years, the Supreme Court has "adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no

State can 'pass laws which aid one religion' or that 'prefer one religion over another.'" *Larson*, 456 U.S. at 246 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)). A government policy violates the Establishment Clause if it lacks a secular purpose, advances or inhibits religion, or excessively entangles the government with religion. *Lemon* 403 U.S. at 612-13. New facts have come to light since *Bronx IV* that show D-180 causes unconstitutional denominational preference, inhibits religion, and excessively entangles government with religion. These new facts, along with the Supreme Court's recent decision in *Hosanna-Tabor*, where the Court cautioned against government definition of ecclesiastical terms, show that D-180 violates the Establishment Clause.

A. The Department's exclusion of "religious worship services" unconstitutionally prefers some religious groups to others.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244; *see, e.g., Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ("[t]he government must be neutral when it comes to competition between sects"); *Epperson v. Arkansas*, 393 U.S. 97, 104, 106 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion…. The State may not adopt programs or practices … which 'aid or oppose' any religion.…This prohibition is absolute."). When presented with a state law granting a denominational preference, precedent "demand[s] that we treat the

law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Larson*, 456 U.S. at 246.

In *Larson*, a Minnesota law required religious organizations that receive less than 50% of their total contributions from members or affiliated organizations to comply with registration and reporting requirements applicable to non-religious non-profit organizations. The Unification Church failed to meet this rule and challenged the law. The Court held that the 50% rule "clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents." *Id*. Applying strict scrutiny, the Court found that there was no compelling state interest for treating religious organizations that received less than 50% of their contributions from members or affiliated organizations differently than those that received more than 50% from those sources. *Id*. at 250-51. The Court went on to hold that the 50% rule violated the entanglement prong of the *Lemon* test, because it risked "politicizing" religion by "selective legislative imposition of burdens and advantages upon particular denominations." *Id*. at 254.

Here, the exclusion of "religious worship services," interpreted as "solely the conduct of a particular type of event: a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion," *Bronx IV*, 650 F.3d at 37, results in denominational preference.

Religious groups that have a Judeo-Christian understanding of a "worship service," such as the Church, are excluded. Other religious groups that do not follow a liturgy, that do not "worship" a god, that do not meet collectively, are not "organized," or that are not led by ordained officials, are allowed to rent the school buildings for devotional exercises. A741-42. Essentially, Adventists, Jews, Baptists and Episcopalians are out, and Quakers are in. *Id*. Some Buddhists, Hindus, and Daoists are in, but some are not. *Id*. A group of adherents are ineligible to use the schools for their regular worship, but a single adherent may worship alone unhindered.

The Department claims the prohibition on "houses of worship" cures the denominational preference problem. Appellants' Br. 42-43. But the Department has not defined what a "house of worship" is, nor has it explained how it differs from a "religious worship service." A351. Moreover, prohibiting "houses of worship" still results in denominational preference as not all religions worship as part of their devotional exercises, and not all worship is done collectively or according to a prescribed order or liturgy. Thus, religions that fall into these latter categories may rent Department buildings, but religions that do worship may not.

Discriminating between religious sects because of the way they conduct their devotional exercises is a First Amendment violation of the first order, as the Supreme Court held nearly sixty years ago in *Fowler v. Rhode Island*. There, a

Jehovah's Witnesses sect had conventions that were "different from the practices of other religious groups" because its "religious service is less ritualistic, more unorthodox, less formal than some." 345 U.S. at 69. Regardless, the Court said "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment," because that "is merely an indirect way of preferring one religion over another." *Id*. at 70. "Baptist, Methodist, Presbyterian, or Episcopal ministers, Catholic priests, Moslem mullahs, Buddhist monks could all preach to their congregations in Pawtucket's parks with impunity. But the hand of the law would be laid on the shoulder of a minister of this unpopular group for performing the same function." *Id*.

Discrimination among religious denominations is the very evil the Establishment Clause was designed to protect against. *Larson*, 456 U.S. at 244-45. A government interest compelling enough to justify such preference in these circumstances is inconceivable, and the Department's regulation has the effect of granting benefits disproportionately to some denominations, thereby "politicizing" religion in violation of the third prong of the *Lemon* test. Thus, D-180 violates the Establishment Clause because of its denominational preference.

B. The Department's exclusion of "religious worship services" excessively entangles the government with religion.

The Department's policy fails *Lemon*'s third prong for an additional reason: it takes sides in disputed religious doctrines and invokes a theological concept to

define a government policy. The bar on entanglement "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)).

While the government may, at times, decide whether something is religious, *Bronx IV*, 650 F.3d at 47, it may not "take sides in a religious matter" or "take an official position on religious doctrine" such that it is making a theological determination of whether devotional activities constitute religious worship, *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 425 (2d Cir. 2002); *see Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008) (finding entanglement when government "is placed in the position of deciding between competing religious views.").

1. *Hosanna-Tabor* illustrates the Department's excessive entanglement.

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. The Supreme Court rejected that argument. "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." 132 S. Ct. at 706. Because ministers are responsible for conducting church worship, which itself is an ecclesiastical term, worship is entitled to special First Amendment protection.

Indeed, in distinguishing *Smith*, 494 U.S. 872, the Court pointed out that the EEOC was attempting to regulate not just a physical act, but an "internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 132 S. Ct. at 707. The regulation of peyote in *Smith* was acceptable because of the distinction between "the government's regulation of 'physical acts' from its 'lend[ing] its power to one or the other side in controversies over religious authority or dogma,'" which is unacceptable. *Id*. (quoting *Smith*, 494 U.S. at 877).

In concurrence, three of the justices pointed out the dangers of governmental definition of highly religious terms like "minister." Justice Thomas noted, "Judicial attempts to fashion a civil definition of 'minister' through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some." *Id*. at 711 (Thomas, J., concurring); *see also id*. (Alito, J., and Kagan, J., concurring) ("The term 'minister' is commonly used by many Protestant denominations to refer to members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists.").

The Department concedes *Hosanna-Tabor* applies to this case, but argues that the Court's holding justifies extensive entanglement with religion. Appellants' Br. 30-32. The Department claims the Supreme Court's investigation of the facts in that case to determine the applicability of the ministerial exception amounts to

the same thing the Department did in this case to determine whether groups were engaging in prohibited "religious worship services." But there is a crucial distinction between the two situations: the ministerial exception is a legal concept which is not defined in religious terms; a "religious worship service" is a highly religious term which various religious groups define differently. In *Hosanna-Tabor*, the Court looked at the circumstances of the plaintiff's employment in order to determine whether the ministerial exception applied, not to determine whether she was a "minister," which is a religious term. 132 S. Ct. at 707. The Court recounted objective, secular criteria such as the plaintiff's education, qualifications, job duties, her claim of a ministerial tax exemption, and how the church treated her position. It did not seek to define a religious term or practice, or apply a religious concept to classify the plaintiff's employment, and specifically refused to do so. *Id*. Yet this is exactly what the Department is doing here. Which means that if a religious group engages only in "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, the Department will nonetheless prohibit its meeting in a public school if the religious group happens to use the term "worship service" to label its meetings on its website or in its written materials.

Notably, even this careful avoidance by the Court of applying religious concepts drew cautionary statements from three justices for the same reasons that the Department's policy here violates both religion clauses – namely, because it entangles the government with religion by allowing it to make a religious judgment, and because the wide diversity of religious belief in this country renders it difficult to define religious practices in such a way that would treat all religions equally. *See Hosanna-Tabor*, 132 S. Ct. at 710-11 (Thomas, J., concurring); *id*. at 711 (Alito, J., and Kagan, J., concurring).

2. *Commack* and *Faith Center* struck down similar entanglement.

Two earlier cases demonstrate the entanglement *Hosanna-Tabor* forbids. In *Commack*, 294 F.3d at 423, this Circuit held that New York's kosher fraud law excessively entangled the government with religion because the state took "an official position on religious doctrine," "effectively discriminating in favor of the Orthodox Hebrew views of dietary requirements." *Id*. at 425. State law defined "kosher" as "prepared in accordance with orthodox Hebrew religious requirements." *Id*. at 423. The state advanced two arguments, both employed by the Department here, that the law was constitutional. First, it argued that "no one disputes the meaning of the term 'kosher,'" but religious disagreement on what is "kosher" and the state's adoption of only one of those definitions showed that the state had "aligned itself with one side of an internal debate within Judaism." *Id*. at

426. Second, the state claimed it relied on meat producers and vendors to comply with the law. But the state could not make a determination that a vendor did not conform to the kosher requirements without first having arrived at an official position on what those requirements are. *Id*. at 428. This excessively entangled the state with religion.

Similarly, in *Faith Center Church Evangelistic Ministries v. Glover*, 2009 WL 1765974, at *9-10 (N.D. Cal. June 19, 2009), the court declared a no-worship policy unconstitutional under the Establishment Clause. There, the Ninth Circuit, like this Court, held that a ban on worship and "religious services" in library meeting rooms was a viewpoint neutral and reasonable policy in a limited public forum. *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891 (9th Cir. 2007). But after the Ninth Circuit's ruling on the free speech claim, the district court held that a ban on religious worship in a government facility excessively entangled the government with religion. The library argued that it relied only on the use applications to determine whether an event would fall within the ban on religious worship – as the Department argues here – but the library's failure to define "religious services" and worship and evidence that the religiosity of questionable applications was resolved by library staff showed excessive entanglement. 2009 WL 1765974, at *9.

The Department's policy runs afoul of the Establishment Clause in the same way as the policies in *Commack* and *Faith Center*. First, the Department is regulating a specifically religious activity, determined not by any objective criteria, but by the beliefs of the participant and the subjective interpretations of the government. It is employing a theological term to effect government policy. Like the many definitions of "minister" in *Hosanna-Tabor*, or the different definitions of "kosher" in *Commack*, or the wide variety of worship in *Faith Center*, religions differ on what constitutes worship.

D-180 requires the Department to decide what it means by "religious worship services." Does it include 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 resulted in a fishing expedition for detailed information from churches, searches of church websites and sermons, and skepticism of church applications. A1786-87, A1803-07, A1826-33. That is exactly the type of government action that *Faith Center* found unconstitutional. "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 Colo. Christian Univ.*, 534 F.3d at 1259 (striking

down a Colorado statute that distinguished between "sectarian" and "pervasively sectarian" schools as favoring some religions over others).

Second, the Department claims it relies on applicants to define "religious worship services" for themselves, but that is not its practice. When Pastor Hertzog applied to use a school for an informational meeting, and said that the activity would include reading and studying the Bible, prayer, singing, and fellowship, the Department interpreted this as a "religious worship service" and denied the application. A133-34. When Pastor Hall applied for similar activities, the Department deemed them to be "worship." A72. When Ms. Cole inquired about holding a prayer meeting and a Bible study, the Department said the Bible study was okay, but not the prayer meeting because it was worship. A1150-51. The Department could not process these applications without first deciding what a "religious worship service" is. *Commack*, 294 F.3d at 428.

Beyond just "discharge[ing] constitutional obligations," *Bronx IV*, 650 F.3d at 47, the government waded into excessive entanglement in *Hosanna-Tabor* by defining what constitutes a "minister," in *Faith Center* by failing to define worship and "religious services," and in *Commack* by adopting only one sectarian definition of "kosher." In the same way, the Department here cannot define "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).

In short, it is "no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment. Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings." *Fowler*, 345 U.S. at 70. If courts are incompetent to classify actions taking place at religious meetings, so too is the Department. Just as the church in *Hosanna-Tabor*, not the government, had the right to define what constitutes a minister, the Church in this case has the right to define what worship is, and the Department is not qualified to do so without immersing itself deeply in religious matters like the government in *Commack* and *Faith Center*. The Department's current policy unconstitutionally entangles the city with religion.

C. The Department's exclusion of "religious worship services" inhibits religion.

The Department's policy also fails the second prong of *Lemon* by allowing some religions to practice devotional activity in public buildings, but barring others from doing the same. In *Commack*, New York's kosher fraud statutes inhibited religion "by effectively prohibiting other branches [of Judaism] from using the kosher label in accordance with their religious beliefs." 294 F.3d at 430. Thus,

kosher food vendors could only comply with the law by accepting "a meaning of kosher as defined by religious views that are not their own." *Id.* D-180 inhibits religion in a similar way.

As discussed above, the Department views "religious worship services" as religious activity of Judeo-Christian religions. But the definition of worship varies from one religion to another. A741-42. Pastor Hertzog did not believe his informational meeting to be a "religious worship service," A822-23, and Ms. Cole did not believe her prayer meetings were a "religious worship service," A1150-51. But the Department did. Thus, in order to get a permit to use Department facilities, Hertzog and Cole were required to abandon their religious beliefs as to what constitutes worship and adopt the Department's definition. But other religions whose devotional exercises are not classified as "religious worship services" by the Department may continue to rent school buildings under D-180 without any changes to their ministry. This unconstitutionally inhibits religion in violation of the Establishment Clause.

CONCLUSION

For these reasons, the Court should affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because this brief contains 13,986 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 pt. font.

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