NO. 14-354

In the Supreme Court of the United States

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

v.

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

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

This case presents an ideal opportunity for the Court to address a critical question of First Amendment law that has left the circuits deeply divided: does the government violate the First Amendment by excluding religious worship from a speech forum?

Petitioners Bronx Household of Faith and its two pastors ("the Church") have standing to bring this petition because they continue to rent one of Respondents' schools to conduct worship services, and Respondents' policy prohibits them from doing so, even for periodic uses.

The Second Circuit's divided decision below conflicts with the free exercise jurisprudence of this Court and other circuits. It also erroneously concludes under the Establishment Clause that listening to pastors' sermons to determine if the content constituted a "religious worship service" did not excessively entangle Respondents with religion, and excluding worship services of some religions but not others is not a denominational preference. The Second Circuit's decision likewise conflicts with this Court's and other circuits' equal access jurisprudence by concluding that it is not viewpoint discrimination to exclude "religious worship services," which contain the same components of speech allowed in the forum, such as speaking, singing, and praying, from a broadly open forum. This Court should grant review to resolve these conflicts and the important questions they raise.

ARGUMENT

I. This Case Is a Clean Vehicle to Resolve the Important Questions Presented.

A. The Church Has Standing.

The sole basis for Respondents' standing argument is that the Church is not suffering an injury in fact. But the Church continues to rent one of the schools for periodic worship services, which Respondents' policy clearly prohibits. That the violation of the Church's First Amendment rights will now occur once a quarter rather than once a week does not deprive it of standing.

There is no question that the Church has suffered a past and continuing injury from Reg. I.Q., which is remedied in part by the damages claim Petitioners pleaded in their complaint. Of course, a damages claim always remains justiciable. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 113 (1983) ("If [plaintiff] has suffered an injury barred by the Federal Constitution, he has a remedy for damages under § 1983.").

The Church also faces a continuing injury, which confers standing to pursue injunctive relief. Since moving into its new building in April 2014, the Church has twice rented the school for worship services in July and October.[1] Reply App.1a-2a. In

[1] The July worship celebrated the end of the Church's vacation Bible school. The October worship service ultimately did not occur only because the school janitor neglected to open the building, so the Church was locked out. However, school

fact, Petitioner Robert Hall testified that the Church has always planned to continue to rent the school for worship services because the new building will not accommodate large crowds. Ct. of Appeals App. ("A") 1535.

The Church has applied to rent the school for this year's Good Friday and Easter worship services on April 3 and 5, 2015. Reply App.2a. The Church also plans regular rental of the school as its congregation has already outgrown the new building. Reply App.3a. And Respondents' policy bans all worship services, regardless of the frequency, so they will continue to enforce the policy against the Church in the future.

Article III standing is premised on a plaintiff showing "(1) an "injury in fact," (2) a sufficient "causal connection between the injury and the conduct complained of," and (3) redressability. *Susan B. Anthony List v. Driehaus* (*SBA List*), 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). Although "past exposure to illegal conduct" alone does not grant standing to pursue injunctive relief, it is sufficient when accompanied by "any continuing, present adverse effects" of the illegal conduct. *Lujan*, 504 U.S. at 564.

The Church satisfies Article III standing because it demonstrates an "intention to engage in a course of conduct arguably affected with a constitutional

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officials approved the application and accepted the church's money. Reply App.2a.

interest"—continued rental of the school this Easter and beyond, as evidenced by its pending permit applications—and a "credible threat of enforcement"—Respondents' continued enforcement of Reg. I.Q. *SBA List*, 134 S. Ct. at 2342. This Court has found standing upon less certain facts. *See id.* at 2343 ("Both petitioners have pleaded specific statements they intend to make in future election cycles."); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 182 (2000) (finding plaintiff "testified that he would like to fish in the river at a specific spot he used as a boy, but that he would not do so now because of his concerns about Laidlaw's discharges").

Respondents' policy bans "religious worship services," and, if the stay is lifted, they will enforce the policy. Moreover, the Church has pending permit applications, and it will continue to file additional applications in the future. Thus, the Church has standing to pursue its claims.

B. The Petition Contains a Complete Factual Record and Final Rulings on the Church's Claims.

The Petition presents a full factual record and adjudication of all of the Church's claims, making this case ripe for resolution by this Court. A previous petition filed by the Church was interlocutory when the Second Circuit ruled against it on its Free Speech Clause claim. App.165a. But that ruling left unresolved the Church's claims under the Religion Clauses. The Second Circuit ruled on those claims in its most recent decision. App.1a. Thus, this Petition

is a clean and complete vehicle to address the important questions presented.

II. The Decision Below Upholds the Exclusion of Worship from a Public Forum Under the Free Exercise Clause in Conflict with this Court's Precedent and that of Other Circuits.

Conspicuously absent from Respondents' opposition is any attempt to describe how Reg. I.Q. survives the baseline free exercise test announced in *Employment Division v. Smith*, 494 U.S. 872 (1990), and affirmed in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). This is not surprising because a government policy like Reg. I.Q., which singles out expressive conduct undertaken for religious reasons for exclusion from a public forum is not neutral or generally applicable and cannot be justified by an unfounded fear of violating the Establishment Clause. Pet. 14-16.

Instead of describing how the no-worship-service policy survives *Smith*, Respondents assert that *Smith* and *Lukumi* apply only when there is a government-imposed prohibition, restraint, or burden on religious exercise. Opp. 18. But those are present here because Respondents are excluding the Church from accessing a public forum open broadly to the community. Moreover, a burden on free exercise is not limited to a prohibition on religious behavior. It can also arise where the government conditions a benefit on the forfeiture of religious freedom. *See*, *e.g.*, *McDaniel v. Paty*, 435 U.S. 618 (1978) (finding state did not compel minister to run

for office, but conditioned his ability to do so on forfeiting his religious convictions). The Department did not need to open its facilities for after hours non-governmental uses, but it did. Now it must abide by constitutional rules forbidding express discrimination against religious expression and practices in otherwise permissible uses. *See Widmar v. Vincent*, 454 U.S. 263, 267 (1981) ("[T]he University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.").

Tellingly, Respondents make no attempt to distinguish *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703 (4th Cir. 1994), which, in conflict with the Second Circuit, held that a school violated the Free Exercise Clause (and the *Smith* test) because charging churches more than non-religious groups to rent school buildings was neither neutral nor justified by a compelling state interest. Pet. 19.

Instead of addressing these issues, Respondents continue to argue that they are subsidizing the Church, which in turn justifies Reg. I.Q. under *Locke v. Davey*, 540 U.S. 712 (2004). Both arguments miss the mark.

First, *Locke* clearly stated that it did not apply to forum situations. Respondents and the Second Circuit fail to address the critical factor that distinguishes this case from *Locke*: this is a forum for speech and the scholarship program in *Locke* was

"not a forum for speech." 540 U.S. at 720 n.3. Indeed, *Locke* distinguished not just an "open public forum," but "speech forums" generally. *See id.* (citing cases that found the forum to be "metaphysical" (e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995)) and "nonpublic" (e.g., *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985)). *Locke* is inapplicable regardless of the type of forum at issue here. And Respondents do not attempt to address the circuit split created by the Second Circuit's application of *Locke* to this case. Pet. 22-23.

Second, Reg. I.Q. does not create a subsidy. Respondents open empty school buildings for uses that "pertain to the welfare of the community," and users, including the Church, pay rent according to the Department's uniform fee schedule. App.290a, 301a–303a. The Department sometimes profits from these rental fees.[2] But below market rental rates are not a subsidy. *See Fairfax Covenant Church*, 17 F.3d at 708 ("Rather than subsidizing a church user, such a cost-recovering rent in fact provides money to the School Board to offset its ongoing expenses for school facilities.").

Moreover, an in-kind benefit available to all users was present in all of the Court's prior equal

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[2] *See* Christine Kiracofe, *The Constitutional Parameters of Renting Public School Space for Weekend Worship Services*, 287 ED. LAW REP. 663, 664 (2013) ("[O]ne congregation that has rented space in a Brooklyn high school has paid the district more than $38,000 a year in rental fees for the use of the facilities for a few hours, one day a week, when school was not in session").

access cases, but posed no obstacle to striking down similarly discriminatory exclusions. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102–03 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 386–87 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 231–32 (1990). In fact, this Court ordered the University of Virginia to provide its student fee grants to an evangelical Christian student newspaper because the university violated the First Amendment's requirement that the government give all groups equal access to the forums it has created. *Rosenberger*, 515 U.S. 819.

Finally, Respondents argue that the majority's decision below does not require proof of animus in a free exercise claim. Opp. 22. But the majority plainly states that "the absence of discriminatory animus" showed that the Department did not violate the Free Exercise Clause. App.32a. Either the Second Circuit requires animus to prove a free exercise violation despite *Lukumi* saying it is not required, Pet. 17, or it misreads *Lukumi* as requiring animus. If Respondents were correct, and the Second Circuit does not require animus to prove a free exercise violation, then the court should have applied the *Smith* test, which it did not do. Regardless, there is a conflict among the circuits on whether proof of animus is required, and the Court should resolve it. Pet. 18–19.

III. The Decision Below Is Irreconcilable with this Court's Establishment Clause Precedent and Conflicts with the Tenth Circuit.

Respondents argue Reg. I.Q. causes no denominational preference because applicants that do "not hold worship services [are] unlikely to seek a permit for worship services." Opp. 25. But that is a non-starter. The record shows religious users acquiring permits for worship, including student clubs that worship on-campus during school hours. Pet. 5–6. Expert witness testimony established that religions worship differently and may not label their devotional activity "worship." Pet. 8–9; A733, 741–42. But because they do not use the label "worship," Respondents permit their activity, while banning the Church's. This is clear denominational preference under *Larsen v. Valente*, 456 U.S. 228, 244–45 (1995).

Respondents also assert that there is no excessive entanglement because they disclaim any official role in determining what is or is not a "worship service." Opp. 8, 34. But they admit that they may second-guess an applicant's self-characterization of its activities. *Id*. Department officials listened to pastors' sermons, scoured church websites, attended church events, and asked churches to describe what they intend to do from the moment they enter the school to the moment they leave.[3] Pet. 7–8. The Second Circuit ruled this was

[3] The record clearly shows that Respondents did not change their protocol in December 2011, as the examples described

not excessive entanglement, but the Tenth Circuit ruled that such line-drawing by government officials was excessive entanglement. Pet. 27–28. This Court should grant review to correct the Second Circuit's errors and realign it with this Court's precedent.

IV. The Decision Below Escalates a Well-Established Conflict Among the Circuits on Whether the Free Speech Clause Permits the State to Ban Religious Worship in a Public Forum.

The Second Circuit deepened an already well-established circuit conflict on whether the exclusion of religious worship from a government speech forum is content-based or viewpoint-based discrimination under the Free Speech Clause. This petition offers an opportunity to resolve that conflict and bring uniformity to the law.

This Court has long indicated that the exclusion of worship services and other devotional activity from public forums is content-based or viewpoint-based discrimination. *Widmar*, 454 U.S. at 269 n.6; *Rosenberger*, 515 U.S. at 845; *Good News Club*, 533 U.S. at 112.

Contrary to these decisions, the majority below and the Ninth Circuit in *Faith Center Church Evangelistic Ministries v. Glover*, 480 F.3d 891 (9th Cir. 2007), held that policies excluding worship from

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above all occurred after that date. Regardless, the voluntary cessation of a challenged practice does not deprive the Court of the power to determine its legality. *Friends of the Earth*, 528 U.S. at 189.

limited public forums are viewpoint neutral.[4] But the Seventh and Tenth Circuits have held that such policies are viewpoint discriminatory. *See Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 781 (7th Cir. 2010); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996). Respondents dismiss this conflict by asserting that these cases involved "open forum[s]." Opp. 29. But viewpoint discrimination triggers strict scrutiny in any forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The conflict between the circuits needs resolution by this Court.[5]

The Department also makes the remarkable assertion that a "worship services prohibition is viewpoint neutral." Opp. 34. But this is not true. The Department's rule that an otherwise permissible use is disallowed if it constitutes a "worship service" is not neutral. Such a rule disfavors worship services and the expression they contain—rituals or ceremonies conducted from the perspective of honoring a divine being—as opposed to those rituals

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[4] The Church does not concede that Respondents created a limited rather than a designated public forum, but in either case, their discriminatory actions are impermissible.

[5] *See* App.195a ("The Supreme Court's precedents provide no secure guidelines as to how [this case] should be decided."); App.54a ("This case presents substantial questions involving the contours of both religion clauses and the Free Speech Clause of the First Amendment, the resolution of which are ripe for Supreme Court review.") (Walker, J., dissenting); *Badger Catholic*, 620 F.3d at 779 ("The Supreme Court is not always clear about the difference" between content and viewpoint-based discrimination).

or ceremonies honoring human heroes, such as athletes and public servants.

The Church's worship services contain the same component parts as permitted secular activities—teaching, singing, collection of donations, and eating, just to name a few. The position advanced by Respondents and adopted by the Second Circuit conflicts with *Good News Club*, 533 U.S. at 111 ("What matters for Free Speech Clause purposes is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations"); *id.* at 112 n.4 ("Regardless of the label [used], what matters is the substance of the Club's activities").

Respondents claim the Church has "conceded" there is no secular analogue to a religious worship service. Opp. at 12, 26, 28, 29. That is incorrect. This has been *Respondents'* position, not the Church's, throughout the litigation. Opp. 22, Case No. 11-386 (2011). Worship services often entail expressive activities that are also found in numerous secular uses that Respondents allow. *See* Pet. 6 ("rituals, recitations, moral instruction, songs, collections, and meals"). The only distinction is the religious content of Petitioners' expressive events. Under the First Amendment, the government may not impose discriminatory treatment on the basis of such theological distinctions. The supposed concession Respondents seize upon is illusory, and attempts to obscure discriminatory treatment of only *certain* religious practices. Indeed, Respondents' position highlights how the Second Circuit's

reasoning fails as a constitutional rule. The court below claimed that groups may engage in all of the component parts of a worship service in the schools, but not if they label their meetings "religious worship services." App.177a. That distinction unconstitutionally elevates form over substance.

The Second Circuit also erred in holding that the forum was a limited public forum when it is actually a designated public forum. Pet. 34-37; *see Lamb's Chapel*, 508 U.S. at 391 (noting designated public forum argument has "considerable force"); *Good News Club*, 533 U.S. at 106 (assuming without deciding the forum was limited, but finding viewpoint discrimination). The Second Circuit's decision on this point conflicts with the First, Third, Fourth, and Fifth Circuits. Pet. 36-37.

CONCLUSION

A divided Second Circuit rejected this Court's precedent and escalated conflicts with other circuits on the exclusion of worship services from public forums. This case is an ideal vehicle to resolve important First Amendment questions, and for these reasons the Court should grant review.

Respectfully submitted,

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January 26, 2015

APPENDIX

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DECLARATION OF PASTOR ROBERT HALL, CO-PASTOR OF THE BRONX HOUSEHOLD OF FAITH SUPPORTING PETITIONERS' PETITION FOR WRIT OF CERTIORARI

I, Robert Hall, state that the following statements are true and correct based upon my personal knowledge:

1. I am one of the Petitioners in the case of *Bronx Household of Faith v. Board of Education of the City of New York*, Supreme Court Docket number 14-354.

2. I currently serve as co-pastor of Bronx Household of Faith, a Christian church located in the Bronx New York.

3. Bronx Household of Faith started meeting in a New York City Public School, P.S. 15, for its weekly worship services in August 2002 because of the injunction issued by the District Court in this case.

4. After we completed the construction of our own building, across the street from P.S. 15, we started conducting our weekly worship services there in April 2014.

5. We have applied to New York City Department of Education officials to hold four different worship services since we moved our weekly services in April 2014.

6. The first service we conducted in P.S. 15 after we moved our weekly services was on July

27, 2014. It was the final meeting of our multi-day vacation Bible school. We had conducted the vacation Bible school at our own facility, but we needed a larger space to hold our service because of the additional people who attended, so we used the public school.

7. We applied for a second worship service, paid our rental fee, and were approved by Department of Education officials for a meeting scheduled for October 19, 2014. This was a worship service to dedicate our new building. Our building was too small to hold the large crowd we anticipated. However, the school employee from New York City did not show up to unlock the building, so we were forced to conduct the worship service in our own facility.

8. We have applied to conduct two additional worship services in P.S. 15 on April 3, 2015 for a Good Friday Service, observing the crucifixion of Jesus Christ, and another worship service on April 5, 2015, to celebrate the resurrection of Jesus Christ.

9. Bronx Household of Faith will continue to apply to conduct worship services in the New York City schools on a regular, periodic basis. For major events and Christian holidays, we will need to rent the New York City school to conduct our worship services, in order to accommodate the larger number of people who attend our events.

10. Our new facility is small and it is likely that we will have to move back to P.S. 15 in the future to hold our weekly worship services.

DECLARATION UNDER PENALTY OF PERJURY

I, ROBERT G. HALL, a citizen of the United States and a resident of the State of New York, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing Declaration is true and correct.

Executed this 22nd day of January, 2015.

s/Robert Hall
ROBERT HALL