No. 14-354

In the
# Supreme Court of the United States

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

Petitioners,

-against-

BOARD OF EDUCATION OF THE CITY OF NEW YORK and COMMUNITY SCHOOL DISTRICT No. 10,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION

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## COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

A regulation of the New York City Department of Education allows outside organizations, including religious organizations, to apply for permits to use space in public schools during non-school hours at far below market rates, subject to priority for school-sponsored events and rules prohibiting partisan political events, private events, and commercial uses, among other activities. The regulation prohibits the grant of permits to organizations that, by their own description, seek to hold "religious worship services" in the public schools or to use the schools as a "house of worship."

The questions presented are:

1. Whether the petitioner congregation and its two pastors now lack standing to seek an injunction and declaratory relief compelling the Department to permit the Church to use public-school space for its worship services, where the Church has for months been holding its worship services in a newly constructed building that it owns.

2. Whether the Constitution compels the Department to grant permits for organizations to hold worship services in the public schools.

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## INTRODUCTION

The petitioners here – a Christian congregation located in the Bronx, New York, and its two pastors – seek injunctive and declaratory relief under the Free Exercise, Free Speech, and Establishment Clauses of the First Amendment compelling the New York City Department of Education to afford them space in a New York City public school, at a fee vastly below market rents, for use as their weekly house of worship. The individual petitioners have described the school as "God's house," and said they hope to see a church in every New York City public school (A634; 635; 652-653; 657, 790; 941, 942).

These petitioners have twice before sought certiorari on the same issues, and this Court has twice denied the writ. The present petition is no more worthy of certiorari than the earlier two.

To the contrary, there is now a new and further reason to deny this petition. As petitioners concede, the Church has completed its own building in the Bronx and has been using that building for several months as its house of worship, even though a district court order still in effect would allow the Church to use school space for weekly worship services (as it had done since 2002). The Church's decision to relocate its worship services to its own building defeats petitioners' ability to establish standing to pursue the injunction they seek. At a minimum, petitioners' decision to

relocate raises serious threshold questions of justiciability that counsel for denial of the writ on prudential grounds.

Even if these threshold obstacles were not present, the petition still would not warrant the Court's review. Although the petition argues that the court of appeals' rulings here conflict with the Court's precedents and decisions of other circuit courts, none of the claimed conflicts is genuine. The petition should be denied.

## STATEMENT

1. New York City's public schools educate a large and richly diverse body of students – more than 60 percent of the school system's 1.1 million students are immigrants or the children of immigrants, originating from countries around the globe.[1]

This case involves a Department of Education policy for use of public school buildings during extended, or non-school, hours that was adopted as part of the Department's former

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[1] NYC Coalition for Educational Justice, Looming Crisis or Historic Opportunity? Meeting the Challenge of the Regents Graduation Standards (Feb. 2009), at 12, *available at* http://www.advocatesforchildren.org/Our_Children_Our_Schools%20_FINAL_Report.pdf?pt=1; New York City Independent Budget Office, New York City Public School Indicators: Demographics, Resources, Outcomes (July 2014), *available at* www.ibo.nyc.ny.us./iboreports/2014indicatorsreport.pdf. The statistics exclude students in the City's charter schools.

standard operating procedures manual, and which became codified as Chancellor's Regulation D-180 in 2010.

Regulation D-180 gives priority to school-sponsored activities, such as programs for at-risk children, college test administration, and adult education classes, among many others (A918-921). Subject to this priority, outside organizations may obtain a permit to use available space in school buildings for holding social, civic, and recreational meetings and entertainment, and other uses pertaining to the welfare of the community (A226). The regulation prohibits the granting of permits for partisan political events, commercial activities (except for flea markets), private or personal events (such as weddings), and any gambling activities (A433). All events by outside organizations are required to be non-exclusive and open to the public (A226).

The regulation allows religious organizations as well as non-religious organizations to apply for permits to use school space, including for Bible study classes, religious clubs, sporting events, lectures, and performances (A226-227). Under § I.Q., no organization may obtain a permit for "the purpose of holding religious worship services" or "otherwise using a school as a house of worship" (A227). As described below, under procedures developed in 2011, the Department defers to the applicant's description – either in its application or in other publicly distributed statements – as to whether its proposed use of school facilities would

constitute a "religious worship service" or use of the school as a "house of worship" (A967).

The Department does not charge outside organizations "rent" for the after-hours use of its schools, nor does it pass along overhead costs such as heating, electricity or other operational costs (A964). Outside organizations receiving permits pay a fee for custodial services, which is calculated based on the collective bargaining agreement with the custodial union (A243; A928). Fees reflect the size and number of rooms requested, multiplied by the number of hours the rooms will be used, according to a fee schedule (A963). The Department derives no profit from these fees; to the contrary, the Department substantially subsidizes the actual cost in order to maximize the after-school opportunities available to students and their families (*id.*; A929).

2. Bronx Household of Faith first sought a permit to use a New York City public middle school for "religious worship" in 1996, which the Department denied. The Church sued, raising Free Exercise, Equal Protection, and Free Speech rights claims. The federal district court and court of appeals rejected the claims. This Court denied certiorari. 523 U.S. 1074 (1998).

The Church renewed the dispute following this Court's decision in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). The Church again sought a permit to hold its weekly worship services in a City public school, and after the

Department again denied that permit application, the present round of litigation began. This time, the district court granted a preliminary injunction of the worship services prohibition, which was affirmed on interlocutory appeal. 249a; 331 F.3d 342 (2d Cir. 2003).

Under the preliminary injunction, the Church began holding its weekly worship services in a Bronx public school in 2002. Church pastors have conceded that the weekly meetings in question are a "church service," "worship services," or a "Christian worship service" (A70; 610; 695; 936, 937). During this time, the Church also applied for permits specifically to hold a worship service on school property (A704; 776). Other congregations benefitting from the injunction also described their proposed activity as a worship service (A80, ¶11; 84, ¶3; 91, ¶6).

During this time, the Church had no other house of worship (A567-568). The Church paid a flat rate of $550 a month to use the public school for its weekly worship services, which it considered to be "more economical" than renting commercial space (A772-773; 790).

The Church also attributed special significance to holding worship services in a public school building (A638; 941). The pastors have said that the "church is God's method of evangelism, and that's why meeting in the schools is so important" (A670). They have further said that the school is "God's house," and they hope to see a

church in every school in New York City (A634; 635; 652-653; 657, 790; 941, 942).

By the 2004-2005 school year, at least 23 congregations held what they described as regular "worship" or regular "services" in New York City public schools (A943). By April 2012, nearly 100 congregations were seeking permits to hold worship services in City schools (A1741, ¶14). Services were largely held on Sunday, and sometimes occurred at the same time that children were in the building participating in other activities (A952-953).

The congregations in question used various methods to advertise their worship services (A947-950). Department regulations require outside organizations to include a disclaimer in all media and signage stating that their activity is not sponsored or endorsed by the Department (A229), but congregations holding worship services often failed to comply (A380-386). One congregation waited across the street from the school to give students free hot chocolate and invite them to attend worship services at their school (A947, ¶64b). Another pastor distributed church-imprinted balloons and proselytizing materials at a PTA back-to-school party at the school where his church held its worship services (A947, ¶64a).

3. Following discovery, the parties both moved for summary judgment, and the district court permanently enjoined enforcement of the worship services prohibition as unconstitutional viewpoint discrimination under *Good News Club*.

The district court also determined that the worship services prohibition required the Department to identify "religious services" and therefore led to an excessive government entanglement with religion.

In a 2-1 decision, the United States Court of Appeals for the Second Circuit reversed and vacated the injunction. The court of appeals ruled that the worship prohibition did not constitute viewpoint discrimination because, for valid non-discriminatory reasons, it excluded all viewpoints within a singular religious activity ("the conduct of worship services") and, consistent with *Good News Club*, it allowed all viewpoints of religious speech that had secular analogues. 176a-177a. The Court held that the prohibition on worship services in the public schools was reasonable because it also enabled the Department to avoid violating the Establishment Clause. 184a.

Judge Walker dissented. He would have held that the worship services prohibition is impermissible viewpoint discrimination and that the Department's Establishment Clause concerns were "insubstantial" (213a).

The Church again unsuccessfully sought certiorari on its First Amendment, Free Exercise, and Establishment Clause claims, raising the same arguments it proposes now (A118). 132 S. Ct. 816 (2011).

4. Following the Court's denial of certiorari, the Department made plans to begin enforcing its policy against granting permits for use of school

space for worship services (A966). After reviewing its procedures, the Department decided that no staff would determine whether an applicant's activities constituted "religious worship services" or use of a school as a "house of worship," but rather would require that the applicant alone describe its proposed activity (A967). Under longstanding practice used for all permit applications, Department staff would be permitted to look beyond the four corners of the application to confirm that the applicant's characterization of its activity on the application form was consistent with its description of the activity on its website, flyers and other any publicly distributed materials (A967, at ¶27). But staff members were not authorized to make any independent judgment as to whether a described activity constituted worship services (*id.*).

Before the policy was actually implemented, the district court again entered a preliminary injunction (A157). Thereafter, the district court permanently enjoined the worship services prohibition for a second time (56a-112a). Applying strict scrutiny, the district court concluded that denying the Church a permit would violate the Free Exercise Clause because the Church could afford no other location for its worship services, and because the Department's regulation impermissibly favored non-theistic over theistic religions, and less structured religious practices over more formal ones. The district court also rejected the Department's contention that its policy was warranted to avoid risking a violation of the

Establishment Clause, and further held that the policy impermissibly entangled the Department in religious matters (*id.*).

5. The appeal returned to the same panel of the Second Circuit. In a decision issued on April 3, 2014, the court of appeals again vacated the injunction and reversed the judgment, by the same 2-1 vote that decided the prior appeal. The Second Circuit again determined that the worship services prohibition is constitutional in light of the Department's "reasonable concern to observe interests favored by the Establishment Clause and avoid the risk of liability under that clause." *Bronx Household of Faith v. Bd. of Educ.*, 750 F.3d 184 (2d Cir. 2014).

The court of appeals rejected the district court's determination that the Free Exercise Clause obligates the Department to provide a subsidized government-owned space for the Church's worship services, finding that the Free Exercise Clause "has never been understood to require government to finance a subject's exercise of religion" (11a). The court of appeals stated that *Locke v. Davey*, 540 U.S. 712 (2004), had "expressly ruled" that where, as here, government was motivated by anti-establishment concerns, a decision to exclude a class of religious activity from receiving a state subsidy "is neither a violation of free exercise, nor even subject to strict scrutiny" (18a). The court also rejected the contention that the Department's policy disfavors certain religions, because all religions remain free to engage in their religious

practices anywhere other than the school facilities and may still use school facilities for the same purposes as any other user (22a-23a).

The court of appeals also disagreed that only an actual Establishment Clause violation could justify the prohibition (27a). The court found that the Department had "substantial reasons for concern" that hosting and subsidizing worship services would violate the Establishment Clause and that the district court's rule was not required by the case law and would force the Department to risk violating one Religion Clause or the other if it wrongly guessed the Establishment Clause's "exact contours" (27a-28a; 31a). The Court also found that the record was devoid of evidence of excessive entanglement by Department staff in religious activities (35a-37a).

Judge Walker again dissented. He would have held that the worship prohibition "discriminates against religious belief," is subject to strict scrutiny, and is not justified by a compelling government interest (45a).

The court of appeals denied rehearing en banc (A282a-283a), and thereafter stayed the issuance of the mandate pending petitioners' application for certiorari, thereby leaving the district court's permanent injunction in place.

6. The petition acknowledges (at 4) that the Church completed construction of its own building in the Bronx during the summer of 2014. The Church's website shows that it has stopped holding

its weekly worship services in a public school,[2] though the district court's permanent injunction remains in effect, due to the stay of the mandate.

## REASONS FOR DENYING THE WRIT

The petition does not warrant the Court's review. As a first point, even if the petition proposed any legal issue worthy of certiorari (and it does not), this case would be a demonstrably poor vehicle for its resolution. From the outset, this litigation has been premised on the Church's asserted need to hold weekly worship services on school property. The Church's completion of its own house of worship fundamentally changes the factual context, and indeed raises a substantial threshold question as to petitioners' continued standing to seek injunctive relief.

Nor are the questions presented by the petition worthy of certiorari, even assuming they could be reached if review were granted. The Church's contention that its Free Exercise claim must be subject to strict scrutiny under *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993), was proposed in its 2011 petition, and has no more merit now. The petition also presents no genuine circuit split on the role of animus in Free Exercise analysis – the petition instead

[2] http://www.bhof.org/building-project/ (last accessed Dec. 19, 2014).

mischaracterizes the court of appeals' discussion of animus.

Because the Church has long acknowledged that it sought to hold a weekly worship service on school property, and now concedes (at 15) that there is no secular analog to that activity, there is no certworthy issue under the Establishment or Free Speech clauses regarding any supposed excessive entanglement or unconstitutional line drawing. Additionally, the record establishes that the Department defers to applicants' description of its proposed activities, rather than delving into matters of doctrine or drawing lines itself.

Although the Church again argues (at 31) that *Good News Club* permits no distinction between a worship service and other forms of religious speech, *Good News Club* did not address that issue and does not require that result. The court of appeals' decision here is fully consistent with *Faith Center Church Evangelistic Ministries v. Glover*, 480 F.3d 891 (9th Cir. 2007), the only other circuit case to address the issue in the context of a limited public forum. The Church relies on open-forum cases to create the appearance of a circuit conflict, but open forum cases involve an entirely different legal analysis from limited public forum cases.

## I. This Case Is a Poor Vehicle for the Court's Review Due to Serious Questions of Standing.

Even if the petition otherwise raised questions of law warranting the Court's review (and we show below that it does not), it should be denied because threshold questions of standing make the case a decidedly poor vehicle for the Court's consideration.

This case is brought solely by the Bronx Household of Faith and its two pastors (A25-26). This is not a class action or a lawsuit brought by multiple congregations.

The petition seeks review of the court of appeals' rulings denying petitioners injunctive and declaratory relief compelling the Department to allow the Church to use public-school space for its weekly worship services. But as noted above, Bronx Household has completed construction on its own building in the Bronx. For the past several months, the congregation has been holding weekly worship services in that building, not in a public school, though a district court injunction is still in effect due to a stay of the mandate. The Church's relocation of its weekly worship services to its own building removed the essential predicate of this action and the rationale for the relief it sought.

Consequently, it appears that petitioners now lack standing to seek prospective injunctive relief.[3]

As a "core component" of justiciability, a litigant must establish standing to invoke the authority of a federal court, because standing is an "essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff must demonstrate standing separately for each form of relief sought, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006), and at every stage of the litigation. *Alvarez v. Smith*, 558 U.S. 87, 92 (2009); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997). At an "irreducible constitutional minimum," Article III standing requires that a plaintiff establish three factors: an injury in fact, causation, and redressability. *Lujan*, 504 U.S. at 560-561.

The Church's completion of its own building means that it has no need to hold weekly worship services in school property. The Church therefore has no injury in fact, and certainly no threat of

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[3] Though petitioners' complaint also sought nominal damages (A26), petitioners never pressed for that relief below, the district court's judgment did not award nominal damages, petitioners did not ask the court of appeals to review any question as to nominal damages, and the court of appeals did not review any such question. Petitioners have thus waived that claim. *ACLU of Mass. v. United States Conf. of Catholic Bishops*, 705 F.3d 44, n.7 (1st Cir. 2013), and in any event no such claim could be presented on this petition.

imminent or future injury sufficient to support a claim for injunctive relief. *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (respondents were required to identify application of the regulation that threatened "imminent and concrete harm" and past injury did not suffice). Indeed, the Church's 2001 complaint was premised on the fact that it had "no other place to meet" for worship services other than the City's public schools (A19-20, ¶13).

That contention remained a pivotal basis for the relief the Church sought in its most recent 2012 motion for injunctive relief. In that motion, the Church told the district court that, if it were prevented from holding its weekly worship services in a public school, it could no longer worship together as a congregation and it would "undermine our ability to engage in the duties of our Christian faith" (A71, ¶10). The district court and the court of appeals dissent accepted that contention in finding a Free Exercise violation (49a-50a; 68a). The relocation of the Church's weekly worship services from school property, an action initiated by the Church itself, brings the standing issue to the fore. At a minimum, the presence of this serious question makes the petition a poor vehicle for the Court's review.

The Church has represented (at 4, 7) that it still might want to hold "weeknight and weekend meetings" in a public school building, or "to meet regularly in [a public school] for large-scale events and activities, which include worship." One of the pastors testified that, once the Church moved its

worship services from the public school, it might still use a public school for sports activities or youth rallies (A807-808), and that he could "envision" wanting to rent the auditorium again if his building's meeting space was not large enough (*id.*). And a recent court filing seeking a stay of the mandate noted the Church's desire to use school space for "events that include worship," including banquets. Motion for Stay of Mandate, at 16-17, No. 12-2730 (2d Cir. July 3, 2014), ECF No. 225.

But none of these representations by the Church or its pastors suffices to cure the standing problem. The Church notably does not contend that it has any continuing need or desire to use public-school space for its weekly worship services. The Department's regulation allows the Church, like any other community group, to apply to use school property for meetings, sports activities, banquets, or youth rallies. This lawsuit has never been about any of those kinds of events.

To the contrary, the Church's First Amendment and Establishment Clause claims have always rested on its asserted need to hold subsidized worship services on school property, and that need no longer exists. The claimed predicate for this action is thus now gone, and the Church no longer has standing to pursue the prospective injunctive relief it sought below or, at a minimum, there are serious questions as to its standing. For all these reasons, the petition is an unsuitable vehicle for review by the Court.

## II. The Petition Presents No Certworthy Question of Law.

Disregarding the threshold points raised above, petitioners argue solely that the petition warrants the Court's review because the Second Circuit's rulings conflict with decisions of this Court and creates divisions in authority among the courts of appeals. None of these arguments withstands scrutiny: the Second Circuit's rulings are fully in accord with this Court's precedents and do not create or deepen any circuit split.

### A. The Second Circuit's Free Exercise Analysis Does Not Conflict With Any Decision of this Court or Create Any Circuit Split.

1. The Church first claims (at 14-17) that the Second Circuit's refusal to apply strict scrutiny under the Free Exercise Clause conflicts with this Court's decisions in *Lukumi* and *Employment Division v. Smith*, 494 U.S. 872 (1990). The Church raised that same issue in its 2011 petition, and the issue no more warrants the Court's review now than it did then.

Petitioners ignore fundamental differences between *Lukumi* and *Smith*, on the one hand, and this case, on the other. In *Lukumi*, the Court struck down a criminal prohibition on animal slaughter, as practiced in the Santeria religion. In *Smith*, the Court upheld the denial of unemployment benefits to an employee who was dismissed for ingestion of

peyote, a crime under state law. Both cases involved laws that prohibited or burdened forms of religious exercise.

This case, by contrast, does not involve any government-imposed prohibition, restraint, or burden on religious exercise. Neither *Lukumi* nor *Smith* addresses whether a government's decision not to affirmatively provide property for use in religious exercise is subject to strict scrutiny. And nothing in either case suggests that governmental decisions about whether to aid or subsidize religious exercise are analyzed the same way as decisions about whether to prohibit, restrict, or burden it.

Indeed, in *Locke*, this Court advised against the sweeping understanding of *Lukumi* that the petition advocates. *Locke* rejected a challenge to a state provision that denied scholarship funds to students pursuing a theology degree. 540 U.S. at 715-16. The Court recognized that applying a "presumption of unconstitutionality" to every government regulation that was not facially neutral regarding religion would extend *Lukumi* beyond its facts and reasoning, because not every regulation that singles out religion should be regarded as presumptively unconstitutional and subjected to strict scrutiny. *Id.* at 720. The Court noted that the state's exclusion of devotional theology from its scholarship program "impose[d] neither criminal nor civil sanctions on any type of religious service or rite," but rather merely reflected a choice "not to fund a distinct category of

instruction." *Id.* at 720-21. This case, too, involves no government sanction imposed against any religious practice, but rather a decision not to aid religious worship services by providing space in public schools at fees far below market rate.

Nor did *Lukumi* or *Smith* involve a government's effort to reconcile competing Free Exercise and Establishment Clause interests, as this case does. Therefore, neither case purports to command the application of strict scrutiny where, as here, the government's action reflects a good-faith attempt to reconcile the tension often found at the intersection of Free Exercise, Free Speech, and Establishment Clause interests. *Id.* at 718. It is precisely because of the convergence of those interests that *Locke* provides the most apt analytical framework for this case.

Moreover, despite the Church's contentions (at 15), the record evidence shows that congregations allowed to hold worship services in the City's public schools at far below market rates receive substantial financial subsidies. Congregations operating in City schools under the injunctions represented that they would see increases as high as 600 percent in their costs of obtaining space for worship if public-school space became unavailable (A87, ¶19; A93-94, ¶¶19-20; 790). Petitioners attempt to distinguish *Locke* because the scholarship subsidy at issue there did not arise in a free speech forum context, but that ignores the substantial government subsidy that has supported petitioners' Church. There are few

areas where "antiestablishment interests come more into play" than where taxpayer funds are directed to support clergy. 540 U.S. at 722. The Court noted in *Locke* that the government could have decided, consistent with the Establishment Clause, to afford scholarships to students pursuing degrees in devotional theology but rejected the contention that this extension of the program was required by the Free Exercise Clause.

The Church attempts to distinguish *Locke* on the ground that it did not involve forum analysis, but this distinction does not support petitioners' arguments for strict scrutiny. Petitioners seem to assume that the New York City public schools are an open public forum, when all three judges of the court of appeals, including the dissenting judge, held that the schools are a limited public forum. (175a; 215a). Indeed, every court in this long litigation has concluded that the City's schools are a limited public forum. Similarly, in *Good News Club*, the parties agreed that schools in New York State governed by the same statutory framework that applies here were a limited public forum. 533 U.S. at 106.

Petitioners offer no meaningful basis to depart from this well-established precedent to conclude that the City's public schools are an open public forum, and their extensive reliance on open-forum cases, such as *Widmar v. Vincent,* 454 U.S. 263 (1981), is thus misplaced. Indeed, the Court has made clear that the application of a regulation to a traditional public forum "differs markedly"

from analysis applicable to a limited public forum. *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, n.14 (2010).

Restrictions placed on a limited public forum, by contrast to those in an open forum, are traditionally analyzed for viewpoint-neutrality and reasonableness, not under strict scrutiny. *Good News Club,* 533 U.S. at 107. Petitioners' attempt to impose strict scrutiny in this context would effectively upend limited public forum analysis. It would make no sense to apply strict scrutiny under petitioners' Free Exercise claim when a less restrictive standard would apply to their related Free Speech claim, based on the very same facts. Otherwise, strict scrutiny under the Free Exercise Clause would trump the defining characteristic of the limited public forum, which is that reasonable, viewpoint-neutral rules may be adopted for such fora.[4]

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[4] The Church also contends that, unlike in *Locke*, there is no historical precedent for the worship services prohibition. *Locke* does note, however, that "[s]ince the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders." 40 U.S. at 722. Petitioners also argue (at 21) that 49 of the 50 largest school districts allow worship services in their public schools. But a close examination of the cited non-record material indicates that the Church is conflating all uses by religious groups with uses specifically for worship services, which is almost never expressly permitted in the cited rules and regulations. And if the Church were correct that New York City were an outlier, it would be a further reason to deny the petition, not a reason to grant it.

2. The Church argues (at 17-19) that the Second Circuit's decision "deepens" a circuit split on the issue of whether *Lukumi* requires proof of animus as a necessary precondition to applying strict scrutiny under the Free Exercise clause. But their argument mischaracterizes the Second Circuit's discussion of animus.

The Second Circuit did not hold that a showing of animus is required for strict scrutiny to apply under the Free Exercise Clause. Instead, the court of appeals noted the absence of any evidence of religious animus by way of distinguishing *Lukumi*, a case in which the Court discerned no government interest for the challenged regulation *except* religious animus. The court of appeals also highlighted two further important differences from *Lukumi*: that the Department's policy does not suppress or burden any religious practice, and that the Department's policy here is motivated by manifestly reasonable Establishment Clause-related concerns.

A subsequent decision demonstrates beyond any question that it is not the law of the Second Circuit that a showing of animus is required as a prerequisite to the application of strict scrutiny under the Free Exercise Clause. In *Central Rabbinical Congress v. New York City Department of Health & Mental Hygiene*, the Second Circuit held that strict scrutiny applied to a health regulation burdening a certain religious circumcision practice, and specifically stated that "close scrutiny of laws singling out a religious

practice for special burdens is not limited to the context where such laws stem from animus, pure and simple." 763 F.3d 183, 197-198 (2d Cir. 2014). Indeed, in *Central Rabbinical Congress*, the Second Circuit approvingly cited the Tenth Circuit's decision in *Shrum v. City of Coweta*, 449 F.3d 1132 (10th Cir. 2006), one of the two cases (along with an Eleventh Circuit decision) that are advanced by petitioners as purportedly on the *other* side of the split from the Second Circuit. Consequently, there is no merit to petitioners' assertion that the Second Circuit is in conflict with the Tenth and Eleventh Circuits on the role of animus under *Lukumi*.

The mere fact that the Second Decision in this case discussed the Department's lack of animus does not mean that the Court imposed any sort of litmus test requiring a showing of animus, as the petition urges (at 17-19). In *Locke*, too, the Court noted that the history of the challenged law revealed nothing "that suggests animus toward religion." *Locke*, 540 U.S. at 725. Without evidence of animus, the Court found no basis to apply a presumption of unconstitutionality to the law. *Id.*

Moreover, even petitioners acknowledge (at 17) that a showing of animus may be relevant under the *Lukumi* analysis. Nor could petitioners deny this, as the decision in *Lukumi* itself noted that the record there established that "suppression of the central element of the Santeria worship service was the object of the [challenged] ordinance." 508 U.S. at 534-535. The Second Circuit's discussion of animus here is also

consistent with several other circuit court decisions on the point. *See Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 780 (7th Cir. 2010); *Ass'n of Christian Schs. Int'l v. Stearns,* 362 Fed. Appx. 640, 645 (9th Cir. 2010); *Wirzburger v. Galvin*, 412 F.3d 271, 281 (1st Cir. 2005). Because the Second Circuit never *required* evidence of animus as an essential element of a Free Exercise claim under *Lukumi*, as the petition erroneously contends, its decision does not present any conflict on the point that requires the Court's resolution.

3. The Church again identifies two cases from its 2011 petition as in supposed conflict with the Second Circuit's ruling but no circuit split has been created. *Badger Catholic v. Walsh* concerned a university public forum. The court of appeals there found *Locke* inapplicable because the policy at issue had been motivated by hostility to religion. 620 F.3d at 780. The plaintiff organization there also never requested funding for worship services. Quite the opposite, it readily conceded that worship services were not "at issue." Brief for Respondents at 23, Badger Catholic v. Walsh, 131 S.Ct. 1604 (2011) (No. 10-731).

The Tenth Circuit's decision in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), likewise does not stand in conflict with the Second Circuit's rulings here. *Colorado Christian* concerned a state financial aid program that excluded "pervasively sectarian" institutions. There, the court's decision rests on two dispositive features of the program that were not present in

*Locke* and are not present here: discrimination among religions and intrusive determinations regarding what constitutes a "pervasively sectarian" institution. *Id.* at 1256. Unlike the program in *Colorado Christian*, the worship services prohibition treats all individual religions and religious institutions without discrimination or preference and requires no governmental inquiry into religious doctrine.

### B. The Second Circuit's Establishment Clause Analysis Does Not Conflict With Any Decision of this Court or Create Any Circuit Split.

1. The Church is mistaken in urging (at 24) that this case conflicts with *Larson v. Valente*, 456 U.S. 228 (1982), because the worship services prohibition constitutes a denominational preference for religions that do not hold worship services. The worship services prohibition applies to an organization seeking to hold what the applicant defines as a worship service in a public school. While an applicant that does not hold worship services is unlikely to seek a permit for worship services, that decision reflects a matter of private choice, not a denominational preference imposed by the government. *Locke*, 540 U.S. at 719 ("link between government funds and religious training is broken by the independent and private choice of recipients"). As the court of appeals reasoned, the Department is not compelled to permit worship services simply because all religions do not hold

them. 750 F.3d at 196. *Cf. Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) ("So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing").

2. Because the Church readily concedes that it seeks to hold worship services and that there is no secular analog to that activity (Pet. 15), the petition does not raise any issue of impermissible classification of religious expression. Thus, there is no merit to the Church's claim (at 26) that the Second Circuit's decision authorized "fishing expeditions into religious speech," contrary to the Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012).

*Hosanna-Tabor* addressed whether an employer could assert a ministerial exemption defense to an employment discrimination claim, and that has no factual relevance here. In this case, petitioners have never denied that they sought to hold their weekly worship service in a public school, even when they have occasionally described their worship services as "meetings" that include "Hymn singing, prayer, communion, preaching, teaching, fellowship" (at 8). Despite the fact that the Church and other congregations at times used similar descriptions, consisting of the individual elements of their worship services (A141-148; 155; 797), they consistently acknowledged that they were, in fact, holding weekly worship services (A70; 80, ¶11; 84,

¶3; 91, ¶6; 610; 695; 704; 776; 936; 937). Petitioners complain (at 8) that Department officials once overrode their own description of events on a permit by writing "WORSHIP" on the permit when they had not used that term, but that occurred before the Department's 2011 protocol deferring to an organization's descriptions of activities was distributed to staff and implemented (A968-969, ¶32). In any event, that particular permit application was granted (*id.*; 1093-1096).

While there is also no evidence that the Department examined religious doctrine here, *Hosanna-Tabor* demonstrates the Court's recognition that some degree of inquiry into matters of religion may be necessary under the Free Exercise Clause, and therefore, the Department's reliance here on a religious applicant's own characterization of its religious activities poses no conflict with *Hosanna-Tabor*. In order to determine the availability of the ministerial exemption, the Court in *Hosanna-Tabor* examined the circumstances of the teacher's employment, including whether her duties were secular or religious, in order to determine whether she was entitled to the ministerial exception. *See* 132 S. Ct. at 704. That involved an analysis of her training, the ecclesiastical direction she received, her ministerial responsibilities, her secular responsibilities, and whether she considered herself, and held herself out as, a Church minister. *Hosanna-Tabor* therefore poses no conflict.

Because the Church concedes that it has been using a public school to hold its worship services, there is also no genuine issue of line drawing or entanglement for the Court to resolve, and thus no circuit conflict on the issue of entanglement.

### C. The Second Circuit's Free Speech Analysis Does Not Conflict with Any Decision of this Court or Create Any Circuit Split.

1. The Church again contends that the court of appeals decision conflicts with *Good News Club*. But there is no conflict: the Church's concession (at 15) that its weekly worship services are a category of speech that has no secular analog sharply distinguishes this case from *Good News Club*.

In *Good News Club*, the Court held that the challenged policy involved viewpoint discrimination because an after-school Bible study club engaged in discussion of an otherwise permissible subject matter but was excluded "on the basis of its religious perspective" on that subject matter. 533 U.S. at 108. The Court considered the Club's activities virtually indistinguishable from the film on family values from a religious perspective, as was at issue in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 385 (1993), or the student publication written from a religious perspective, as was at issue in *Rosenberger v.*

*Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995). 533 U.S. at 108-110. The Court drew a distinction between the club's activities and "mere religious worship, divorced from any teaching of moral values." *Id.* at 112, n.4.

The Church's claim of conflict ignores that that, in *Good News Club*, the school district sought to impose the label of "religious worship" on speech about moral values merely because it was undertaken from a religious viewpoint. Here, the Church itself conceded that it sought to hold a worship service in school property (A70, ¶5; 610; 695, ¶4; 936, ¶46; 937, ¶48), and the petition acknowledges (at 15) that the worship service is distinguishable from other forms of speech and has no secular analog. Consequently, this case does not challenge a policy that excludes speech on a particular matter when made from a religious perspective, while permitting speech on the same matter from non-religious perspectives. Given the Church's concessions, the case also poses no genuine issue regarding where to draw a line between a worship service and other forms of religious expression.

Petitioners mistakenly argue (at 29-36) that the Second Circuit's rulings create a circuit split as to the presence of viewpoint discrimination. To support their claim of a conflict, petitioner relies, first and foremost, on cases resolving the issue in an open forum. But this case involves a limited public forum, not an open forum, see *supra*, at 20,

so the cited decisions do not conflict with the rulings here.

And as the Church is obliged to concede (at 33), the only circuit-level case addressing a similar viewpoint discrimination issue in the context of a limited public forum, *Faith Center Church v. Glover*, 480 F.3d 891, is in complete harmony with the Second Circuit's decisions. This Court also denied certiorari review in *Faith Center*. 552 U.S. 822 (2007).

In *Faith Center*, which concerned worship services in a public library that was also a limited public forum, the court of appeals determined that religious worship was not a "viewpoint" on a particular subject matter but was instead a "category of discussion" that encompassed many different religious perspectives. The Court reasoned that a "blanket exclusion" of worship services from the library was based on the content of speech rather than viewpoint. 480 F.3d at 915. The Court also noted that no line drawing between religious worship and other forms of religious speech was required because that distinction had already been made by Faith Center itself. 480 F.3d at 918. The only analogous circuit court decision therefore

accords with the Second Circuit's holdings here.[5]

## III. The Decisions of the Court of Appeals Are Also Correct.

The court of appeals correctly rejected petitioners' claims here. The Department's decision to make public schools available to religious organizations for a wide range of activities, but not for worship services or as a house of worship, is constitutional. The policy does not prohibit, limit, or burden any religious practice; does not entangle the government in matters of religion; and does not impair petitioners' ability to speak freely.

The court of appeals' reasoning reflects the recognition that where, as here, the Religion Clauses of the Constitution are in tension, there must be "room for play in the joints" because there comes a point when "accommodation may devolve into 'an unlawful fostering of religion.'" *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334-335 (1987) (quoting *Hobbie v. Unemployment Appeals Com.,* 480 U.S. 136, 145 (1987)).

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[5] In *Faith Center*, the district court subsequently granted a preliminary injunction on entanglement grounds after finding a likelihood that county officials would be delving into "religious doctrine" in deciding permit applications. *Faith Ctr. Church Evangelistic Ministries v. Glover*, 2009 U.S. Dist. Lexis 52071, 29-30 (N.D. Cal. June 19, 2009). As discussed in the text, *supra* at 8, 26, no similar evidence of entanglement exists here.

The record evidence demonstrated that the City's reasonable Establishment Clause concerns were the motivating factor in prohibiting worship services in its public schools, which made *Lukumi* strict scrutiny review inappropriate and *Locke* the better analytical model for the Free Exercise claim. The Second Circuit then correctly determined that the worship services prohibition would nonetheless survive even strict scrutiny because it was motivated by reasonable Establishment Clause concerns rather than animus, treated all permit applicants identically, and imposed no burden on any religious practice.

The court of appeals also found no merit in petitioners' contention that the worship services prohibition impermissibly favors religions that do not hold worship services. As the court pointed out, all religious congregations may use school facilities for the same purposes as any other community group, and it was not constitutionally significant that certain religious groups may not hold worship services. A government practice that uniformly prohibits worship services in a limited public forum is not rendered unconstitutional merely because a group abstains from worship services in its religious practices.

The court of appeals also had an ample evidentiary basis for finding that weekly worship services being held in the City's public schools would give rise to a "reasonable concern" regarding the appearance of endorsement of religion, and that, based on *Locke*, the City need not show that

an actual violation of the establishment Clause would result. The record shows that use of public-school space is substantially subsidized under the existing fee schedule (A87, ¶19; A93-94, ¶¶19-20; 790). Moreover, during the period that congregations have been holding worship services in the school under injunctions in this lawsuit, congregations have dominated school use on Sundays, posted signs identifying the school building as a church, and proselytized outside the buildings (A938-939, ¶51; 945, ¶¶61-62; 947, ¶64; 948, ¶65; 950, ¶66).

Furthermore, particularly given the remarkable diversity of backgrounds and faiths represented among New York City's public schoolchildren, it is significant that school space is most readily available for use by outside organizations on Sundays, and thus would not be equally available to faiths that hold weekly worship services on other days of the week (*see* A921-23). The Constitution does not require government to turn a blind eye to the very values of pluralism and respect for religious diversity that undergird the Establishment Clause itself.

In also rejecting, for the second time, the Church's contention that the prohibition excessively entangled the Department in church activities, the court of appeals pointed out that the Church acknowledged its intention to use the school for worship services and had sought permits for that specific purpose. The record evidence also established that the Department's 2011 protocol

called upon the applicant, not Department employees, to define the proposed activity, and the Department would not inquire further unless there was publicly available evidence from the applicant itself contradicting its certification that its activities conformed to all applicable Chancellor's Regulations, including the worship services prohibition (A967-968, ¶¶28-31).

Throughout this litigation, the Church and other congregations have signaled their understanding of the term worship services by consistently using that term to describe their proposed activity (A80, ¶11; 84, ¶3; 91, ¶6). And this Court also routinely uses the terms "worship services," "religious worship," and "religious services" in a manner that clearly distinguishes the activity from other forms of speech. *See e.g. Hosanna-Tabor,* 132 S. Ct. 694 (2012); *Sossamon v. Texas,* 131 S. Ct. 1651, 1657 (2011); *Cutter v. Wilkinson*, 544 U.S. 709, 721 (2005): *Lukumi*, 508 U.S. at 534; *Employment Div. v. Smith*, 494 U.S. at 884-85.

In finding that the worship services prohibition is viewpoint neutral, the court of appeals correctly recognized that it imposes no restraint on any point of view and permits the free expression of religious views protected by *Good News Club* and other viewpoint discrimination decisions. The court found the prohibition reasonable because of the substantial subsidy involved, as well as the perception of "state-sponsored Christian churches" that would be

fostered if congregations used public-school space as their houses of worship (191a).

Finally, this record also supports the consistent findings by every court that the New York City public schools, after hours, constitute a limited public forum. The Department prioritizes the after-hours use of public schools for educational purposes. Permits for community, youth and adult group activities are subject to broad preclusions for partisan political events, commercial activities, and personal and private events. That is a defining characteristic of a limited public forum. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (government may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects and may impose restrictions on speech that are reasonable and viewpoint-neutral).

For all these reasons, the Second Circuit correctly rejected petitioners' claims for an injunction compelling public-school space to be made available, at rates substantially below market rents, for the Church to use as its weekly house of worship.

## CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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