# 12-2730

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**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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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.*

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

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**APPELLEES' PETITION FOR REHEARING EN BANC**

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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

A divided panel of this Court ruled that the government does not violate the Free Exercise Clause when it targets religious practices for exclusion and discriminates between religions in an otherwise open and neutral forum. Maj. Op. 27. The New York City Department of Education ("City"), pursuant to Regulation D-180, allows community groups to rent public schools during non-school hours for nearly any type of speech. Maj. Op. 4. Regulation D-180 § I.Q ("Reg. I.Q"), however, prohibits groups like Bronx Household of Faith ("Church") from renting school facilities for "religious worship services."

Against the weight of precedent, the panel majority's opinion (1) failed to apply the settled test for free exercise cases announced in *Employment Division v. Smith*, 494 U.S. 872 (1990), and misapplied *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), thus, creating a circuit split with the Fourth Circuit in *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703 (4th Cir. 1994); (2) misapplied *Locke v. Davey*, 540 U.S. 712 (2004), thus, creating circuit splits with the Seventh Circuit in *Badger Catholic Inc. v. Walsh*, 620 F.3d 775 (7th Cir. 2010), and the Tenth Circuit in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008); and (3) failed to apply the Supreme Court's ruling in *Larson v. Valente*, 456 U.S. 228 (1982), thus, creating a conflict with the Court's precedent and with the Tenth Circuit.

Judge Walker dissented and found Reg. I.Q unconstitutional under the foregoing precedent. Dissenting Op. 8-9. This Court should grant en banc review to correct the majority's deeply flawed decision.

## ARGUMENT

### I. Misapplying Binding Precedent, the Panel Majority Held that Free Exercise Claims Must Be Proved Through Animus.

The panel majority's opinion did not apply the settled free exercise test announced in *Smith*, misapplied *Lukumi*, and conflicts with the Fourth Circuit.

#### A. The Panel Majority Failed to Apply the *Smith* Test.

It is well-settled that if a law burdening religious exercise is not neutral or not generally applicable, then it must be narrowly tailored to advance a compelling state interest. *Smith*, 494 U.S. at 879; *see Lukumi*, 508 U.S. at 531-32 ("A law failing to satisfy [neutrality and general applicability] must be justified by a compelling government interest and must be narrowly tailored to advance that interest."). A law is not neutral "if it refers to a religious practice without a secular meaning discernable from the language or context." *Lukumi*, 508 U.S. at 533.

Absent from the panel majority's decision is any mention of this test or even a citation to *Smith*.[1] *But see* Dissenting Op. 4-12. Despite extensive briefing on the *Smith* test, Appellees' Br. 23, 26, 32, 39, the majority's opinion examined only

[1] Although *Smith* dealt with a criminal law and Reg. I.Q is a civil law regulating a government forum, the *Smith* test still applies. *Lukumi*, 508 U.S. at 531; *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 n.25 (3d Cir. 2002).

whether animus motivated the no-worship regulation, Maj. Op. 10, whether the reasonable fear of an Establishment Clause violation justified the regulation, *id*. at 15, and whether there was discrimination against particular religions, *id*. at 18.

But Reg. I.Q clearly fails the *Smith* test. First, the regulation is not neutral or generally applicable. It refers to religiously motivated conduct on its face ("religious worship services") and categorically treats that religious expression different from all other expression in the forum. Dissenting Op. 5. "Religious worship services" "refers to a religious practice without secular meaning." *Lukumi*, 508 U.S. at 533. In addition, according to the uncontroverted testimony of the expert witness the regulation favors non-theistic religions, who do not engage in "religious worship services," over theistic religions that do worship a deity. Dissenting Op. 5. So while Jews, Muslims, and Christians may not rent the schools for devotional activities, Theravada Buddhists, Taoists, and classical Hindus may do so. Thus, Reg. I.Q is neither neutral nor generally applicable.[2]

Second, Reg. I.Q cannot survive strict scrutiny because the City does not have a compelling interest in excluding worship.[3] Dissenting Op. 8. The Supreme Court has never held that the government violates the Establishment Clause by

[2] The panel's refusal to apply strict scrutiny also conflicts with *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981), and *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2987 (2010), which ruled that government policies singling out religious groups for disadvantageous treatment must pass strict scrutiny.

[3] The majority writes of the difficulty in applying the allegedly competing interests of the Religion Clauses. But strict scrutiny properly balances those interests.

providing religious groups equal access to government programs, buildings, or funding. Dissenting Op. 9-10; *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (funding); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112-17 (2001) (buildings); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (funding); *Widmar*, 454 U.S. at 274-75 (buildings). To get around this, the majority's opinion raises a straw man by asserting that the Free Exercise Clause does not require the government to finance the exercise of religion. Maj. Op. 8-9. But the City is not financing the Church. The Church pays to rent the facilities. To the extent the Church receives a benefit by not having to pay for other overhead costs incurred by the City, that benefit is the same as all other community groups receive, and therefore, "incidental," not a violation of the Establishment Clause. *Widmar*, 454 U.S. at 273-74.

Nor is Reg. I.Q narrowly tailored to the City's fear of violating the Establishment Clause. The City allegedly fears forum domination by churches and "subsidizing" their activities. But there is no forum domination in the City's nearly 1,200 buildings when only 5% of all permits were issued to religious groups, and a much smaller percentage of those were issued for worship services. In addition, the City could write many policies more narrowly tailored to these interests, such as limiting the frequency of rentals when other groups desire to rent the same space or charging all groups more money to cover the so-called "subsidy" of overhead

costs. The City, however, has attempted none of these solutions. Thus, Reg. I.Q is not narrowly tailored to a compelling interest, and the panel's failure to apply the *Smith* test warrants en banc review.

### B. The Panel Majority Misapplied *Lukumi*.

The panel majority misapplied *Lukumi* by ruling (1) that strict scrutiny of a government policy affecting religious conduct is only applicable if the government enacted the policy with animus, and (2) that the exclusion of the Church from the City's schools is different from the exclusion of the Santeria from Hialeah.

The majority held that *Lukumi* does not apply to this case because, unlike the City of Hialeah, there is no evidence of animus against a particular religious group. Maj. Op. 12. But only two justices agreed with the portion of *Lukumi* that declared the government must act with animus before strict scrutiny applies to a law disabling religious practice. *See Colorado Christian Univ.*, 534 F.3d at 1260 n.7 ("The section of the *Lukumi* opinion presenting evidence that the prohibition of animal sacrifice was based on hostility to the religion was joined by only two Justices.") (citation omitted). To be sure, other circuits have not required a showing of animus in free exercise claims. *See Fairfax Covenant Church*, 17 F.3d at 707 (striking down school policy of charging churches more rent without any evidence of animus); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (declaring no-beard policy of police department to be unconstitutional even

without evidence of animus). Thus, the panel majority applied the dicta of only two Justices as a constitutional rule. That alone is grounds for en banc review.

The majority also wrongly distinguished *Lukumi*. It found that the Santeria church in *Lukumi* was banned completely from exercising its faith in Hialeah, essentially saying that the Santeria church had nowhere else to go to practice its religion. By contrast, the majority asserts that the Church may practice its religion anywhere in New York City, just not in the schools. But this compares apples to oranges. The relevant inquiry is whether the faith-practitioner is permitted or excluded from the *forum* otherwise open to all. In *Lukumi*, the forum was the city boundaries, and the ordinance prohibiting animal sacrifice applied to the entire forum. In this case, the forum is not New York City, but is the City's school buildings, and Reg. I.Q applies to all 1,200 school buildings. Judged on that basis, it is clear that the majority failed to recognize that the exclusion of "religious worship services" is nearly identical to the exclusion of animal sacrifice in *Lukumi*. This misapplication of controlling law should be reviewed by the full court.

### C. The Panel Majority's Decision Conflicts with the Fourth Circuit.

The panel majority's opinion also created a circuit split with the Fourth Circuit's decision in *Fairfax Covenant Church*, 17 F.3d 703. There, a school district charged churches conducting worship services more rent than nonreligious groups because it was concerned about subsidizing religion and forum domination

by churches. *Id*. at 705. The Fourth Circuit applied the *Smith* test and held the policy burdened the church's right to practice religion and was not justified by a compelling interest. *Id*. at 707. The court rejected the school's subsidy and domination concerns because the "the costs of maintaining a public forum do not advance the views and beliefs of those using the forum," and there was no evidence of forum domination. *Id*. at 708-09. Here, the majority failed to apply the *Smith* test, and ruled that the City's mere *concern* about "subsidy" and domination justified Reg. I.Q. But the forum is equally available to all community groups—there is no subsidy. And there is no evidence of forum domination since religious groups comprise only 5% of users. Thus, the majority reached a conclusion in direct conflict with *Fairfax Covenant Church*. This circuit split and the erroneous application of the settled free exercise test warrants en banc review.

## II. By Wrongly Applying *Locke v. Davey*, the Panel Majority Created a Circuit Split with the Seventh and Tenth Circuits.

The panel majority's opinion wrongly relied on *Locke* to uphold the City's exclusion of "religious worship services" from otherwise neutrally available school buildings. In doing so, it created a circuit split with the Seventh and Tenth Circuits.

### A. The Panel Majority Misapplied *Locke*.

*Locke* is inapplicable to this case for many reasons, but two stand out: (1) this case involves access to a forum and *Locke* does not apply to forum cases, and (2) this case does not involve a historical aversion to providing direct money

payments to study for the ministry, but does involve a longstanding, national, and historical practice of allowing churches to meet in public forums.

First, the Supreme Court said that the *Locke* opinion does not apply to government programs that create a forum for speech. Dissenting Op. 7. The scholarship program in *Locke* was "not a forum for speech" and was not designed, like the City's program here, to "encourage a diversity of views from private speakers." 540 U.S. at 720 n.3. Thus, the Court explicitly stated: "Our cases dealing with speech forums are simply inapplicable."[4] *Id*. The panel majority's opinion disregards that instruction.

Second, unlike this case, which involves a neutral City program of renting empty school buildings to the community, *Locke* involved direct money payments of scholarships for high-achieving students to educational institutions. 540 U.S. at 717. The Court held Washington's program constitutional because states historically refused to use tax money to support clergy. *Id*. at 722-23. This case involves no transfer of money to churches.

The Church pays the City to rent the schools. The City is not making any direct monetary contribution to any organization who rents the schools. Dissenting Op. 7. The so-called "subsidy" is more akin to the same level of services the City

[4] The Court's instruction that *Locke* does not apply to forum cases is important because otherwise courts could read *Locke* to overrule decades of case law granting religious people access to government benefits. *See, e.g.*, *Good News Club*, 533 U.S. at 112-117; *Rosenberger*, 515 U.S. 819; *Widmar*, 454 U.S. 263.

provides religious institutions through police and fire protection, sidewalk maintenance, and sewer connections that it grants equally to everyone. "If the Establishment Clause barred the extension of general benefits to religious groups, 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" *Widmar*, 454 U.S. at 274-75 (citations omitted). If the City were truly concerned that the rental rates it charges community groups do not cover all of the City's overhead costs, it could raise the rates for everyone. What it cannot do is claim that it is "subsidizing" religious groups when they pay the uniform rate that thousands of other community groups pay to meet in the City's approximately 1,200 school buildings. This is not a subsidy case like *Locke*.

Further, history is replete with churches using public buildings for worship, from the framers of the Constitution, who attended church in the U.S. Capitol building, to churches meeting in the federal court in New York during the Great Awakening, to 49 of 50 of the biggest school districts allowing such practices today. Dissenting Op. 10. Unlike *Locke*, there is no argument that history favors expelling churches from open government buildings.

And yet, the majority opinion, ignoring these distinguishing characteristics, applied *Locke* to justify the City's exclusion of "religious worship services." Unlike *Locke*, where the state controlled the money at every step, including the decision as to which schools and students were eligible, here the City will rent the

schools to virtually anyone, except if they intend to engage in what the City deems "religious worship services." This is an open forum case. *Locke* was not. The government does not violate the Establishment Clause by providing an equally available benefit to all participants in a forum for speech.

**B. The Panel Majority's Decision Conflicts with the Seventh Circuit.**

By holding the City's policy constitutional under *Locke*, the panel majority created a circuit split with the Seventh Circuit's decision in *Badger Catholic v. Walsh*, 620 F.3d 775 (7th Cir. 2010). There, the University of Wisconsin refused to provide student activity fees to any student organization that conducted worship, proselytizing, or religious instruction. 620 F.3d at 777. The university argued that its funding program was constitutional under *Locke*. The Seventh Circuit, in an opinion by Judge Easterbrook, disagreed. It said the program in *Locke* did "not evince hostility to religion," but the University of Wisconsin's exclusion of prayer, religious instruction, and worship from the funding program did. *Id*. at 780. Also, *Locke* involved government speech because the state retained plenary control over how to use the scholarship funds, but the University "created a public forum where the students, not the University, decide what is to be said." *Id*. The panel in this case ruled that Reg. I.Q was constitutional under *Locke* even though this case, like *Badger Catholic*, also involves a speech forum, and, unlike *Badger Catholic*, does not even include direct money payments to community organizations.

### C. The Panel Majority's Decision Conflicts with the Tenth Circuit.

The panel majority's opinion also created a circuit split with the Tenth Circuit. In *Colorado Christian University*, the Tenth Circuit held that *Locke* did not forbid providing college scholarships to students at pervasively sectarian institutions. 534 F.3d at 1256. The court ruled that excluding those institutions from the program violated the First Amendment because it impermissibly discriminated among religions, unconstitutionally scrutinized religious belief and practice, and there was no historic and substantial interest in denying funding to such institutions. *Id*. at 1259, 1261-62, & 1268.

In a stretch of logic, the majority in this case ruled that Reg. I.Q does not discriminate among religions because all religions may rent the schools, but some religions may not worship there. By contrast, in *Colorado Christian University* the Tenth Circuit held that by "giving scholarship money to students who attend sectarian—but not 'pervasively' sectarian—universities, Colorado necessarily and explicitly discriminates among religious institutions." 534 F.3d at 1258. Thus, in this Circuit a government program drawing lines between religions that worship and those that do not is permitted, but in the Tenth Circuit drawing lines between sectarian and pervasively sectarian religions violated the Free Exercise Clause.

In *Colorado Christian University*, the state examined curricula and the religious doctrines of the governing boards to decide whether an institution was

"pervasively sectarian" or just sectarian. *Id*. at 1263. The Tenth Circuit ruled that these inquiries violated the Religion Clauses because they involved the evaluation of contested religious questions and practices. *Id*. at 1266; *see also Widmar*, 454 U.S. at 269 n.6 ("Merely to draw the distinction would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases."). But the majority here concluded that the City did not violate the Religion Clauses by "look[ing] beyond the application at the applicant's website and other public materials," including listening to sermons, attending religious meetings, and interrogating clergy. Maj. Op. 30. These types of intrusive inquiries were declared unconstitutional by the Tenth Circuit, but not by the majority here.[5] This Court should grant en banc review to correct the majority's misapplication of *Locke* and avoid conflicts with the Seventh and Tenth Circuits.

[5] The Panel majority also wrongly relied on *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012), to justify the City's intrusive inquiries into applications. Maj. Op. 35. *Hosanna-Tabor* actually supports enjoining the no-worship policy. There, the Court looked at the circumstances of the plaintiff's employment to determine whether the ministerial exception – a legal concept – applied. The Court did not look at her circumstances to determine whether she was a "minister" – a religious concept – according to the church. *Id*. at 707. The Court recounted objective, secular criteria like the plaintiff's education, qualifications, job duties, her claim of a ministerial tax exemption, and how the church treated her position. It did not define a religious term or practice, like "religious worship services," or apply a religious concept to classify the plaintiff's

## III. The Panel Majority's Decision Conflicts with *Larson v. Valente* and Creates a Circuit Split with the Tenth Circuit.

The panel majority's decision concluded that the City did not violate the Religion Clauses by treating religious groups differently, depending on whether they worship. But the majority concedes (strangely) that Reg. I.Q's

> impact on [different religions] will be different to the extent that religions that do not conduct religious worship services will not apply to conduct religious worship services and will therefore not be refused something they might have wanted, while religions that do conduct religious worship services, such as Bronx Household, may ask to conduct religious worship services and be denied.

Maj. Op. 19. Aside from being self-contradictory, this decision by the majority conflicts directly with the Supreme Court's ruling in *Larson v. Valente*.

In *Larson*, Minnesota required religious organizations that received less than 50% of their total contributions from members or affiliated organizations to comply with registration and reporting laws applicable to non-religious non-profit organizations. 456 U.S. at 231-32. The Court held that the 50% rule "clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents." *Id*. at 246. And 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.

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employment, and specifically refused to do so. *Id*. Yet this is exactly what the City is doing here.

The City's exclusion of "religious worship services" results in denominational preference similar to *Larson*. As the panel majority admits, religious groups that have a Judeo-Christian understanding of a worship service, such as the Church, are excluded from renting the schools. But religious groups that do not hold "religious worship services" may rent the schools for devotional exercises.[6] Maj. Op. 19. Discrimination among religious denominations is the very evil the Religion Clauses were designed to protect against. *Larson*, 456 U.S. at 244-45. The majority's conclusion that this does not violate the Religious Clauses conflicts with *Larson* and is grounds for en banc review.

Similarly, the majority's opinion created a circuit split with the Tenth Circuit on the question of whether Reg. I.Q discriminates between religions. The Tenth Circuit ruled in *Colorado Christian University* that by "giving scholarship money to students who attend sectarian—but not 'pervasively' sectarian—universities, Colorado necessarily and explicitly discriminates among religious institutions." 534 F.3d at 1258. Thus, in this Circuit a government program drawing lines between religions that worship and those that do not is permitted, but in the Tenth Circuit drawing lines between sectarian and pervasively sectarian religions violates

[6] Even prohibiting "houses of worship" 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.

the Free Exercise Clause. This circuit split, in addition to the conflict with *Larson*, warrants en banc review.

## IV. The Case Is Ripe for En Banc Review on All of the Church's Claims.

Finally, the Court should examine not only the panel's divided rulings on the Religion Clauses, but all of its First Amendment rulings, which conflict with Supreme Court and circuit precedent. *See* Dissenting Op. 12 (noting need for review of all claims); *W. Pacific R.R. Corp. v. W. Pacific R.R. Co.*, 345 U.S. 247, 250 (1953) (granting appellate courts broad discretion to grant rehearing en banc).

## CONCLUSION

Over a strong dissent, a panel of this Court upheld the City's policy of excluding churches from renting empty school buildings for "religious worship services" in an otherwise neutral and open public forum. The majority's opinion conflicts with multiple decisions from the Supreme Court and sister circuits, and for those reasons, this Court should grant en banc review to correct the conflicts.

Respectfully submitted,

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Dated: April 16, 2014

## CERTIFICATE OF COMPLIANCE

This petition complies with the page limitation of Fed. R. App. P. 35(b)(2), because it contains 15 pages, excluding the parts of the petition exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This petition 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 Word 2007 in 14-point Times New Roman.

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## CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2014, I electronically filed the foregoing document, which automatically sends notice of filing to all attorneys of record.

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