12-2730

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE BRONX HOUSEHOLD OF FAITH,
ROBERT HALL, and JACK ROBERTS,
Plaintiffs-Appellees,
v.
BOARD OF EDUCATION OF THE CITY OF NEW YORK and
COMMUNITY SCHOOL DISTRICT NO. 10,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of New York

Brief of Amicus Curiae Americans United for Separation of Church and State, in Support of Defendants-Appellants and Reversal

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Identity and Interests of Amicus Curiae*

Americans United for Separation of Church and State is a national, nonsectarian, public-interest organization dedicated to defending the constitutional principles of religious liberty and separation of church and state. We represent more than 120,000 members, supporters, and activists across the country, including thousands who reside in this Circuit. Since our founding in 1947, we have regularly served as a party, as counsel, or as an amicus curiae in scores of church-state cases before the U.S. Supreme Court, this Court, and other federal and state courts nationwide.

One of Americans United's principal goals is to protect the rights of individuals to hold and practice the religious beliefs of their choice without interference by the government. We have therefore advocated for such rights as counsel and amicus in many cases, including suits by prison inmates to protect their rights to worship (*see Sossamon v. Texas*, 131 S. Ct. 1651 (2011); *Cutter v. Wilkinson*, 544 U.S. 709 (2005)), by a public-school student to be permitted to wear his hair in

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* No party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than amicus curiae, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

accordance with the tenets of his religion (*see A.A. ex rel. Betenbaugh v. Needville Independent School District*, 611 F.3d 248 (5th Cir. 2010)), by a church to be allowed to engage in its religious rituals free from prosecution under the nation's drug laws (*see Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006)), and by survivors of fallen war-veterans of minority faiths to be given the same level of recognition on government-issued burial markers as provided to adherents of more established faiths (*Circle Sanctuary v. Nicholson*, No. 06-C-0660-S (W.D. Wis. Nov. 13, 2006)). In all of these situations, the First Amendment's Free Exercise Clause or related statutes were used as a shield against governmental interference with religious practices.

In contrast, the Free Exercise Clause was not intended to function as a sword to extract government subsidies for religious institutions or to inject religious worship services into the public schools. Such a misguided construction of the Clause threatens religious freedom instead of advancing it, by putting funds coercively extracted from taxpayers to religious uses, by causing religious institutions to become dependent on public largesse, and by causing public schools to be identified with religious congregations. The district court's decision

would have exactly these effects. For this reason, we file as amicus in support of reversal.

Source of Authority to File

All parties have consented to the filing of this brief.

Summary of Argument

Last year, in *Bronx Household of Faith v. Board of Education of New York ("Bronx IV")*, 650 F.3d 30 (2d Cir.), *cert. denied*, 132 S. Ct. 816 (2011), this Court rejected Bronx Household's free-speech challenge to the Board's prohibition against use of school property for worship services. The district court and Bronx Household have attempted to employ the Free Exercise Clause to circumvent this Court's decision. But when religious groups have challenged refusals by public educational institutions to grant the groups access to the institutions' property for religious activities, the U.S. Supreme Court has looked principally to the First Amendment's Free Speech Clause — not its Free Exercise Clause — to decide the cases.

This is for good reason. The Supreme Court and the circuit courts have repeatedly spurned arguments that the Free Exercise Clause requires government bodies to extend to religious institutions or

activities subsidies that are offered to non-religious groups or for non-religious pursuits. In the leading case, *Locke v. Davey*, 540 U.S. 712 (2004), the Court upheld a state law that prohibited the use of state scholarships for study toward a theology degree, because the law did not impose a significant burden on religious practice, accommodated religion by funding many other kinds of religious study, and was motivated not by hostility toward religion but by an important state interest in ensuring that religious ministries are supported privately.

Likewise, the Board's policy here merely denies a subsidy to religious worship instead of affirmatively restricting it, extensively accommodates religion by allowing school facilities to be used for all religious activities that fall short of a worship service, and is motivated by an important governmental interest in avoiding school promotion of religion. Indeed, in the first appeal of this long-fought legal battle, *Bronx Household of Faith v. Community School District No. 10 ("Bronx I")*, 127 F.3d 207, 216 (2d Cir. 1997), this Court ruled meritless a free-exercise attack upon a Board facilities-access policy that was *less* welcoming of religious activity than the Board's current policy is, explaining that the policy in effect then did not restrict religious

practice because Bronx Household could hold its religious services on private property.

Precedent similarly forecloses Bronx Household's argument that the Board's current access policy unconstitutionally discriminates between religious groups that hold worship services and those that do not. This contention is nothing more than a disparate-impact claim — a claim that is not cognizable under the Free Exercise Clause. If it were, *Locke* and *Bronx I* — as well as a series of cases that have rejected free-exercise claims to governmental support for parochial schools — would have come out the other way, for the policies upheld in those cases had disparate impacts on different religious groups too. Some religions do not call for their adherents to formally study to become ministers or to attend religious institutions for schooling in their formative years. Others oppose accepting public funding for such education. Such disparities have never compelled extension of government subsidies to religious groups.

The district court's decision should be reversed.

Argument

I. The Supreme Court has looked to the Free Speech Clause, not the Free Exercise Clause, to decide limited-public-forum cases.

In *Bronx IV*, 650 F.3d at 36, 45, 51, this Court held that the school property at issue here is a "limited public forum" and rejected Bronx Household's claim that denying the congregation access to that forum for worship services violates the First Amendment's Free Speech Clause. Supreme Court case-law does not support Bronx Household's attempt to resurrect this claim under the Free Exercise Clause. In recent decades, the Supreme Court has decided many constitutional cases where religious groups sued over denial of access to a limited public forum. The Court has focused on the Free Speech Clause — not the Free Exercise Clause or any other constitutional provision — in adjudicating these cases.

In the earliest of these cases, *Widmar v. Vincent*, 454 U.S. 263, 273 n.13 (1981), the Supreme Court struck down as violating the rights of free speech and association a public university's ban on the use of university facilities for religious activity by student groups, declining to "inquire into the extent, if any, to which free exercise interests are infringed by the challenged [u]niversity regulation." Then, in *Lamb's*

Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 387, 389, 392–93 (1993), the Court ruled unconstitutional under the Free Speech Clause a public school's refusal to allow a church to show a religious film series in school facilities open to secular private groups, eschewing adjudication of a free-exercise claim brought by the church. Likewise, in *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 827, 837 (1995), the Court held that a university violated the Free Speech Clause by providing free printing for secular but not religious student publications, without ruling on a free-exercise claim brought by the religious students. And in *Good News Club v. Milford Central School*, 533 U.S. 98, 120 (2001), the Court invalidated under the Free Speech Clause a school district's denial of access to its facilities for religious meetings, without even mentioning the Free Exercise Clause.

Subsequently, in *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009), the Supreme Court rejected a religious group's argument that it had a free-speech right to erect a permanent monument on government property where other permanent monuments had been allowed (concluding that such monuments represent government speech instead of private speech), without any suggestion that the religious

group could use the Free Exercise Clause to reach a different result. *See also Board of Education v. Mergens*, 496 U.S. 226, 253 (1990) (holding that school's exclusion of religious student club from school facilities violated Equal Access Act, 20 U.S.C. §§ 4071–74, without deciding club's free-speech and free-exercise claims); *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839, 862 n.22 (2d Cir. 1996) (holding that to extent that school's denial of access to religious student club did not violate Equal Access Act, it also did not violate Free Speech and Free Exercise Clauses).

Most recently, in *Christian Legal Society Chapter v. Martinez*, 130 S. Ct. 2971, 2985–86 (2010), the Supreme Court reaffirmed that the Free Speech Clause is the constitutional provision courts should principally look to when a religious group seeks access to a limited public forum. There, a public university denied access to university facilities and communications channels to a religious student club because the club would not comply with the university's nondiscrimination policy. *Id.* at 2978–81. The club contended that in addition to violating its free-speech rights, the university violated its expressive association and free-exercise rights. *Id.* at 2981.

The Court rejected the club's assertion that its association claim should be analyzed separately from the speech claim, explaining, "[w]hen these intertwined rights arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association." *Id.* at 2985. The Court stated that the club was "seeking what is effectively a state subsidy" when it requested access to the university's limited public forum. *Id.* at 2986. The Court added that "[i]n diverse contexts, our decisions have distinguished between policies that require action and those that withhold benefits," and concluded that "[a]pplication of the less-restrictive limited-public-forum analysis better accounts for the fact" that the university was "dangling the carrot of subsidy, not wielding the stick of prohibition." *Id.* The Court then disposed of the club's free-exercise claim in a four-sentence footnote, noting that the university's anti-discrimination policy applied neutrally to both religious and secular groups. *Id.* at 2995 n.27.

Bronx Household thus, at best, faces an uphill battle in attempting to employ a constitutional provision other than the Free Speech Clause to gain access to the Board's limited public forum.

II. The courts have rejected the proposition that the Free Exercise Clause gives religious groups a right to public subsidies equal to those the government offers to non-religious groups.

A. Supreme Court decisions.

There is good reason why the Supreme Court has not relied on the Free Exercise Clause in analyzing whether religious groups were unconstitutionally denied access to limited public fora. Aside from situations (such as those in cases like *Rosenberger*, 515 U.S. 819, and *Good News*, 533 U.S. 98) where the government violates the Free Speech Clause through viewpoint-based discrimination within such fora, the Supreme Court has generally held "in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983).

For instance, in *Regan*, the Court ruled that the government is not required to subsidize through tax deductions and exemptions the

constitutionally protected lobbying activities of all charities, even though it provides such tax subsidies to veterans' organizations. *See id.* at 546–48. In *Maher v. Roe*, 432 U.S. 464, 478–79 (1977), and *Harris v. McRae*, 448 U.S. 297, 321–22 (1980), the Court rejected claims that the government is constitutionally obligated to subsidize the protected right to abortion through Medicaid payments, despite the fact that the government subsidizes other medical services. The Court explained in the latter case that "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." 448 U.S. at 317 n.19; *see also Rust v. Sullivan*, 500 U.S. 173, 201 (1991) ("The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected . . . .").

Applying this principle to the constitutional provision that is central to this appeal, the Supreme Court has said that the "'the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). The Court has accordingly rejected the

argument that the Free Exercise Clause requires the government to subsidize religious activity to the same extent it subsidizes secular conduct.

The leading case is *Locke*, 540 U.S. 712. There, the Supreme Court considered a free-exercise challenge to a state law that prohibited university students from using state scholarship funds to pursue a degree in devotional theology. *Id.* at 715. On its face, the law discriminated against a particular religious practice. *Id.* at 720. Yet the Court upheld the law, for several reasons. *Id.*

First, the law "place[d] a relatively minor burden" on religious scholarship applicants. *Id.* at 725. It did not impose "criminal [or] civil sanctions on any type of religious service or rite," "deny to ministers the right to participate in the political affairs of the community," or "require students to choose between their religious beliefs and receiving a government benefit." *Id.* at 720–21. Instead, "[t]he State ha[d] merely chosen not to fund a distinct category of instruction." *Id.* at 721.

Second, the scholarship program went a "long way toward including religion in its benefits," because it permitted scholarship funds to be used for religious classes and at religious schools. *Id.* at 724.

Third, the law was not motivated by "animus toward religion," but by a "historic and substantial state interest" in ensuring that religious ministries are supported by private money instead of tax dollars. *Id.* at 721–23, 725. Because the burden on religion was "minor" while the state interest was "substantial," the law was constitutional. *Id.* at 725.

Locke was hardly an unusual case. Its outcome was consistent with a series of earlier Supreme Court decisions holding that the Free Exercise Clause (as well as the Equal Protection Clause) does not require government bodies to subsidize religious institutions equally to secular institutions.

In *Norwood v. Harrison*, 413 U.S. 455, 462, 469 (1973), the Supreme Court concluded that the Free Exercise and Equal Protection Clauses do not entitle "parochial schools to share with public schools in state largesse, on an equal basis or otherwise." In *Brusca v. State Board of Education*, 405 U.S. 1050 (1972), *aff'g mem.*, 332 F. Supp. 275 (E.D. Mo. 1971) (three-judge court), the Court summarily affirmed the denial of a free-exercise and equal-protection challenge to a clause of a state constitution that prohibited the state from aiding religious but not secular private schools. Similarly, in *Luetkemeyer v. Kaufmann*, 419

U.S. 888 (1974), *aff'g mem.*, 364 F. Supp. 376 (W.D. Mo. 1973) (three-judge court), the Court summarily affirmed a lower court's rejection of a free-exercise and equal-protection attack on a state statute that authorized free bus transportation for public-school pupils but not for pupils enrolled in church-related schools.

Although Supreme Court summary affirmances such as *Brusca* and *Luetkemeyer* do not render precedential every word of the lower-court opinions they uphold, they are binding precedent with respect to the "'issues presented and necessarily decided by those actions.'" *Schultz v. Williams*, 44 F.3d 48, 60 (2d Cir. 1994) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983)); *accord Soto-Lopez v. New York City Civil Service Commission*, 755 F.2d 266, 272 (2d Cir. 1985). In fact, in *Sloan v. Lemon*, 413 U.S. 825, 834–35 (1973), the Court cited *Brusca* in holding that "valid aid to nonpublic, nonsectarian schools [provides] no lever for aid to their sectarian counterparts."

B. Decisions of other circuits and state courts.

The federal courts of appeals have applied *Locke* and its progenitors to reject a variety of requests by religious organizations for extension to them of subsidies offered to secular groups. For example, in

Eulitt ex rel. Eulitt v. Maine Department of Education, 386 F.3d 344, 354 (1st Cir. 2004), the court held that a state did not violate the Free Exercise Clause by paying tuition for students in secular but not religious private schools, noting, "[*Locke*] confirms that the Free Exercise Clause's protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund the secular equivalents of such activity." In *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 409–10 (6th Cir. 2007), the court, relying on *Locke*, ruled that a state did not violate the Free Exercise Clause by denying a religious facility for troubled youths public funding available to non-religious entities.

In *Bowman v. United States*, 564 F.3d 765, 775 (6th Cir. 2008), the court upheld a federal regulation that provided former military service-members credit toward retirement for secular but not religious public-service work, explaining that "[t]he withholding of a retirement credit for [a former soldier's] work as a youth minister does not burden his right to practice or adhere to his religious beliefs." And in *Gary S. v. Manchester School District*, 374 F.3d 15, 21 (1st Cir. 2004), the court

ruled that a school district was not obligated to provide disabled children at private schools with special-education benefits equal to those given to such children at public schools, for "the mere non-funding of private secular and religious school programs does not 'burden' a person's religion or the free exercise thereof." *See also Wirzburger v. Galvin*, 412 F.3d 271, 279–82 (1st Cir. 2005) (upholding against free-exercise challenge prohibition in Massachusetts Constitution on use of initiative process to repeal constitutional provision restricting public aid to religious organizations).

State courts have reached similar conclusions. In *Anderson v. Town of Durham*, 895 A.2d 944, 959 (Me. 2006), the Maine Supreme Court rejected a free-exercise attack on the program that was also at issue in *Eulitt*, 386 F.3d 344, stating, "[t]he statute merely prohibits the State from funding [religious parents'] school choice, and as such, it does not burden or inhibit religion in a constitutionally significant manner." In *University of the Cumberlands v. Pennybacker*, 308 S.W.3d 668, 680 (Ky. 2010), the Kentucky Supreme Court spurned a free-exercise attack on a state constitutional provision that restricts state funding to religious educational institutions, concluding that any free-

exercise interests had to yield to "the state's legitimate and fully constitutional antiestablishment concerns." *Accord Bush v. Holmes*, 886 So. 2d 340, 362–66 (Fla. Dist. Ct. App. 2004) (rejecting free-exercise attack on state constitutional provision barring state funding of religious schools), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006).

C. This Court's decisions.

What is more, even before *Locke* was decided, this Court rejected arguments that the Free Exercise Clause creates an entitlement to access public-school facilities for religious purposes. In *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir. 1965), the Court rebuffed a contention that the Free Exercise Clause gave public-school students a right to say prayers on their own initiative in the classroom. The Court explained that, even if it were assumed for the sake of argument that the Establishment Clause did not prohibit the prayers, the school's actions did not present an "inexorable conflict with deeply held religious belief" because the children were free to pray outside the school day. *Id.* at 1002.

In *Brandon v. Board of Education*, 635 F.2d 971 (2d Cir. 1980), this Court held that the Free Exercise Clause did not entitle a group of

students to use public-school facilities for communal prayer meetings before commencement of the school day. The Court noted that the school's refusal to permit such use did not place "coercive restraints on religious observation," as "the students . . . are free to worship together as they please before and after the school day and on weekends in a church or any other suitable place." *Id.* at 977.

And, in the first appeal in this long-running controversy, *Bronx I*, 127 F.3d 207, this Court spurned a free-exercise attack on a Board policy that was *more* restrictive of religious uses of school property than the one at issue now is. That policy denied access to school facilities for "religious services or religious instruction," while allowing entry "for the purposes of discussing religious material or material which contains a religious viewpoint." *Id.* at 210. The Court stated that the policy did "not bar any particular religious practice" or "interfere in any way with the free exercise of religion by singling out a particular religion or imposing any disabilities on the basis of religion." *Id.* at 216. The Court added, "[t]he members of [Bronx Household] are free to practice their religion, albeit in a location separate from [school property]." *Id.* The Court concluded: "'The free exercise of religion means, first and

foremost, the right to believe and profess whatever religious doctrine one desires.' That right has not been taken from the members of [Bronx Household]." *Id.* (quoting *Employment Division v. Smith*, 494 U.S. 872, 877 (1990)).

III. Under *Locke* and related decisions, Bronx Household's free-exercise claim fails.

A. The Board's policy does not impose a substantial burden on religious exercise.

Bronx Household's free-exercise argument is foreclosed by *Locke*, *Bronx I*, and the other cases described above. As in *Locke*, 540 U.S. at 725, the Board's policy imposes no more than a "minor burden" on Bronx Household's religious practice. Bronx Household is not being prohibited from engaging in any religious rite or activity; the church remains free to hold religious worship services on private property. Rather, the Board has merely chosen not to subsidize Bronx Household's religious worship.

As this Court explained in *Bronx IV*, 650 F.3d at 41, the Board "would be substantially subsidizing churches" if it is forced to allow religious worship services in school facilities. The Board does not charge rent for its facilities, but only charges fees for the partial cost of

custodial work and security services. *Id.* at 41 & n.10; *see also* A928–29 ¶¶ 33–34; A963–64 ¶¶ 15–17. The fees charged by the Board are far below market rents in New York City. A71 ¶ 9; A87–88 ¶¶ 18–19, 21; A93–94 ¶¶ 19, 21. Thus, when the Board is prohibited from enforcing its facilities-access policy, the City "foots a major portion of the costs of the operation of a church." *Bronx IV*, 650 F.3d at 41.

Nevertheless, it is apparently the view of the district court and Bronx Household that withdrawal of this subsidy would impose a substantial burden on the religious exercise of Bronx Household and other churches, because they have grown so much while using school property during the long years during which the Board's policy has been enjoined by the district court that — if forced to move to more expensive private facilities — they would be unable to afford to continue the same level or breadth of religious activity they engage in now. *See* SPA15–18; A70–72 ¶¶ 5, 8–14; A79–81 ¶¶ 5–8, 11–16; A84–88 ¶¶ 5–8, 15–21; A91–94 ¶¶ 4–6, 17–21. In other words, the ruling below suggests that the Board cannot constitutionally withdraw a subsidy that it never voluntarily provided in the first place, but was instead forced to grant

by the district court, because some New York City churches have effectively become "hooked" on the subsidy.

Such an argument has no support in the law. To the contrary, the Supreme Court has cautioned that a principal purpose of the First Amendment's separation between church and state is to prevent a "dependency of one upon the other." *See School District v. Schempp*, 374 U.S. 203, 222 (1963). Moreover, government action that "operates so as to make the practice of . . . religious beliefs more expensive" "imposes only an indirect burden on the exercise of religion," and to strike down laws on that ground would put in question a wide swath of legislation. *See Braunfeld v. Brown*, 366 U.S. 599, 605–06 (1961) (plurality opinion of Warren, C.J., joined by three other Justices); *accord id.* at 521–22 (Frankfurter, J., concurring in the judgment, joined by Harlan, J.). Indeed, if withdrawal of a subsidy can give rise to a free-exercise violation, then a city that establishes a school-voucher program would never be able to terminate the program, or to exclude religious schools from it, once those schools had become dependent on the vouchers. A result of this kind would eviscerate the teaching in *Locke*, 540 U.S. at 718–19, that there is "play in the joints" between the Religion Clauses

of the First Amendment that allows — but does not require — the government to aid religious institutions in situations where such aid is not barred by the Establishment Clause.

The cases that Bronx Household cites in support of its contention that the Board's policy significantly burdens religion (*see* Appellees' Response in Opposition to Motion for Stay, filed Aug. 6, 2012, at 16–18) are all inapposite. Those cases involved situations in which the government prohibited a religious practice entirely, barred people from participating in politics because of their religious status, attempted to substantially interfere with the internal affairs of a church, or attempted to suppress a particular religious faith.

For example, in *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 526–28 (1993), a city completely prohibited a religious group from engaging in ritual animal sacrifice called for by its faith. In *McDaniel v. Paty*, 435 U.S. 618, 620–21 (1978), a state barred ministers from serving as state legislators. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 699 (2012), the government contended that employment-discrimination statutes could be used to override a church's decisions on which individuals should

carry out its ministerial functions. And in *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953), a city allowed traditional religious groups to hold religious services in a public park but prohibited the Jehovah's Witnesses from doing so. None of the serious invasions of religious liberty in the cases cited by Bronx Household are comparable to the Board's mere refusal to subsidize religious worship services.

B. The Board's policy accommodates a broad array of religious activities.

As in *Locke*, 540 U.S. at 724, the Board's policy goes a "long way toward including religion in its benefits." The policy only prohibits use of school buildings for "religious worship services" or "as a house of worship." *Bronx IV*, 650 F.3d at 34–35. All religious pursuits that fall short of these acts — including "prayer, singing hymns, religious instruction, expression of religious devotion, or the discussion of issues from a religious point of view" — are allowed. *Id.* at 38.

Indeed, the Board's current policy accommodates religious activity to a far greater extent than did the policy this Court upheld against a free-exercise challenge in *Bronx I*, 127 F.3d at 216. As noted above, that older policy prohibited use of school facilities for "religious services or religious instruction." *Id.* at 210. We find quite puzzling the district

court's attempt to distinguish *Bronx I* on the grounds that the current policy "discriminates against religion on its face" (SPA16), for the *Bronx I* policy was *more* discriminatory.

The current policy's broad accommodation of religious practice confirms that, as in *Locke*, 540 U.S. at 720–21, the Board is "not requir[ing] [people] to choose between their religious beliefs and receiving a government benefit." The Supreme Court explained in *Locke* that although students could not use state scholarship funds to pursue a degree in devotional theology, they could still seek such a degree while using the funds for other purposes. *Id.* at 721 n.4. Here, even though churches cannot hold worship services on school property, they can still hold worship services elsewhere, and can still use school property for a wide variety of other religious activities.

This case is therefore unlike a set of Supreme Court cases that prohibited government bodies from denying unemployment compensation to persons who lost their jobs because of a conflict with the requirements of their religion. *See Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987); *Thomas v. Review Board*,

450 U.S. 707 (1981); *Sherbert,* 374 U.S. 398. Those cases concerned an "important benefit" that some people need for sheer survival. *See Thomas,* 450 U.S. at 717. In contrast to the case at bar and *Locke*, the claimants in those cases could not practice their religions and still partake of the benefit in some manner, but instead were forced to choose between violating their religious beliefs and foregoing the benefit entirely. *See Hobbie*, 480 U.S. at 141.

C. The Board's policy is not motivated by anti-religious animus.

As in *Locke*, 540 U.S. at 724–25, the Board policy's broad accommodation of religious activity evinces that the policy is not motivated by anti-religious animus. Rather, as in *Locke*, *id.* at 722–23, 725, the Board's policy is motivated by "substantial" "antiestablishment interests."

This Court explained in *Bronx IV*, 650 F.3d at 40, that the Board had "a strong basis for concern that permitting use of a public school for the conduct of religious worship services would violate the Establishment Clause." The Court noted that the Board had a "reasonable" "concern that it would be substantially subsidizing churches if it opened schools for religious worship services." *Id.* at 41.

The Court further stated that "[t]he Board could also reasonably worry that the regular, long-term conversion of schools into state-subsidized churches on Sundays would violate the Establishment Clause by reason of public perception of endorsement" of religion. *Id.* at 42.

* * * * *

Because the Board's policy imposes no more than a minor burden on religious practice, because it allows a wide variety of religious activities in school facilities, and because it is motivated by important antiestablishment interests, the policy, as in *Locke*, 540 U.S. at 725, does not violate the Free Exercise Clause.

IV. The Board's policy does not unconstitutionally discriminate among religions.

Bronx Household argues that *Locke* is distinguishable, and that the Board's policy runs afoul of the Free Exercise Clause, because the policy affects different religious groups differently. According to Bronx Household, religious groups that hold traditional worship services are excluded by the policy, while religious groups whose activities do not rise to the level of "religious worship services" are not. *See* Appellees' Opposition to Motion for Stay at 20–21.

Bronx Household's factual premise is questionable, for the Board's policy prohibits use of school facilities not only for "religious worship services," but also "as a house of worship." *Bronx IV*, 650 F.3d at 34–35. The latter prohibition may well cover activities of a less traditional religious group that are analogous to a "religious worship service." But even if the Board's policy does limit the activities of some religious groups more than those of others, Bronx Household's legal argument holds no water.

A. Bronx Household's "discriminatory impact" argument would overturn the results of numerous cases.

Essentially, Bronx Household is advancing a "disparate impact" claim under the Free Exercise Clause. Such a claim is not recognized by the case-law. Indeed, in *Braunfeld*, the Supreme Court rejected a free-exercise challenge to a Sunday-closing law that inflicted significant economic harm upon certain (but not most) religious groups, explaining, "it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions." 366 U.S. at 606 (four-Justice plurality); *accord id.* at 521–22 (two-Justice concurrence).

If Bronx Household's "discriminatory impact" argument was valid, *Locke* and related cases would have come out the other way. The restriction upheld in *Locke*, 540 U.S. at 716, against use of state scholarship funds for pursuit of a theology degree certainly did not impact all religious sects. Some religious groups — including the Baha'i faith, Christian Scientists, and Quakers — do not have ordained clergy or professional religious scholars, and so study for a theology degree would not be part of their religious practice. *See* Paula Hartz, *Baha'i Faith* 94 (2002); *Religion in America* 155 (Harold Rabinowitz and Greg Tobin eds., 2011); *Quakers*, BBC, Religions (July 3, 2009), http://www.bbc.co.uk/religion/religions/christianity/subdivisions/quakers_1.shtml. This fact did not change the outcome of *Locke*.

The restraints on public funding of religious schools that were upheld against free-exercise challenges in the many cases cited earlier (*see supra* §§ II(A), (B)) likewise impact some religious groups but not others, as some religious groups — such as the Jehovah's Witnesses — generally send their children to public schools and do not operate religious schools. *See* Andrew Holden, *Jehovah's Witnesses: Portrait of a Contemporary Religious Movement* 133 (2002). Other religious groups

oppose the provision of governmental aid to religious institutions and refuse to accept such aid. *See, e.g.*, Ram A. Cnaan & Charlene C. McGrew, *Social Welfare*, *in Handbook of Religion and Social Institutions* 67, 85 (Helen Rose Ebaugh ed., 2000); *Public Education*, Union for Reform Judaism, Policies & Governance, Resolutions (Dec. 2001), http://urj.org/about/union/governance/reso/?syspage=article&item_id=1975.

For similar reasons, the district court went astray in attempting to distinguish *Bronx I*, 127 F.3d at 210, 216, on the grounds that the policy upheld there — which denied access to school facilities for "religious services or religious instruction" — did not disparately impact different religious groups while the one at issue here does. *See* SPA16. Some religious groups may not hold religious services or religious instruction at all. For instance, Quakers "have no creed, no sacraments, and no presiding ministers"; their "worship is based on silence," and "[s]ome [Quaker] meetings are completely silent." *A Guide to Quaker Meeting for Worship* (1994), http://www.qis.net/~daruma/hw-intro.html. Other faiths may believe that religious services or instruction should take place only in their own, sanctified facilities. Mormons, for example,

believe that certain sacraments can be performed only in sanctified Mormon temples "reserved for special religious worship." *What is a Mormon Temple,* The Church of Jesus Christ of Latter-Day Saints (Sept. 13, 2012), http://www.mormontopics.org/eng/temple. Thus, if Bronx Household's "discriminatory impact" argument was meritorious, this Court would have struck down the *Bronx I* policy instead of upholding it.

B. The cases Bronx Household cites in support of its "discriminatory impact" argument are inapposite because they all involved intentional discrimination.

The cases on which Bronx Household relies in support of its argument that the Board's policy unconstitutionally discriminates among religions (*see* Appellees' Opposition to Motion to Stay at 20–23, 33–34) all involved intentional governmental targeting of a particular religious group or other facial discrimination between religions, not a mere disparate impact on different faiths.

In *Lukumi*, 508 U.S. at 525, 536, 538, a city "gerrymander[ed]" an ordinance in order to "suppress" a single religious group's practice of a particular religious ritual central to its faith.

In *Fowler*, 345 U.S. at 69, a city barred Jehovah's Witnesses from holding their religious services in a public park — while allowing other religious groups to do so — "because of the dislike which the local officials had of [the Jehovah's Witnesses] and their views."

In *Larson v. Valente*, 456 U.S. 228, 230, 255 (1982), the Supreme Court struck down under the Establishment Clause, not the Free Exercise Clause, a statute that "impos[ed] certain registration and reporting requirements upon only those religious organizations that solicit more than fifty per cent of their funds from nonmembers." The Court explained that the statute did not merely "happen to have a 'disparate impact' upon different religious organizations" but instead made "explicit and deliberate distinctions between different religious organizations." *Id.* at 246 n.23.

Finally, in *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1250–51 (10th Cir. 2008), the Tenth Circuit struck down a state law that allowed state university scholarships to be used at some religious institutions, but not ones that were determined to be "pervasively sectarian" under six detailed statutory criteria. The court held that the statute violated the Free Exercise Clause and other

constitutional provisions because it "explicitly discriminate[d] among religious institutions" and its "sole function and purpose" was "to exclude some but not all religious institutions on the basis of the stated criteria." *Id.* at 1258.

This Court need not address whether *Colorado Christian* is consistent with *Locke*, because the Board policy here is quite different from the one struck down in that Tenth Circuit case — as well as those invalidated in the Supreme Court cases cited by Bronx Household. The Board's policy neither facially discriminates among religious groups nor has such a purpose. The policy applies to all religious groups equally and only draws distinctions among the kinds of religious activities it permits in public-school buildings. There is no evidence of any desire by the Board to favor some faiths over others. As this Court found in *Bronx IV,* 650 F.3d at 46, there is "no sound basis for concluding that the Board's actions have been motivated by anything other than a desire to find the proper balance between two clauses of the First Amendment."

* * * * *

Bronx Household's "discriminatory impact" argument under the Establishment Clause fails for the same reasons that it falters under

the Free Exercise Clause. Indeed, this Court extensively addressed — and rebuffed — Bronx Household's Establishment Clause contentions in *Bronx IV*, 650 F.3d at 45–48; nothing more needs to be said about them.

Conclusion

This Court should reverse the district court's decision. It should not permit the district court and Bronx Household to use the Free Exercise Clause to circumvent this Court's ruling that the Board's policy is constitutional. Allowing the ruling below to stand would upset the delicate balance the Supreme Court has drawn — and eviscerate the "play in the joints" that lies (*Locke*, 540 U.S. at 719) — between the Free Exercise and the Establishment Clauses of the First Amendment, not just in this context, but in many others.

Respectfully submitted,

By: /s/ Alex J. Luchenitser Date: September 17, 2012
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