UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: November 19, 2012 Decided: April 3, 2014)

Docket No. 12-2730-cv

- -X

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

Plaintiff-Appellees,

v.

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

Defendant-Appellants

- X

Before: WALKER, LEVAL, and CALABRESI, *Circuit Judges*.

Defendants, the Board of Education of the City of New York and Community School District No. 10 appeal from the grant of summary by the United States District Court for the Southern District of New York (Preska, *C.J.*), permanently enjoining Defendants from enforcing a policy which permits the use of school facilities outside of school hours by outside organizations and individuals but provides that no permit shall be granted for the purpose of holding religious worship services. The Court of Appeals (Leval, *J.*) rejects the District Court's conclusion that the policy violates the Free Exercise and Establishment Religion Clauses of the First Amendment. REVERSED.

Judge Walker dissents by separate opinion.

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LEVAL, *Circuit Judge*:

This appeal raises the question whether the Board of Education of The City of New York (the "Board"),[1] in making the City's school facilities available outside of school hours for use by outside users and subsidizing such use, may, in furtherance of interests favored by the Establishment Clause of the First Amendment, refuse to permit the holding of religious worship services. The United States District Court for the Southern District of New York (Preska, *C.J.*) concluded that the Free Exercise and Establishment Clauses of the First Amendment compel the Board to allow outside users to conduct religious worship services in the school facilities and enjoined the Board from enforcing its prohibition. We conclude that the Board's prohibition was consistent with its constitutional duties. We therefore vacate the injunction imposed by the District Court and reverse its judgment.

[1] During this litigation, the Board was renamed the New York City Department of Education. *See, e.g.*, *A.R. ex rel. R.V. v. New York City Dep't of Educ.*, 407 F.3d 65, 67 n.2 (2d Cir. 2005).

1 The Board and co-defendant Community School District No. 10 appeal from the District
2 Court's grant of summary judgment permanently enjoining Defendants from enforcing
3 Chancellor's Regulation D-180 § I.Q. ("Reg. I.Q.") against Plaintiffs, The Bronx Household of
4 Faith ("Bronx Household") and its pastors Robert Hall and Jack Roberts. Regulation D-180
5 governs the "extended use" of school facilities (the term refers to the use of school facilities
6 outside of school hours by outside organizations and individuals).[2] Extended use, which requires
7 a permit issued by the Board, is subsidized in that no rent is charged for use of the school
8 facilities.[3] Reg. I.Q. provides: "No permit shall be granted for the purpose of holding religious
9 worship services, or otherwise using a school as a house of worship."[4]

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[2] Reg. D-180 § I.S. provides that "[p]ermits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this regulation on the same basis that they are granted to other clubs for students that are sponsored by outside organizations."

[3] "While the [Board] imposes no excess charge (profit or overhead) on extended use of its schools, there are pass-along contractual costs . . . i.e., costs incurred in schools for custodial services when the use is outside of normal school hours." Reg. D-180 § IV.A. Users may also incur charges for use of additional services or specialized equipment or facilities. *See* Reg. D-180 § V.

[4] Reg. I.Q. authorizes denial of a permit sought either for (1) "the purpose of holding religious worship services" or (2) "otherwise using a school as a house of worship." In this opinion we limit our consideration to the first clause. Because we conclude that the denial of Bronx Household's application for a permit under this clause is constitutional, we have no need to consider whether the Board might also lawfully deny an application for a permit based solely on the second clause. Judge Calabresi notes that if worship that is not religious does exist, so that, as the dissent may be taken to suggest, Dissenting Op. at 5, the first clause discriminates against *religious* worship, the second clause, which does not distinguish between religious and any such putative nonreligious worship, would be sufficient to pass constitutional muster since it does not treat nonreligious worship more favorably than religious worship. *See Bronx Household III*, 492 F.3d at 92-106 (Calabresi, J., concurring); *Bronx Household IV*, 650 F.3d at 51-52 (Calabresi, J., concurring).

The District Court found that enforcement of Reg. I.Q. to exclude religious worship services would violate the Free Exercise and Establishment Clauses. We disagree. We conclude Reg. I.Q. is constitutional in light of the Board's reasonable concern to observe interests favored by the Establishment Clause and avoid the risk of liability under that clause. Accordingly, we vacate the injunction and reverse the District Court's judgment.

BACKGROUND

We assume familiarity with the facts and procedural history of this long-running litigation, as set forth in our prior opinions, and we recount them here only as necessary to explain our disposition of this appeal. *See Bronx Household of Faith v. Bd. of Educ. of City of New York*, 650 F.3d 30 (2d Cir. 2011) ("*Bronx Household IV*"); *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 492 F.3d 89 (2d Cir. 2007) ("*Bronx Household III*"); *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 331 F.3d 342 (2d Cir. 2003); *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997).

In July 2007, the Board adopted Reg. I.Q. (then designated Standard Operating Procedure § 5.11). On November 2, 2007, in litigation resulting from the Board's denial of Bronx Household's application for a permit to use school facilities for "Christian worship services," the district court permanently enjoined the Board from enforcing the rule. *Bronx Household IV*, 650 F.3d at 35; *Bronx Household of Faith v. Bd. of Educ. of City of New York*, No. 01 Civ. 8598, 2007 WL 7946842, at *1 (S.D.N.Y. Nov. 2, 2007). The District Court's ruling was predicated on its conclusion that the rule constituted an unconstitutional viewpoint discrimination against

religion and as such was forbidden by *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111-12 (2001), in which the Supreme Court found that a school's refusal to permit a Christian children's club to meet at the school outside of school hours because of the club's religious nature constituted viewpoint discrimination and violated the club's free speech rights. *See Bronx Household of Faith v. Bd. of Educ. of City of New York*, 400 F. Supp. 2d 581 (S.D.N.Y. 2005).

On appeal, we reversed the District Court's judgment and vacated the injunction. *Bronx Household IV*, 650 F.3d at 51. (We incorporate that opinion into this one by reference as several of the issues we there discussed are pertinent to the present appeal.) Noting the "important difference between excluding the *conduct of an event or activity* that includes expression of a point of view, and excluding the *expression* of that point of view," we observed that, unlike the rule imposed by the school in *Good News Club*, the Board's rule barring the conduct of religious worship services placed no restriction on the use of school facilities by religious groups to teach religion, sing hymns, recite prayers, and express or advocate their religious point of view. *Id.* at 37-38. The rule prohibiting religious worship services therefore did not exclude expression of a religious viewpoint. It was a content-based exclusion of a particular category of activity, which exclusion was constitutionally permissible in light of the Board's reasonable and good faith belief that permitting religious worship services in its schools might give rise to an appearance of endorsement in violation of the Establishment Clause, thus exposing the Board to a substantial risk of liability.[5] *Id.* at 43.

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[5] We did not find that a violation of the Establishment Clause had occurred or would have occurred but for the prohibition on religious worship services but rather that "it was objectively

1 We also rejected Bronx Household's claim that the rule violated the Establishment
2 Clause. *Id.* at 45-48. We found no basis for Bronx Household's contention that the rule was
3 motivated by hostility to religion. *Id.* at 46. Nor would a reasonable observer perceive the rule as
4 an expression of such hostility in light of the range of religious activity the rule permitted and in
5 light of the reasonableness of the imposition of the rule to guard against being found in violation
6 of the Establishment Clause. *Id.* at 45-46. Finally, we rejected Bronx Household's claim that the
7 Board would become excessively entangled in religious matters in undertaking to determine
8 whether an applicant's proposed activities constituted a religious worship service. *Id.* at 46-48. In
9 the first place, Bronx Household had expressly applied to conduct "Christian worship services."
10 Moreover, in view of the fact that both the Free Exercise and Establishment Clauses impose
11 restrictions on the conduct of government relating exclusively to religious activities, in many
12 instances "government officials cannot discharge their constitutional obligations without close
13 examination of . . . particular conduct to determine if it is properly deemed to be religious and if
14 so whether allowing it would constitute a prohibited establishment of religion." *Id.* at 47.
15 On remand to the District Court after we vacated the injunction, Bronx Household again
16 moved for a preliminary injunction against enforcement of Reg. I.Q., this time on different
17 grounds. Bronx Household asserted that our prior ruling, which was based on its Free Speech
18 Clause claim, should not close the matter as neither we nor the District Court had passed on its
19 claims that Reg. I.Q. violated the Free Exercise Clause. The District Court again granted a

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reasonable for the Board to worry that use of the City's schools for religious worship services . . . expose[d] the City to a substantial risk of being found to have violated the Establishment Clause." *Bronx Household IV*, 650 F.3d. at 43.

1 preliminary injunction, *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 855 F.
2 Supp. 2d 44 (S.D.N.Y. 2012), and went on to grant summary judgment in favor of Bronx
3 Household, permanently enjoining the enforcement of Reg. I.Q. *Bronx Household of Faith v. Bd.*
4 *of Educ. of City of New York*, 876 F. Supp. 2d 419 (S.D.N.Y. 2012).

5 Defendants appealed, and this case is now before us for the sixth time.

6 **DISCUSSION**

7 The District Court concluded for a number of reasons that the enforcement of Reg. I.Q. to
8 exclude religious worship services would violate the Free Exercise Clause and the Establishment
9 Clause. We respectfully disagree.

10 *A. The Free Exercise Clause*

11 1) *The Free Exercise Clause does not entitle Bronx Household to a grant from the Board*
12 *of a subsidized place to hold religious worship services.*

13 The District Court found that the enforcement of Reg. I.Q. to exclude religious worship
14 services would violate Bronx Household's rights under the Free Exercise Clause because the
15 City's schools are "the only location in which [Bronx Household's congregation] can afford to
16 gather as a full congregation [for Sunday worship services] without having to curtail other of
17 their religious practices." *Bronx Household*, 876 F. Supp. 2d at 426. The District Court cited no
18 authority for this proposition, and we know none.

19 The Free Exercise Clause bars government from "prohibiting the free exercise" of
20 religion. U.S. Const. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of

1 religion].”). In the District Court’s view, because Bronx Household and its congregants have a
2 constitutional right to worship as they choose without interference from government, and cannot
3 afford to pay for a large enough site to accommodate the entire congregation, the Free Exercise
4 Clause obligates the Board to provide them with a subsidized facility in which to exercise the
5 right. The Free Exercise Clause, however, has never been understood to require government to
6 finance a subject’s exercise of religion. And to the extent any such suggestion has been raised in
7 litigation, it has been rejected. *See, e.g., Locke v Davey*, 540 U.S. 712 (2004) (finding that the
8 exclusion of devotional theology degree programs from eligibility for state scholarships does not
9 violate Free Exercise Clause); *Skoros v. City of New York*, 437 F.3d 1, 39 (2d Cir. 2006) (“Just as
10 government may not compel any person to adopt a prescribed religious belief or form of worship,
11 no person may require the government itself to behave in ways that the individual believes will
12 further his or her spiritual development.” (internal quotation marks and emphasis omitted));
13 *Eulitt ex. rel. Eulitt v. Maine Dep’t of Educ.,* 386 F.3d 344, 354 (1st Cir. 2004) (“The fact that the
14 state cannot interfere with a parent’s fundamental right to choose religious education for his or
15 her child does not mean that the state must fund that choice . . . .”); *see also Regan v. Taxation*
16 *With Representation of Washington*, 461 U.S. 540, 549-50 (1983) (“We have held in several
17 contexts that a legislature’s decision not to subsidize the exercise of a fundamental right does not
18 infringe the right . . . . The reasoning of these decisions is simple: although government may not
19 place obstacles in the path of a person’s exercise of . . . freedom of speech, it need not remove
20 those not of its own creation.” (internal quotation marks and brackets omitted)).

2) The Supreme Court's ruling in Lukumi that invidiously discriminatory ordinances targeting a religious practice of a particular religion are subject to strict scrutiny has no application to Reg. I.Q.

The District Court believed that under authority of the Supreme Court's ruling in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993) ("*Lukumi*"), the validity of Reg. I.Q. must be assessed under strict scrutiny because it prohibits the provision of a subsidized premises for the conduct of religious worship services, constitutes a discrimination against religion generally, and constitutes a discrimination against those religions that conduct worship services. *Bronx Household*, 876 F. Supp. 2d at 428-32. We respectfully disagree. In our view the District Court's reasoning is incorrect for several reasons. In the first place, we think the District Court's view that Reg. I.Q. is subject to strict scrutiny is based on a misunderstanding of *Lukumi*. Secondly, on facts very similar to these, the Supreme Court has rejected applicability of strict scrutiny. Furthermore, a reasonable governmental decision not to subsidize a category of activity is not a suspect discrimination among religions merely because some religions do and others do not engage in that activity.

a) Suspect discrimination against religion.

The District Court believed that, under the *Lukumi* precedent, because the conduct of religious worship services is an activity that has no secular analog, a decision by the Board not to subsidize it is necessarily a suspect discrimination against religion to be assessed under strict scrutiny. *But see* note 4; *Bronx Household III*, 492 F.3d at 92-106 (Calabresi, J. concurring);

1 *Bronx Household IV*, 650 F.3d at 51-52 (Calabresi, J., concurring). It is correct without question
2 that in declining to furnish school facilities for the conduct of religious worship services, Reg.
3 I.Q. focuses on a religious activity that has no secular analog. There is no such thing as a
4 nonreligious "religious worship service." In our view, the District Court's conclusion is based on
5 a misunderstanding of the Supreme Court's opinion. While there are indeed words in the *Lukumi*
6 opinion, which, if taken out of context, could be read as expressing such a message, it becomes
7 clear when the words are considered in context that they mean no such thing.

8 In *Lukumi*, worshipers in the Santeria religion, in which animal sacrifice plays an
9 important part of worship services, were planning to build a house of worship in the city of
10 Hialeah, Florida. 508 U.S. at 525-26. Members of Hialeah's city council disapproved of
11 Santeria's practice of animal sacrifice and, with a goal of banning the practice, the council passed
12 a set of ordinances prohibiting the unnecessary killing of animals in a ritual or ceremony not
13 primarily for the purpose of food consumption. *Id.* at 526-28. Hialeah claimed that the
14 prohibition was motivated by secular objectives including public health and prevention of cruelty
15 to animals. *Id.* at 527-28. Although the set of ordinances was designed to appear to apply even-
16 handedly to religious and secular conduct alike, a plethora of exceptions and exclusions
17 (exempting, for example, fishing and Kosher slaughter) made the prohibition apply almost
18 exclusively to the Santeria ritual of animal sacrifice. *Id.* at 535 ("[A]lmost the only conduct
19 subject to [the prohibition] is the religious exercise of Santeria church members."). In addition,
20 the legislative history revealed that disapproval of animal sacrifice *as a Santeria religious ritual*
21 had in fact motivated the legislators. *Id.* at 534 ("[S]uppression of the central element of the

1 Santeria worship service was the object of the ordinances."). Furthermore, although the
2 legislation claimed a variety of secular goals, those objectives were belied by exclusions that
3 were incompatible with those goals because they widely permitted animal sacrifice outside the
4 context of Santeria religious ceremonies. *Id.* at 536. Because the prohibition was found to be
5 motivated by disapproval of a religious practice and represented an attempt suppress it, and
6 because, notwithstanding its disguise, it in fact applied almost exclusively to the Santeria ritual of
7 animal sacrifice, the Supreme Court found that the ordinances were subject to strict scrutiny, and
8 that they violated the plaintiffs' free exercise rights. *Id.* at 547.

9 The *Lukumi* opinion, indeed, declared the "principle" that "government, in pursuit of
10 legitimate interests, cannot in a selective manner impose *burdens* only on conduct motivated by
11 religious belief," *id.* at 543 (emphasis added), thus justifying strict scrutiny. It characterized this
12 principle as "essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id*.
13 Yet, there are crucial differences between the facts in *Lukumi* and those in the present case. First,
14 the ordinances in *Lukumi* were intended to, and did, *suppress* a religious ritual of a particular
15 faith, by prohibiting its performance in the city. Reg. I.Q. does no such thing. It leaves all
16 religions free without interference to engage in whatever religious practices they choose
17 (including, of course, religious worship services) throughout the City. It represents only a
18 decision by the Board not to subsidize religious worship services by providing rent-free school
19 facilities in which to conduct them.

20 Second, the Hialeah ordinances were motivated by the city council's disapproval of the
21 targeted religious practice. The Board has no such motivation. There is not a scintilla of evidence

that the Board disapproves of religion or any religion or religious practice, including religious worship services. Its sole reason for excluding religious worship services from its facilities is the concern that by hosting and subsidizing religious worship services, the Board would run a meaningful risk of violating the Establishment Clause by appearing to endorse religion. This difference is of crucial importance in determining the reach of *Lukumi*'s reasoning that a burdensome regulation focused on a religious practice is constitutionally suspect and therefore subject to strict scrutiny. This reasoning makes perfect sense when the regulation's focus on religion is gratuitous, and all the more so when it is motivated by disapproval of religion (or of a particular religion or religious practice). On the other hand, it makes no sense when the regulation's focus on religion is motivated by the governmental entity's reasonable interest in complying with the Establishment Clause. The Free Exercise and Establishment Clauses place limits on the conduct of all governmental entities. The Free Exercise Clause prohibits government from interfering with free exercise of religion. The Establishment Clause prohibits government from engaging in conduct that would constitute an establishment of religion, such as endorsing, or seeming to endorse, a religion. It is only to the extent that governmental conduct *affects religion* that the restrictive force of the Religion Clauses is operative. Accordingly, rules and policies designed to keep a governmental entity in conformity with its obligations under the Religion Clauses must of necessity focus on religious subject matter. If the focus is not religious, the Religion Clauses have no application. Such focus on religion is neither an invidious discrimination nor constitutionally suspect. To the contrary, it is inevitable.

1 To illustrate, we consider a number of rules that might be adopted with the purpose of
2 complying with the Religion Clauses. One such rule might state, "This city shall not adopt any
3 rule or practice that constitutes an improper burden on the free exercise of religion, or that
4 constitutes an establishment of religion." Or a school board might adopt a rule stating, "No
5 school or teacher shall compel any student to participate in religious exercises, or seek to
6 persuade any student to alter his or her religious beliefs." Such rules can hardly be
7 constitutionally suspect in view of the fact that they are constitutionally mandated. Going further,
8 a reformed Hialeah, chastened by the Supreme Court's ruling in *Lukumi,* might adopt a new
9 ordinance that summarizes the Supreme Court's ruling. The ordinance might provide something
10 like, "Under no circumstances will this city pass any ordinance prohibiting any practice
11 undertaken as a religious exercise, unless it similarly prohibits the practice when done in a
12 secular context, and in no circumstances will a practice be prohibited because of disapproval of
13 the practice as a religious ceremony." Or, in recognition of the Supreme Court's recent ruling in
14 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694 (2012), that
15 there is a constitutionally compelled "ministerial exception" to the laws forbidding
16 discrimination in employment, the Congress might pass a statute amending the federal laws that
17 forbid discrimination in employment, stating something like, "No minister of a religious faith
18 shall have a claim against the church or religious organization that employs the minister for the
19 performance of ministerial duties." These hypothetical rules – the very rules declared by the
20 Supreme Court to be constitutionally mandated – do not represent invidious discrimination
21 against religion and are not constitutionally suspect simply because the limitations they impose

1 target religion. They target religion in order to give effect to the Constitution's Religion Clauses,
2 which themselves apply only to religion. Yet under the District Court's analysis, a statute stating
3 the rule of *Lukumi* would fail to pass the test of *Lukumi,* and a statute stating the rule of
4 *Hosanna-Tabor* would fail to pass the test of *Hosanna-Tabor*. We believe the District Court has
5 misunderstood *Lukumi* in construing it to mean that a rule declining to subsidize religious
6 worship services so as not to risk violating the Establishment Clause is automatically
7 constitutionally suspect and subject to strict scrutiny.

8 *b) Locke v. Davey.*

9 More importantly, upon facts very similar to ours, the Supreme Court has expressly ruled
10 that where motivated by Establishment Clause concerns, a governmental decision to exclude
11 specified religious causes from eligibility to receive state educational subsidies is neither a
12 violation of free exercise, nor even subject to strict scrutiny under *Lukumi*.[6] In *Locke v. Davey*,
13 540 U.S. 712 (2004), the State of Washington had established a scholarship program to assist
14 academically gifted students in post-secondary education. 540 U.S. at 715. The state, however,
15 provided by statute and by provision of its constitution that students pursuing a degree in
16 theology were not eligible to receive the scholarship grants. *Id.* at 716. This restriction was
17 challenged by Davey, a gifted student, who was awarded a grant but was informed that it could
18 not be used to pursue the degree in pastoral ministries he sought. *Id.* at 717. Davey brought suit

[6]Judge Walker argues in his dissent that "*Locke* is not applicable here . . . because it dealt only with a government subsidy." Dissenting Op. 7. However, Reg. I.Q. also concerns a government subsidy. As discussed above, the regulation represents a governmental decision not to subsidize religious worship services by providing rent-free facilities to house such services. *See supra* pp. 10, 12. Therefore, *Locke* is not distinguishable on this ground.

alleging, among other claims, that the state's refusal to allow use of its scholarship funds for the study of theology was, under the rule of *Lukumi*, presumptively unconstitutional and subject to strict scrutiny. *Id.* at 720. Recognizing the state's Establishment Clause interest underlying the restriction, the Court observed that "[t]he[] two [Religion] Clauses . . . are frequently in tension. Yet we have long said that there is room for play in the joints between them. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 718-19 (citations and internal quotation marks omitted). Specifically addressing Davey's claim that the prohibition was presumptively unconstitutional and subject to strict scrutiny pursuant to *Lukumi,* the Court concluded:

> We reject his claim of presumptive unconstitutionality, however; to do otherwise would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning. In *Lukumi*, the city of Hialeah made it a crime to engage in certain kinds of animal slaughter. We found that the law sought to suppress ritualistic animal sacrifices of the Santeria religion. In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit. The State has merely chosen not to fund a distinct category of instruction.

Id. at 720-21 (citations and footnote omitted).

1 Finding no animus toward religion in the legislative history or text of the prohibition, nor
2 in the operation of the scholarship program, and finding substantial evidence indicating a
3 historical aversion to using tax funds to support the ministry, "which was one of the hallmarks of
4 an 'established' religion," *id*. at 722-25, the Court concluded that, "[g]iven the historic and
5 substantial state [anti-establishment] interest at issue, we therefore cannot conclude that the
6 denial of funding for vocational religious instruction alone is inherently constitutionally suspect."
7 *Id*. at 725. Accordingly, Davey's Free Exercise Clause claim failed because "[t]he State's [anti-
8 establishment] interest in not funding the pursuit of devotional degrees is substantial and the
9 exclusion of such funding places a relatively minor burden on [students eligible for scholarship
10 funds]." *Id*.

11 As Washington's exclusion of students of theology from eligibility for the state's
12 subsidies was not subject to strict scrutiny under *Lukumi* because the exclusion was enacted in
13 the interest of establishment concerns, we can see no reason why the rule should be any different
14 in this case. We see no meaningful distinctions between the cases. Our record reveals no animus
15 toward religion generally or toward a particular religion or religious practice in either the text of
16 Reg. I.Q. or the operation of Board's policy. Underlying the Board's prohibition is a slightly
17 different manifestation of the same historical and constitutional aversion to the use of public
18 funds to support the practice of religion cited by the Court in *Locke*. As in *Locke,* the Board's
19 interest in respecting the principle of the Establishment Clause that disfavors public funding of
20 religion is substantial, and the burden, if it can properly be called a burden, that falls on Bronx
21 Household in needing to find a location that is not subsidized by the City for the conduct of its
22 religious worship services, is minor from a constitutional point of view.

1 We do not mean to imply that merely by claiming the motivation of observing interests
2 favored by the Establishment Clause a governmental entity gets a free pass, avoiding *all* scrutiny.
3 We recognize that a school authority's prohibition of a religious practice, even if explained as an
4 attempt to comply with constitutional responsibilities, can in some circumstances represent a
5 suspect discrimination of religion, which violates one or both of the Religion Clauses. A court
6 would likely have rejected, for example, a claim by Hialeah that its ordinances, which prohibited
7 almost exclusively a religious practice of the Santeria church, were permissible in light of
8 Hialeah's interest in observing the Establishment Clause. *See Good News Club*, 533 U.S. at 112-
9 19 ("[A]corrding to Milford, its restriction was required to avoid violating the Establishment
10 Clause. We disagree.").
11 Our point is therefore not that a refusal to subsidize a religious practice, sought to be
12 justified as an effort to comply with the Establishment Clause, necessarily defeats a claim of
13 violation of the Free Exercise Clause. It is rather that *Lukumi*'s invocation of presumptive
14 unconstitutionality and strict scrutiny cannot reasonably be understood to apply to rules that
15 focus on religious practices in the interest of observing the concerns of the Establishment Clause.
16 The constitutionality of such rules must be assessed neutrally on all the facts and not under strict
17 scrutiny.
18 *c) Discrimination against particular religions.*
19 We also disagree with the District Court's view that Reg. I.Q. is a constitutionally suspect
20 discrimination *among religions* because it affects religions that conduct worship services and
21 does not affect religions that do not. Reg. I.Q. treats all religions in the same fashion. It leaves all

1 religions free to engage in whatever practices they wish anywhere other than the Board's school
2 facilities. Furthermore, to the extent that different religions choose to avail themselves of the
3 Board's subsidized facilities, Reg. I.Q. treats them all similarly as to what they may do and may
4 not do. The "religious worship services" prohibition bars all conduct of religious worship
5 services in the school facilities. The activities not prohibited are likewise permitted to all users.
6 Religions that conduct religious worship services are not excluded by Reg. I.Q. from the
7 use of school facilities. They may use the facilities for the same purposes and in the same manner
8 as the facilities are used by religions that do not conduct religious worship services. They may
9 use the facilities to teach religion, read from and discuss the Bible, advocate their religious
10 views, sing hymns, say prayers, and do all things that must be permitted under the rule of *Good*
11 *News Club.* Such religions, it is true, may not use the school facilities for the conduct of religious
12 worship services. While Reg. I.Q. thus treats these two classes of religions equally, its impact on
13 them will be different to the extent that religions that do not conduct religious worship services
14 will not apply to conduct religious worship services and will therefore not be refused something
15 they might have wanted, while religions that do conduct religious worship services, such as
16 Bronx Household, may ask to conduct religious worship services and be denied.
17 It does not follow, however, that such a disparate impact violates the Free Exercise
18 Clause. "[I]t is a basic tenet of First Amendment law that disparate impact does not, in itself,
19 constitute viewpoint discrimination." *Christian Legal Soc. Chapter of the Univ. of California,*
20 *Hastings Coll. of the Law v. Martinez,* 130 S.Ct. 2971, 2996 (2010). In *Lukumi*, the reason for
21 striking down the Hialeah ordinances was not that the Santeria religion wished to practice animal

sacrifice while other religions did not. The prohibition of Santeria's ritual animal sacrifice was struck down because the evidence showed that the prohibition was motivated exclusively by discriminatory disapproval of that religious practice, and that the city's claim that the ordinances were motivated by public health and other neutral concerns was false. It is the clear implication of the Supreme Court's opinion that, if the prohibition had applied across-the-board, affecting religious and secular practice equally, and had not been motivated by hostility to Santeria's religious practice, the prohibition would have been upheld, notwithstanding that it would have burdened the Santeria religion without similarly burdening other religions that do not practice animal sacrifice. *See Lukumi*, 508 U.S. at 547 ("Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.").

Thus, it is clear that the Free Exercise Clause would not prohibit the Board from denying permits to those seeking to use school facilities for the killing of animals, or for boxing, or other martial arts contests, so long as the Board's restriction applies to secular usage as well as religious, and was not motivated by discriminatory disapproval of any particular religion's practices. The Board is not compelled to permit a practice it has a justifiable reason for excluding just because the exclusion may affect one religion that practices the excluded conduct while not affecting other religions that do not.

1 Nothing in this record remotely supports a finding that the Board disapproves of
2 religious worship services or wishes to favor religions that do not practice religious worship
3 services over those that do. The Board's only motivation is to act consistently with its
4 establishment concerns and protect itself against reasonable Establishment Clause challenges.[7]
5 We conclude that *Lukumi*'s invocation of strict scrutiny has no application to these facts,
6 and that Reg. I.Q. does not impose an unconstitutional burden on Bronx Household's right of
7 free exercise of religion.[8]

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[7] Nor was the District Court correct in its view that Reg. I.Q. discriminates against "religions that fit the 'the ordained' model." *Bronx Household*, 876 F. Supp. 2d at 431. There is no evidence whatsoever that the Board applies Reg. I.Q. only where the proposed religious worship service would be conducted by an ordained minister. The District Court perhaps based this finding on our earlier observation in *Bronx Household IV* that "[r]eligious worship services are conducted according to the rules dictated by the particular religious establishment and are *generally* performed by an officient of the church or religion." 650 F.3d at 41 (emphasis added). This passage was descriptive, rather than prescriptive, and included the word "generally" to make clear that the presence of an officiant was merely a common feature, and not a definitional requirement of a religious worship service. Far from specifying that an ordained officiant is an essential feature of services to which Reg. I.Q. applies, the Board has essentially left it to applicants to state whether they will conduct religious worship services.

[8] Alternatively, the same sensible result could be reached through two other routes of interpretation. First, the *Lukumi* "principle" that "government, in pursuit of legitimate interests, cannot in a selective manner impose *burdens* only on conduct motivated by religious belief," 508 U.S. at 543 (emphasis added), might be deemed inapplicable to the present case on the ground that a government decision not to subsidize a religious activity is not deemed to constitute a "burden" on that activity, within the meaning of *Lukumi*. Or, the "strict scrutiny" test may apply, but be deemed satisfied when government decides not to subsidize a religious practice acting on a good faith and reasonable concern that such subsidizing would present a meaningful risk of being found in violation of the Establishment Clause. Regardless of which of these three analytical formulas is used, the validity of Reg. I.Q. would be sustained against Bronx Household's *Lukumi*-based challenge.

1 3) *If the Board has a reasonable, good faith concern that making its school facilities*
2 *available for the conduct of religious worship services would give rise to a substantial*
3 *risk of violating the Establishment Clause, the permissibility of the Board's refusal to do*
4 *so does not turn on whether such use of school facilities would in fact violate the*
5 *Establishment Clause.*

6 As in *Bronx Household IV*, we do not reach the question whether the Board would violate
7 the Establishment Clause by allowing the subsidized use of the school facilities for religious
8 worship services because we believe it is unnecessary to do so. The District Court acknowledged
9 that a motivation to avoid violation of the Establishment Clause would justify the Board's
10 exclusion of religious worship services *if* allowing the conduct of religious worship services
11 would in fact violate the Establishment Clause. But the court expressed the view that, unless the
12 excluded practice would in fact constitute a violation of the Establishment Clause, steering clear
13 of conduct that might be reasonably suspect under the Establishment Clause does not furnish
14 adequate reason for declining to offer the school facilities for the conduct of religious worship
15 services. *Bronx Household*, 876 F. Supp. 2d at 433-37. The Board contends this was error.

16 We cannot accept the District Court's rule for two reasons. First, this rule would unfairly
17 put the Board in an impossible position of being compelled at its peril to risk violating one
18 Religion Clause or the other if it wrongly guessed the Establishment Clause's exact contours.
19 Second, the District Court's rule contradicts the most nearly comparable Supreme Court
20 authority, as well as clear Second Circuit authority.

No extant decision by the Supreme Court permits the Board to predict with confidence whether it might be found in violation of the Establishment Clause if it offers its school facilities to Bronx Household, as well as numerous other churches, for the conduct of subsidized worship services (virtually all of which would be Christian services held on Sundays, as that is when the school facilities are most available for such use). Essentially two choices are open to the Board. It can either make its facilities available for worship services, or decline to do so. If the rule were as the District Court proposed, a wrong guess as to what the Supreme Court will eventually hold would put the Board in violation of one of the two Religion Clauses. If the Board declines to host and subsidize religious worship services, and the Supreme Court eventually rules that allowing religious worship services would not violate the Establishment Clause, the Board would have committed years of violations of the Free Exercise Clause rights of rejected permit applicants. On the other hand, if the Board offers its facilities for subsidized religious worship services, and the Supreme Court eventually rules that the practice causes sufficient appearance of endorsement to constitute a violation of the Establishment Clause, the Board would have committed years of violation of that clause. Under the District Court's rule, the Board would be compelled to speculate with little guidance which way the Supreme Court will eventually go, and if it guesses wrong, it would have committed extensive violations of one of the Religion Clauses. Such a rule would be exceedingly unfair to the Board. In our view, the better rule allows the Board, if it makes a reasonable, good faith judgment that it runs a substantial risk of incurring a violation of

1 the Establishment Clause by hosting and subsidizing the conduct of religious worship services, to
2 decline to do so.[9]

3 Furthermore, the Supreme Court in *Locke* expressly rejected the District Court's rule. As
4 we explained above, in *Locke* the Court was ruling on the question whether the State of
5 Washington, acting pursuant to constitutional and historical concerns about government funding
6 of religious practices, could lawfully exclude students seeking degrees in theology from
7 eligibility for state scholarship grants. In ruling that the exclusion did not violate the free exercise
8 rights of the plaintiff who was ineligible for grant funds because he was pursuing a degree in
9 theology, the Court explicitly considered and rejected the argument that establishment concerns
10 could justify the religion-based exclusion only if the reviewing court concluded that granting the
11 subsidy for the excluded religious purpose would in fact violate the Establishment Clause. It
12 explained, as set forth above, that "there is room for play in the joints between [the Religion
13 Clauses]. . . . [S]ome state actions permitted by the Establishment Clause . . . [are] not required
14 by the Free Exercise Clause. . . . If any room exists between the two Religion Clauses, it must be
15 here." 540 U.S. at 718-19, 725 (internal quotation marks omitted). If it was clear that the State of
16 Washington was free in service of establishment interests to exclude theology students from
17 eligibility for its scholarships, even though making them eligible would not have violated the
18 Establishment Clause, we see no reason why the Board may not similarly in service of the

[9] *Cf. Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) ("[U]nder Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.").

1 establishment interests decline to subsidize religious worship services, even if subsidizing them
2 would not violate the Establishment Clause.

3 Furthermore, our court has repeatedly rejected the District Court's rule. In *Marchi v. Bd.*
4 *of Coop. Educ. Servs. of Albany*, 173 F.3d 469 (2d Cir. 1999), we considered a teacher's claim
5 that his First Amendment rights were violated by a school board directive that he "cease and
6 desist from using any references to religion in the delivery of [his] instructional program unless it
7 is a required element of a course of instruction for [his] students and has prior approval by [his]
8 supervisor." *Id*. at 472-73. We decided that the school board "d[id] not impermissibly infringe
9 Marchi's free exercise rights" in interpreting the directive to prohibit communications that
10 "sufficiently intruded religious content into a curricular matter, not involving religion, such that
11 the school authorities could reasonably be concerned that communications of this sort would
12 expose it to non-frivolous Establishment Clause challenges." *Id*. at 477. We recognized that
13 "when government endeavors to police itself and its employees in an effort to avoid transgressing
14 Establishment Clause limits, it must be accorded some leeway, even though the conduct it
15 forbids might not inevitably be determined to violate the Establishment Clause" because "[t]he
16 decisions governmental agencies make in determining when they are at risk of Establishment
17 Clause violations are difficult." *Id*. at 476; *see id*. ("[I]n dealing with their employees,
18 [governmental agencies] cannot be expected to resolve so precisely the inevitable tensions
19 between the Establishment Clause and the Free Exercise Clause that they may forbid only
20 employee conduct that, if occurring, would violate the Establishment Clause and must tolerate all
21 employee conduct that, if prohibited as to non-employees, would violate the Free Exercise
22 Clause.").

1 And in *Skoros v. City of New York*, 437 F.3d 1 (2d Cir. 2006), we considered a Free
2 Exercise Clause challenge to New York City Department of Education's school holiday display
3 policy, which had been promulgated in light of Establishment Clause concerns. The policy
4 permitted the display of "secular" holiday symbols including Christmas trees, menorahs and the
5 star and crescent but did not permit a crèche to be displayed as a symbol of Christmas. *Id*. at 5-6.
6 We decided that the holiday display policy did not violate the Free Exercise Clause and, in doing
7 so, recognized that even though the policy might have permitted a crèche to be displayed without
8 violating the Establishment Clause, "we afford the government some leeway in policing itself to
9 avoid Establishment Clause issues, even if it thereby imposes limits that go beyond those
10 required by the Constitution." *Id.* at 34-35.

11 Returning to the present case, as we explained at length in *Bronx Household IV*, the
12 Board has substantial reasons for concern that hosting and subsidizing the conduct of religious
13 worship services would create a substantial risk of liability under the Establishment Clause.
14 "[T]he Supreme Court has warned that violation of the Establishment Clause can result from
15 *perception* of endorsement. The Establishment Clause, at the very least, prohibits government
16 from *appearing* to take a position on questions of religious belief." 650 F.3d at 41 (internal
17 quotation marks omitted). As we explained, during Sunday services, under the District Court's
18 injunction, the Board's schools are dominated by church use: "Church members post signs,
19 distribute flyers, and proselytize outside the school buildings. In some schools, no other outside
20 organizations use the space. Accordingly, on Sundays, some schools effectively become churches
21 [as] both church congregants and members of the public identify the churches with the schools."

1 *Id*. at 42. We noted also that the fact that school facilities are available for such use primarily on
2 Sundays results in an unintended bias in favor Christian religions, which prescribe Sunday as the
3 principal day for worship services, while Jews and Muslims, for example, hold worship services
4 on days during which school facilities are less available for such use. *Id.* at 43. All of this, which
5 we explained in greater detail in our earlier opinion, supports a reasonable concern on the part of
6 the Board that hosting and subsidizing the conduct of religious worship services might support a
7 non-frivolous claim that the Board is creating a public perception of endorsement of religion. *Id.*
8 at 42.

9 In view of (1) the absence of discriminatory animus on the part of the Board against
10 religion, or against religions that conduct worship services; (2) the bona fides and the
11 reasonableness of the Board's concern that offering school facilities for the subsidized conduct of
12 religious worship services would create a substantial risk of incurring a violation of the
13 Establishment Clause claim; and (3) the fact that the Board's policy (a) leaves all persons and
14 religions free to practice religion without interference as they choose, (b) treats all users, whether
15 religious or secular, in identical fashion, and (c) imposes no burden on any religion, leaving all
16 free to conduct worship services wherever they choose other than the Board's schools; as well as
17 the other reasons recited in this opinion and in *Bronx Household IV*, we conclude that Reg. I.Q.
18 does not violate Plaintiffs' rights to free exercise of religion, whether or not it is subject to strict
19 scrutiny.

1 B. *The Establishment Clause*

2 *1) The District Court erred in concluding that Reg. I.Q. violates the Establishment*
3 *Clause because it compels the Board to become excessively entangled with religion by*
4 *deciding what are religious worship services.*

5 The District Court ruled that the Board's very act of determining whether a proposed use
6 of the school facilities is a religious worship service (and therefore is prohibited by Reg. I.Q.)
7 would constitute an excessive entanglement with religion, which violates the Establishment
8 Clause. *Bronx Household*, 876 F. Supp. 2d at 440-45; *see Lemon v. Kurzman*, 403 U.S. 602, 612-
9 13 (1971). We disagree for a number of reasons.

10 When this case was before us in *Bronx Household IV*, Bronx Household presented us
11 with the same argument. We rejected it. First, we noted that whatever merit the argument might
12 have in other circumstances, it could have no application here because Bronx Household
13 acknowledged its intention to conduct religious worship services in the school facilities. Its
14 application for an extended use permit specified its intention to conduct "Christian worship
15 services." 650 F.3d at 35. Furthermore, we noted that Bronx Household's argument
16 "overlook[ed] the nature of the duties placed on government officials by the Establishment
17 Clause." *Id*. at 47. The Establishment Clause prohibits government officials from taking action
18 that would constitute an establishment of religion. In many circumstances, especially when
19 dealing with applications to conduct arguably religious exercises on public property, government
20 officials cannot discharge their obligations under the Establishment Clause without examining
21 the conduct to determine whether it is in fact religious and, if so, whether the conduct is of such

nature that allowing it to take place on public property would constitute a prohibited establishment of religion. If public officials were not permitted to undertake such inquiries, they could not discharge their duties to guard against violation of the Establishment Clause. Thus, the Constitution, far from forbidding government examination of arguably religious conduct, at times compels government officials to undertake such inspection in order to draw constitutionally necessary distinctions. We concluded that "the mere act of inspection of religious conduct" did not constitute excessive entanglement, observing that to prohibit such inspection "would effectively nullify the Establishment Clause." *Id*.

On remand, the District Court concluded that "[f]actual and legal developments since [*Bronx Household IV*] merit reconsideration of Plaintiffs' Establishment Clause claim." *Bronx Household*, 855 F. Supp. 2d at 60-61. In particular, the District Court pointed to "new facts documenting how the Board's current policy fosters excessive governmental entanglement" and the Supreme Court's recent decision in *Hosanna-Tabor*. *Id.* at 64. The District Court believed this decision pertinent because the Supreme Court "emphasized the wide berth religious institutions are to be given with respect to their core activities, including worship." *Id*. at 63. Upon reconsidering Bronx Household's Establishment Clause claim, the District Court concluded that Reg. I.Q. compels Board officials to become excessively entangled with religion by requiring them "to make their own bureaucratic determinations as to what constitutes 'worship,'" contravening *Hosanna-Tabor*'s prohibition of such government involvement in ecclesiastical decisions. *Bronx Household*, 876 F. Supp. 2d at 440.

1 We respectfully disagree. The evidentiary record does not sustain the district court's
2 findings that the Board makes its own determination whether an applicant's proposed activities
3 constitute a religious worship service. And, in any event, *Hosanna-Tabor* does not support the
4 proposition that it would be improper for the Board to make such a determination.

5 The Board's policy is *not* to make its own determination whether conduct proposed by an
6 applicant constitutes a religious worship service. To the contrary, the Board's policy is to rely on
7 the applicant's own characterization as to whether the applicant will conduct religious worship
8 services. Under Reg. D-180, every extended use applicant must submit an application for a
9 permit. The application form requires the applicant to provide a "Description of Activities to be
10 conducted," and to sign a certification that "the Information I have provided . . . is complete and
11 accurate to the best of my knowledge," and that "the activities to be conducted . . . do not include
12 any of the prohibited uses described . . . in Chancellor's Regulation D-180." App. 996.[15] The
13 Board reviews the applicant's "Description of Activities to be conducted" to see whether the
14 applicant has stated an intention to conduct religious worship services. It does not consider
15 whether proposed activities that the application does not describe as a religious worship service
16 in fact constitute a religious worship service. The Board may, however, look beyond the
17 application at the applicant's website and other public materials. If the applicant states on its
18 website or in other public materials an intention to conduct a religious worship service without

[15] *See also* Reg. D-180 § II.L ("Providing incorrect, incomplete, or misleading information on the Permit Application or the failure to conform to any of the guidelines and/or limitations contained in this regulation, as well as any other applicable laws and regulations governing the use of school buildings and grounds, may lead to the revocation of the permit, the denial of future Permit Applications and other legal actions by the [Board].").

1 having acknowledged that intention in its application, the Board may either request an
2 explanation of the apparent discrepancy or deny the application pursuant to § II.L of Reg. D-180.
3 As with respect to the application itself, in reviewing an applicant's website or other public
4 materials, the Board does not make its own assessment whether the described activities constitute
5 a religious worship service but limits its inquiry to the applicant's own characterization. The
6 Board, furthermore, makes no attempt to define, or impose on applicants a definition of, what
7 constitutes a "religious worship service."

8 Although it is uncontradicted that the Board's policy is not to make its own determination
9 whether an applicant's proposed activities constitute a religious worship service, but rather to
10 rely exclusively on the applicant's own characterization, the District Court nonetheless concluded
11 that Reg. I.Q. compels excessive entanglement because the Board acknowledged that its policy of
12 not making its own determination had not in every instance been properly carried out. *Bronx*
13 *Household*, 876 F. Supp. 2d at 440-41. For example, the Board acknowledged an instance (not
14 involving Bronx Household) in which, contrary to Board policy, a permit applicant who
15 indicated that the activities to be conducted included "Prayer" and "Bible Study" was told by a
16 Board representative that "Bible study would be ok, but not prayer meetings." The fact that there
17 have been instances, none involving Bronx Household, in which Board personnel improperly
18 deviated from the Board's policy cannot justify the District Court's conclusion that Reg. I.Q.
19 compels excessive entanglement and is therefore unconstitutional.

1 The District Court also justified its finding based on the fact that the Board's policy
2 permits the Board to inspect an applicant's website and other public materials. The court
3 explained,

> 4 While this approach of looking beyond the four corners of the Extended Use
> 5 Application may be proper for purposes of verifying a political or commercial
> 6 applicant's compliance with Ch. Reg. D–180, the same cannot be said of
> 7 verifying whether a religious applicant is complying with the worship-related
> 8 provisions of the regulation. This is because it is the religious adherents alone
> 9 who can determine for themselves how to "shape their own faith,"
> 10 *Hosanna–Tabor,* 132 S.Ct. at 706, and no amount of bureaucratic second-
> 11 guessing—even if based solely on the adherents' own words—may invade
> 12 their province.

13 *Bronx Household*, 876 F. Supp. 2d at 442 (citation, brackets and internal quotation marks
14 omitted).

15 We believe the District Court's reasoning was flawed in two respects. First, as explained
16 above, the Board's policy providing that it may examine an applicant's website and other public
17 materials (in addition to the application) was not a deviation from the Board's policy of accepting
18 an applicant's own characterization of whether its activities constitute a religious worship
19 service. According to the Board's policy, it is only when an applicant itself characterizes its
20 conduct as a religious worship service that the Board will consider it to be such. The aspect of the
21 Board's policy that allows it to look at an applicant's website and other public materials in
22 addition to the application does not represent a deviation from the policy of using only an
23 applicant's own characterization.

1 Because the Board does not make its own determinations whether an applicant's
2 proposed activities constitute worship services, the District Court's interpretation of *Hosanna-*
3 *Tabor* as prohibiting a governmental authority from making such determinations has no
4 pertinence. But, even if the Board were making its own determinations, *Hosanna-Tabor* would
5 not prohibit such a policy. The Supreme Court's ruling rather supports the opposite conclusion.
6 In *Hosanna-Tabor*, the plaintiff Perich, who was employed by a church to teach in a
7 capacity regarded by the church as that of a minister, was dismissed from her employment after
8 developing an illness and taking a period of disability leave. 132 S.Ct. at 700. The plaintiff sued
9 for reinstatement, alleging that her dismissal violated the Americans with Disabilities Act (the
10 "ADA"), 42 U.S.C. § 12101 *et seq.* (1990). *Id.* at 701. The Supreme Court ruled in favor of the
11 church, holding that, because the plaintiff was employed by the church as a minister, she had no
12 claim against the church under the employment discrimination laws. *Id*. at 707-10. The Court
13 reasoned that, because the Free Exercise Clause requires that religions be free to select their own
14 ministers, and because the Establishment Clause is offended by giving the state the power to
15 determine which individuals will minister to the faithful on behalf of a church, there is an
16 implicit, constitutionally mandated "ministerial exception" to the employment discrimination
17 laws. The Court explained,

18 > Requiring a church to accept or retain an unwanted minister, or punishing a
19 > church for failing to do so, intrudes upon more than a mere employment
20 > decision. Such action interferes with the internal governance of the church,
21 > depriving the church of control over the selection of those who will personify
22 > its beliefs. By imposing an unwanted minister, the state infringes the Free

> Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Id. at 706.

In the present case, even if the Board were making its own determination whether an applicant's proposed conduct constitutes a religious worship service, *Hosanna-Tabor* would not support the conclusion that the Establishment Clause prohibits a governmental entity from making that determination. This is for two reasons.

First, the constitutional impropriety that led the Supreme Court to read a ministerial exception into the employment discrimination statutes is not present on these facts. The problem in *Hosanna-Tabor* was that, unless the employment discrimination laws are read not to apply to a claim against a church by a minister asserting a right to employment, the consequence would be that a governmental authority – a judge, or a jury, or an administrative agency – would dictate to the church whom it must employ to serve as minister, communicating its teachings to its faithful. The governmental authority would, to a significant extent, be directing, shaping and controlling the ecclesiastical actions of the church.

The Board deciding for itself whether an applicant's proposed conduct constitutes a religious worship service would not entail imposing any such control over a church's religious activity. Unlike *Hosanna-Tabor*, where a government authority would be requiring a church to communicate the tenets of its faith through a minister not of its own choosing, under no

1 circumstances would the Board under Reg. I.Q. be telling any person or entity how to conduct
2 worship services. The only practical consequences that would turn on the Board's decision would
3 be whether the Board would make its subsidized school facilities available to the applicant. The
4 applicant would remain free to shape its religious worship services in any way it chose.[16]

5 *Hosanna-Tabor*, moreover, does not merely fail to support Bronx Household's claim of
6 Establishment Clause violation due to excessive entanglement by the Board; it actively
7 contradicts the argument. This is because in *Hosanna-Tabor* the Supreme Court itself did
8 precisely what the District Court found a governmental entity prohibited from doing.

9 The conclusion that there is an implicit ministerial exception that bars a minister from
10 suing the church that employs her under the ADA did not resolve the case. The question
11 remained whether the plaintiff was a minister and thus subject to the ministerial exception. It was
12 undisputed that, according to the church's classification, the plaintiff served in the role of a
13 commissioned minister.[17] If the District Court were correct, the church's classification of the

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[16]Nor could a decision by the Board overruling an applicant's own understanding of whether proposed activities constituted a religious worship service ever deprive an applicant of the opportunity to conduct what it deemed to be a religious worship service. The denial of a permit application based on the Board's rejection of the applicant's own characterization of the proposed activities would occur only when the Board deemed activities that the applicant did not consider a religious worship service to be a religious worship service. In that circumstance, by definition, the denial would only prohibit use for activities that the applicant did not consider to be a religious worship service. The application would have lost no opportunity to conduct a religious worship service because of the Board's own characterization of the proposed activities.

[17] "The Synod classifies teachers into two categories: 'called' and 'lay.' . . . Once called, a teacher receives the formal title 'Minister of Religion, Commissioned'. . . . Hosanna-Tabor asked [the plaintiff] to become a called teacher. [She] accepted the call and received a 'diploma of vocation' designating her a commissioned minister." 132 S.Ct. at 699-700.

1 plaintiff as a minister would have ended the matter; the Supreme Court, a governmental
2 authority, would have been compelled (so as to avoid excessive entanglement) to accept the
3 church's designation. The Court did not do so. It undertook to make its own determination
4 whether the plaintiff was a minister subject to the ministerial exception. Based on its own
5 assessment of the pertinent facts (including the nature of the duties assigned to her), the Court
6 determined that she was a minister. *See* 132 S.Ct. at 707-08 ("As a source of religious
7 instruction, Perich performed an important role in transmitting the Lutheran faith to the next
8 generation. In light of . . . the formal title given Perich by the Church, the substance reflected in
9 that title, her own use of that title, and the important religious functions she performed for the
10 Church—we conclude that Perich was a minister covered by the ministerial exception.").[18]

11 For all the reasons outlined above and as well as those we discussed in our earlier
12 decision in *Bronx Household IV*, which we now reaffirm without need to repeat them, we
13 conclude that the District Court erred in concluding that Reg. I.Q. violates the Establishment

[18] Nor was the Supreme Court's undertaking to determine for itself whether the plaintiff was a minister, rather than accept the church's characterization, done carelessly without recognition of its implications for the excessive entanglement argument. Justice Thomas, who concurred in the judgment, wrote separately, espousing the very arguments Bronx Household makes here, to reject the aspect of the Court's decision that refused to regard the church's characterization as conclusive. Justice Thomas argued that, in order not to intrude on theological decision, he would have deemed the plaintiff's ministerial status conclusively established by the fact that the church deemed her a minister. *Id.* at 711 (Thomas, *J.*, concurring) ("Hosanna-Tabor sincerely considered Perich a minister. That would be sufficient for me to conclude that Perich's suit is properly barred by the ministerial exception."). No justice joined in Justice Thomas's objection. All of the eight other justices joined in one or both of the Chief Justice's opinion for the Court, and the concurring opinion of Justice Alito, both of which explicitly justified the judgment on the Supreme Court's determination, rather than the church's designation, that the plaintiff was in fact performing in the role of a minister.

1 Clause by compelling the Board to make decisions that constitute excessive entanglement with
2 religion.[19] We have considered Bronx Household's other arguments and find no merit in them.[20]

3 **CONCLUSION**

4 For the foregoing reasons, the judgment of the district court is REVERSED, and the
5 injunction barring enforcement of Reg. I.Q. is VACATED.

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[19] We similarly reject Bronx Household's claim that Reg. I.Q. causes excessive entanglement by requiring the Board to take an official position on religious doctrine. Unlike in *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2d Cir. 2002), where we held laws defining "kosher" according to the dictates of Orthodox Judaism "excessively entangle government and religion because they (1) take sides in a religious matter, effectively discriminating in favor of the Orthodox Hebrew view of dietary requirements; (2) require the State to take an official position on religious doctrine; and (3) create an impermissible fusion of governmental and religious functions by delegating civic authority to individuals apparently chosen according to religious criteria," *id.* at 425, the Board had not engaged in any comparable practices.

[20] In his dissent, Judge Walker advances many of the same arguments he advanced in *Bronx Household IV*, 650 F.3d at 52-65. Our responses are contained in previous *Bronx Household* opinions and set forth in this opinion.