IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WESTFIELD HIGH SCHOOL L.I.F.E. CLUB; STEPHEN GRABOWSKI, by and through his parents, Edmund and Mary Etta Grabowski; TIMOTHY SOUZA and DANIEL SOUZA by and through their parents, Ralph and Diane Souza; SHARON SITLER and PAUL SITLER, by and through their parents, William and Denise Sitler; and DUSTIN COOPER, by and through his parents, Brian and Amy Turner-Cooper,	)	
Plaintiffs,	)	C.A. NO. 03-30008 FHF
v.	)	
WESTFIELD PUBLIC SCHOOLS; DR. THOMAS Y. McDOWELL, Individually and in his official capacity as Superintendent of Westfield Public Schools; and THOMAS W. DALEY, Individually and in his official capacity as Principal of Westfield High School,	)	
Defendants.	)	

UNITED STATES' MEMORANDUM AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

The United States submits this memorandum of law in support of Plaintiffs' Motion for Preliminary Injunction. This case involves important issues regarding the elimination of discrimination in public high schools on the basis of religion. Plaintiffs allege, inter alia, that Defendants violated their First and Fourteenth Amendment rights by discriminating against their religious beliefs at Westfield High School. Plaintiffs assert that Defendants refused to allow them to distribute pamphlets containing religious messages, even though Defendants permitted the distribution of secular pamphlets by these same students the year before.

The United States is charged with enforcement of Title IV of the Civil Rights Act of 1964, which authorizes the Attorney General to seek relief if a school deprives students of the equal protection of the laws. See 42 U.S.C. § 2000c-6. The United States also is authorized under Title IX of the Civil Rights Act of 1964 to intervene in cases alleging violations of the Equal Protection Clause that are of general public importance. See 42 U.S.C. § 2000h-2. Because the complaint in this case alleges an Equal Protection Clause violation, and First Amendment violations that parallel the Equal Protection claim, the United States has a strong interest in the outcome of this case.

Because of the United States' statutory mandate to prevent discrimination on suspect criteria such as religion, this memorandum focuses on the issues asserted in the Verified Complaint concerning unconstitutional discrimination against religious points of view. We do not address other issues presented such as whether Defendants' prior restraint of free speech or an absolute ban on non-school related distribution of literature by students, as the superintendent's letter suggests now may be the policy of the school, are unconstitutional. Suffice it to say that those restraints as implemented by Defendants are also unlawful. See Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988); Riseman v. Sch. Comm., 439 F.2d 148 (1st Cir. 1971).

FACTS

For the purposes of this Memorandum, the United States has relied on the facts as pleaded in the Plaintiffs' Verified Complaint.

ARGUMENT

The First and Fourteenth Amendments to the United States Constitution proscribe government regulations of speech that discriminate against a particular point of view. The mere fact that school administrators believe that certain speech may offend other students is insufficient to censor speech. This is as true with speech expressing a religious viewpoint that may make some students uncomfortable as it is with any other viewpoint that others may find unsettling. Moreover, the Supreme Court has made clear that schools may not use the Establishment Clause to censor religious speech that is the speech of students and not the speech of the school. Defendants' actions, prohibiting Plaintiffs from distributing candy canes accompanied by religious literature but permitting them to distribute candy canes accompanied by secular literature, violates the Plaintiffs' rights under First and Fourteenth Amendments. Assuming that the Court finds factual support for the material statements of fact set forth in the Verified Complaint, an injunction is warranted.

I. Because this Case Addresses the School's Restrictions on Students' Private Expression, and Not the School's Regulation of Its Own Speech, Hazelwood v. Kuhlmeier Is Inapplicable.

As the Supreme Court stated in Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969), students possess First Amendment rights even "in light of the special characteristics of the school environment." Id. at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."). Although the Court has affirmed the authority of school officials "to prescribe and control conduct in the schools," id. at 507, "the school's authority is not absolute." Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157, 172 (D. Mass. 1994). In Tinker, the Court upheld the right of students to wear black

armbands to school in protest of the Vietnam war, despite the concerns of school administrators that this protest would disrupt the orderly operation of the school. See Tinker, 393 U.S. at 508-509.

In Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988), the Court distinguished between the issue of Tinker, "whether the First Amendment requires a school to tolerate particular student speech," id. at 569, and the very different question of "whether the First Amendment requires a school affirmatively to promote particular student speech." Id. at 570. The Hazelwood Court held that Tinker's rule for school officials' efforts "to silence a student's personal expression that happens to occur on the school premises" is not appropriate for analyzing "educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school," since the latter category of expressive activities "may fairly be characterized as part of the school curriculum." Id. The Court held that restrictions imposed on a student newspaper, produced as part of a for-credit course, edited by a journalism teacher, and subject to pre-approval of all articles by the school principal, constituted regulation of the school curriculum rather than suppression of individual expression, and thus were to be given considerable deference by the courts. Id. at 263, 270.

Defendants strive to characterize this case as involving avenues of expression that "may fairly be characterized as part of the school curriculum," id. at 271, such as the school newspaper in Hazelwood or a school play. Their argument is without merit.

Defendants contend that because the students' religious club, called the Love and Insight for Eternity ("L.I.F.E.") Club, is given access to school facilities for their after-school meetings, with a faculty member present as required of all student clubs, is allowed to place posters for the

meetings on the same terms as other school clubs, is "permitted to meet before the start of the school day at the flagpole on school grounds to conduct a morning prayer," (Memorandum of Law of Defendants, Westfield Public Schools and Dr. Thomas Y. McDowell, in Opposition to Plaintiffs' Motion for Preliminary Injunction ("Def. Mem.") at 2-3), the L.I.F.E. Club is therefore a school sponsored-activity that "may fairly be characterized as part of the school curriculum." Id. at 9 (quoting Hazelwood, 484 U.S. at 271).

But it simply cannot be the case that the L.I.F.E. Club can fairly be characterized as part of the Westfield High curriculum. If this were so, Defendants would be in flagrant violation of forty years of Supreme Court precedent barring school-sponsored prayer and devotional activities. See, e.g., Engel v. Vitale, 370 U.S. 421 (1962) (holding daily classroom prayer unconstitutional); Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (holding daily Bible reading unconstitutional); see also Rivera v. East Otero Sch. Dist. R-1, 721 F. Supp. 1189, 1196 (D. Colo. 1989) ("Student religious activities violate the Establishment Clause when they are conducted in concert with school authority."). The L.I.F.E. Club is not an activity of the Defendants. Plaintiffs describe themselves not as "school sponsored," as Defendants state without citation, Def. Mem. at 8, but as "a non-curriculum related student-initiated and student led Christian club at Westfield High School." Verified Complaint at 5, ¶ 22.

As a non-curriculum related student group, Defendants are required both by the Equal Access Act, 20 U.S.C. 4071 et seq., and the Constitution, see Prince v. Jacoby, 303 F.3d 1074, 1090-92 (9th Cir. 2002), to provide them with equal access to school facilities and related resources as other non-curricular student clubs. In Bd. of Educ. v. Mergens, 496 U.S. 226 (1990), the Supreme Court held that a school violated the Equal Access Act when it denied a student Bible club "official recognition" by the school, a designation which allowed it "to be part of the student

activities program and carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair." Id. at 247.

The Court made clear in Mergens that the religious speech of the students remained theirs and did not become that of the school when given "officially recognized" status. The petitioners in Mergens made the same "speech of the school" argument that Westfield High School makes here:

> [P]etitioners maintain that because the school's recognized student activities are an integral part of its educational mission, official recognition of respondents' proposed club would effectively incorporate religious activities into the school's official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students.

Id. at 247-48 (plurality opinion). The Court rejected this, stressing that the speech would appear to the reasonable observer to be the students', and not the school's:

> [T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.

Id. at 250 (emphasis in original). The Court further held that the presence of a faculty sponsor at a religious club meeting in a "nonparticipatory capacity," id. at 236, does not violate the Establishment Clause. Id. at 251.

It follows directly from Mergens that Defendants' insistence that this case falls within Hazelwood must be rejected. Hazelwood applies to "educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." Hazelwood, 484 U.S. at 570. Mergens holds that an officially recognized student religious club, with a faculty sponsor, access to school media for announcing their meetings, and access to school

meetings space -- all of the factors highlighted by Defendants in their brief -- does not bear the official imprimatur of the school. Defendants' argument that it does bear the school's imprimatur therefore should be rejected.

Other courts have reached similar conclusions. In East High Gay/Straight Alliance v. Bd. of Educ., 81 F. Supp. 2d 1166, 1194-95 (D. Utah 1999), the court rejected a high school's claim that its scope of authority to regulate student groups seeking access to school meeting facilities, the PA system, the yearbook, and other media was governed by Hazelwood. The court held that the defendants' Hazelwood rationale for excluding a group with a gay-positive viewpoint "blur[red] the distinction between the power and discretion of school officials to select appropriate subject matter and materials to be taught in the school's curriculum and the relatively limited power of school officials to restrict or proscribe student expression of student views." Id. at 1195; see also Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 216 (3d Cir. 2001) (rejecting school's argument that Hazelwood standard governed analysis of harassment policy, since "the Policy covers far more than just Hazelwood-type school sponsored speech; it also sweeps in private student speech that merely 'happens to occur on the school premises'") (quoting Hazelwood, 484 U.S. at 271); Burch v. Barker, 861 F.2d 1149, 1150 (9th Cir. 1988) (holding that Tinker, not Hazelwood, applied to students' distribution of underground newspaper at school barbeque, since "[t]his case, unlike [Hazelwood v.] Kuhlmeier, concerns a policy aimed at curtailing communications among students, communications which no one could associate with school sponsorship or endorsement"); Clark v. Dallas Indep. Sch. Dist., 806 F. Supp. 116, 120 (N.D. Tex. 1992) (rejecting school's argument that Hazelwood applied to efforts by school to bar students from meeting on school grounds for prayer and distributing religious tracts, and holding that Tinker applied because "[t]he conduct at issue was voluntary, student-initiated, and free from the

imprimatur of school involvement."); Coy v. Bd. of Educ., 205 F. Supp. 2d 791, 799-900 (N.D. Ohio 2002) (disciplining plaintiff for using school computer to view his personal website, which contained material objectionable to school officials, should be viewed under standard of Tinker, not Hazelwood).

For all of the reasons set forth above, Hazelwood's standard for speech that "may fairly be characterized as part of the school curriculum," 484 U.S. at 570, has no bearing on this case, and Defendants' arguments to the contrary should be rejected.

II. Defendants' Actions Constitute Unconstitutional Viewpoint Discrimination.

Defendants' prohibition against the L.I.F.E. Club and its members' distribution of candy canes and religious messages constitutes viewpoint discrimination in violation of the First and Fourteenth Amendments to the Constitution.[1]

Ordinarily, when a school acts to restrict students' freedoms of speech and expression, the analysis to be applied to the restriction depends on the nature of the forum, see Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983); that is, whether a particular school is a

[1] Because most claims of religious viewpoint discrimination are addressed in the context of the First Amendment, few opinions address claims of religious viewpoint discrimination under the Fourteenth Amendment independently of the First Amendment. Nevertheless, "[c]ontent-based restrictions also have been held to raise Fourteenth Amendment equal protection concerns because, in the course of regulating speech, such restrictions differentiate between types of speech." Burson v. Freeman, 504 U.S. 191, 197 n.3 (1992); see also Police Dept. v. Mosley, 408 U.S. 92 (1972) (exemption of labor picketing from ban on picketing near schools violates Fourteenth Amendment right to equal protection). Moreover, the Supreme Court often has referred to discrimination on the basis of religion as a suspect classification subject to strict scrutiny. See, e.g., United States v. Armstrong, 517 U.S. 456, 464 (1996) (decision to prosecute may not be based on an "unjustifiable standard such as race, religion, or other arbitrary classification") (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (rational basis review of economic legislation contrasted with "inherently suspect distinctions such as race, religion, or alienage").

public forum, see id. at 45, a non-public forum, see id. at 46, or a limited public forum, see Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (2001). Regardless of the nature of the forum, however, a school's restriction of speech violates the First Amendment, applicable to the states through the Fourteenth Amendment, if it discriminates against a particular point of view. See Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 391-93 (1993); Perry, 460 U.S. at 46; Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1298 (7th Cir. 1993).[2]

The facts set out in the Verified Complaint show that Westfield school officials prohibited the L.I.F.E. Club and its members from distributing literature because of the literature's religious viewpoint. During the last academic year, 2001-02, Thomas Daley, the principal of Westfield High School (WHS), allowed the L.I.F.E. Club to distribute candy canes with the message "Happy Holidays," a distinctly secular greeting that does not convey a religious sentiment, nor even specify the holiday to which it refers. See Verified Complaint at 10, ¶¶ 52-54. This past year, however, in December 2002, Westfield school officials prohibited the L.I.F.E. Club from distributing candy canes with religious messages that contained a Christian explanation of the creation of the candy cane, a salvation prayer and scripture verses. See id. at 10-12, ¶¶ 56-67; Def. Mem. at 3. Principal Daley, who had permitted the secular message the year before, found the religious message to be "offensive" and referred the matter to Dr. Thomas McDowell, the Superintendent of Westfield schools. Verified Complaint at 11, ¶¶ 58-62. Superintendent McDowell agreed with the principal's assessment. See id. Despite the different treatment of the

[2] The nature of the forum is relevant to Plaintiffs' claim that Defendants' regulations of speech are content-based and therefore must be justified by either compelling interests or a rational basis, depending on the nature of the forum. See Lamb's Chapel, 508 U.S. at 390-92. But the nature of the forum is not relevant in cases of viewpoint discrimination.

L.I.F.E. Club's respective requests, the school district's policy regarding the distribution of printed materials and students' freedom of speech remained the same during those years. See id. at 9-11, ¶¶ 48-50, 56-59.[3] Therefore, the "offensive" religious viewpoint of the message sought to be distributed was the basis for the school officials' prohibition, and there is no indication that the school officials prohibited the distribution of the religious messages for any other reason.[4]

The circumstances here are similar to those that led to a finding of viewpoint discrimination in Lamb's Chapel and Good News Club. In Lamb's Chapel, the Supreme Court considered the constitutionality of a school district's denial of a church group's request to use

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[3] Plaintiffs assert, and Defendants deny, that the L.I.F.E. Club was granted permission to distribute candy canes, the story of the creation of the candy cane, Bible verses, and the salvation prayer during the 2000-01 school year. See Verified Complaint, at 9, ¶ 46; Answer of Defendants, at 8, ¶ 46. If the Court finds that Plaintiffs were allowed to distribute the candy canes with a religious message attached in 2000-01, and Principal Daley in 2001-02 would not grant them permission to again distribute the candy canes with the same or similar message not because there had been a problem with the candy cane distribution but because he found the content of the attachment to be "offensive," and suggested that the message be changed to a "non-offensive message" such as Happy Holidays, this would be further evidence of viewpoint discrimination.

[4] The only other possible explanation for the disparate treatment of the two requests was suggested by Superintendent McDowell in a letter to Plaintiffs' counsel shortly after denying the L.I.F.E. Club's December 2002 request. Superintendent McDowell stated:

> We do not allow students to distribute non-school curriculum or activity related literature of any kind directly to other students on school grounds. We do not single out students based upon the content of their message, in this or any other instance. Should a student or group of students simply wish to distribute candy canes with no message, it would be treated in the same manner, as would a handout advertising a sale at a local store.

Verified Complaint, Exh. D, at 1. This position, however, contradicts the school's written policies, which do not prohibit the distribution of "non-school curriculum or activity related" literature, and it is inconsistent with the way the school has operated in the past. Moreover, if this were the policy, it would be facially unconstitutional. See Riseman v. Sch. Comm., 439 F.2d 148 (1st Cir. 1971).

school facilities to present a lecture and film about child rearing and family values from a religious perspective. See Lamb's Chapel, 508 U.S. at 387-89, 393. The school district permitted the use of its facilities for "social, civic, or recreational uses," but not for "religious purposes." Id. at 387. There was no suggestion that a lecture or film about child rearing or family values from a secular perspective would not be a "social, civic, or recreational" use, nor was there any indication in the record that the church group's application to use the school facilities was denied "for any reason other than the fact that the presentation would have been from a religious perspective." Id. at 393-94. The Court therefore held that the school district's action violated the First Amendment because it discriminated against a particular point of view. See id. at 394.

In Good News Club, the Supreme Court held that a school district's denial of a religious youth organizations' request to use its facilities was unconstitutional when the school permitted community use of its facilities by groups that "promote[] the moral and character development of children" and the Good News Club would have done just that, only from a religious point of view. Good News Club, 533 U.S. at 108-09. The Court concluded, therefore, that the exclusion of the Good News Club constituted viewpoint discrimination in violation of the First and Fourteenth Amendments. See id. at 110.

Just as in Lamb's Chapel and Good News Club, the L.I.F.E. Club and its members sought to use school facilities in a manner that would otherwise be permitted, to distribute candy canes with pamphlets expressing holiday greetings. Based on the religious nature of the pamphlets, Defendants prohibited their distribution in December 2002, after having permitted the distribution of messages conveying secular holiday greetings the year before. Defendants' prohibition of the L.I.F.E. Club's distribution of religious messages therefore constitutes viewpoint discrimination. See Good News Club, 533 U.S. at 110; Lamb's Chapel, 508 U.S. at 394; see also Grace Bible

Fellowship, Inc. v. Maine Sch. Admin. Dist., 941 F.2d 45, 48 (1st Cir. 1991) (holding that the exclusion of a religious group from the use of school facilities was unconstitutional because it was viewpoint based); Hedges, 9 F.3d at 1298 (striking down junior high school policy barring distribution of religious material in elementary school, stating "[e]ven when the government may forbid a category of speech outright, it may not discriminate on account of the speaker's viewpoint. Especially not on account of a religious subject matter, which the free exercise clause of the first amendment singles out for protection.") (citation omitted); Clark, 806 F. Supp. 116, 121 (N.D. Tex. 1992) ("A blanket prohibition on high school students' expression of religious views and even proselytizing on campus is unconstitutional and contrary to the purpose of secondary schools.").

III. Defendants' Viewpoint-Based Censorship Is Not Justified.

Defendants suggest that their viewpoint discrimination was justified because the religious materials could have offended other students and to have permitted the distribution of the materials may have violated the Establishment Clause. See Verified Complaint at 10-11, ¶¶ 51, 58; Def. Mem. at 15. Defendants also claim that the candy canes caused a disruption, but in support of this assertion merely allege that some candy canes were handed out at some point in a Spanish class and a drawing class. See Def. Mem. at 13-14. Neither the fear of offending some students nor the "disruptive" circumstances identified by Defendants can justify viewpoint discrimination, however, and permitting the distribution of the materials would not violate the Establishment Clause.

In justifying the prohibition against the distribution of the religious messages, school officials allegedly explained that the messages were "offensive," Verified Complaint at 10-11, ¶¶

51, 58, and that other students in the school had a right not to be exposed to material they may find offensive, see id. at 11, ¶¶ 60, 63. As the Supreme Court made clear in Tinker, however,

> undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . .

Tinker, 393 U.S. at 508. Concerns that other students may take offense cannot justify the suppression of the messages sought to be distributed. Rather, school officials must be able to show that the distribution of the materials "would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." Id. at 509 (internal quotation marks omitted).

Under this high standard, schools cannot ban speech that merely "arouses the hostility" of other students, Pyle, 861 F. Supp. at 171, or provokes other students to voice their objection to the distribution of the materials, see Clark, 806 F. Supp. at 120; see also Saxe, 240 F.3d at 211 ("Tinker requires a specific and significant fear of disruption, not just some remote apprehension of disturbance."); Thompson v. Waynesboro Area Sch. Dist., 673 F. Supp. 1379, 1387 (M.D. Pa. 1987) (finding right of high school students to distribute religious literature in high school and stating "fear that expression of an unpopular viewpoint may cause a disturbance or create discomfort is not a constitutionally valid reason for regulating speech"); Cintron v. State Bd. of Educ., 384 F. Supp. 674, 679 (D.P.R. 1974) (invalidating ban on distribution of political and religious literature at junior high school since "[n]o attempt is made to restrict the operation of these rules to situations where school functioning is materially disrupted or the rights of students substantially infringed"). Here there is no indication that even such low-level reactions would

occur in response to the distribution of the L.I.F.E. Club's religious messages at Westfield High School. To the contrary, the L.I.F.E. Club distributed the candy canes and religious messages during the 2000-01 school year, apparently without incident. See Verified Complaint at 9, ¶¶ 43-46.[5]

Likewise, another of Defendants' proffered justification for discrimination -- that permitting the L.I.F.E. Club to distribute their religious messages would violate the Establishment Clause -- is without merit. The Supreme Court squarely has addressed and rejected the proposition that the Establishment Clause could justify the government's discrimination against a religious viewpoint. "More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." Rosenberger v. Univ. of Virginia, 515 U.S. 819, 839 (1995); see Lamb's Chapel, 508 U.S. at 395 (holding that permitting a church group to use school facilities on an equal basis as any other community group would not transgress the Establishment Clause and that fear of Establishment Clause violation therefore could not justify discriminatory prohibition of church group's use); see also Johnston-Loehner v.

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[5] It may be that even meeting the high standard set by Tinker could not justify a school's viewpoint-based, as distinct from content-based, regulation. Though the Court in Tinker phrased the issue in terms of the "prohibition of a particular expression of opinion," Tinker, 393 U.S. at 509, Tinker concerned a content-based, not a viewpoint-based, regulation. Moreover, the Supreme Court has suggested that the threat of disturbance cannot justify viewpoint discrimination. See Lamb's Chapel, 508 U.S. at 395-96 (noting that fears of public unrest and violence "would be difficult to defend as a reason to deny the presentation of a religious point of view about a subject the District otherwise opens to discussion on District property"); cf. R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992) (holding that though government may regulate "fighting words" as a category of speech because of its content, it "may not regulate [their] use based on hostility--or favoritism--towards the underlying message expressed"); see also Pyle, 861 F. Supp. at 173 (stating that school can ban T-shirts expressing antipathy towards, or sympathy with, a particular group if the message would cause substantial and material disruption of the school, "[b]ut the school cannot pick and choose; it may not prohibit antipathetic slogans but allow positive ones").

O'Brien, 859 F. Supp. 575, 580 (M.D. Fla. 1994) (holding that prohibiting the distribution of religious materials by students in school because of the religious content of the literature is not justified by the Establishment Clause and actually violates it by inhibiting religion); Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 296 (E.D. Pa. 1991) (holding that prohibiting distribution of religious materials because of their religious viewpoint involves an excessive government entanglement with religion, which the Establishment Clause forbids).

A neutral policy that permits the L.I.F.E. Club to distribute their candy canes and religious messages on the same basis as it would any non-religious message would not violate the Establishment Clause because the policy would have a secular purpose, would not have the principal or primary effect of advancing or inhibiting religion, and would not foster an excessive entanglement with religion. See Lamb's Chapel, 508 U.S. at 395 (applying test of Lemon v. Kurtzman, 403 U.S. 602 (1971)); see also Slotterback, 766 F. Supp. at 296 (holding that a neutral policy that would permit the distribution of materials in school without regard to their religious content would not violate the Establishment Clause); Thompson, 673 F. Supp. at 1389 (same).

Most recently, the Supreme Court in Good News Club (discussed in Section II, supra), found that the school's argument that it had to exclude the religious group's speech from its limited public forum in order to protect the Establishment Clause's guarantee of government neutrality toward religion "defies logic." Good News Club, 533 U.S. at 114. The Court observed that the religious group "seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups." Id. The Court in Good News Club addressed the Establishment Clause argument advanced by Defendants here. Defendants state that "[s]tudents who were not members of the L.I.F.E. Club may view the religious literature attached to the candy canes as an endorsement by the school district of a specific religious belief and an impermissible

advancement of religion." Def. Mem. at 16. In Good News Club, addressing the potential perceptions of elementary school students, the Court stated: "[W]e cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum." Id. at 118. The Court thus suggested that the greater threat to Establishment Clause values would come from censoring individual religious expression, not by permitting it on a neutral basis with other types of individual speech.

The Court in Bd. of Educ. v. Mergens, 496 U.S. 226 (1990), addressed the facts of this case even more directly. Mergens, as discussed in Section I, supra, held that for a high school to give a religious student group official recognition as a student club, with a faculty sponsor and full access to school media, did not violate the Establishment Clause. See id. at 247-48. The plurality in Mergens observed that "secondary school students are mature enough . . . to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis, " id. at 250, and added: "The proposition that schools do not endorse everything they fail to censor is not complicated." Id. Mergens and Good News Club make quite plain that failing to censor student's religious speech, even though it may occur inside the schoolhouse gate, does not violate the Establishment Clause. See also Slotterback, 766 F. Supp. at 294 ("A school district's policy cannot be unconstitutional simply because it allows students . . . to advance religion."); Rivera, 721 F. Supp. at 1195 ("The Establishment Clause is a limitation on the power of governments: it is not a restriction on the rights of individuals acting in their private lives . . . . It is clear that the mere fact that student speech occurs on school property does not make it government supported.").

In prohibiting the distribution of the L.I.F.E. Club's religious literature, school officials

discriminated against its members' religious point of view. Such viewpoint discrimination violates the First and Fourteenth Amendments and cannot be justified here by any threat of disruption or concerns that permitting the distribution would violate the Establishment Clause.

CONCLUSION

For the reasons set forth above, appropriate relief should be granted.

Respectfully submitted,

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