No. 03-1101

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CHILD EVANGELISM FELLOWSHIP
OF NEW JERSEY, ET AL.,

Plaintiffs-Appellees

v.

STAFFORD TOWNSHIP SCHOOL DISTRICT, ET AL.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES AND URGING AFFIRMANCE

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

TABLE OF CONTENTS (continued): **PAGE**

CONSTITUTION & STATUTES:

RULES:

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INTEREST OF THE UNITED STATES

This case presents important questions regarding how Supreme Court precedent concerning viewpoint discrimination against religious speech should be applied to a school's system for allowing community groups to communicate with parents.

The United States has participated in numerous cases addressing similar First Amendment issues of equal access for religious speakers, including *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Bronx Household of Faith* v. *Board of Education*, No. 02-7781 (pending in 2d

Cir.). As we stated in *Lamb's Chapel*, "[t]he United States is the proprietor of numerous non-public and 'designated' or 'limited' public forums," and accordingly has an interest in the outcome of cases involving this subject matter. U.S. Amicus Br. at 1.

In addition, the United States has an interest in enforcement of First Amendment principles providing equal treatment of persons irrespective of their religious beliefs. This is especially true when, as here, a complaint also raises parallel Fourteenth Amendment equal protection claims. This interest arises from the United States' ability to intervene, pursuant to Title IX of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2, in equal protection cases of general public importance.

The United States files this brief as *amicus curiae* pursuant to Fed. R. App. P. 29(a), arguing that the School District engaged in unconstitutional viewpoint discrimination against the Plaintiffs when it denied them access to school-controlled communication channels on equal terms with other community groups engaged in children's activities.

STATEMENT OF THE ISSUES

1. Whether the district court correctly found that Defendants-Appellants engaged in unconstitutional viewpoint discrimination when they barred a religious youth organization from distributing and displaying its permission slip-flyers at two elementary schools, pursuant to a written policy providing for teacher distribution of materials promoting community-sponsored activities to students,

and an unwritten practice of allowing community organizations to promote recreational activities on school property and at school events.

2. Whether the district court correctly found that granting access to a religious youth organization seeking to promote its after-school activities on equal terms with other youth-oriented community organizations would not violate the Establishment Clause.

STATEMENT OF THE CASE

The Stafford Township School District's ("Stafford's") written distribution policy permits faculty members to distribute materials to students that "relate to school matters or community activities" and that are "directly associated with the children who are enrolled in" the school district. *Child Evangelism Fellowship* v. *Stafford Township Sch. Dist. ("CEF")*, 233 F. Supp. 2d 647, 652 (D.N.J. 2002). The policy's stated purpose is to reflect the school board's "commitment to assist all organizations in [its] rapidly growing community." *Ibid.* It identifies specific non-profit organizations that are permitted to distribute information for student receipt, such as the Boy Scouts, the Girl Scouts, the 4-H Club, and the Lions Club; all other organizations must receive approval from the school board. *Id.* at 652-653.

In general practice, teachers at Ocean Acres Elementary School ("Ocean") and McKinley Avenue Elementary School ("McKinley") distribute approved materials to students immediately prior to their dismissal from school. *Id.* at 653. The teachers do not incorporate the materials into the school's curriculum, nor

even discuss them. *Id.* at 664. Some organizations promote purely recreational activities, others provide health and safety information, and others, like the Girl Scouts, aim to instill "leadership, values, social conscience, and conviction about their own self-worth." *Id.* at 653 (citation omitted). Activities advertised through the access policy also have included such events as "community service projects, cultural exchanges and environmental stewardships," App. Br. at 7, among many others.

Stafford also has a practice of permitting various organizations to hang posters on the walls of the school and to participate in Back-to-School-Night programs by distributing informational materials to parents in attendance. *Id.* at 654. Stafford does not have a written policy governing such activities, and does not distinguish the criteria for engaging in these activities from the criteria in the written policy governing distribution of promotional materials by teachers. *Id.* at 661.

Child Evangelism Fellowship of New Jersey, Inc. ("CEF") is a non-profit Christian organization that establishes Good News Clubs at schools around the country. With the permission of parents, the Clubs provide religious instruction to young persons through "Bible lessons, missionary stories, singing, and other activities." *Id.* at 651. CEF aims to "foster self-esteem in youth and to instill or cultivate morals and character in children, as well as to provide a positive recreational experience." *Ibid.*

CEF sought permission to participate in the various fora (i.e., the

"community communications system") that Stafford has established for community groups to communicate with parents. Specifically, CEF sought to have teachers distribute its flyers, participate in upcoming Back-to-School-Night programs, and hang its flyers in the same manner as other community organizations' materials.

Stafford denied CEF's request because it believed that doing so would violate the Establishment Clause. The district court, relying primarily on the reasoning in *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001) (holding that an elementary school could not bar a Good News Club from using school facilities to hold meetings that addressed topics appropriate to the forum from a religious perspective), found that Stafford engaged in impermissible viewpoint discrimination by denying CEF access to the community communications system.

The district court also concluded that allowing CEF to have access to the community communications system would not violate the Establishment Clause. Again relying on *Good News Club*, the district court found that the total context would not lead a reasonable observer to conclude that Stafford would be endorsing religion if it granted equal access, nor would it be thereby coercing students to participate in religious activities. Moreover, the court concluded that giving CEF equal access would prevent government hostility and fulfill the requirement of government neutrality toward religion that the Constitution requires. The district court therefore enjoined Stafford from refusing to distribute and post CEF's

materials in the same manner as other community organizations' materials.

SUMMARY OF ARGUMENT

Consistent with the Supreme Court's analysis in *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001), the district court correctly held that CEF established a likelihood of success in proving that Stafford violated its free speech rights. CEF's materials advertising its Good News Club fall within the scope of Stafford's written distribution policy, which permits distribution of materials that "relate to * * * community activities" and are "associated with" the students at the elementary schools. *Child Evangelism Fellowship* v. *Stafford Township Sch. Dist.*, 233 F. Supp. 2d 647, 652 (D.N.J. 2002). CEF's Good News Club meetings offer students recreational opportunities that are identical to activities sponsored by other community organizations that advertise through Stafford's community communications system. Through these meetings, CEF strives to "foster self-esteem in youth and to instill or cultivate morals and character in children" while providing "a positive recreational experience." *Id.* at 651. That CEF does these things from a religious viewpoint does not change the fact that its advertisement of its activities meets the criteria of the forum of "relat[ing] to * * * community activities" and the forum's purpose of "assist[ing] all organizations in [Stafford's] rapidly growing community." *Id.* at 652; see *Good News Club*, 533 U.S. at 112; *Board of Educ.* v. *Mergens*, 496 U.S. 226, 247, 250-252 (1990). Because Stafford failed to distribute and post CEF's materials solely because of the religious perspective of the activities at its meetings, Stafford engaged in impermissible

viewpoint discrimination. This is true whether the community communications system is deemed a limited public forum or a non-public forum. See *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-393 (1993). Stafford's suggestion that the materials distributed under the access policy constituted school-sponsored speech subject to lower First Amendment protections is simply unsupported by the facts of this case.

Stafford would not violate the Establishment Clause by allowing CEF to promote its after-school activities on equal terms with other organizations. To the contrary, permitting access on an equal basis would preserve the neutrality toward religion required by the Establishment Clause. See *School Dist. of Grand Rapids* v. *Ball*, 473 U.S. 373, 382 (1985) (holding that the Establishment Clause "requir[es] the government to maintain a course of neutrality among religions, and between religion and nonreligion.").

ARGUMENT

I.

STAFFORD ENGAGED IN UNCONSTITUTIONAL VIEWPOINT DISCRIMINATION BY DENYING CEF EQUAL ACCESS TO ITS COMMUNITY COMMUNICATIONS SYSTEM

Stafford engaged in unconstitutional viewpoint discrimination by denying CEF the same opportunity to promote its after-school activities that other community organizations enjoy. This is true whether Stafford's community communications system is deemed a limited public forum or a non-public forum. In either type of forum, restrictions on private speech must be viewpoint neutral.

CEF's materials were in all relevant respects identical to those of other community organizations that Stafford has distributed and displayed pursuant to its written policy and practice. It is only because of the religious perspective of CEF's activities that Stafford denied CEF the ability to distribute and display materials promoting them. Thus, Stafford engaged in unconstitutional viewpoint discrimination in violation of CEF's First Amendment rights.

A. Stafford Must Operate its Community Communications System in a Viewpoint Neutral Manner

Stafford may restrict access to its community communications system, whether it is deemed a limited public forum or a non-public forum, so long as those restrictions are viewpoint neutral. "It is axiomatic that the government may not regulate speech based on * * * the message it conveys." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (citing *Police Dep't of Chic.* v. *Mosley*, 408 U.S. 92, 96 (1972)). Stafford's claims to the contrary notwithstanding, see App. Br. at 31, the Supreme Court has long held that even in purely non-public fora, the government may not engage in viewpoint discrimination: "Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993) (citing *Cornelius* v. *NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985), in turn citing *Perry Educ. Ass'n.* v. *Perry Local Educators' Ass'n*, 460

U.S. 37, 49 (1983)); see also *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 106-107 (2001) (viewpoint neutrality required in limited public forum); *Rosenberger*, 515 U.S. at 829 ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."). Regardless of whether Stafford's community communications system is a limited public forum (which is more likely, as the district court found, *Child Evangelism Fellowship* v. *Stafford Township School District*, 233 F. Supp. 2d 647, 659 (D.N.J. 2002)), or even a non-public forum, Stafford's restrictions on the community activities that may be advertised must be viewpoint neutral.

B. Excluding CEF's Promotional Materials is Viewpoint Discrimination

Stafford engaged in viewpoint discrimination when it excluded CEF's materials from its community communications system. Stafford created and operated a forum that enabled private organizations to promote activities and events that "relate to school matters or pupil-related community activities" (JA-189)[1] and are "directly associated with the children who are enrolled in" the school district (JA-191), in pursuit of its stated policy to "assist all organizations in [its] rapidly growing community." 233 F. Supp. 2d at 652.

In application, this policy is as broad as it sounds. Materials distributed under the policy have included advertisements for a variety of sporting and

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[1] References to JA are to the Joint Appendix.

recreational activities, including game nights (JA-340, 341, 342), poster contests (JA-345), and art classes (JA-346, 347), as well as "Christmas Decoration Contests, and Easter Egg Hunts," App. Br. at 7; JA-349, and "community service projects, cultural exchanges and environmental stewardships," among many others. App. Br. at 7. Groups given access to the community communications system have included organizations specifically named in the policy, such as the Girl Scouts, Boy Scouts, Lion's Club, as well as other groups such as Stafford Wrestling (JA-350), and the Long Beach Island Foundation of the Arts and Sciences (JA-346).

CEF easily meets the "speaker identity" and "subject matter" requirements for the forum Stafford created. *Cornelius* v. *NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985). First, CEF is without question a Stafford Township organization, and therefore is a member of the class that Stafford pledged to assist in its written distribution policy (JA-190). Second, CEF's permission slip-flyers promote a "pupil-related community activit[y]" (JA-189). Specifically, CEF flyers state that its meetings include Bible lessons, story-telling, a snack, playing learning games, and other activities (JA-213-216). Given that Stafford has previously allowed other community organizations to advertise recreational (JA-340, 341, 342), artistic (JA-345, 346, 347), and holiday-themed activities (JA-349), the specific activities advertised in CEF's flyer are indistinguishable from those advertised in flyers that Stafford already distributes. Denying CEF's request to advertise its Good News Club simply because its songs, stories, and games are

Christian-based constitutes viewpoint discrimination.

Stafford's viewpoint discrimination is also evident in its allowing the Girl Scouts to distribute handouts explaining its goals of teaching "leadership, values, and social conscience, and conviction about [one's] self-worth." *CEF*, 233 F. Supp. 2d at 653. Likewise, Stafford has allowed the Boy Scouts to distribute materials. The Supreme Court recently recognized that the Boy Scouts, as an association, seek "to instill values in young people." See *Boy Scouts of Am.* v. *Dale,* 530 U.S. 640, 649 (2000) (quoting the Scouts' mission statement). CEF's goals are similar. CEF strives to "foster self-esteem in youth and to instill or cultivate morals and character in children" while providing "a positive recreational experience" through its Good News Clubs. *CEF*, 233 F. Supp. 2d at 651. That CEF approaches the same goals as the Girl Scouts and Boy Scouts through "'quintessentially religious programs' indicates not that the speech relates to a different subject matter, but only that CEF speaks on similar topics from a religious standpoint." *Id.* at 660. By refusing to distribute CEF's promotional information only because of the religious nature of the activities promoted, the school district engaged in precisely the type of viewpoint discrimination the Supreme Court held unconstitutional in *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001).

In *Good News Club*, a local Good News Club chapter sought permission to hold its weekly meetings on school grounds after school hours. The school district's community use policy permitted school property to be used for a broad

range of activities, such as "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community." 533 U.S. at 102. The school district rejected the Club's request because it considered its activities to be religious in nature. *Id.* at 108. The Supreme Court held that the school district engaged in unconstitutional viewpoint discrimination when it denied the Club's request because the Club sought to address a topic clearly within the bounds of the forum. *Id.* at 107-108. The Court explained that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." *Id.* at 112; see also *Rosenberger*, 515 U.S. at 831 (university could not deny funding to student publication presenting religious viewpoints); *Lamb's Chapel*, 508 U.S. at 386 (school opening facilities after hours to "social, civic and recreational meetings * * * and other uses pertaining to the welfare of the community" could not prohibit group wishing to present film series about child rearing and family values from a Christian perspective).

Stafford suggests that *Good News Club* is distinguishable on the grounds that "the school policy in [*Good News Club*] *explicitly permitted* the subject matter of 'morals and character building' in the fora while Stafford's does not." App. Br. at 33 (emphasis in original). But Defendants-Appellants are mistaken. There was no such express permission of morals and character as a subject matter in the policy at issue in *Good News Club*. There, as here, the school had a broad access policy, opening its facilities to "instruction in any branch of education, learning or

the arts" and "social, civic, and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community[.]" *Good News Club*, 533 U.S. at 102. The Plaintiffs argued that this broad policy would permit promoting "the moral and character development of children," because the policy would grant access to groups like the Boy Scouts, and the Supreme Court agreed. *Id.* at 108. As in *Good News Club*, because Stafford unquestionably permits other organizations (e.g., the Girl Scouts) to promote recreational activities intended to strengthen the moral and character development of the participants under its broadly worded access policy, Stafford may not discriminate against a group that engages in those activities from a religious perspective.

Stafford's argument that CEF's flyers are qualitatively different because other organizations advertise "mundane age-appropriate recreational activities," App. Br. at 7 (citing JA-326), while CEF's flyers advertise events "at which proselytizing will take place," App. Br. at 28, is without merit. As set forth above, the Boy Scouts and Girl Scouts teach a particular view of morals and character. Likewise promoting "environmental stewardship," see App. Br. at 7, would appear to convey a particular view of the world and a person's responsibilities in it, as would many of the other civic and charitable organizations such as 4-H, the Lions Club, and the Municipal Alliance that Stafford welcomes in its community communications forum. See App. Br. at 7. The activities that children would participate in at CEF's Good News Club meetings – singing, snacks, stories, games, and similar activities (see JA-212-215) – are every bit as "mundane" and

"age-appropriate" as the activities that other groups use to impart their various messages. The difference is the viewpoint: CEF seeks to use these activities to impart a religious message – what Stafford calls "proselytizing," while other groups seek to impart various secular messages. Stafford's objection that the activities at CEF's meetings amount to "proselytizing" merely underscores its viewpoint discrimination.

C. CEF's Promotional Materials are not School-Sponsored Speech

Stafford attempts to craft an argument, based on the Supreme Court's ruling in *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260, 271 (1988), that materials distributed through its community communications system are properly classified as school-sponsored speech and its discrimination against CEF is thus subject to a deferential standard. App. Br. at 24-30. This argument has no basis in the law or the record.

First, *Hazelwood* concerned the issue of *subject matter* restrictions on student speech. In *Hazelwood*, the Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." 484 U.S. at 273. It did not discuss the more invidious censorship based on discriminating between speakers' *viewpoints*. See *id.* at 287 n.3 (Brennan, J., dissenting) ("Petitioners themselves concede that [c]ontrol over access to [the school newspaper] is permissible only if the distinctions drawn * * * are viewpoint neutral.") (internal

quotations omitted). Stafford's contention that viewpoint neutrality does not apply is thus based on an incorrect and incomplete reading of *Hazelwood*.

More importantly, *Hazelwood* addresses a school's authority "over school-sponsored publications, theatrical productions, and other expressive activities" that "may fairly be characterized as part of the school curriculum." *Hazelwood*, 484 U.S. at 271. Indeed, the holding of *Hazelwood* was that educators could control the style and content of a student newspaper that was funded by the school, supervised by a teacher, and required as part of a journalism course for which students received grades and academic credit. *Id.* at 273. The speech at issue here – various private organizations' permission slips for after-school recreational activities – is simply not the type of "school-sponsored" speech, such as school newspapers and plays, that might "fairly be characterized as part of the school curriculum" and which the public "might reasonably perceive to bear the imprimatur of the school." *Id*. at 271.

Also misplaced is Stafford's effort to classify the type of speech at issue in this case as akin to the school-sponsored pre-football game prayer in *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000). In *Santa Fe*, the Court held that a school's pre-game invocation policy, which purported to be a neutral policy facilitating student speech, was in reality a subterfuge designed to perpetuate the school's "popular state-sponsored religious practice" of pre-game prayers. *Id.* at 309. *Santa Fe* is inapplicable to this case, which involves a policy that not merely purports to facilitate the expression of community groups, but one

in which there is no suggestion that the policy has in reality been co-opted by the school for other purposes.

Stafford has created a forum that permits community groups to distribute materials and information in a laudable effort "to assist all organizations in [its] rapidly growing community." *CEF*, 233 F. Supp. 2d at 652. As set forth above, its exclusion of CEF should be evaluated under the Supreme Court's standards for evaluating viewpoint discrimination in limited public and non-public fora. This is simply not a case about decisions regarding the content of the curriculum, as in *Hazelwood*, or attempts by the government to sponsor official religious exercises, as in *Santa Fe*.

D. Stafford's Reason for Discriminating Against CEF's Speech is Not Compelling

Stafford's claim that it had to discriminate against CEF to avoid an Establishment Clause violation is without merit. First, the Supreme Court has never held that a State's interest in avoiding an Establishment Clause violation justifies viewpoint discrimination. "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*, 515 U.S. at 839. "We have said that a state interest in avoiding an Establishment Clause violation may be characterized as compelling, and therefore may justify *content-based* discrimination. However, it is not clear whether a State's interest in avoiding an

Establishment Clause violation would justify *viewpoint discrimination*." *Good News Club*, 533 U.S. at 112-113 (internal quotations and citations omitted) (emphasis added).

Second, regardless whether a school's interest in preventing an Establishment Clause violation could ever justify discriminating against a speaker's viewpoint, as set forth below, Stafford has not demonstrated that permitting CEF to promote its after-school activities in the same manner as other community organizations would, in fact, violate the Establishment Clause. Stafford thus has no justification for discriminating against CEF.

II.

PERMITTING CEF TO PROMOTE ITS AFTER-SCHOOL ACTIVITIES ON EQUAL TERMS WITH OTHER COMMUNITY ORGANIZATIONS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

The district court correctly concluded that allowing CEF to promote its after-school activities in the same manner as other community organizations would not violate the Establishment Clause. In fact, permitting access on an equal basis with other community organizations promoting after-school recreational activities would preserve the neutrality toward religion required by the Constitution. See *School Dist. of Grand Rapids* v. *Ball*, 473 U.S. 373, 382 (1985) (holding that the Establishment Clause "requir[es] the government to maintain a course of neutrality among religions, and between religion and nonreligion."). Nonetheless, Stafford and its *amici* urge this court to ignore the Supreme Court's rulings in *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001), and

Board of Education v. *Mergens*, 496 U.S. 226 (1990) (holding that a public high school does not violate the Establishment Clause by granting a student religious club access to school facilities for meetings and access to the school's communications systems to promote its activities), and to rule instead that permitting CEF access to its community communications system would constitute an impermissible state endorsement of religion, or would otherwise exert coercive pressure on students to participate in CEF's activities. Both arguments are unsupported by the facts of this case.

A. Permitting CEF to Access Stafford's Community Communications System Would Not Constitute State Endorsement of Religion

Stafford's primary reason for excluding CEF from its community communications system is its mistaken belief that distributing and displaying CEF's flyers would constitute an impermissible state endorsement of religion. It would not. A state endorses religion when it "sends a message to nonadherents that they are outsiders, * * * and an accompanying message to adherents that they are insiders[.]" *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984). To evaluate a state's actions, the Supreme Court asks "whether an objective observer, acquainted with the text, * * * history, and implementation of the [policy], would perceive it as a state endorsement of" religion. *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 308 (2000); see also *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 780 (1995) ("[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which

the religious [speech takes place].") (O'Connor, J., concurring).

Under this analysis, the informed, reasonable observer would be a parent of a child receiving a permission slip-flyer for CEF's after-school activities, because the express purpose of the distribution policy is to "communicate with the parents of the [Stafford Township] children" (JA-190). An informed parent is one who is aware that Stafford, through its policy and practice, permits community organizations to promote and conduct a variety of after-school activities on school grounds. See *Good News Club*, 533 U.S. at 115. An informed parent could read the "This is not a school-sponsored activity" statement at the top of the flyer (JA-215). And an informed parent would be well aware that "a school does not endorse or support * * * speech that it merely permits on a nondiscriminatory basis." *Mergens*, 496 U.S. at 250. Indeed, "[t]he proposition that schools do not endorse everything they fail to censor is not complicated." *Ibid.* Parents, then, are not at risk of perceiving a state endorsement of religion if CEF is granted access to Stafford's community communications system in the same manner as other community organizations.

Yet even if the proper "reasonable observer" from whom to evaluate Stafford's policy is a reasonable elementary school student, the result would be the same. A reasonable, informed student would know that she could not participate in many of the activities that are advertised in the flyers unless she receives parental permission. See *Good News Club*, 533 U.S. at 117-118 ("Surely even young children are aware of events for which their parents must sign permission

forms."). And if the students are capable of reading the description of the Good News Club activities on the flyer, they are also capable of reading the "This is not a school-sponsored activity" disclaimer at the top. Thus the students at Ocean and McKinley are in the same position as those in *Good News Club* whom the Supreme Court concluded would not perceive an endorsement of religion by the school.

The Supreme Court in *Good News Club* made clear that the argument that school children are impressionable cuts both ways. The Court noted that "even if we were to inquire into the minds of schoolchildren in this case, we 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." 533 U.S. at 118. Similarly, if students are aware that other community organizations may distribute flyers that advertise after-school activities but that CEF may not, then students are at risk of perceiving government hostility toward religion. See *Gregoire* v. *Centennial Sch. Dist.*, 907 F.2d 1366, 1381 n.12 (3d Cir.) (holding, in case involving equal access to school auditorium, that "[t]he impressionability argument, even if it were persuasive in this context, cuts two ways. If we presume, as [the school] would have us do, that students and their parents are incapable of understanding the lack of endorsement when equal access is granted, it is at least as likely that they will misapprehend the *exclusion* of religious speech as discrimination *against* religion.") (emphasis added), cert. denied, 498 U.S. 899 (1990).

Finally, built-in protections associated with Stafford's community communications system ensure that neither parents nor students would perceive a state endorsement of religion in this context. CEF's flyer would be distributed to students in the same manner as other community groups' flyers – at the end of the school day. Per Stafford's policy, the flyer content would not be discussed during school hours, nor would it be incorporated into the curriculum in any way. See *Child Evangelism Fellowship* v. *Stafford Township Sch. Dist.*, 233 F. Supp. 2d 647, 664 (D.N.J. 2002). In light of the overall context, neither parents nor students would perceive school endorsement of religion.[2]

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[2] Stafford's *amicus* nonetheless argues that "elementary school officials cannot aid the dissemination of religious messages to pupils." Brief *Amicus Curiae* of Americans United for Separation of Church and State, *et al.* at 18. Yet the cases cited are simply not applicable to the particular context of Stafford's community communications system. Those cases illustrate active school participation in a religious organization's activities, not the benign administrative role teachers play at Ocean and McKinley in distributing *all* community organizations' flyers. Compare *CEF*, 233 F. Supp. 2d at 653, 664 (teachers distribute religious organization's flyers at the end of the day, refrain from discussing content of flyers, and do not incorporate flyer content into the curriculum) and *Sherman* v. *Community Consol. Sch. Dist. 21*, 8 F.3d 1160, 1166 (7th Cir. 1993), cert. denied, 511 U.S. 1110 (1994) (same) with *Jabr* v. *Rapides Parish Sch. Bd.*, 171 F. Supp. 2d 653, 662-663 (W.D. La 2001) (school principal distributed Bibles to elementary students from his office during school day); *Quappe* v. *Endry*, 772 F. Supp. 1004, 1014-1015 (S.D. Ohio 1991) (teacher actively recruited students to participate in religious organization's activities), aff'd per curiam, 979 F.2d 851 (6th Cir. 1992) (unpublished table decision); *Doe* v. *Shenandoah County Sch. Bd.*, 737 F. Supp. 913, 915, 918 (W.D. Va. 1990) (teacher physically participated and verbally encouraged students to participate in religious organization's activities); *Spacco* v. *Bridgewater Sch. Dep't*, 722 F.

(continued...)

The Seventh Circuit also relied on contextual factors to "significantly mitigate any Establishment Clause concerns" arising from a religious organization's efforts to promote its activities in an elementary school during school hours and on school property. *Sherman* v. *Community Consol. Sch. Dist. 21*, 8 F.3d 1160, 1166 (7th Cir. 1993), cert. denied, 511 U.S. 1110 (1994). The court reasoned that, because the religious organization "never ha[d] the students' undivided attention to promote its religious message," no Establishment Clause violation existed. *Id.* at 1166-1167. The court concluded that, because students received multiple flyers from a variety of organizations at one time during the school day, and because the content of the flyers was never incorporated into the curriculum or discussed during school hours, the organization's message was sufficiently divorced from the workings of the school to obviate the possibility of the students' confusing the two. *Ibid.*

That the Ninth Circuit declined to apply similar reasoning in a recent case is of little consequence. See *Culbertson* v. *Oakridge Sch. Dist. No. 76*, 258 F.3d 1061 (9th Cir. 2001) (holding that a religious organization must be permitted access to elementary school's facilities after hours, but denying organization's request for dissemination of its permission slips during school hours in the same

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[2](...continued)
Supp. 834 (D. Mass. 1989) (school held classes in a church-owned building that contained numerous religious symbols, and school's lease gave church undue influence over the school's curriculum).

manner as secular organizations). The court failed to cite any authority for its finding that having teachers distribute permission slips "puts the teachers at the service of the club" and constitutes a violation of the Establishment Clause. *Id.* at 1065. Because the court offered very little discussion on this issue, it is unclear whether any of the contextual factors identified in *Good News Club* or *Sherman* that negated any impression of endorsement were present in *Culbertson*.[3]

What is clear is that the reasoning of *Good News Club* and *Sherman* is "equally persuasive in the context of the fora at issue here." *CEF*, 233 F. Supp. 2d at 663. Students at Ocean and McKinley are not in danger of perceiving an endorsement of religion by the school. Teachers play at best a ministerial role in distributing community organizations' flyers. Even so, most of CEF's information (e.g., permission slips, Back-to-School-Night promotional materials) is directed toward parents who are unlikely to be confused about whether the school was endorsing religion. See *Good News Club*, 533 U.S. at 115. Moreover, "the danger that children would misperceive the endorsement of religion is [not] any greater than the danger that they would perceive a hostility toward the religious viewpoint

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[3] The decision by the district court in *Rusk* v. *Crestview Local Schools*, 220 F. Supp. 2d 854 (N.D. Ohio 2002) (appeal pending in 6th Cir., No. 02-3991), for the reasons set forth above, is an erroneous application of *Good News Club*. The district court in *Rusk*, while acknowledging that the religious organization's flyers were "neutral in tone" because they "neither proselytize[d] nor 'tout[ed]' the benefits of being Christian over any other religion or lack thereof," nonetheless upheld a school's decision to exclude them because they promoted "overtly religious" activities. 220 F. Supp. 2d at 859.

if [CEF] were excluded from the public forum." *CEF*, 233 F. Supp. 2d at 664 (quoting *Good News Club*, 533 U.S. at 118). The district court thus was correct to conclude that allowing CEF to promote the Good News Club's activities in the same manner as other community organizations would not result in an impermissible endorsement of religion.

B. Permitting CEF to Access Stafford's Community Communications System Would Not Coerce Students to Participate in CEF's Activities

The district court also correctly found that permitting CEF equal access to Stafford's community communications system would not constitute government coercion of students to participate in CEF's activities. As the Court held in *Good News Club*, "[b]ecause the children cannot attend without their parents' permission, they cannot be coerced into engaging in the Good News Club's religious activities." *Good News Club*, 533 U.S. at 115.

The same is true here. The coercion test of *Lee* v. *Weisman*, 505 U.S. 577 (1992), and *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000), is not relevant to these facts. That test does not apply to the general question of exposure to religious speech, but deals with the specific circumstance of government sponsoring religious exercises and "coercing those present to participate in an act of religious worship." *Santa Fe*, 530 U.S. at 312; see also *ibid.* (characterizing pre-game prayers for some as "personally offensive religious rituals."). In *Lee* v. *Weisman*, the Court stated that while "[p]eople may take offense at all manner of religious as well as nonreligious messages" which do not

amount to government coercion, in the case of graduation prayer "the State has in every practical sense compelled attendance and participation *in an explicit religious exercise* at an event of singular importance to every student, one the objecting student had no real alternative to avoid." 505 U.S. at 597-98 (emphasis added). Neither Stafford nor its *amici* point to any cases that apply the coercion test outside of the context of religious *exercises* such as graduation or football game prayer. Compare *Weisman* and *Santa Fe* with *Good News Club*, 533 U.S. at 115 ("Because the children cannot attend without their parents' permission, they cannot be coerced into engaging in the Good News Club's *religious activities*.") (emphasis added). The children in this case, like the children in *Good News Club*, can only participate in CEF's religious activities with parental permission. And as demonstrated above, there is no legal basis for the argument that the coercion test should be applied to the situation of students merely reading the permission slip-flyers. As in *Good News Club*, "to the extent elementary school children are more prone to peer pressure than are older children, it is simply not clear what, in this case, they could be pressured to do." 533 U.S. at 117 n.7. The endorsement test is thus the proper test for evaluating these facts.

Stafford's repeated attempts to evade the Supreme Court's reasoning in *Good News Club* are ultimately unpersuasive. The holding of *Good News Club* directly applies to the facts of this case: When a religious group seeks "nothing more than to be treated neutrally and given access to speak about the same topics as are other groups," granting that religious group access to a forum would not

violate the Establishment Clause. *Good News Club*, 533 U.S. at 114.

CONCLUSION

For the foregoing reasons, the order of the district court granting a preliminary injunction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the Brief for the United States As Amicus Curiae In Support of Appellees Urging Affirmance complies with the type-volume limitation set forth in Fed. R. App. P. 29(d) and Rule 32(a)(7). This brief contains 6180 words, as calculated by the WordPerfect 9 word-count system.

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