UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHILD EVANGELISM FELLOWSHIP OF SOUTHERN CALIFORNIA - POMONA VALLEY CHAPTER, et al ,

Plaintiffs,

v

P JOSEPH LENZ, et al. ,

Defendants.

Case No EDCV 04-839-VAP(SGLx)

[Motions filed on September 14, 2004, and September 27, 2004.]

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendants' Motion to Dismiss and Plaintiffs' Motion for Preliminary Injunction came before the Court for hearing on October 25, 2004. After reviewing and considering all papers filed in support of, and in opposition to, the Motions, as well as the arguments advanced by counsel at the hearing, the Court DENIES Defendants' Motion to Dismiss and GRANTS Plaintiffs' Motion for Preliminary Injunction

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I. BACKGROUND AND PROCEDURAL HISTORY

A. PLAINTIFFS' ALLEGATIONS

Plaintiff Child Evangelism Fellowship of Southern California ("CEF") is a non-profit, Christian organization. [Complaint ¶ 27] Plaintiff Miralee Hossie is the director of the Pomona Valley Chapter of CEF [Id.] Defendants are members of the Upland Unified School District Board of Education ("the School Board") and officials of the Upland Unified School District ("the District") who are responsible for enforcing the District's policies. [Id ¶¶ 33-35.]

The School Board adopted a policy entitled, "Community Relations· Use of School Facilities" ("the Policy") [Id ¶ 37] The Policy was adopted pursuant to the California Civic Center Act ("the Civic Center Act"), which allows the governing board of any school district to permit the use of school facilities by outside groups as a civic center [See id. ¶ 45 (citing Cal. Educ. Code § 38131).] The Civic Center Act permits community groups to use school facilities for certain enumerated purposes, including the discussion of subjects pertaining to "the educational, political, economic, artistic, and moral interests of the citizens of the communities in which [the groups] reside " [Id ¶ 48 (citing Cal Educ Code § 38131(a))] Under the Civic Center Act, the governing board "may charge an amount not

to exceed direct costs for use of the school facilities", however, when religious organizations use the facilities for religious services, they must be charged an amount at least equal to the District's direct costs [Id. ¶¶ 56, 57 (citing Cal Educ Code §§ 38131(b)(3), 38134(d)).]

The School Board's Policy allows citizens and community groups to use the facilities of the District for:

> 1 Public, literary, scientific, recreational, educational, or public agency meetings.
> 2 The discussion of matters of general or public interest
> 3 The conduct of religious services for temporary periods or a one-time or non-renewable basis, by any church or religious organization which has no suitable meeting place for the conduct of its services. . .
> [¶¶]
> 8 Other purposes deemed appropriate by the Board.

[Complaint ¶¶ 37-38.] The Policy states that the School Board "shall not charge fees for the use of school facilities or grounds under its control for activities of non-profit organizations, clubs or associations, with a participation of at least 50% Upland youth, which promote youth and school activities These groups include, but are not limited to, Girl Scouts, Boy Scouts, Campfire, Inc., Parent-Teacher's Associations, and school-community advisory councils." [Id ¶ 39] The Policy states, however, that the activities of religious groups "shall be charged direct costs." [Id]

In February 2004, Ms Hossie applied to use the Sycamore Elementary School for after-school meetings of the Good News Club, a Christian organization that uses the Bible to address issues facing students [Id ¶¶ 65, 66, 67.] She was permitted to use the facilities but alleges that she was not informed of the per-use fee. [Id. ¶ 69] At the end of March 2004, the District sent her an invoice for $304 [Id ¶ 70] Ms Hossie objected to the fees; however, the District continued to charge the per-use fee. [Id. ¶¶ 71, 72] Under the Policy, Plaintiffs claim, Ms Hossie's CEF group qualifies for "free use," but the group is required to pay direct costs because it is a religious organization [Id ¶¶ 40, 41]

B. PROCEDURAL HISTORY

On July 9, 2004, Plaintiffs filed a Complaint against Defendants alleging that the District's Policy and the Civic Center Act violate (1) the rights to freedom of speech, association, and assembly under the First Amendment; (2) the Equal Protection Clause of the Fourteenth Amendment, (3) the Free Exercise Clause of the First Amendment, and (4) the Due Process Clause of the Fourteenth Amendment

On September 14, 2004, Defendants filed a Motion to Dismiss ("Mot. to Dismiss") under Federal Rule of Civil

Procedure 12(b)(6) and 12(b)(7). On October 8, 2004, Plaintiffs filed an Opposition ("Opp'n to Mot to Dismiss") On October 14, 2004, Defendants filed a Reply ("Reply for Mot. to Dismiss").

On September 27, 2004, Plaintiffs filed a Motion for Preliminary Injunction ("Mot for Prelim Injunct "). Defendants filed an Opposition ("Opp'n to Prelim. Injunct ") on October 8, 2004, and Plaintiffs filed a Reply ("Reply for Prelim. Injunct ") on October 19, 2004.

II. DISCUSSION

A. MOTION TO DISMISS UNDER RULE 12(B)(6)

1. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a party may bring a motion to dismiss for failure to state a claim upon which relief can be granted. Dismissal is appropriate when it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations set forth in the complaint See Williamson v. General Dynamics Corp , 208 F.3d 1144, 1149 (9th Cir 2000), Big Bear Lodging Ass'n v Snow Summit, Inc., 182 F.3d 1096, 1101 (9th Cir 1999)

The Court must view all allegations in the complaint in the light most favorable to the non-moving party and

must accept all material allegations – as well as any reasonable inferences to be drawn therefrom – as true See Big Bear Lodging Ass'n, 182 F.3d at 1101; American Family Ass'n, Inc. v City and County of San Francisco, 277 F.3d 1114, 1120 (9th Cir 2002).

2. DISCUSSION

Defendants argue that Eleventh Amendment immunity bars Plaintiffs' Complaint because Plaintiffs seek compensatory relief in addition to injunctive and declaratory relief. [Mot. to Dismiss at 8, 9.]

Plaintiffs argue that the Ex Parte Young doctrine "permits limited injunction [sic] suits against individually named state officials for prospective relief " [Opp'n to Mot. to Dismiss at 17] There is no Eleventh Amendment immunity, Plaintiffs claim, for declaratory and injunctive relief sought against Defendants in their official capacities [Opp'n to Mot. to Dismiss at 18.] Furthermore, Plaintiffs state, the Eleventh Amendment does not bar actions for damages against Defendants in their individual capacities pursuant to 42 U.S C. § 1983 [Id at 18-20.]

Under Ex Parte Young, 209 U.S. 123 (1908), a plaintiff may sue state officials in their official capacities for injunctive and declaratory relief See

Rounds v Oregon State Bd of Higher Educ , 166 F.3d 1032, 1036 (9th Cir. 1999) ("Ex Parte Young provide[s] a narrow exception to Eleventh Amendment immunity for certain suits seeking declaratory and injunctive relief against unconstitutional actions taken by state officers in their official capacities."). A plaintiff may seek to enjoin the enforcement of an unconstitutional state law by suing the state officer who has the responsibility of enforcing that law Ex Parte Young, 209 U.S. at 157

Defendants concede that "the Ex Parte Young doctrine permits limited injunction suits against individually named state officials for prospective relief." [Mot. to Dismiss at 8.] Nevertheless, Defendants seek dismissal under Rule 12(b)(6) by characterizing Plaintiffs' action as a suit for compensatory damages. [See id at 8; Reply for Mot to Dismiss at 10]

Even if the Court accepts Defendants' argument that the Eleventh Amendment bars compensatory damages in this action, dismissal is inappropriate because, as Defendants acknowledge, the Complaint also states claims for injunctive and declaratory relief under Ex Parte Young [See Reply for Mot to Dismiss at 9] Defendants argue that under Edelman v Jordan, 415 U S. 651 (1974), an action for prospective injunctive relief under Ex Parte Young "may not include a retroactive award which requires

the payment of funds from a state treasury." [Mot. to Dismiss at 10] Nevertheless, Edelman does not hold, or even imply, that a complaint against a state official seeking compensatory damages in addition to injunctive and declaratory relief should be dismissed in its entirety because retroactive damages are barred under the Eleventh Amendment. In Edelman, the Supreme Court reversed the District Court's decision as to the retroactive damages without disturbing the injunctive and declaratory relief granted by the District Court See 415 U S at 658-59

Thus, even if Defendants are immune from suit for compensatory damages, they are not immune from suit for injunctive and declaratory relief [1] Therefore, Defendants have not shown that the Complaint fails to state a claim under Rule 12(b)(6).

B. MOTION TO DISMISS UNDER RULE 12(B)(7)

1. LEGAL STANDARD

A party may move to dismiss a case for failure to join an indispensable party under Federal Rule of Civil

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[1] Defendants' argument that qualified immunity shields their actions from liability also fails. [See Reply for Mot. to Dismiss at 11] Qualified immunity does not apply to claims for injunctive and declaratory relief. Presbyterian Church (U S A) v. United States, 870 F.2d 518, 527 (9th Cir. 1989) ("Qualified immunity is an affirmative defense to damage liability; it does not bar actions for declaratory or injunctive relief.")

Procedure 19 Fed R Civ. P. 12(b)(7). A court should only grant a Rule 12(b)(7) motion if the court determines that joinder would destroy jurisdiction and the absent party is necessary and indispensable See Shermoen v United States, 982 F 2d 1312, 1317-18 (9th Cir 1992) A Rule 12(b)(7) motion requires the moving party to bear the burden of producing evidence in support of the motion See Citizen Band Potawatomi Indian Tribe of Okla v Collier, 17 F 3d 1292, 1293 (10th Cir 1994)

Rule 19(a) provides that a person who is subject to process, and whose joinder will not deprive the Court of jurisdiction, shall be joined if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons or parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest

Fed R Civ. P 19(a) If it is not feasible to join a necessary party, the Court must determine whether the action "in equity and in good conscience" may proceed in the absence of that party, or whether it must be dismissed with "the absent party being thus regarded as indispensable." Fed. R. Civ P 19(b)

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2. DISCUSSION

Defendants seek dismissal of this action under Rule 12(b)(7) for failure to join the State of California ("the State"). [Mot. to Dismiss at 4.] Defendants argue that the Complaint should be dismissed because (1) the State is an indispensable party in this action and (2) the State cannot be joined as a party because it is immune. [Id.] Defendants argue that the State is an indispensable party because (1) complete relief cannot be accorded without its presence as a party, (2) the State will not be able to protect its interests unless it is a party, and (3) the District could be subject to inconsistent obligations without joining the State as a party. [Id. at 4-6.]

(a) Complete Relief

The State, Defendants claim, is an indispensable party in an action where the constitutionality of a state statute is challenged. [Id. at 5.] Nevertheless, the case cited by Defendant in support of this broad assertion stands merely for the proposition that *some* actions challenging the constitutionality of certain state statutes may require the state to be joined.

In Cunningham v. Metropolitan Seattle, 751 F. Supp. 885, 896 (W.D. Wash. 1990), the District Court found that the State of Washington was a necessary party to a suit

challenging the constitutionality of a state statute governing the election of members of the municipal council because only the state legislature could change the statute [2] The plaintiffs in Cunningham argued that the state statute governing the selection of the municipal council violated the "one person, one vote" principle under the Equal Protection Clause. Id. at 887 In Cunningham, a court decision striking down the state

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[2] A second case cited in Defendants' Motion, Eldredge v. Carpenters 46 Northern Cal Counties Joint Apprenticeship and Training Committee, 662 F 2d 534, 537 (9th Cir. 1981), does not support Defendants' position for several reasons First, Eldredge did not involve a challenge to the constitutionality of a state statute Second, in Eldredge, there was no claim that a state was an indispensable party Third, the Ninth Circuit reversed the District Court's order dismissing the action for failure to join indispensable parties under Rule 19. Id at 538 For these reasons, Eldredge is inapposite

Likewise, Romero v. United States, 784 F 2d 1322 (5th Cir. 1986), is of no avail to Defendants In Romero, the Fifth Circuit found that the State of California was not an indispensable party in an action challenging the constitutionality of a federal statute. Id at 1325 Defendants interpret Romero to "impl[y] that the State of California would have been an indispensable party if the plaintiff was challenging the constitutionality of the procedures employed by the state of California." [See Mot to Dismiss at 5.]

In Romero, the Fifth Circuit concluded that the State of California was *not* an indispensable party to plaintiff's action challenging a federal statute, which permitted the Internal Revenue Service to pay plaintiff's tax refund directly to the California Department of Social Services for taxpayer's overdue child support 784 F 2d at 1325 Even if the language in Romero implies that the State of California would have been an indispensable party under Rule 19 if the action involved the "constitutionality of procedures employed by California," such an implication is non-binding dictum from authority outside the Ninth Circuit.

statute as unconstitutional could not provide complete relief because plaintiffs sought a new and constitutional statutory scheme for electing council members that only the state legislature could enact. See id. at 896 Therefore, the District Court held, the State of Washington was a necessary party to the suit because only the state legislature, and not the court, could amend the procedures used to elect the metropolitan council to comply with the Equal Protection Clause

In contrast, the Court can provide complete relief to the parties already joined in the case. Plaintiffs seek declaratory relief from the District's Policy and parts of the Civic Center Act, injunctive relief barring Defendants in their official capacity from enforcing the Policy and challenged provisions of the Civic Center Act, and compensatory damages from Defendants in their individual capacities. A decision by this Court declaring parts of the Civic Center Act unconstitutional and enjoining Defendants from applying those parts would satisfy the relief sought in the Complaint The State is not a necessary party for the Court to grant any of the relief sought by the Complaint because the relief sought does not require the State legislature to enact or amend the challenged statute

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Furthermore, in Cunningham, the District Court refused to dismiss the case even after determining that the State of Washington was a necessary party 751 F Supp at 896 The District Court stated that "[t]his action need not be dismissed because there was no impediment to appropriate state officials being joined as defendants." Id.

Defendants argue that the State cannot be joined in this case because it is immune under the Eleventh Amendment. [Mot to Dismiss at 6.] Nevertheless, as in Cunningham, if the Court concludes that the State is an indispensable party, State officials, who are not immune under Ex Parte Young, may be joined.

(b) The State's Interests

Defendants argue that the State will not be able to protect its interests without being named in the action [Mot. to Dismiss at 5.] Defendants claim that "this action will affect the State's economic interest

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because this decision will have statewide impact on schools' compliance with the Civic Center Act and their ability to recover fees "[3] [Id]

Plaintiffs counter that the State has already received notice of the action from Plaintiffs and has the opportunity to intervene as a party [Opp'n to Mot to Dismiss at 8.] Furthermore, Plaintiffs argue that Defendants are able to protect and represent the State's interest [Id]

In Shermoen, the Ninth Circuit held the question of whether an absent party is indispensable under Rule 19 "parallels the question [of] whether a party's interests are so inadequately represented by existing parties as to permit intervention of right under [Rule] 24(a) " 982 F 2d at 1318. The Ninth Circuit identified three factors in determining whether the existing party would adequately represent the interests of an absent party "whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent

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[3] Defendants rely on Kescoli v Babbitt, 101 F 3d 1304 (9th Cir. 1996), to argue that the judgment in this case could affect the economic interests of the State and, thus, the State is an indispensable party. Kescoli involved a settlement agreement affecting the rights of sovereign Native American tribes, who were not parties to the agreement. Kescoli does not support the proposition that the State of California is an indispensable party whenever its economic interests are indirectly affected in litigation.

party's arguments; whether the party is capable of and willing to make such arguments, and whether the absent party would offer any necessary element to the proceedings that the present parties would neglect." Id. (internal quotation marks omitted) There, the Ninth Circuit concluded that a potential conflict of interest existed between the United States and absent Native American tribes, and thus the absent tribes were indispensable parties. Id

Based on the factors identified in Shermoen, the State is not an indispensable party to this case. Defendants do not identify any potential conflict of interest between Defendants and the State Nor do Defendants argue that the State is in the position to make arguments that Defendants cannot readily make. Even if the State decides not to intervene in this case, the Court finds that the State's interests are consistent with the interests of Defendants and that Defendants are able to protect and represent the State's interests in this action.

(c) Risk of Inconsistent Obligations

Third, Defendants claim that "there is a substantial risk that the District will face inconsistent obligations insofar as the State may command the District to charge fees under the auspices of [Education Code] section

38131(b)(3) " [Mot to Dismiss at 6] Plaintiffs argue that there is no possibility of an inconsistent obligation because an state statute may not abridge federal constitutional rights [Opp'n to Mot to Dismiss at 10 (citing Ceniceros v. San Diego Unified Sch. Dist , 106 F.3d 878, 883 (9th Cir. 1997)).]

Plaintiffs also rely on Good News Club v Milford Central School, 533 U.S 98 (2001), in which the Supreme Court addressed the constitutionality of a New York statute that prohibited the use of public school facilities for religious purposes In Good News Club, the Court stated that a school may not engage in unconstitutional viewpoint discrimination on the grounds "that purely religious purposes can be excluded under state law " Id at 107 n.2.

As in Good News Club, this case involves a state statute limiting the use of public school facilities for religious purposes. In the event that the Court grants any relief that may impose seemingly inconsistent obligations on Defendants, under Good News Club, the legal and constitutional obligations are clear – it is no defense that unconstitutional discrimination is mandated by state law. Even without the State's presence as a party, Defendants would not face inconsistent obligations. Therefore, the State is not an

indispensable party under Rule 19, and Defendants fail to meet their burden to dismiss under Rule 12(b)(7)

C. PRELIMINARY INJUNCTION

1. LEGAL STANDARD

The traditional criteria for granting a preliminary injunction are (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) the advancement of the public interest (in certain cases). Los Angeles Mem'l Coliseum Comm'n v Nat'l Football League, 634 F 2d 1197, 1200 (9th Cir 1980)

In the Ninth Circuit, a party seeking a preliminary injunction must demonstrate either "(1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in favor of the moving party." Stuhlberg Int'l Sales Co v. John D Brush & Co., 240 F 3d 832, 839-40 (9th Cir 2001) (citing Dr. Seuss Enter. v. Penguin Books USA, Inc., 109 F 3d 1394, 1397 & n.1 (9th Cir 1997)). See also Univ of Hawaii Prof Assembly v. Cayetano, 183 F.3d 1096, 1101 (9th Cir. 1999) These are not two distinct tests but ends of a continuum where the required showing of harm varies inversely with the required showing of merit Id

(quoting Republic of the Philippines v Marcos, 862 F.2d 1355, 1362 (9th Cir. 1988))

Defendants argue that Plaintiffs are subject to a heightened burden to obtain a preliminary injunction. [Opp'n to Prelim. Injunct at 3] First, Defendants claim that the preliminary injunction would provide substantially all of the relief sought in the Complaint, and thus, the Plaintiffs must show that the factors are "heavy and compelling in the movants [sic] favor" before a preliminary injunction may issue [Id (citing Kikumura v Hurley, 242 F 3d 950, 955 (10th Cir. 2001)). Defendants present only non-binding authority from outside the Ninth Circuit in support of this proposition Furthermore, as Plaintiffs argue, the Motion for Preliminary Injunction does not seek "substantially all the relief" sought at trial [Reply for Prelim Injunct at 2] In their Motion, Plaintiffs do not seek declaratory and injunctive relief against the Civic Center Act, but only an injunction against the District's Policy. [See id at 4-5.] Thus, the Court is not persuaded that a heightened pleading standard imported from another circuit applies to this case.

Second, Defendants state that "[a] heightened standard is also applied when the moving party seeks to enjoin governmental action taken in the public interest

pursuant to a statutory or regulatory scheme " [Id at 4.] In such a case, "an injunction may not be issued to halt the conduct absent great and immediate threat that the named plaintiff will suffer irreparable injury for which there would be an inadequate remedy at law " [Id (citing Nava v. Dublin, 121 F.3d 453, 458 (9th Cir 1997).]

Defendants' interpretation of Nava is untenable because, as Plaintiffs point out, that case involved the standard for granting *permanent* injunctive relief. [See Reply for Prelim Injunct. at 3, Nava, 121 F 3d at 453 ("We examine in this appeal the propriety of the district court's entry of a *permanent injunction* preventing the California Highway Patrol ("CHP") from authorizing its officers to apply the carotid hold.") (emphasis added).] Therefore, Nava does not control this motion for injunctive relief

2. DISCUSSION

Plaintiffs seek a preliminary injunction requiring Defendants to permit Plaintiffs' meetings without charge and enjoining Defendants from applying the District's Policy [Mot for Prelim. Injunct. at 25] The necessary elements for issuing a preliminary injunction in the Ninth Circuit are discussed in turn.

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(a) Likelihood of Success on the Merits

A party seeking a preliminary injunction must show a likelihood of success on the merits See Stuhlberg Int'l Sales Co , 240 F 3d at 839-40. The Court finds that Plaintiffs have met their burden of showing likelihood of success on the claim for freedom of speech under the First Amendment. Therefore, the Court does not address the likelihood of success on the merits of Plaintiffs' other claims or whether Plaintiffs satisfy the alternative grounds for issuance of a preliminary injunction

In analyzing a free speech claim under the First Amendment, the Court must determine whether the speech was protected by the First Amendment, identify the type of forum at issue, and decide whether the exclusion was justified by the applicable standard See Cornelius v. NAACP Legal Def and Educ Fund, 473 U.S 788, 797 (1985).

In this case, Defendants do not dispute that Plaintiffs' speech was protected by the First Amendment, nor do Defendants dispute that they applied the District's Policy and charged Plaintiffs a fee. [See Opp'n to Prelim. Injunct at 2, Ex. 1, ¶ 7.] In fact, Defendants claim that they are required to collect a fee

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for direct costs under the Civic Center Act. [Id. at 5 (citing Cal Educ. Code §§ 38131(b)(3), 38134(b))]

(i) Forum Analysis

Plaintiffs argue that Defendants have created a designated public forum [Mot. for Prelim. Injunct. at 10.] In the alternative, however, Plaintiffs claim that even if the school facilities are considered limited public fora, the District's Policy is unconstitutional viewpoint discrimination. [Id at 15] Defendants contend that "the District has only created a limited public forum." [Opp'n to Prelim. Injunct. at 5]

Where the state has designated public school facilities as civic or community centers for use by outside groups, the Supreme Court and the Ninth Circuit have treated these areas as limited public fora See, e g., Good News Club, 533 U S at 106 (interpreting a New York statute); Culbertson v Oakridge Sch. Dist No. 76, 258 F 3d 1061, 1064 (9th Cir. 2001) (interpreting an Oregon statute). Because both Plaintiffs and Defendants agree that the District has created, at a minimum, a limited public forum, the Court adopts that finding for the purposes of this Motion [4]

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[4] The Court notes that the Office of the Attorney General of the State of California has issued an opinion on the Civics Center Act stating that the civics centers in public schools are designated public fora. 76 Cal. (continued .)

(ii) Viewpoint-neutral Restrictions

Although the state has no obligation to create a limited public forum, once such a forum is established, government restrictions on the use of the forum must be reasonable and viewpoint neutral

> Although a speaker may be excluded from a nonpublic [or a limited public] forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Cornelius, 473 U S. at 806. (internal citations omitted), see also Culbertson, 258 F 3d at 1064 (same).

The Supreme Court has held that a state policy denying the after-school use of school facilities by religious groups while permitting other nonprofit and community groups to use the facilities constitutes viewpoint discrimination Good News Club, 533 U.S at 111-12; see also Lamb's Chapel v Center Moriches Union Free Sch Dist , 508 U.S 384, 394 (1993); Rosenberger v Rector & Visitors of the Univ of Va., 515 U.S 819, 831 (1995) In Good News Club, the school opened its

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[4] (. continued)
Ops. Atty. Gen. 52 (1993) Because the Court finds that the District's Policy constitutes unlawful viewpoint discrimination, the Court does not decide at this time whether the California Legislature has created a designated public forum

facilities to community groups that "promote[] the moral and character development of children," but excluded all religious organizations 533 U.S. at 108. The Supreme Court stated "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 111-12.

(a) Content or Viewpoint Exclusion

Plaintiffs claim that the District's Policy requires "Plaintiffs to pay a fee, simply because Plaintiffs are addressing permissible topics from a religious point of view." [Mot for Prelim Injunct at 17.] According to Plaintiffs, the topics discussed at Plaintiffs' meetings are similar to topics discussed at the meetings of Boy Scouts and Girl Scouts, which are permitted without charge under the Policy. [Id at 18] Therefore, Plaintiffs claim the Policy constitutes viewpoint discrimination [Id]

According to Defendants, Plaintiffs have been charged the fee because of the content of Plaintiffs' speech. [Opp'n to Prelim Injunct. at 10] Defendants claim that "[t]he fee in this case is not imposed because the Plaintiffs are teaching secular subjects from a religious perspective, but because their meetings constitute or contain *religious services*." [Id (emphasis in

original).] Defendants argue that "[t]he exclusion of 'direct exhortations to religious observance' in a public school is not viewpoint discrimination, but a permissible exclusion based on subject matter of the speech " [Id. (citing Hills v. Scottsdale Unified Sch Dist., 329 F.3d 1044 (9th Cir 2003)).]

The language in the District's Policy contradicts Defendants' assertion that Plaintiffs are charged a fee under the Policy because they conduct "religious services." The Policy expressly states that "[a]ctivities of religious *groups*" shall be charged direct costs [See Mot for Prelim Injunct., Ex. 2 (emphasis added).] Furthermore, Defendants' proffered interpretation of its Policy as only excluding "religious services" and not "religious organizations" is inconsistent with Defendants' other argument that state law "*requires* that religious organizations be charged a fee" and that "the District is required by state law to recoup its direct costs from *groups* such as the Good News Club " [Opp'n to Prelim Injunct. at 5 (second emphasis added).] The language of the Policy and Defendants' representations permit a reasonable inference that the Policy targets religious groups and not religious services.[5]

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[5] Furthermore, in Good News Club, the Supreme Court addressed the issue of whether the meetings of the Good (continued .)

(b) Discriminatory Exclusion and Fees

Plaintiffs argue that the District may not charge different fees for access to a limited public forum based on the content or viewpoint of the speech [Mot. for Prelim. Injunct at 14-15, 17-18.] Plaintiffs allege that secular groups with similar purposes are permitted to meet free of charge, while Plaintiffs' religious group is charged a fee. [Id. at 18.]

Defendants interpret Supreme Court precedent to prohibit only exclusions of religious groups from a limited public forum and to permit different fees for

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[5](.. continued)
News Club constituted "religious worship " 533 U S. at 112 n 4 "What matters for the purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons." Id at 111. The Supreme Court concluded "that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values," but that as used by the Club, "[r]eligion is the viewpoint from which ideas are conveyed." Id. at 112 n.4

Plaintiffs and Defendants agree that other clubs, including the Boy Scouts and the Girls Scouts, are allowed to use the District's facilities free of charge [See Mot. for Prelim. Injunct at 18; Opp'n to Prelim. Injunct at 9] The Supreme Court implied in Good News Club that there is no logical difference under the Free Speech Clause between the activities of the Good News Club and the Boy Scouts and Girl Scouts

Plaintiffs in this case also organize meetings of the Good News Club [Mot. for Prelim. Injunct at 2] Although the Supreme Court's factual determination that the Good News Club does not conduct religious services is not binding on this Court, the Supreme Court's finding is evidence that Plaintiffs, who run the same club as in Good News Club, do not conduct religious services.

religious groups. The Supreme Court's decision in Good News Club, according to Defendants, only held "that a statutory *prohibition* on use of school property after school hours by a religious organization was unconstitutional 'viewpoint discrimination '" [Opp'n to Prelim. Injunct. at 5 (emphasis in original)] Defendants claim that the Civic Center Act and the District's Policy are consistent with Good News Club because both expressly give access to religious groups. [Id at 5, 8-9]

For the purposes of determining viewpoint discrimination, there is no legal distinction in Supreme Court precedent between an exclusion from a limited public forum and a differential fee schedule. In Rosenberger, a Christian student newspaper sued a state university after the university refused to pay for the newspaper's printing costs from a student activities fund. 515 U.S. at 826-27. The university argued that Supreme Court precedents prohibiting religious viewpoint discrimination, such as Lamb's Chapel, did not apply when the "case involves the provision of funds rather than access to facilities" and "that the State must have substantial discretion in determining how to allocate scarce resources." Id at 832. The Supreme Court unequivocally rejected this distinction between "funding

of speech" and "provision of access to facilities."[6] Id at 835; see also Gentala v. Tucson, 325 F Supp. 2d 1012, 1014 (D. Ariz 2003) (holding that the city's policy of denying reimbursement of costs from a civic events fund based an organization's religious affiliation was viewpoint discrimination)

The test for viewpoint discrimination, under Lamb's Chapel, Rosenberger, and Good News Club, is whether the state treats private religious speech and private secular speech on an equal basis Defendants claim that they are forced by state law to treat religious groups differently by charging a fee for direct costs. [Opp'n to Prelim Injunct at 5.] In other words, Defendants concede that they treat Plaintiffs' private religious speech differently than analogous secular speech. Under Supreme Court precedent, Defendants' actions likely constitute

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[6] The Supreme Court stated,

> The University urges that, from a constitutional standpoint, funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not Beyond the fact that in any given case this proposition might not be true as an empirical matter, the underlying premise that the University could discriminate based on viewpoint if demand for space exceeded its availability is wrong as well The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity

Rosenberger, 515 U S. at 835.

viewpoint discrimination Therefore, the Court finds that Plaintiffs have shown a strong likelihood that they can prove that Defendants engaged in viewpoint discrimination

(iii) Establishment Clause Justification

Defendants argue that the Civic Center Act and the District's Policy "are narrowly tailored to avoid a violation of the Establishment Clause." [Opp'n to Prelim. Injunct at 7.] According to Defendants, the California Legislature sought to avoid favorable treatment of religious organizations and activities while not discriminating against them by completely excluding them from school facilities [Id.] Defendants argue that permitting religious groups to hold "services" on school grounds would violate the Establishment Clause. [Id. at 8]

Plaintiffs respond by arguing that giving religious groups equal access to the District's facilities for the purpose of engaging in *private* speech is not prohibited by the Establishment Clause [Mot. for Prelim Injunct. at 19.]

The government's interest in avoiding an Establishment Clause violation can be a compelling interest that is sufficient to justify government

restrictions based on content or viewpoint In Widmar v Vincent, 454 U S. 263, 271 (1981), the Supreme Court stated that the interest of a state university in complying with the Establishment Clause may be a compelling interest, however, the Court held that an "equal access" policy was compatible with the Establishment Clause In Rosenberger, the Supreme Court stated that the indirect disbursement of student activities funds by a state university to a Christian student newspaper was neutral toward religion and did not violate the Establishment Clause. 515 U.S at 840. In Good News Club, the Supreme Court again rejected an Establishment Clause defense, stating that the Good News Club meetings after school hours, not sponsored by the school, open to any student with parental consent, and in a forum open to other organizations, did not violate the Establishment Clause. 533 U S. at 113

Recently, in Gentala, 325 F. Supp. 2d at 1020, a District Court rejected the Establishment Clause defense raised by the city to defend its policy prohibiting use of a special Civic Events Fund for events that directly support religious organizations. Defendants properly note that Gentala is not binding appellate authority [Opp'n to Prelim. Injunct at 9] Nevertheless, Gentala is persuasive because of its similar factual background and unique procedural history.

In Gentala, the plaintiffs sought to organize local activities for the National Day of Prayer 325 F. Supp. 2d at 1015 They applied for support from the Civic Events Funds, which was set up to encourage and support civic and community events. Id The city, through the Fund, "provide[d] support to civic events sponsored by nonprofit organizations and individuals by providing certain City services, such as equipment, 'at no charge.'" Id at 1014 The city's policy denied coverage from the Fund for events held "in support of" religious organizations. Id

The plaintiffs in Gentala brought suit alleging unconstitutional viewpoint discrimination and sought an injunction against the city. See id. at 112. Although the District Court found that the city's policy constituted unlawful viewpoint discrimination, the District Court initially denied the injunction because the city had a compelling justification under the Establishment Clause for its policy. Id.

A Ninth Circuit panel reversed the District Court's denial of the injunction. See Gentala v. Tucson, 213 F.3d 1055 (9th Cir. 2000). On rehearing en banc, the Ninth Circuit affirmed the District Court's order denying an injunction, finding that the Establishment Clause provided a compelling justification for withholding

direct support for religious organizations. See Gentala v. Tucson, 244 F 3d 1065, 1082 (9th Cir. 2000), vacated by 534 U S. 946 (2001). The Supreme Court granted certiorari, vacated the Ninth Circuit's judgment, and remanded back to the Ninth Circuit "for further consideration in light of Good News Club v. Milford Central School " Gentala v Tucson, 534 U S 946, 946 (2001) (per curiam) On remand, the District Court found, based on Good News Club, the city's policy of excluding events that directly supported religious organizations was "not neutral toward religion" and that the city did not meet its burden of showing that the Establishment Clause required its discriminatory policy. Gentala, 325 F Supp 2d at 1020 The District Court concluded that the city's support of religious organizations on an equal basis with other secular organizations through the Civic Events Fund would not create excessive entanglement with religion, be interpreted as an endorsement of religion by the city, or subsidize religious activity Id. at 1021, 1023, 1025. Based on these findings, the District Court declared the city's policy unconstitutional and permanently enjoined the city from applying it. Id at 1025.

Defendants do not cite specific reasons why a nondiscriminatory "free use" policy would violate the Establishment Clause After examining the Supreme

Court's decisions in Widmar, Rosenberger, Good News Club, and the District Court and Ninth Circuit decisions in Gentala, the Court concludes that the Establishment Clause defense raised by Defendants in this case is unlikely to succeed Equal "free use" access to the District's facilities "would ensure neutrality [toward religion], not threaten it " See Good News Club, 533 U.S at 114 Plaintiffs' meetings, as in Good News Club, occur after school, without sponsorship by the school, and in a forum equally open to secular organizations In addition, the District's fee waiver, as in Rosenberger and Gentala, would not require direct payment to Plaintiffs' religious organization. The District's situation is analogous to the position of the city in Gentala, since both incur the costs when citizens and community organizations use public property as a limited public forum. Like the city in Gentala, Defendants have a policy that waives the recoupment of costs for certain community groups but charges costs to religious organizations

Based on the analysis of these factors, the Court concludes that Plaintiffs have shown a strong likelihood of success on the merits on the free speech claim.

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(b) Irreparable Injury

In Elrod v. Burns, 427 U S 347, 373 (1976), the Supreme Court held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." See also S O.C., Inc. v County of Clark, 152 F.3d 1136, 1148 (9th Cir 1998).

The parties agree that Plaintiffs have been prevented from holding after-school meetings in the District's facilities without paying a fee. [Mot. for Prelim. Injunct at 1, Opp'n to Prelim Injunct. at 2.] The Court has concluded that Plaintiffs have shown that they will likely succeed on the merits of their free speech claim Therefore, Plaintiffs likely have been, and will continue to be, deprived of their First Amendment right to use the District's facilities on the same basis as non-religious organizations engaged in similar activities Under Elrod, this supports a finding of irreparable harm

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III. CONCLUSION

For the forgoing reasons, Defendants' Motion to Dismiss is DENIED, and Plaintiffs' Motion for Preliminary Injunction is GRANTED

IT IS SO ORDERED.

Dated: Nov. 15 2004

VIRGINIA A. PHILLIPS
United States District Judge