No. 03-1534

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHILD EVANGELISM FELLOWSHIP
OF MARYLAND, ET AL.,

Plaintiffs-Appellants

v.

MONTGOMERY COUNTY PUBLIC SCHOOLS, ET AL.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS AND URGING REVERSAL

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INTEREST OF THE UNITED STATES

This case presents important questions regarding how Supreme Court precedent concerning viewpoint discrimination should be applied to private religious speech in a public school setting.

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), *Bronx Household of Faith* v. *Board of Education*, No. 02-7781, 2003 WL 21297327 (2d Cir. June 6, 2003), and *Child Evangelism Fellowship* v. *Stafford*

Township School District, No. 03-1101 (pending in 3d 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 Board of Education for the Montgomery County Public Schools engaged in unconstitutional viewpoint discrimination against plaintiffs-appellants when it denied them access to a channel of communication open to other community groups that sponsor children's activities.

STATEMENT OF THE ISSUES

1. Whether the district court erred in denying a preliminary injunction when it found "conflicting precedents" on the likelihood of success issue and that the plaintiffs-movants demonstrated irreparable harm, while finding that the defendants demonstrated only that it was "likely" that they would suffer "some sort of significant harm."

2. Whether defendants-appellees engaged in unconstitutional viewpoint discrimination when they barred a religious youth organization from including its promotional permission slip/flyer with other community groups' materials that are sent to parents in students' take-home folders.

3. Whether granting access to a religious youth organization seeking to promote its after school activities on equal terms with other youth-oriented community organizations would violate the Establishment Clause.

STATEMENT OF THE CASE

The Board of Education for the Montgomery County Public Schools (the Board) has a written policy that permits community organizations to communicate with parents about activities that may be of interest to students attending local schools. This policy states that "[a]nnoucements of educational services or cultural or recreational programs directly related to the educational program may be made available to students" provided that the organization sponsoring the announcement is not-for-profit and the announcement is approved for distribution by either the director for School Administration or the deputy superintendent of schools (Verified Complaint ¶ 13 (Comp.); MCPS Reg. CNA-RA, "Advertising Materials and Announcements").[1] Organizations that are interested in promoting

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[1] Discovery in this case has shown that the Board does not exclusively adhere to this policy when deciding whether a community organization's announcement may be made available to parents. Other factors considered by the Board appear to include subjective, unwritten criteria that is implemented in a non-uniform manner by Board personnel (J.A. 163, 201 (Confino Trans.)).

their community activities typically provide the schools with informational flyers or brochures. These materials are then included in "take-home folders" that students bring to their parents at the end of the school day (Pl.'s Statement of Supp. Mat. Facts in Support of Pl.'s Mot. for Prelim. Inj. at 26-28 (Supp. Facts)). There is no evidence to suggest that teachers discuss or incorporate the materials into the school's curriculum, nor is there evidence to suggest that teachers encourage students to participate in a particular organization's activities.

In general practice, the Board has permitted a wide variety of community organizations to distribute materials promoting a range of activities directed toward the educational, cultural, and recreational interests of students attending Montgomery County Public Schools. Specific groups that have sponsored flyers for distribution include the Department of Public Works and Transportation, Giant Foods, the Round House Theatre, the American Red Cross, the Boy Scouts and Girl Scouts, the Young Men's Christian Association (YMCA), and the Boys and Girls Clubs (Def.'s Opp. to Mot. for Prelim. Inj. at 2 (Def.'s Opp.); Supp. Facts at 20). The Board has distributed some information about educational, cultural, and recreational events when sponsored by a church or religious group, but has not "distribute[d] information about religious activities" (Def.'s Opp. at 2).

Child Evangelism Fellowship of Maryland (CEF) is a non-profit Christian organization that establishes Good News Clubs at schools around the country (Comp. ¶¶ 5-6). With the permission of parents, the Clubs provide religious instruction to young persons through Bible lessons, missionary stories, singing,

and other activities (Comp. ¶¶ 5-6). Club meetings "are intended to be educational, cultural and recreational, and to instill or cultivate morals and character in children" (Comp. ¶ 6).

In August 2001, CEF sought permission to have its permission slip/flyer included in the take-home folders of students attending Mill Creek Towne Elementary School (Mill Creek) and Clearspring Elementary School (Clearspring) (Pl.'s Mem. in Supp. of Mot. for Prelim. Inj. at 3 (Pl.'s Mem.)). The flyer included the disclaimer: "Good News Clubs are not associated or affiliated in any way with Montgomery County Public Schools." The Board denied CEF's request in October 2001 due to the flyer's "religious nature" and the Board's belief that permitting distribution of the flyer would violate the Establishment Clause (Pl.'s Mem. at 3-4). CEF continued to seek permission to have its flyers included in the take-home folders throughout late 2001 and early 2002, and the Board continued to deny CEF's requests on the ground that doing so would violate the Establishment Clause (Pl.'s Mem. at 4-6).

On January 17, 2003, after the Board failed to respond to CEF's final request, CEF filed a complaint in the United States District Court for the District of Maryland, arguing that the school district engaged in discriminatory treatment in violation of the Free Speech and Free Exercise Clauses of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and parallel provisions of the Maryland Constitution (Comp. ¶¶ 34-43). CEF sought preliminary injunctive relief enjoining the Board from, *inter alia*, refusing to include CEF's

informational permission slip/flyer in students' take-home folders on the same basis as other community groups' information.

In an order issued April 29, 2003, the district court (Peter J. Messitte, J.), consistent with its oral ruling of April 14, 2003, denied CEF's request for a preliminary injunction to have its permission slip/flyer included in students' take-home folders. While the court recognized that the plaintiffs had suffered "irreparable harm," and that it was only "likely" that defendants would suffer "some sort of significant harm" if the preliminary injunction were granted, it declined to grant CEF's motion in the face of "conflicting . . . precedent" (Hearing Tr. 129, *Child Evangelism Fellowship, et al.* v. *Montgomery County Pub. Sch., et al.*, No. PJM-03-162 (Apr. 14, 2003)). This appeal followed.

SUMMARY OF ARGUMENT

In light of the Supreme Court's decision in *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001), CEF has established a likelihood of success of proving that the Board violated its free speech rights. CEF's materials advertising its Good News Club fall within the scope of the Board's written announcement policy, which permits organizations to distribute announcements of "educational," "cultural," or "recreational" programs that are "directly related" to the educational program of Montgomery County Public Schools (Verified Complaint ¶ 13). CEF offers students educational, cultural, and recreational opportunities that are similar to activities offered by other community organizations that submit flyers for inclusion in the take-home folders. Through

its Good News Clubs, CEF strives to foster self-esteem in youth and to instill morals and character in children while providing a positive recreational experience. See *Child Evangelism Fellowship* v. *Stafford Township Sch. Dist. (Stafford)*, 233 F. Supp. 2d 647, 651 (D.N.J. 2002). That CEF does these things from a religious viewpoint does not change the fact that its activities meet the Board's criteria for inclusion in the take-home folders. See *Good News Club*, 533 U.S. at 112; *Board of Educ.* v. *Mergens*, 496 U.S. 226, 247, 250-252 (1990). Because the Board failed to include CEF's materials in the take-home folders solely because of the religious perspective of the activities at its meetings, the Board engaged in impermissible viewpoint discrimination. This is true whether the "folder forum" 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).

The Board would not violate the Establishment Clause by allowing CEF to promote its after-school activities on equal terms with other organizations. Permitting CEF to access the Board's folder forum would not cause a reasonable observer to perceive a state endorsement of religion, nor would it result in an excessive state entanglement with religion. To the contrary, permitting access on an equal basis would preserve the neutrality toward religion required by the Constitution. See *School Dist.* 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

THE DISTRICT COURT ERRED IN BALANCING THE IMMINENT HARM TO CEF AGAINST THE POTENTIAL HARM TO DEFENDANTS-APPELLEES WHEN CONSIDERING CEF'S MOTION FOR PRELIMINARY INJUNCTION

Under this Court's decision in *Blackwelder Furniture Co.* v. *Seilig Manufacturing Co.*, 550 F.2d 189, 195 (4th Cir. 1977), the granting of a preliminary injunction is dependent upon four factors: the likelihood of irreparable harm to the plaintiff; the likelihood of harm to the defendant; the plaintiff's likelihood of success on the merits; and, the public interest. A court begins its analysis by balancing the likelihood of irreparable harm to the plaintiff against the likelihood of harm to the defendant. *Ibid.* If a decided imbalance of hardship weighs in the plaintiff's favor, then the plaintiff is not required to make a strong showing of a likelihood of success. *Direx Israel, Ltd.* v. *Breakthrough Med. Corp.*, 952 F.2d 802, 813 (4th Cir. 1991). Instead, it is enough that the plaintiff present "grave or serious questions." *Blackwelder*, 550 F.2d at 196. However, the "importance of probability of success increases as the probability of irreparable injury diminishes." *Id.* at 195.

Here, the district court improperly found that CEF's real, imminent, and irreparable injury did not substantially outweigh the Board's potential, speculative harm. The court thus abused its discretion by finding that CEF was required to show a strong likelihood of success on the merits. Yet even if CEF was required to show a strong likelihood of success on the merits, the facts of this case

demonstrate that CEF has met this burden and the district court erred in finding otherwise.

The district court correctly found that CEF would suffer "irreparable harm" if it were precluded from distributing its flyers in the Board's take-home folder forum (Hearing Tr. 129). Indeed, the Supreme Court has noted that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). Without access to the take-home folder forum during the crucial time at which Good News Clubs are forming (*i.e.*, the beginning of each semester), CEF will be unable to communicate with parents about the Clubs' formation, purpose, and meeting times. Thus, communications with parents during this critical time is essential to the very existence of the Clubs.

In considering the potential harm to the Board, the district court found that it was only "likely" that defendants would suffer "some sort of significant harm" if the Board were required to include CEF's flyers in the take-home folders (Hearing Tr. 129). Yet the only real and imminent harm that the Board may incur if the preliminary injunction is granted is an administrative one: the burden of including CEF's flyers with the myriad other flyers sent home to parents in the students' take-home folders. When this slight administrative burden is weighed against the real and imminent violation of CEF's First Amendment rights, the balance "tips decidedly" in favor of CEF. *Direx*, 952 F.2d at 813. Given that CEF has raised "serious * * * questions" that are "fair ground[s] for litigation," *Direx*, 952 F.2d at

813, and that there is "conflicting . . . precedent," (Hearing Tr. 129), the district court erred by denying CEF's motion for a preliminary injunction.

II

THE BOARD ENGAGED IN UNCONSTITUTIONAL VIEWPOINT DISCRIMINATION BY DENYING CEF EQUAL ACCESS TO ITS FOLDER FORUM

The Board 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 the Board's folder forum 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 the Board has included in students' take-home folders pursuant to its written policy and practice. It is only because of the religious perspective of CEF's activities that the Board denied CEF the ability to promote them. Thus, the Board engaged in unconstitutional viewpoint discrimination in violation of CEF's First Amendment rights.

A. The Board Must Operate Its Folder Forum In A Viewpoint Neutral Manner

The Board may restrict access to its folder forum, whether it is deemed a limited public forum or a non-public forum, so long as its 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 Chi.* v. *Mosley*, 408 U.S. 92, 96 (1972)). 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), 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 the Board's folder forum is a limited public forum (which is more likely, see *Child Evangelism Fellowship* v. *Stafford Township Sch. Dist.*, 233 F. Supp. 2d 647, 659 (D.N.J. 2002)), or even a non-public forum, the Board's restrictions on the community activities that may be advertised within that forum must be viewpoint neutral.

B. Excluding CEF's Promotional Materials Is Viewpoint Discrimination

The Board engaged in viewpoint discrimination when it excluded CEF's materials from its folder forum. The Board created and operated a forum that

enabled private organizations to promote "educational," "cultural," and "recreational" activities and events that are "directly related to the educational program" of Montgomery County Public Schools.

In application, this policy is extremely broad, and the requirement of being "directly related" to the educational program has been read very liberally. Materials distributed under this policy (or under any of the other written or unwritten policies followed by the Board) have included advertisements for a variety of activities, including adult education classes, cultural events such as plays and "Earth Day" celebrations, athletic league try-outs, and charitable activities such as clothing and food drives. Groups given access to the folder forum have included the Department of Public Works and Transportation, theater companies, the YMCA, the Salvation Army, local churches, the Boys and Girls Clubs, and the Boy Scouts and Girl Scouts, among many others (J.A. 555-558, 560, 562-563, 565).

CEF easily meets the "speaker identity" and "subject matter" requirements for the forum the Board created. *Cornelius* v. *NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985). First, CEF is a nonprofit organization seeking to advertise an event of interest to Montgomery County Public School students. Second, CEF's permission slip/flyer promotes "educational," "cultural," and "recreational" activities. Specifically, CEF's flyer states that its meetings include Bible lessons, story-telling, playing learning games, and other activities. Given that the Board has previously allowed other community organizations to advertise

educational, cultural, and recreational activities, the specific activities advertised in CEF's flyer are similar to those advertised in flyers that the Board already distributes – except for their religious perspective. Denying CEF's request to advertise its Good News Club simply because its lessons, stories, and games are Christian-based constitutes viewpoint discrimination.

The Board's viewpoint discrimination is also evident in its allowing the Boy Scouts, the Girl Scouts, and the Boys and Girls Clubs of Greater Washington to distribute handouts. The Supreme Court recently recognized that the Boy Scouts 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). Other courts have recognized the Girl Scouts' goals of character building and social development in children. See, *e.g.*, *Stafford*, 233 F. Supp. 2d at 660. The Boys and Girls Clubs of Greater Washington similarly seek "to help boys and girls of all backgrounds, with an emphasis on at-risk youth, build confidence, develop character and acquire the skills needed to become productive, civic-minded, responsible adults" (J.A. 607). 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. *Stafford*, 233 F. Supp. 2d at 651. That CEF approaches the same goals as the Boy Scouts, Girl Scouts, and Boys and Girls Clubs 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 Board 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).

The Board, by expressly stating that its policy does not permit organizations to further "viewpoint[s] regarding values and character," seems to suggest that the reasoning of *Good News Club* is inapplicable (Def.'s Opp. at 8). It is mistaken. First, it is difficult to accept the Board's assertion that it did not permit organizations to instill morals and character in students. Second, 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 the Board unquestionably permits other organizations (*e.g.*, the Boy Scouts, the Girl Scouts, and the Boys and Girls Club of Greater Washington) to promote activities intended to strengthen the moral and character development of the participants under its broadly worded access policy, the Board may not discriminate against a group that engages in those activities from a religious perspective.

C. The Board's Reason For Discriminating Against CEF's Speech Is Not Compelling

The Board'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, the Board 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. The Board thus has no compelling, or even reasonable, justification for discriminating against CEF.

III

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

The district court erred in failing to conclude that allowing CEF to promote its after-school activities in the same manner as other community organizations would not violate the Establishment Clause. Such a conclusion is at odds with 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 during school hours). 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.* 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").

A. Permitting CEF To Access The Board's Folder Forum Would Not Cause A Reasonable Observer To Perceive A State Endorsement Of Religion

The Board's primary reason for excluding CEF from its take-home folder forum is its mistaken belief that including CEF's flyer in students' take-home folders 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 the Supreme Court's 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 flyer would be in a sealed envelope intended for *parents*. Indeed, the purpose of the take-home folders is to communicate with parents of students attending Montgomery County Public Schools (J.A. 191 (Confino Trans.)). An informed parent is one who is aware that the Board, 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 would read the disclaimer included on the flyer that the Clubs are not associated or affiliated in any way with Montgomery County Public Schools. 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 the Board's folder forum in the same manner as other community organizations.

Yet even if the proper vantage point from which to evaluate the Board's policy is that of a reasonable, informed elementary school student, the result would be the same. Even if a student opened the sealed envelope and read the flyer, a student who is capable of reading the description of the Good News Club activities on the flyer is also capable of reading the flyer's disclaimer. Thus students at Mill Creek and Clearspring 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.

Moreover, the Supreme Court in *Good News Club* made clear that the argument that school children are impressionable cuts both ways. 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. As the Court noted in *Good News Club*: "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. See also *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).

B. Permitting CEF To Access The Board's Folder Forum Would Not Result In Excessive State Entanglement With Religion

Despite the clear holding of *Good News Club*, the Board asserts that "having teachers insert the Club's flyers into the student's take-home folders during the school day, when students are compelled by law to be in attendance, would run afoul of the Establishment Clause" (Def.'s Opp. at 9). The Board suggests that a teacher's involvement in the distribution process would cause students to perceive an endorsement of religion, and would result in an excessive state entanglement with religion (Def.'s Opp. at 9-13). It would not. Built-in protections associated with the Board's folder forum ensure that neither parents nor students would perceive a state endorsement of religion in this context. CEF's flyer would be enclosed in a sealed envelope addressed solely to parents. It would be distributed to students in the same manner as other community groups' flyers – in a folder that is to be taken home to parents at the end of the school day. There

is no evidence to suggest that teachers would incorporate the flyer's content into the curriculum, or even discuss it. In light of this overall context, neither parents nor students would perceive an endorsement of religion.

The Seventh Circuit relied on these same 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*; see also *Stafford*, 233 F. Supp. 2d at 664-665 (finding no Establishment Clause violation in similar context); but see *Rusk v. Crestview Local Sch.*, 220 F. Supp. 2d 854 (N.D. Ohio 2002) (appeal pending in 6th Circuit, No. 02-3991) (school policy allowing distribution of materials from groups advertising religious activities violated Establishment Clause).

This Court's decision in *Peck* v. *Upshur County Board of Education*, 155 F.3d 274 (4th Cir. 1998), is not inconsistent with *Sherman* and *Stafford*. *Peck*

upheld, as to older students, a school board policy allowing the Gideons to anonymously distribute Bibles during school hours on hallway tables. *Peck*, however, barred this practice in elementary schools. The issue of distributing religious texts to students on unmarked tables in school hallways is quite distinct from distributing permission slips in sealed envelopes intended for parents that contain clear headings stating that they are being distributed by the Good News Club and not the school. As noted in III.A. above, the relevant audience for applying the "reasonable observer" test in this case is comprised of parents, not children as was the case in *Peck*. Moreover, the *Peck* panel's prediction that the Supreme Court would find a distinction between how older and younger children "appreciate the difference between government and private speech," *id.* at 288 n.*, has largely been obviated by the Supreme Court's finding in *Good News Club* 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. To whatever extent this Court's distinction between elementary and secondary students remains viable after *Good News Club* with regard to distribution of Bibles on unmarked tables in school hallways, it is not applicable to allowing a religious-oriented youth organization equal access to take-home folders to advertise their meetings to parents with clearly marked permission slips in sealed envelopes.

While the Ninth Circuit held in *Culbertson* v. *Oakridge School District No. 76*, 258 F.3d 1061 (9th Cir. 2001), that a Good News Club could not require teachers to hand out its permission slips, this decision is in considerable tension with its recent decision in *Hills* v. *Scottsdale Unified School District No. 48*, No. 01-17518, 2003 WL 21197150, at *6 (9th Cir. May 22, 2003), which held that the Establishment Clause did *not* bar teachers from distributing brochures for a religion-based summer camp on the same basis as those of other outside groups. The *Culbertson* court had expressed concern that distributing permission slips would give "a teacher's nod of encouragement [to] the club's religious program." 258 F.3d at 1065. Among the grounds for distinguishing *Culbertson* given by the *Hills* court was that the camp brochures contained an express disclaimer that the activity was not endorsed by the school. 2003 WL 21197150, at *9. Here, as in *Hills*, there is a clear disclaimer. Also, the flyers would be delivered to parents in sealed envelopes, through a process by which parents receive numerous materials from the school from a wide range of organizations, thus avoiding the problem of the "teacher's nod" that the *Culbertson* court found troubling.

Moreover, while the *Culbertson* court was concerned that having teachers distribute permission slips "puts the teachers at the service of the club," 258 F.3d at 1065, this Court has held that a teacher's "negligible" involvement in a religious activity does not violate the Establishment Clause. See *Brown* v. *Gilmore*, 258 F.3d 265, 278 (4th Cir.), cert. denied 534 U.S. 996 (2001) (holding that a State would not become excessively entangled with religion if its teachers informed

students of their statutory option to pray during a mandatory moment of silence because, under such circumstances, "its involvement in religion is negligible").

The reasoning of *Good News Club*, *Sherman*, and *Stafford* is "equally persuasive in the context of the for[um] at issue here." *Stafford*, 233 F. Supp. 2d at 663. Students at Mill Creek and Clearspring are not in danger of perceiving an endorsement of religion by the school. Unlike the high level of school involvement in religions activities that occurred in *Lee* v. *Weisman*, 505 U.S. 577 (1992), and *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000), (see Def.'s Opp. at 13-14), teachers play at best a "negligible" role in distributing community organizations' flyers. See *Brown*, 258 F.3d at 278. And unlike *Lee* and *Santa Fe*, students cannot be coerced "to participate in an act of religious worship." *Santa Fe*, 530 U.S. at 312. 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."). The children in this case, like the children in *Good News Club*, can only participate in CEF's religious activities with parental permission. Thus, "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." *Good News Club*, 533 U.S. at 117 n.7. Finally, "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 if [CEF] were excluded from the public forum." *Stafford*, 233 F. Supp.

2d at 664 (quoting *Good News Club*, 533 U.S. at 118).

The Board'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 denying a preliminary injunction with respect to the Board's take-home folder forum should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the Brief for the United States As Amicus Curiae In Support of Appellants Urging Reversal complies with the type-volume limitation set forth in Fed. R. App. P. 29(d) and Rule 32(a)(7). This brief contains 6113 words, as calculated by the WordPerfect 9 word-count system.

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CERTIFICATE OF SERVICE

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