

The Amicus Brief, CHILD EVANGELISM FELLOWSHIP OF MARYLAND, INC., a Maryland not-for-profit corporation; CHILD EVANGELISM FELLOWSHIP OF NORTHWEST MARYLAND, a Maryland association, v. MONTGOMERY COUNTY PUBLIC SCHOOLS; JERRY D. WEAST, in his official capacity as Superintendent of Montgomery County Public Schools; PATRICIA O'NEILL, SHARON W. COX, KERMIT V. BURNETT, REGINALD M. FELTON, CHARLES HAUGHEY, WALTER N. LANGE, and GABE ROMERO, in their official capacities as members of the Board of Education for Montgomery County Public Schools, , by Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). The brief was filed with the United States Court of Appeals for the Fourth Circuit on June 10, 2003.

NO. 03-1534

THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

CHILD EVANGELISM FELLOWSHIP OF MARYLAND, INC., a Maryland  
not-for-profit corporation; CHILD EVANGELISM FELLOWSHIP OF  
NORTHWEST MARYLAND, a Maryland association,  
Plaintiffs-Appellants

v.

MONTGOMERY COUNTY PUBLIC SCHOOLS; JERRY D. WEAST, in his  
official capacity as Superintendent of Montgomery County Public Schools;  
PATRICIA O'NEILL, SHARON W. COX, KERMIT V. BURNETT,  
REGINALD M. FELTON, CHARLES HAUGHEY, WALTER N. LANGE,  
and GABE ROMERO, in their official capacities as members of the Board of  
Education for Montgomery County Public Schools,  
Defendants-Appellees

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APPEAL FROM THE OPINION OF THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION  
Hon. Peter J. Messitte

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**BRIEF OF AL AND RHONDA BLACK, AS PARENTS AND NEXT  
FRIENDS OF ERIC BLACK; UNION OF ORTHODOX  
JEWISH CONGREGATIONS OF AMERICA; NATIONAL  
ASSOCIATION OF EVANGELICALS; CLIFTON KIRKPATRICK AS  
STATED CLERK OF THE PRESBYTERIAN CHURCH (U.S.A.), AS  
*AMICI CURIAE*  
IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL**

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## **IDENTITY AND INTEREST OF *AMICI* AND AUTHORITY TO FILE**

Al and Rhonda Black are the parents of Eric Black, a student enrolled in Fairfax County Public Schools (“FCPS”), whom FCPS prevented from distributing a flyer/permission slip for Child Evangelism Fellowship of Northern Virginia (“CEF-Northern Virginia”). FCPS also prevented CEF-Northern Virginia from sending home flyers/permission slips through FCPS’s take-home flyer forum due to FCPS Regulation 1367, entitled *Distribution of Fliers or Other Informational Materials and Procedures for Contests and Competitions* (September 13, 1996). The Regulation, a copy of which is attached in the addendum, authorized nonprofit community organizations like scouting groups to distribute flyers about activities, events, contests and competitions through the school system, but not the flyers of nonprofit religious community groups. The Blacks and CEF-Northern Virginia retained Religious Liberty Advocates to address their unequal treatment. This advocacy led to an amicable settlement in January 2003, when FCPS adopted revised Regulation 1367.1 that no longer discriminates against religious community groups and grants students First Amendment literature distribution rights. A copy of this revised Regulation (available at [www.fcps.edu/Directives/R1367.pdf](http://www.fcps.edu/Directives/R1367.pdf)) and related newspaper articles are attached in the Addendum. The revised regulation requires the school district to distribute flyers for religious and non-religious groups at least once each year, requires the

school district to hold a back-to-school night or open house in which all community groups may participate, and makes advertising space in the principal's newsletter available for a fee.

The Union of Orthodox Jewish Congregations of America ("UOJCA") is a non-profit organization representing nearly 1,000 Jewish congregations throughout the United States. It is the largest Orthodox Jewish umbrella organization in this nation. Through its Institute for Public Affairs, UOJCA researches and advocates legal and public policy positions on behalf of the Orthodox Jewish community.

Of particular relevance to this case, UOJCA is the parent organization of the National Conference of Synagogue Youth ("NCSY"). One of the world's most successful Jewish youth movements, NCSY provides educational, religious, and social programming for over 40,000 American teenagers annually through weekend retreats, summer trips, and after-school clubs. NCSY invites any Jewish teenagers, regardless of their level of affiliation or observance, to participate. The case at bar will have a substantial impact upon NCSY's ability to serve students.

UOJCA supports Child Evangelism Fellowship (CEF) in this case because we believe that Montgomery County Public Schools' policy is a roadblock in the path of the Orthodox Jewish community's full enjoyment of our constitutional rights as guaranteed by the First Amendment. We believe that the limited forum doctrine may not be used to support viewpoint-based discrimination against

religious speech and that the Establishment Clause may not be raised as a defense for what is essentially religious discrimination.

The National Association of Evangelicals (“NAE”) is a non-profit association of evangelical Christian denominations, churches, organizations, institutions, and individuals that includes more than 50,000 churches from 74 denominations and serves a constituency of approximately 20 million people. The NAE is committed to defending religious freedom as a precious gift of God and a vital component of American heritage.

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 2.5 million members in more than 11,500 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. It is not affiliated with the National Association of Evangelicals.

This brief is consistent with the policies adopted by the General Assembly regarding the religious liberty guarantees of the First Amendment. The 200th General Assembly of the Presbyterian Church (U.S.A.) expressly addressed these issues:

Religious expression by the government itself or sponsored by the government threatens religious liberty and is forbidden by the establishment clause. On the other hand, religious expression by private citizens and organizations, initiated by private citizens and organizations, is protected by both the free speech and free exercise clauses and cannot be banned from public places.

Presbyterian Church (U.S.A.), *God Alone Is Lord of the Conscience*, A Policy Statement Adopted by the General Assembly 42-43 (1988). The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

Consent to file this brief was granted by appellants and requested from, but denied by, appellees. A motion for leave to file this brief *amici curiae* accompanies the brief.

## SUMMARY OF ARGUMENT

For forty years, the Supreme Court has heard a steady stream of cases concerning religious speech in the public schools. The Court has decided those cases with remarkable consistency, explained by the “crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990). It is now well-settled that government must be neutral in its treatment of private speech, even when it enhances that speech, and that this neutrality does not violate the Establishment Clause. *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995).

*Mergens* applied this neutrality principle to approve access by a religious group to a school newspaper, bulletin boards, and public address system. 496 U.S. at 247. *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), applied the neutrality principle to Good News Club meetings held in elementary schools. By excluding the Good News Club from its take-home flyer forum for distribution of information, Montgomery County Public Schools (“MCPS”) violated the Supreme Court’s well-settled principle of neutrality.

## ARGUMENT

### **I. The Club's flyers and permission slips constitute private speech, protected by the First Amendment.**

This case is controlled by the clear principle to which the Supreme Court has adhered for forty years, crystallized in *Board of Education v. Mergens*, 496 U.S. 226 (1990) (plurality opinion): “[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” *Id.* at 250.

This distinction between government speakers and private speakers is at the core of the First Amendment. The difference between protected free speech and free exercise of religion, on the one hand, and forbidden establishment of religion on the other, is the difference between private action and government action. Private citizens are free to take any position on religious matters; they are under no obligation to remain neutral. But religious speech by government is forbidden or severely constrained.

Both the protections for private speech and the restrictions on government speech flow from the government's duty to stay neutral on matters of religion:

The government must be neutral both in its own speech and in its treatment of private speech. It may not take a position on questions of religion in its own speech, and it must treat religious speech by private speakers exactly like secular speech by private speakers.

Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 3 (1986).

Accordingly, wherever the government facilitates expression of a diverse range of views, it has neither the duty nor the authority to exclude religious speakers.

Unfortunately, this principle of government neutrality has been fiercely resisted at every turn. One set of schools still seeks to sponsor prayer or even religious instruction, with or without a veneer of student choice. Another set of schools is equally determined to exclude all religious speech, or at least all evangelical Christian speech, from all campus fora, claiming to see forbidden sponsorship in the simplest incidents of equal treatment.

Before the Equal Access Act, 20 U.S.C. § 4071 *et seq.* (2000), school districts frequently prohibited religious speech without explanation or out of exaggerated concerns about the Establishment Clause. After that Act defined “open forum” in secondary schools in terms of whether the school permitted “one or more noncurriculum related student groups,” 20 U.S.C. § 4071(b), schools insisted that the Act had no effect, claiming that every secular club was curriculum related. The Supreme Court rejected that claim in *Mergens*, 496 U.S. at 250.

In cases outside the scope of the Act, school boards argued that religion could be an excluded subject matter even if the school had created a public forum. The Supreme Court rejected this claim, holding that religious speech expresses

protected viewpoints. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). Another school district renewed the argument, claiming that at least some subset of “quintessentially religious” speech was an excludable subject matter in an elementary school. The Supreme Court again rejected the argument. *Good News Club v. Milford Central School*, 533 U.S. 98, 107-12 (2001).

The Supreme Court has never been persuaded that evangelical or proselytizing speech deserves lesser First Amendment protection than any other speech at the core of the First Amendment. See *Rosenberger*, 515 U.S. at 826 (protecting student magazine that “encouraged students to consider what a personal relationship with Jesus Christ means”); *Lamb's Chapel*, 508 U.S. at 387 (protecting “an evangelical church”); *Mergens*, 496 U.S. at 247-48 (noting fear that the “Christian club” would “proselytize other students”); *Widmar v. Vincent*, 454 U.S. 263, 265 n.2 (1981) (protecting “an organization of evangelical Christian students”). In fact, the court below seems to have agreed that this point is firmly established by the Supreme Court. J.A. 804 (hearing trans.). Contradictorily, however, the district court permitted MCPS to continue its disparate treatment of CEF because, as the court recognized, CEF “is a *decidedly religious organization with a religious viewpoint.*” *Id.* (emphasis added). See also J.A. 57 (MCPS’s Opp. to Motion for Preliminary Injunction (“MCPS’s Opp.”)).

These anti-religious school boards are every bit as persistent as the pro-religious school boards in cases like *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). The Constitution is equally offended in either case: when a religious majority imposes its religious views on religious and secular minorities, and when a secular majority denies a religious minority the right to meet or to advertise its meetings equally with other groups.<sup>1</sup>

**A. MCPS gives no preferential access to the religious message; therefore, it is private speech.**

Identifying government sponsorship of religion is not difficult. Preferential treatment is always barred; neutral treatment never is. To elaborate: Religious speech is attributable to the government if government employees select the religious message,<sup>2</sup> deliver the religious message,<sup>3</sup> solicit or endorse the religious message,<sup>4</sup> arrange for the religious message,<sup>5</sup> or give an otherwise private speaker preferential access to a school forum.<sup>6</sup> No such attribution can be made here.

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<sup>1</sup> In *Santa Fe*, senior counsel for these *amici* represented parents objecting to school-sponsored prayer at high school football games. The two representations are fully consistent, because the same principle of government neutrality controls both cases.

<sup>2</sup> *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>3</sup> *Abington School District v. Schempp*, 374 U.S. 203 (1963).

<sup>4</sup> *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Treen v. Karen B.*, 455 U.S. 913 (1982).

<sup>5</sup> *Lee v. Weisman*, 505 U.S. 577 (1992).

<sup>6</sup> *Santa Fe*, 530 U.S. 290 (2000); *Stone v. Graham*, 449 U.S. 39 (1980).

In contrast, if a private speaker selects and delivers his own message, if government employees express no opinion about that message, if government employees do not invite or arrange for the message, if government employees give the speaker no preferential access to a government forum, and, in general, if government employees treat the religious speaker like similarly situated secular speakers, the religious speech is attributable to the private speaker.

This is the rule in elementary schools. *Milford*, 533 U.S. 98 (2001). It is the rule in public schools more generally. *Lamb's Chapel*, 508 U.S. 384 (1993). It is the rule in higher education. *Rosenberger*, 515 U.S. 819 (1995). It has long been the rule on other government property. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The Supreme Court has *never* held in *any* context that government may or must discriminate against religious speech by private speakers.

MCPS seems to believe that these cases are inapposite because of trivial factual variations. J.A. 61 (MCPS's Opp.). The argument, this time, is that even though a school does not endorse a group's religious speech by permitting the group to meet in an empty classroom after school, *see Milford*, or in a student

activity period, *see Mergens*, a school does endorse a religious group if it gives the group equal rights to announce the existence of such meetings in flyers/permission slips.

The Supreme Court already rejected this argument in *Mergens*. Plaintiffs there sought not just the right “to meet informally after school,” but “official recognition by the school.” 496 U.S. at 247. Official recognition “carrie[d] with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair.” *Id.* The Court held that denial of access to these means of communication denied the school equal access under the Equal Access Act, *id.*, and that so interpreted, the Act did not violate the Establishment Clause, *id.* at 247-53. *Mergens* did not have to decide whether the Free Speech Clause required equal access to these means of communication, but subsequent cases have firmly applied the principle of equal access to public school free speech cases outside the scope of the Equal Access Act. *Milford* and *Lamb’s Chapel* hold that the First Amendment requires schools to treat religious speech equally with secular speech, and *Mergens* holds that equal treatment requires access to collateral means of communication used to announce the group and its meetings. There is simply no basis for MCPS’s argument that somehow the flyers are outside the scope of the controlling principle of neutrality toward religious speech.

Some courts continue to resist the neutrality principle, sometimes ignoring the Supreme Court's most relevant opinions in the process.<sup>7</sup> In *Rusk v. Crestview Local Schools*, 220 F. Supp. 2d 854 (N.D. Ohio 2002), the district court all but ignored the *Milford* opinion, electing instead to apply the “constitutionality tests as I interpret them.” *Id.* at 860 (emphasis added). In *Culbertson v. Oakridge School District No. 76*, 258 F.3d 1061, 1065 (9th Cir. 2001), the Ninth Circuit held, with minimal discussion and no citation to *Mergens*, that teachers distributing permission slips for community groups on a viewpoint-neutral basis “goes beyond opening access to a limited public forum.” These cases, which permit discrimination against religious speech, are contrary to the controlling principle of *Milford* and *Mergens*.

Several lower courts have upheld equal access to a school's fora for distributing information. *See Hills v. Scottsdale Unified Sch. Dist., No. 48*, 2003 WL 21197150, \*1 (9th Cir. May 22, 2003) (holding that under Supreme Court precedent, the school district violated plaintiff's free speech right by denying him equal access to teacher-distributed take-home flyer forum at district elementary schools on the basis of his religious viewpoint); *Sherman v. Community Consolidated Sch. Dist. 21*, 8 F.3d 1160 (7th Cir. 1993) (upholding policy allowing

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<sup>7</sup> *See, e.g., Milford*, 533 U.S. at 109 n.3 (finding the Second Circuit's failure to cite *Lamb's Chapel* both “incredible” and “remarkable”).

the Boy Scouts to affix posters on the building and have teachers distribute their flyers to students at an elementary school, over objection that the Boy Scouts are “religiously discriminatory” because they exclude atheists); *Child Evangelism Fellowship of N.J., Inc. v. Stafford Township Sch. Dist.*, 233 F. Supp. 2d 647, 663 (D.N.J. 2002), *appeal docketed*, No. 03-1101 (3d Cir. Jan. 9, 2003) (“find[ing] that the *Milford* reasoning is equally persuasive in the context of the [school district’s take-home flyer forum]”); *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897, 911 (W.D. Mich. 2000) (upholding policy allowing religious groups “to distribute materials to students in ‘Friday folders’ which the students take home with them” on the same basis as other groups). *Cf. Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3724 (U.S. May 2, 2003) (NO. 02-1610) (requiring equal access for a religious student group to funding, yearbook, public address systems, bulletin boards, student/staff time, school supplies, vehicles, and audio/visual equipment).

In *Hills*, the Ninth Circuit found unconstitutional a school district’s discrimination against a citizen’s religious viewpoint and required the district to grant the citizen equal access to its information distribution forum. *Hills*, 2003 WL 21197150 at \*1. The Court also ruled that the Establishment Clause would not be violated if a school district “permitted distribution of literature that advertised religious programs or events” to elementary students during school hours, nor

when “teachers hand the flyers directly to the students.” *Id.* at \*8-10. The *Hills* decision greatly undermines the continued vitality of *Culbertson* even in the Ninth Circuit. Although *Hills* distinguished *Culbertson*, the distinctions seem unnecessary as a matter of legal logic, but necessary to avoid direct conflict between two panels within the same circuit.<sup>8</sup>

As did the school district in *Hills*, MCPS believes it can enforce a forum of private speakers more closed than a nonpublic forum. Government could invite a wide range of groups to express a wide diversity of ideas, but then selectively exclude certain groups because of their viewpoint. This category of forum does not exist in Supreme Court cases. It cannot exist without enabling wholesale evasion of the basic obligation of viewpoint neutrality among private speakers. Viewpoint discrimination against a private religious group cannot be justified when the group is not funded by the school, not directed or supervised by faculty, not claimed as the school’s own, and not sponsored by the school in any functional sense. Indeed, CEF’s flyer clearly announces “This is not a school sponsored

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<sup>8</sup> The *Hills* court suggested that *Culbertson* permitted distribution of brochures but not permission slips, a distinction that seems to lack legal merit. The *Hills* court mentioned three further distinctions from *Culbertson*: (1) the underlying activity occurred off school grounds; (2) the school did not handle the permission process; and (3) the brochure contained an express disclaimer. *Id.* at \*9. As in *Hills*, CEF’s brochure contains a disclaimer and MCPS schools are uninvolved in the permission process. It should be immaterial whether the meetings are on or off campus where the meetings occur after school and are administered by non-school staff.

activity.” J.A. 46 (CEF flyer). As the number of independent speakers increases, MCPS’s claim to endorse them all becomes more and more obviously fictional.

**B. Exclusion of CEF from MCPS’s fora for distributing information is viewpoint discrimination.**

MCPS distributes the materials of a wide variety of community organizations, including the Girl Scouts, Boy Scouts, YMCA, Jewish Community Center, Jewish Social Service Agency, Potomac Boys Club, Salvation Army, Boys & Girls Club, and Norbeck Community Church. J.A. 554-65 (Confino flyer log). Many of these groups provide cultural and recreational activities for children. Many of the groups recruit members to join them. Many of the groups seek to inculcate civic virtues and good character in their members.<sup>9</sup> Several of these groups including the Boy Scouts, Girl Scouts and Salvation Army, affirm statements of religious faith or even require such statements from every member.<sup>10</sup>

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<sup>9</sup> See, e.g., J.A. 586 (YMCA’s mission is to foster spiritual, mental and physical development); J.A. 592 (Boy Scouts’ mission is to prepare young people to make ethical and moral choices); J.A. 600 (Girl Scouts are dedicated to helping girls build character); J.A. 607 (Boys & Girls Club’s mission is to help boys and girls develop character). MCPS’s claim that it “does not permit the Scouts to use [its] forum to further [the Scouts’] viewpoint regarding values and character” (J.A. 56 (MCPS’s Opp.)) is not only difficult to believe but smacks of arbitrary post hoc line drawing.

<sup>10</sup> See, e.g., J.A. 590, 593 (Boy Scouts’ bedrock value and oath are doing duty to God); J.A. 599 (Girl Scouts promise to try to serve God); [http://www.salvationarmyusa.org/www\\_usn.nsf/vw\\_dynamic\\_index/FD46E6DAF1743E4B85256B76006FA193?openDocument](http://www.salvationarmyusa.org/www_usn.nsf/vw_dynamic_index/FD46E6DAF1743E4B85256B76006FA193?openDocument) (last visited June 9, 2003) (Salvation Army members share the common purpose of motivating all people to embrace the salvation provided to them in Christ).

These religious commitments are acceptable to MCPS, apparently because they are not *too* religious.

CEF is an entity of similar character. Like the other groups welcomed by MCPS, it provides recreational activities for children, including singing and games. J.A. 46-47 (CEF flyer). Like other groups welcomed by MCPS, the Good News Club invites children to join and it aspires to inculcate civic virtues and good character in them. Finally, by encouraging children to respect and obey their parents, teachers, and other authorities, the Club fosters attitudes that will improve their health and safety. The difference is that the Club seeks to ground these virtues in a biblically centered Christian faith.

Because of this difference, MCPS will not disseminate CEF materials through the take-home flyer forum. MCPS thus discriminates between religious and secular viewpoints and among religious viewpoints. There is more non-religious and not-too-religious speech on the campus than there would be without MCPS's enhancement of private speech. MCPS has interfered with the free flow of ideas in the private sector, tilting the balance against speech that it finds too religious.

It is this very discrimination, between religious and secular approaches to teaching morals and character development, that the Supreme Court invalidated as viewpoint discrimination in *Milford*. 533 U.S. at 108. Indeed, some of the very

clubs – Good News, Boy Scouts, and Girl Scouts – that receive unequal treatment here were at the heart of the discrimination invalidated in *Milford*. *Good News Club v. Milford Central Sch.*, 202 F.3d 502, 504 (2d Cir. 2000), *rev'd*, 533 U.S. 98 (2002). *Accord Good News/Good Sports Club v. School Dist.*, 28 F.3d 1501, 1505-06 (8th Cir. 1994) (finding viewpoint discrimination between Good News Club and Boy Scouts).

The Club’s take-home flyers are private speech under the Supreme Court’s cases. MCPS has created an informational forum, open to community groups in general, and actively used by groups that recruit children to join their groups and adopt their creeds. The metaphysics of whether the forum is limited or nonpublic is irrelevant. Even in nonpublic forums, the government is required to be viewpoint neutral. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); *Sons of Confederate Veterans v. Commissioner of the Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 616 n.4, 622 (4th Cir. 2002). If MCPS distributes information for private speakers, it must do so without regard to religious viewpoint.

**C. MCPS’s content-based rationales for excluding CEF are pretexts for viewpoint discrimination.**

MCPS argues that its exclusion of CEF is constitutionally permissible because MCPS excludes “dissemination of information regarding any groups [sic]

religious activities” and because CEF’s “activities are primarily evangelical.” J.A. 56-57 (MCPS’s Opp.).

The Supreme Court has repeatedly rejected the argument that religion is just a subject matter and not a source of viewpoints on the whole range of issues affecting how people, children included, are to live. *See Milford*, 533 U.S. at 109-10; *Rosenberger*, 515 U.S. at 831; *Lamb’s Chapel*, 508 U.S. at 394. Renewing the argument here, MCPS complains that CEF’s flyers have religious content. J.A. 57 (MCPS’s Opp.). It is simply unreasonable to complain that the flyers honestly describe the religious nature of the Club. It is obviously better for all – most especially for parents who do not want their children to attend — that the Club be transparent about its religious nature. It would be misleading to distribute a flyer that simply promotes an hour of stories, activities, singing and games without any mention of its religious nature.

The argument that CEF is different from the included groups because it “evangelizes” its members is disingenuous. *Id.* Most of the included groups recruit members, or else they would cease to exist. Many of the included groups have and promote various creeds, oaths, or other statements of principles, to which they expect their members to subscribe. The Boy Scouts and Salvation Army require their members to believe in God.<sup>11</sup> Seemingly, MCPS does not object to

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<sup>11</sup> *See supra*, note 10.

recruitment, indoctrination, or proselytizing *per se*, but to the particular religious viewpoints for which CEF recruits and proselytizes. This is viewpoint discrimination, pure and simple. And it violates the most fundamental principle of the First Amendment’s Religion Clauses. *See County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989) (“The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief. . . .”)

**II. Neutral treatment of religious and non-religious speech is mandated, not violated, by the Establishment Clause.**

**A. Enhancements to private speech must be neutral.**

What arguably distinguishes this case from other debates about equal access is that MCPS has chosen to facilitate private speech by disseminating materials for a variety of community groups. But the Supreme Court has repeatedly held that neutrality is required even when the government enhances private speech. *Rosenberger* applied this principle to facts much more difficult than this case, requiring a university to equally fund a pervasively religious magazine. “Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints.” *Id.* at 835.

MCPS can disseminate the full range of private speech, or it can refuse to disseminate any private speech. But it cannot facilitate only certain types of

private speech, selected in whole or in part on the basis of viewpoint. *Rosenberger*, 515 U.S. at 835-37. It cannot disseminate only non-religious or not-too-religious speech any more than it can disseminate only evangelical speech. *Id.*

**B. The Supreme Court has repeatedly held that neutrality toward religious speech does not violate the Establishment Clause.**

The Supreme Court has repeatedly “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. Among the cases the Supreme Court cited for this proposition was *Mergens*, a case dispositive of this one. Respondents in *Mergens* sought official recognition for their student club to gain formal access to facilities and to the school newspaper, bulletin boards, and public address system. 496 U.S. at 247. They had already obtained permission to meet informally after school, underscoring the centrality of their quest, like CEF’s, for access to communication channels. *Id.* Upholding their right to such access under the Equal Access Act, the Court emphasized that any risk of official state endorsement or coercion was largely self-imposed, “because the school itself has control over any impressions it gives its students.”<sup>12</sup> *Id.* at 251.

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<sup>12</sup> See also *Hedges v. Wauconda Community Sch. Dist.*, 9 F.3d 1295, 1299 (7th Cir. 1993) (chastising school district for dealing with possible misperceptions by discriminating against religion instead of educating students that neutrality does not constitute endorsement).

*Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), also offers a compelling analogy in refutation of MCPS's argument. James Zobrest asked the public school district to provide a sign-language interpreter to accompany him to class, and even mass, at a Roman Catholic high school. *Id.* at 18-19 (Blackmun, J., dissenting). Even though the public school employed and paid the interpreter, the Court treated the interpreter as a neutral conduit of private religious speech, who neither added to nor subtracted from the message conveyed. *Id.* at 13. School teachers who merely hand out flyers without commenting on the flyers' printed message are even more obviously a neutral conduit.

**C. The elementary school context of this case does not justify viewpoint discrimination.**

The age of the children in this case does not justify viewpoint discrimination. The *Milford* ruling answers the question with which this Court wrestled in a footnote in *Peck v. Upshur*, 155 F.3d 274, 287 n.\* (4th Cir. 1997), in which this Court (four years before *Milford*) expressed considerable uncertainty whether the Supreme Court would extend equal access to the elementary school context. The Supreme Court's *Milford* decision, adopted by this Court in *Brown v. Gilmore*, 258 F.3d 265, 277-78 (4<sup>th</sup> Cir.), *cert. den'd*, 534 U.S. 996 (2001), instructs that equal access does not violate the Establishment Clause—and indeed is required by the Free Speech Clause—even in the elementary school context.

Additionally, the instant facts are readily distinguishable from the factual situation in *Peck*, in which a school district adopted a new policy allowing Bible distribution. In this case, MCPS routinely distributes flyers for a broad range of community groups, but disallows CEF's informational flyers because religious speech occurs at its after-school meetings. MCPS can easily dispel any potential misunderstanding about the independence of Good News Clubs from the school. Even the youngest children can understand that they have to go to school but they do not have to go to any after-school club. Neutrality may be an abstraction, but a teacher can convey that abstraction in terms young children can understand: "I don't care whether you go to the Good News Club or not. That is up to you and your parents." Or: "We don't run any of the clubs. We just pass out flyers for all the clubs."

If there is some concern that the very youngest children cannot understand even these simple explanations, it matters little, because the flyers are directed to parents, not to children. See *Hills*, 2003 WL 21197150 at \*8; *Child Evangelism Fellowship of N. J., Inc. v. Stafford Township Sch. Dist.*, 233 F. Supp. 2d 647, 658 n.11 (2002). *Milford* involved children as young as six, and the Supreme Court rejected the argument that they would misperceive endorsement. Even if a few children choose to read the flyer before delivering it to their parents, it remains the

case that permission slips are required and only their parents can let them attend Good News Club meetings. J.A. 46 (CEF flyer).

**D. MCPS's exclusion of CEF sends a message of hostility toward evangelical groups.**

MCPS argues that the Establishment Clause requires it to exclude CEF because elementary school children are likely to confuse neutrality for endorsement. J.A. 59-60 (MCPS's Opp.). Even if it were empirically true that children cannot understand First Amendment rights, it is untenable to argue that this compels viewpoint discrimination. It is untenable because it leads to an insoluble contradiction.

If students cannot understand that toleration of the Good News Club is not necessarily an endorsement of religion, then they cannot understand that exclusion of the Club is anything other than a statement of hostility toward religion. Any attempt by MCPS to explain away the apparent hostility would be considerably more complicated than the simple proposition that the school does not endorse everything it fails to censor. *Mergens*, 496 U.S. at 250. On MCPS's hypothesis, the children would be incapable of understanding its explanation that it is not really hostile to the Good News Club's viewpoints.

The argument that the Good News Club should be excluded to avoid a perception of sponsorship is an argument that one side must forfeit its rights and bear all the risk of student misunderstanding while the other side bears no cost or

risk whatever. It is an argument that the state must actively discriminate against one side so that the other side does not mistakenly believe that the state is choosing sides. It is an argument for institutionalized viewpoint discrimination.

To plausibly be perceived as an endorsement, the State's own actions must necessarily include some form of preferential treatment for religious speech – some special privilege, or some manipulation of process to ensure that the religious speaker gets an advantage. A constitutionally cognizable impression of endorsement must be based on some government action, however subtle, that treats religious speech more favorably than other speech. *See Pinette*, 515 U.S. at 777 (O'Connor, J., concurring) (stating that a government endorsement of religion is not created by a “mistaken attribution of private speech to the State”; rather, “the State's own actions . . . and their relationship to the private speech at issue, *actually convey* a message of endorsement”). Without that, the perception of endorsement is without basis, and the free speech rights of religious citizens are at the mercy of other peoples' misperceptions.

Even in the elementary school context, *Milford* clearly subordinates perception to reality. *See* 533 U.S. at 116 (“we did not suggest that, when the school was not actually advancing religion, the impressionability of students would be relevant to the Establishment Clause issue”); *id.* at 117 (“even if we were to consider the possible misperceptions by schoolchildren,” the result would not

change). To the extent perception matters, the Court held that the perceived hostility to religious viewpoints from excluding them is at least as important as any perceived endorsement from not excluding them. *Id.* at 118. *Accord Stafford*, 233 F. Supp. 2d at 664; *Daugherty*, 116 F. Supp. 2d at 908-09. MCPS permits almost any community group, except for CEF, to use its fora for distributing information. By excluding CEF, MCPS conveys an overt message of religious hostility that is far more real than any mistaken implication of endorsement that some student might draw from mere equal treatment. In so doing, MCPS sends an unmistakable message that groups with secular or not-too-religious views are favored, full members of the political community, and an accompanying message to evangelical groups that they are disfavored and not welcome within the political community. *See Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703, 708 (4th Cir. 1994) (“discrimination against religious organizations moves the School Board into a non-neutral, antireligion corner by burdening free speech and the free exercise of religion”).

In this case, there is no ambiguity about what MCPS has actually done or about what it is being asked to do. What it has actually done is to exclude evangelical religious speech, because of its religious content, from a forum open to substantially all secular and not-too-religious community groups. That is actual

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religious discrimination, and it conveys an entirely accurate message of hostility to religious speech. What MCPS is being asked to do is to admit a religious club to a forum on the same terms as secular and not-too-religious clubs, and to let parents freely choose among clubs that teach morals and character development from either a secular or religious perspective. Such equal participation and parental choice convey no message of endorsement to any reasonable or informed observer. If a child misunderstands, the solution is to give that child or his parents an explanation – not to use a child’s mistake as an excuse for immediate resort to flagrant viewpoint discrimination. *See Hills*, 2003 WL 21197150 at \*9-10.

### **CONCLUSION**

The central command of the Religion Clauses is that government should be neutral toward religious belief and practice. MCPS has violated that command. It has used communication media to enhance private speech in a discriminatory way, distorting the marketplace of ideas in a manner that is hostile to evangelical religion. The preliminary injunction should be reversed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(C), I certify as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,976 words, including footnotes, but excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word<sup>®</sup> 2000 in 14-point “Times Roman” style typeface.

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Dated: June 10, 2003

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of this Brief *Amici Curiae* have been served by on counsel (listed below) for each party, and that ten copies of this Brief have been dispatched by to the Clerk of the United States Court of Appeals for the Fourth circuit, on this 10th day of June, 2003.

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