No. 08-1371

IN THE

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE LIBERTY COUNSEL, CHILD EVANGELISM FELLOWSHIP AND LAMB'S CHAPEL IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the family. Liberty Counsel has offices in Florida, Virginia and Washington, D.C. and has hundreds of affiliate attorneys in every state. Liberty Counsel has represented numerous faith-based non-profit organizations, including Child Evangelism Fellowship, in matters addressing free speech and free exercise rights, including equal access, under both the First Amendment of the United States Constitution and the Equal Access Act, 20 U.S.C.§ 4071.

Child Evangelism Fellowship ("CEF") is an international non-profit religious organization. Among the ministries operated by CEF is the Good News Club, which offers moral and character development from a Christian perspective at public elementary schools. CEF has dealt first hand with the conflict between equal access rights and the Establishment Clause, including as the plaintiff in federal court challenges throughout the United States. CEF has succeeded in protecting its equal access rights against various attempts to carve out

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[1] Amici file this brief with the consent of all parties. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this brief.

exceptions to this Court's clear directives. *See, e.g., Good News Club v. Milford Central School,* 533 U.S. 98 (2001).

Lamb's Chapel is an evangelical Christian church located in New York. Lamb's Chapel has also dealt first hand with equal access issues on public school campuses as the Petitioner in *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384 (1993).

Liberty Counsel, CEF and Lamb's Chapel are deeply concerned about the effect that the lower courts' decisions in this case would have upon the equal access rights they have fought so hard to protect. Amici believe that the lower court decisions, if left intact, could significantly undermine First Amendment rights.

SUMMARY OF ARGUMENT

This Court's and Congress' messages could hardly be clearer: Public schools must grant private religious organizations access equal to that granted to non-religious private organizations. Despite its apparent clarity, the message has been garbled by school officials looking for ways to translate "must grant equal access" into "need not grant equal access," "may grant similar access," or some comparable phrase that will permit them to limit or exclude religious organizations from public school campuses. As a result, CEF, other religious organizations and students have repeatedly had to ask courts to re-establish the parameters of First Amendment and statutory protection for private religious organizations seeking access to public

schools. Those efforts have been largely successful, if costly and time-consuming, in shoring up the wall of protection for religious expression in public schools.

The Ninth Circuit's decision in this case, however, creates a new crack in the foundation that will lead to a crumbling of the equal access rights this Court and Congress have found to be integral to the fundamental First Amendment rights enjoyed by all Americans. This Court should reverse the lower court's decision to halt the erosion of these cherished First Amendment rights.

LEGAL ARGUMENT

I. THE LOWER COURT'S DECISION UNDERMINES SOUND PRECEDENT ESTABLISHING AND PROTECTING FIRST AMENDMENT EQUAL ACCESS RIGHTS AT PUBLIC SCHOOLS.

More than a quarter century of precedent affirming that the First Amendment requires private religious organizations be granted equal access to public school speech fora should have settled the issue. *See Widmar v. Vincent*, 454 U.S. 263 (1981) *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384 (1993), *Good News Club v. Milford Central School,* 533 U.S. 98 (2001). School officials have tried to invent clever schemes to get around this precedent. For the most part, courts have largely rejected these strategies and upheld the spirit and the letter of this Court's First Amendment jurisprudence. However, the decision

below undermines this Court's precedent, and it must be reversed

A. Religious Speech Must Be Afforded Equal Access To Public School Facilities.

Private religious speech in a public forum on otherwise permissible subjects is entitled to the highest protection under the First Amendment. *Good News Club,* 533 U.S. at 98; *Lambs Chapel,* 508 U.S. at 384; and *Widmar,* 454 U.S. at 276. However, in the school context, speech restrictions on religious viewpoints are frequently justified by school officials simply because the speech is religious.

In *Widmar,* university officials cited a regulation prohibiting the use of university buildings or grounds for "purposes of religious worship or religious teaching" as authority for excluding a Christian organization from facilities otherwise generally available for similar secular groups. *Id.* This Court held that once the university created a forum for use by student groups it could not exclude a group based upon the religious content of its message unless the exclusion was necessary to serve a compelling state interest and narrowly drawn to achieve that end. *Id.* at 270. The university's claim that it had to abide by the regulation prohibiting religious teaching to avoid violating the Establishment Clause did not satisfy the compelling interest standard. *Id.* at 271-273. Granting equal access would not violate the Establishment Clause because an open forum

policy including nondiscrimination against religious groups has a secular purpose, avoids entanglement with religion, and does not have the primary effect of advancing religion. *Id.* Of particular import in *Widmar* was the fact that there were over 100 religious and non-religious groups using school facilities, which militated against a finding that granting the Christian group access would represent endorsement of religion. *Id.* at 274.

Similarly, this Court found there was no danger that the community would think a school district was endorsing religion if it permitted a church to show a film series about parenting from a Christian perspective. *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 395 (1993). As was true with the university in *Widmar*, the district in *Lamb's Chapel* had opened school facilities for use by community groups but denied the church's use because of a provision that prohibited the use of school facilities for religious purposes. *Id.* at 394. This Court applied its reasoning in *Widmar* to dispose of the district's claim that showing the film series would trigger an Establishment Clause violation. *Id.* at 395. Echoing its holding in *Widmar,* this Court held that "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." *Id.* at 394.

Even after *Widmar* and *Lamb's Chapel,* school districts continued to struggle with the equal access concept, prompting circuit courts to further

define the nature and extent of equal access rights under the First Amendment. *See e.g., Hsu v. Roslyn Union Free School District No. 3,* 85 F.3d 839 (2d Cir. 1996) *cert denied,* 519 U.S. 1040 (1996), *Good News/Good Sports Club v. School Dist of Ladue*, 28 F.3d 1501 (8th Cir. 1994) *cert denied,* 515 U.S. 1173 (1995).

In *Hsu*, the Second Circuit refused to permit a school district to use a nondiscrimination policy to escape its obligation to provide equal access to a Bible club. *Hsu*, 85 F.3d at 862. *Hsu* presented a factual scenario strikingly similar to the facts in this case but, unlike the Ninth Circuit here, the Second Circuit correctly found that the district's actions violated the organization's equal access rights. In *Hsu*, the district attempted to use its non-discrimination policy to control the content of the club's speech by conditioning official recognition on the club abandoning its requirement that leaders be Christian. *Id.* The Second Circuit held that the non-discrimination policy could not be used to deprive the Bible Club of equal access, *i.e.*, official recognition without restrictions. *Id.*[2] The court

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[2] While the *Hsu* court's overall ruling was correct, it mistakenly differentiated between club officers, saying that the requirement that leaders be Christian was acceptable for leadership positions for which religious beliefs were significant, but not necessarily for less religiously significant positions. *Hsu*, 85 F.3d at 857-858. Making such a differentiation would involve impermissible entanglement with religion, as it requires that the school determine which officers play religiously significant roles and thereby substitute its judgment for the organization's, which this Court found impermissible in *Democratic Party v Wisconsin,* 450 U.S. 107,123 (1981). Notably, *Hsu* was decided before this

explained that religious discrimination is not automatically invidious in a religious club and that there was no invidious discrimination present in the Bible club's requirements. *Id.* at 871. As well as avoiding discrimination, a school's mission may include encouraging tolerance of diverse political and religious views, so long as the views are not offensive or threatening. *Id.* The Bible club's leadership policy was neither. *Id.* Since the club's policy did not involve invidious discrimination or threatening and offensive points of view, the district could not justify violating the club's equal access rights. *Id.*

Complaints about the religious content of club meetings led the Ladue school board to attempt to foreclose access to school facilities until after 6 p.m. *Good News/Good Sports,* 28 F.3d at 1503. However, the board continued to permit Boy Scouts and athletic teams to use school facilities between 3 p.m. and 6 p.m., so long as the meetings were free from any religious speech. *Id.* School officials attempted to justify the exemption for the Boy Scouts based upon the "school district's 'long-standing tradition of cooperation with scout programs.'" *Id.* The district argued that this "long-standing tradition" and its concerns about a possible Establishment Clause violation provided sufficient justification for the new policy. *Id.* The district conceded that both the Scouts and Good News/Good Sports Club addressed the same issues–

Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and such a differentiation would no longer be permissible under *Dale*.

moral and character development–but argued that the club addressed a different "subject matter" because religious speech is a different category. *Id.* at 1506. The Eighth Circuit noted that this Court had rejected that argument in *Lamb's Chapel* and found it equally unavailing in *Good News/Good Sports*. *Id.* The club met its burden of demonstrating that the amended policy permitted the Scouts to express their viewpoint on moral and character development but prohibited the club's religious viewpoint on the same subject. *Id.* at 1507. The district failed to demonstrate that the new policy was necessary to avoid an Establishment Clause violation, particularly since the prior policy, under which the club was granted access, did not result in an establishment of religion. *Id.* at 1510.

Hsu and *Good News/Good Sports* clarified the primacy of the equal access rights established in *Widmar* and *Lamb's Chapel*. However, school districts continued to try to circumvent equal access by raising Establishment Clause concerns. Conflicts among circuit courts regarding the legitimacy of those claims set the stage for further clarification of First Amendment equal access rights in *Good News Club,* 533 U.S. at 98.

B. *Good News Club* Extended Equal Access Rights To Public Elementary Schools.

Despite having reached the proper conclusion regarding the Bible club in *Hsu*, the Second Circuit reversed course in *Good News Club*

when it determined that a New York school district properly denied the Good News Club's application for access to school facilities. *Good News Club v. Milford*, 533 U.S. at 105. Relying upon the same New York law that the Center Moriches district relied upon in *Lamb's Chapel*, the Milford school district determined that Good News Club meetings were not permissible discussions of secular subjects from a religious perspective but prohibited religious instruction. *Id.* The Second Circuit agreed with the district that the club was doing something more than simply teaching moral values. *Id.* at 111. The Second Circuit said that the Christian viewpoint is unique because it contains an "additional layer" in that it is focused on teaching children how to cultivate their relationship with God through Jesus Christ. *Id.* That made the club's activities "quintessentially religious" and took them out of the realm of pure moral and character development so that excluding the club from school facilities did not constitute viewpoint discrimination. *Id.*

This Court rejected the school district's arguments and found the exclusion of Good News Club from school facilities indistinguishable from the exclusions found unconstitutional in *Lamb's Chapel* and *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (finding that the university's denial of student activity fee revenues to a Christian publication was unconstitutional viewpoint discrimination). *Good News Club*, 535 U.S. at 107. As it did in *Lamb's Chapel*, this Court found that exclusion of the Good News Club from the school's forum was impermissible viewpoint discrimination. *Id.* at 109.

"The only apparent difference between the activity of Lamb's Chapel and the activities of the Good News Club is that the Club chooses to teach moral lessons from a Christian perspective through live storytelling and prayer, whereas Lamb's Chapel taught lessons through films. This distinction is inconsequential." *Id.* at 109-110. "What matters for 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.* "It is apparent that the unstated principle of the Court of Appeals' reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a 'pure' discussion of those issues." *Id.* at 111 "According to the Court of Appeals, reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not." *Id.* "We, however, have never reached such a conclusion." *Id.* "Instead we re-affirm our holdings in *Lamb's Chapel* and *Rosenberger* 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.

Justice Scalia emphasized the error in the Second Circuit's attempt to differentiate between the Good News Club's Christian message and non-religious moral and character development programs. *Id.* at 123 (Scalia, J. concurring). The district said that organizations could use its forum

to teach moral values using Aesop's Fables but not the Bible because using Scripture went beyond merely stating a viewpoint. *Id.* at 124. "From no other group does respondent require the sterility of speech that it demands of petitioners." *Id.* "The Scouts can discuss keeping morally straight and living clean lives and give reasons why, but the Club cannot give its reasons why moral values should be fostered, i.e. because God wants and expects it, because it will make the Club members 'saintly' people, and because it emulates Jesus Christ." *Id.* "The Club may not, in other words, independently discuss the religious premise on which its views are based – that God exists and His assistance is necessary to morality." *Id.* "This is blatant viewpoint discrimination."*Id.*

As it had in *Widmar* and *Lamb's Chapel*, this Court rejected the district's argument that its interest in not violating the Establishment Clause somehow outweighed the club's interest in gaining equal access to school facilities. *Id.* at 112. The Court found unpersuasive the fact that the case, unlike *Lamb's Chapel* and *Widmar*, involved elementary-aged children, who, according to the district, would be more likely to be coerced into attending the meetings. *Id.* at 114. While prior decisions had acknowledged that young children are more impressionable than adults, "we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present." *Id.* at 115. Particularly since children could not attend club meetings

without parent permission, there was no valid Establishment Clause claim that could override the club's First Amendment rights. *Id.* at 117-118.

Read together, *Widmar*, *Lamb's Chapel* and *Good News Club* establish that when public schools, whether elementary, secondary or post-secondary, create a forum for expressive activities they must grant equal access to organizations that want to offer a religious viewpoint on an otherwise includible subject. School officials cannot use the Establishment Clause or state laws against religious instruction to evade their obligations to provide equal access to organizations or individuals who want to engage in religious expression.

C. Even After *Good News Club,* Individuals And Groups Continue To Struggle To Obtain Or Maintain Equal Access, And The Lower Court's Ruling Will Exacerbate That Struggle.

Despite the clear message in *Good News Club*, individuals, CEF and other organizations have continued to encounter obstacles when seeking access to school facilities for religiously-based programs. School officials have continued to try to justify differential treatment or even exclusion of religious organizations from school facilities by relying on state laws against religious instruction or policies crafted to exclude religious groups without closing the forum. Individuals, CEF and similar organizations have had to seek relief

from the courts, and their efforts have been largely successful in maintaining the integrity of this Court's equal access precedents. The Ninth Circuit's ruling in this case poses a significant threat to those successes and more importantly to the First Amendment equal access rights this Court has recognized as integral to protecting private organizations' rights of free speech, exercise and association.

The Third Circuit aptly described the efforts of the Punxsutawney school board– and subsequent efforts by other school districts–as "searching valiantly for a potential loophole" to avoid having to permit a Bible club to meet during a school activity period. *Donovan v. Punxsutawney Area School Board*, 336 F.3d 211, 227 (3d Cir. 2003). In *Donovan*, the school board denied the student-led club's request for official recognition and permission to meet during the activity period because of its "religious ties." *Id.* at 215. The Third Circuit found that the Bible club was a group that discussed current issues from a biblical perspective but was denied permission to meet during the school activity period solely because of its religious nature. *Id.* at 226. "This constitutes viewpoint discrimination." *Id.* The court rejected the school board's argument that making religious discussion available during a time of compulsory attendance would unconstitutionally advance religion. *Id.* at 227. That might be a concern if the district were dealing with release time classes taught by superintendent-approved sectarian teachers, but not where students merely sought an equal opportunity to express themselves along with other

like-minded students during the activity period. *Id.* The availability of various activities and the voluntary, student-initiated nature of the club "militate against any government endorsement or entanglement." *Id.* Consequently, there was no valid Establishment Clause concern that would justify the district's discriminatory conduct. *Id.*

Another example of a district's "valiant search for a loophole" is the Stafford Township district's attempt to justify excluding CEF from literature distribution fora for, *inter alia*, fear of creating "divisiveness between and amongst parents to parents and children to children, as well as the staff." *Child Evangelism Fellowship v. Stafford Township School Dist.*, 386 F.3d 514, 523 (3d Cir. 2004). The Stafford district put a new spin on the familiar Establishment Clause defense when it cited concerns about how CEF's requests would affect students and the school-parent relationship and how complying with CEF's requests would affect opening the schools as limited public fora in the future. *Id.* District officials claimed that their exclusion of CEF was viewpoint neutral because they excluded all groups that represented "special interests," espoused "divisive" or "controversial" viewpoints, promoted any point of view, proselytized, spoke about religion and engaged in anything other than "mundane recreational activities." *Id.* at 527. The Third Circuit rejected these arguments as "rationalizations" that "are either incoherent or euphemisms for viewpoint-based religious discrimination." *Id.* The district went beyond merely discriminating against CEF for teaching moral values from a religious

perspective to actually disfavoring CEF because of its particular religious views. *Id.* at 529. District officials granted access to groups such as the Scouts and Elks Club, which espoused religious views and encouraged members to endorse them. *Id.* However, they denied CEF access because, "[w]e were concerned that, what the Child Evangelism Fellowship teaches appears to be inconsistent with what we're obligated to teach, that being diversity and tolerance." *Id.* at 530. The court concluded that "[s]uppressing speech on this ground is indisputably viewpoint-based." *Id.*

After its proposed loopholes of avoiding "separation of church and state," proselytizing and evangelicalism failed, the Montgomery County, Maryland district resorted to an equally unsuccessful claim that granting access to CEF would violate the Establishment Clause. *Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools*, 373 F.3d 589, 594 (4th Cir. 2004). At first the district denied CEF's request to distribute fliers because of their religious nature and concerns about "separation of church and state," even though the district permitted fliers from other organizations such as the Salvation Army, a community church, Boy and Girl Scouts and the Jewish Community Center. *Id.* at 592-593. Later, the district claimed that its denial was not based upon the religious viewpoint of CEF's fliers but on the fact that its forum was not open to "proselytization" or "evangelical groups." *Id.* The district finally conceded that its exclusion of CEF was unconstitutional viewpoint discrimination, but that it was justified because granting CEF access

would constitute establishment of religion. *Id.* at 594. The Fourth Circuit rejected that argument. *Id.* at 596. The court held that simply distributing a flier mentioning a religious organization during school hours does not render the communication state speech or create a perception of endorsement or coercion by the government. *Id.* "Directing them to take home these diverse materials does not coerce them to engage in a religious activity, any more than it coerces them to engage in an environmental activity." *Id.* at 599. Without a viable Establishment Clause defense, the district could not justify its unconstitutional viewpoint discrimination against CEF. *Id.* at 602.

Two years later, the Fourth Circuit rejected Montgomery County's attempt to create a new loophole to exclude CEF from its literature distribution forum. *Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools*, 457 F.3d 376 (4th Cir. 2006) Instead of responding to the court's 2004 decision by granting CEF access to the forum, the district attempted to restructure the forum to exclude CEF. *Id.* at 379-380. The new policy purported to limit literature distribution to five groups, but gave school officials discretion to approve any flier and the right to withdraw approval if officials determined that distribution would undermine the intent of the policy. *Id.* at 380 The Fourth Circuit held that the new policy did not provide the viewpoint neutrality required under the First Amendment. *Id.* at 389. Viewpoint neutrality means more than merely refraining from explicit discrimination, but also maintaining safeguards to prevent the improper exclusion of

viewpoints. *Id.* at 384. The new policy did not provide sufficient safeguards and therefore did not adequately protect against viewpoint discrimination. *Id.* at 389.

The policies enacted by the Anderson School District suffered from similar infirmities and were similarly ruled unconstitutional by the Fourth Circuit in *Child Evangelism Fellowship of South Carolina v. Anderson School Dist. Five*, 470 F.3d 1062 (4th Cir. 2006) In *CEF v. Anderson*, the district refused to grant CEF a waiver of facilities use fees even though it provided a waiver to the Boy Scouts and other non-profit organizations. *Id.* at 1065. The policy in effect at the time that CEF first sought a fee waiver included a "catch-all" provision in which the district reserved the right to waive fees as determined to be "in the district's best interest." *Id.* CEF sought a waiver under that provision, which was the basis for waivers for scout troops, but was denied. *Id* at 1066. As did the school district in *Good News/Good Sports Club v. Ladue,* the Anderson district cited its history of granting free access to the scouts as a justification for granting the scouts but not CEF a fee waiver. *Id.* Two months after CEF filed suit, the district adopted a new policy that replaced the "best interest" waiver with a waiver for groups that began using school facilities before fees were charged or had used school facilities for at least 20 years. *Id.* Only scouting organizations fit the definition. *Id.* Citing *Lamb's Chapel*, the Fourth Circuit said, "[r]ecent Supreme Court decisions establish that any tension between the Establishment and Free Speech Clauses that may

have motivated past exclusion of religious groups from government forums is more apparent than real." *Id.* at 1068. "Government need not fear an Establishment Clause violation from allowing religious groups to speak under the same reasonable, viewpoint-neutral terms as other private parties, even if some speakers are denied forum access under these neutral principles." *Id.* The court re-iterated that viewpoint neutrality means not merely lack of discriminatory treatment, but also adequate standards to ensure that government officials do not have unfettered discretion to burden or ban speech. *Id.* The original "best interest" waiver did not contain those safeguards, and the new policy did not solve the problem. *Id* at 1072.

The unfettered discretion that proved fatal to the policies in *Montgomery County* and *Anderson* also plagued the policy found unconstitutional in *Child Evangelism Fellowship of Virginia v. Williamsburg-James City County School Bd.,* No. 4:08cv4, 2008 WL 3348227 (E.D. Va. August 8, 2008) ("*CEF v. WJCC*"). In *CEF v. WJCC*, the school board's policy waived usage fees for five undefined groups, including scout troops, "school-sponsored activities" and "specific events" run by local charitable organizations. *Id.* at *1. CEF was denied a fee waiver even after it informed the district of *Good News Club v. Milford* and similar precedents defining school districts' equal access obligations under the First Amendment. *Id.* at *2. The district court granted CEF's request for a preliminary injunction, finding that *Anderson* compelled a finding that the school board's actions

were unconstitutional. *Id.* at *4. "Defendant's policy is no better than the 'best interest' policy at issue in *Anderson*." *Id.* at *5. "This vague policy, granting unfettered discretion to the superintendent, violates Plaintiff's First Amendment rights." *Id.*

The school district in Elk River, Minnesota tried to find a statutory loophole in the form of the Boy Scout Equal Access Act, 20 U.S.C. § 7905, discussed *infra*. *Child Evangelism Fellowship of Minnesota v. Elk River Area School District #728*, 599 F. Supp.2d 1136 (D. Minn. 2009) Elk River officials claimed that the statute essentially superseded *Good News Club v. Milford* so as to permit them to grant access to the Scouts and deny access to CEF. *Id.* at 1141. The district court rejected that argument, finding that "the holding in *Milford* dictates that if Elk River allows the Boy Scouts, or any other listed 'patriotic youth group,' access to its limited public fora but does not allow the Good News Club access, it has violated the Free Speech Clause of the First Amendment." *Id.*

As these cases illustrate, even this Court's definitive statement in *Good News Club v. Milford* failed to dampen school districts' resolve to restrict or exclude religious organizations' access to schools' free speech fora. Districts have tried to use the Establishment Clause,""separation of church and state," obligations to "teach diversity and tolerance" and nondiscrimination policies to try to justify restricting or excluding religious expression at public schools.

Districts have also frequently resorted to creative policy writing, trying to "write out" religious organizations while leaving in their long-time users or re-characterize activities to circumvent precedent. An example of the latter strategy is New York City's effort to draft a policy that would prohibit churches from using school facilities on weekends without running afoul of *Good News Club v. Milford*. *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 94 (2d Cir. 2007). School officials read *Good News Club v. Milford* as permitting the exclusion of "pure worship" services, as distinct from religious instruction, from public school campuses and rewrote its policy to provide:

> No permit shall be granted for the purpose of *holding religious worship services*, or *otherwise using a school as a house of worship*. Permits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this chapter on the same basis that they are granted to other clubs for students that are sponsored by outside organizations.

Id. (emphasis in original). The Second Circuit panel vacated a permanent injunction without reaching a consensus on whether the new policy constituted viewpoint discrimination. *Id.* at 91. Judge Calabresi's analysis in support of the school board's position that there was no viewpoint discrimination demonstrates the extremes to which school officials

will go to try to justify discriminatory treatment of religious organizations. *Id.* at 103-104. (Calabresi, J., concurring). Organizations that engaged in Bible studies, religious instruction and singing of Christian hymns could use school facilities under the New York policy. *Id.* However, plaintiffs could not use school facilities for their Bible studies, religious instruction and singing of Christian hymns that included baptism and communion. *Id.* Judge Calabresi agreed with the school board that plaintiffs' activities were not a different perspective on an includible subject matter, but a categorically different subject matter which could be excluded. *Id.* at 100. "Worship is the sui generis subject 'that the District has placed off limits to any and all speakers,' regardless of their perspective." *Id.* Therefore, Judge Calabresi concluded, the exclusion was based upon subject matter, not viewpoint, and was permissible. *Id.* In another concurrence, Judge Leval offered the district another possible avenue for denying the church access. *Id.* at 120. Examining the intricacies of the church's membership policies, Judge Leval suggested that the district could deny access on the grounds that the church was not open to "everyone" and therefore did not comply with state law. *Id.* In particular, Judge Leval noted that Bronx Household's policies permit excommunication of someone who publicly advocates Islam, and suggested that such exclusionary policies could justify denying equal access to school facilities. *Id.*

Judge Calabresi's and Judge Leval's analyses, while not precedential, exemplify the herculean efforts that school officials have

undertaken to try to circumvent equal access. As the other cases discussed above illustrate, religious organizations have made significant progress in halting these efforts, as the circuit courts have largely rejected school officials' arguments and maintained the integrity of this Court's ruling in *Good News Club v. Milford*. The Ninth Circuit's decision here threatens that progress. If the decision is upheld by this Court, then school districts will become emboldened and will implement or use existing nondiscrimination policies to create new obstacles to religious expression in public schools. If *Widmar, Lamb's Chapel* and *Good News Club* are to have any meaning, then this latest maneuver by school officials must be overturned.

II. THE NINTH CIRCUIT'S DECISION THREATENS STATUTORY RIGHTS TO EQUAL ACCESS AT PUBLIC SCHOOLS.

Congress also sent a clear message that discrimination will not be tolerated in public school speech fora when it passed the Equal Access Act, 20 U.S.C. § 4071 and the Boy Scout Equal Access Act, 20 U.S.C. § 7905 The lower court's decision threatens to undermine these statutory protections by sanctioning evasive maneuvers clothed in the language of tolerance and diversity. As is true with First Amendment equal access rights, statutory equal access rights have been hampered by school district efforts to surreptitiously restrict or exclude religious expression without violating the statutes. As they did in the constitutional equal access arena, school districts have tried to use the

Establishment Clause, strategic re-definition of essential terms and creative categorization of activities to evade the statutory requirements. Those efforts have been rejected by this Court and circuit courts, but could be resurrected if the lower court's decision is permitted to stand.

A. Congress Responded To Discrimination On Public School Campuses By Instituting Statutory Equal Access Rights Modeled After *Widmar*.

Congress enacted the Equal Access Act as a direct response to increasing discrimination against religious speech on public school campuses. S. REP. NO. 98-357, at 16 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2348, 2367. "When schools deny equal access to religious clubs they are clearly conditioning receipt of a state benefit upon an agreement to avoid religious speech." S. REP. NO. 98-357, at 20. "Such a denial has a substantial chilling effect on something that for many religious persons is one of the most important aspects of their lives, the ability to talk about their faith and what it means to them." S. REP. NO. 98-357, at 20. "It would be hard to imagine a more significant restraint on their right to exercise their religion freely than denying them the opportunity for religious speech during their school hours." S. REP. NO. 98-357, at 20.

As have the courts, Congress rejected the argument that exclusion of religious speech is

justified to avoid violating the Establishment Clause. S. REP. NO. 98-357, at 20. "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." S. REP. NO. 98-357, at 20 (citing *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)). Debunking some of the myths that had been perpetuated by school districts regarding the Establishment Clause, Congress explained that "the Constitution does not require that the government affirmatively protect the non-religious student from religion, but only that the government restrain itself from participating in religious inculcation." S. REP. NO. 98-357, at 29. "The fundamental rights of free speech, association and exercise of religion of students who view religion as a vital part of their daily lives should not be sacrificed to speculative misperception of misinformed students." S. REP. NO. 98-357, at 29. Rather than fostering these misperceptions by excluding speakers, schools should seek to overcome them by educating students about the First Amendment. S. REP. NO. 98-357, at 29.

Congress modeled the Equal Access Act ("the Act") after this Court's decision in *Widmar*. S. REP. NO. 98-357, at 32. Under the Act, if a school permits a non-curriculum related, student-initiated, student-led club to meet on campus, then it cannot deny equal access to a religious student club. S. REP. NO. 98-357, at 30. The Act does not require that schools permit such clubs, but merely prohibits

discrimination against them if one secular club is permitted. S. REP. NO. 98-357, at 30. Congress adopted this Court's definition of "equal access" in *Widmar, i.e.,* religiously oriented extracurricular activities must be allowed under the same terms and conditions as are other extracurricular activities. S. REP. NO. 98-357, at 32. As has proven true with *Widmar*, what should have been a straightforward concept of equal access for religious speech has become convoluted by school districts' efforts to find loopholes through which they can escape from equal access requirements.

1. In *Mergens*, This Court Rejected Attempts To Weaken Or Overturn The Equal Access Act.

Unfazed by Congress' clear message that *Widmar*'s equal access requirements apply equally to secondary schools, officials of Westside Community Schools trod familiar ground when they denied students' requests for official recognition of a Christian club. *Bd of Educ of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). Following the same path as did the districts in *CEF v. Montgomery County* and *CEF v. Stafford*, the Westside board argued that the Equal Access Act did not apply, and, even if it did, it violated the Establishment Clause. *Id* at 233. This Court rejected both contentions and upheld the constitutionality of the Act.

School officials claimed that they did not have a "limited open forum" as defined under the

Act because their student clubs were all curriculum-related and tied to the educational function of the school. *Id.* This Court rejected the district's narrow reading of the Act's provisions and adopted a definition more in keeping with Congress' intent. *Id.* at 239-240. "We think that the term "noncurriculum related student group" is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school." *Id.* at 239. A group "directly relates" to the curriculum if its subject matter is or soon will be taught in a regularly offered course, concerns the whole body of courses, is required for a course or will result in academic credit. *Id.* "We think this limited definition of groups that directly relate to the curriculum is a commonsense interpretation of the Act that is consistent with Congress' intent to provide a low threshold for triggering the Act's requirements." *Id.* at 240. By contrast, the district's rendering of "curriculum related" as anything remotely related to abstract educational goals would render the Act meaningless, as it would permit districts to evade the Act by strategically describing existing clubs to meet its goals. *Id.* at 244. Under the Court's definition, Westside had at least one "non-curriculum related" club and therefore had a "limited open forum" under the Act. *Id.* at 245. Consequently, its denial of official recognition to the Christian club was a denial of equal access under the statute. *Id.*

This Court found that its analysis under *Widmar* applied equally to the Equal Access Act to defeat Westside's claim that granting the Christian

club official recognition would violate the Establishment Clause. *Id.* at 248. This Court rejected the school's argument that complying with the Act would have the primary effect of endorsing religion. *Id.* at 249. Secondary school students are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. *Id.* at 250. In addition, faculty and staff participation is strictly limited and meetings are held during non-instructional time, which eliminates concerns about official state endorsement. *Id.* at 251. Furthermore, the broad spectrum of student groups and the fact that students are free to initiate and organize additional clubs counteracts any possible message of endorsement of a particular religious belief. *Id.* at 252. This Court also rejected the district's claim that the Act leads to excessive entanglement with religion. *Id.* In fact, the opposite is true: "a denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur." *Id.* at 253. Consequently, the Equal Access Act does not violate the Establishment Clause. *Id.*

That determination should have settled the matter for school officials and lower courts. However, as this litigation illustrates, that has not been the case.

2. School Districts Have Continued To Try To Undermine The Equal Access Act, But Courts Have Largely Rejected Those Efforts.

Even the definitive statement by this Court in *Mergens* did not prevent school districts from attempting to circumvent the Act, just as they attempted to circumvent their constitutional obligation to provide equal access to extracurricular religious speech. With the notable exceptions of this case and the case upon which the Ninth Circuit based its opinion, *Truth v. Kent School District*, 542 F.3d 634 (9th Cir. 2008), courts have largely rejected attempts to undermine the Act.

The Third Circuit utilized the *Mergens* definition of "curriculum-related" to overturn a district's claim that it properly rejected a Bible club's application because the Equal Access Act did not apply to its group of solely "curriculum-related" clubs. *Pope v. East Brunswick Bd of Educ.*, 12 F.3d 1244 (3d Cir. 1993). The Third Circuit explained: "*Mergens* did not hold that the activities of a student organization need only relate in some marginal way to something taught in class." *Id.* at 1253. "Rather, the Court said that the *subject matter* of the student group must be taught in a class." *Id.* A few isolated club activities do not transform an otherwise non-curriculum related student group into a curriculum-related one. *Id.* Instead, whether an activity is "curriculum-related" is determined by reviewing the primary focus of the

activity and measuring that against the topics taught in the course to which the club is supposed to relate. *Id.* The relationship that the district tried to draw between the Key Club and the history curriculum was too attenuated to meet the *Mergens* definition. *Id.* Therefore the Key Club was a non-curriculum club that triggered the Equal Access Act. *Id.* Consequently, the schools' refusal to certify the Bible club violated the Act. *Id.* at 1254.

The Third Circuit found the ski club and anti-drug and alcohol clubs in Punxsutawney even less tangentially related to the curriculum than was the Key Club in *Pope*. *Donovan v. Punxsutawney Area School Board*, 336 F.3d 211, 221 (3d Cir. 2003) "School systems may not evade the Act's requirements by strategically describing existing student groups." *Id.* In addition, districts cannot escape the provisions of the Act by claiming that an activity time prior to the first class is "instructional time" because students must be at school. *Id.* "To conclude that mandatory attendance means that any school period is actual classroom instruction is to undercut both the specific language and the statutory purpose of the Equal Access Act." *Id.* at 223. "It is not mandatory attendance at the school, but mandatory attendance *at the group's meeting* that raises Establishment Clause concerns." *Id. at* 224 (emphasis in original). "Schools may not evade the Act's requirements by strategically describing an activity period." *Id.* "Just as putting a 'Horse' sign around a cow's neck does not make a bovine equine, a school's decision that a free-wheeling activity

period constitutes actual classroom instructional time does not make it so." *Id.*

The Ninth Circuit rejected a district's attempt to interpret the Equal Access Act as requiring either equal access or a fair opportunity to meet. *Prince v. Jacoby*, 303 F.3d 1074, 1079 (9th Cir. 2002) *cert denied* 540 U.S. 813 (2003). In *Prince*, the district claimed that the Act's provision making it unlawful to "deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting" meant that a school did not have to provide equal access if it provided a "fair opportunity" for access. *Id.* The Ninth Circuit rejected that restrictive reading of the Act as antithetical to Congress' purpose. *Id.* at 1081. The term "equal access means what the Supreme Court said in *Widmar*: religiously-oriented student activities must be allowed under the same terms and conditions as other extracurricular activities, once the secondary school has established a limited open forum." *Id.* Congress' objective was to "prohibit discrimination between religious and political clubs on the one hand and other noncurriculum-related student groups on the other." *Id.* at 1082 (citing *Mergens*, 496 U.S. at 238). Denying the Christian club equal access to school facilities violated that standard, and merely providing a "fair opportunity" is not a suitable replacement. *Id.* at 1083. The Ninth Circuit also rejected the district's argument that granting official recognition to the club would result in prohibited "sponsorship" in violation of the Act and the Establishment Clause. *Id.* at 1084. Under the Act, once the district establishes a

limited open forum" it *must* provide the Christian club with equal access to that forum." *Id.* (emphasis in original). If state regulations required sponsorship under the Act, then the regulations must give way. *Id.*

The Second Circuit similarly concluded that the Equal Access Act requires both equal access and a fair opportunity to meet. *Hsu,* 85 F.3d at 854 n. 8. The *Hsu* court found that the Act protected the Bible club's Christian officer requirement and prohibited the district from conditioning recognition on abandoning the requirement. *Id.* at 862. "We conclude that, in light of the Supreme Court's command that we construe the Act broadly, the term 'speech' includes the . . . club's leadership policy provision, to the extent it is designed to ensure a certain type of religious speech will take place at the Club's meetings." *Id.* at 856. The Act was intended to protect both free speech and free association rights, and therefore contains the implicit right of expressive association when the goal of the association is to meet for a purpose protected by the Act. *Id.* at 859. Equal access might require that schools permit exemptions from neutrally applicable rules when those rules impede one or another club from expressing the beliefs that it was formed to express. *Id.* at 860. "When a sectarian religious club discriminates on the basis of religion for the purpose of assuring the sectarian religious character of its meetings, a school must permit it to do so unless that club's specific form of discrimination would be invidious or would otherwise disrupt or impair the school's educational

mission." *Id.* at. 872-873. The club's leadership requirement did neither. *Id.*

In startling contrast to that determination, and to the Ninth Circuit's similar determination in *Prince,* stands the Ninth Circuit's decision in *Truth*, which was the basis for its summary affirmance of the district court's ruling in this case. *Truth v. Kent School Dist.* 542 F.3d 634, 645 (9th Cir. 2008) *cert denied* 129 S.Ct. 2889 (2009). In *Truth*, the Ninth Circuit held that a high school did not violate the Act when it denied official recognition to a Christian club because the denial was based upon the school's nondiscrimination policy, not "speech." *Id.* School officials determined that the club's requirement that members desire to grow in a relationship with Jesus Christ and comply with Christian principles inherently excluded non-Christians in violation of the district's non-discrimination policy. *Id.* The Ninth Circuit concluded that the Act only prevents denial of access or discrimination on the basis of religious content of speech. *Id.* The district's actions did not violate the Act because they were not based on the religious content of the group's speech. *Id.* The court found that the district's non-discrimination policies were content neutral and did not preclude or discriminate against religious speech. *Id.* at 647. Truth did not establish that the district's decision was based upon "the content of a message Truth's discriminatory conduct may attempt to convey." *Id.* "Therefore, to the extent they proscribe Truth's discriminatory general membership restrictions, the policies do not implicate any rights that Truth might enjoy under the Act." *Id.* Although clearly

contrary to the Second Circuit's decision in *Hsu*, the Ninth Circuit held that its decision was consistent because *Hsu* dealt with specific leadership requirements while *Truth* dealt with general membership conditions. *Id.* According to the Ninth Circuit, the specific leadership policies of the club in *Hsu* constituted speech, but Truth's general membership requirements did not. *Id.*

The Ninth Circuit's convoluted logic in *Truth*, and, by extension, in this case, represents the very kind of evasive re-definition this Court rejected in *Mergens*, 496 U.S. at 244. Accepting the Ninth Circuit's reasoning would effectively overrule *Mergens* and render the Act meaningless. The wall of protection Congress built against viewpoint discrimination in public school extracurricular activities would be significantly undermined. School officials would follow the lead of the Kent School District and Hastings and require that CEF and similar organizations cleanse themselves of their religious viewpoint or be excluded from school fora for engaging in "discriminatory conduct." Censorship of religious viewpoints in voluntary extracurricular activities would become acceptable practice on public school campuses unless this Court reverses the lower courts' determinations.

B. Congress Enacted The Boy Scouts Equal Access Act As Further Protection Against Discrimination At Public Schools.

A wave of school restrictions and exclusions of Boy Scout troops prompted Congress to enact the Boy Scouts of America Equal Access Act ("BSEAA") as part of the No Child Left Behind Act of 2001. Pub. L. No. 107-110, § 9525, codified at 20 U.S.C. § 7905. After this Court upheld the Boy Scouts' right to exclude homosexuals from membership and leadership in *Boy Scouts of America v. Dale*, 530 US 640 (2000), school districts began restricting or eliminating the Scouts' rights to use school facilities. 147 Cong. Rec. H2618, S6256 House and Senate members presented evidence that "all over the country the Boy Scouts are under attack and being thrown out of public facilities that are open to other similarly situated groups. From Florida to California, the Boy Scouts are being removed, not because they support an illegal right, but as retribution for the Supreme Court's ruling in the Boy Scouts of America versus Dale." Testimony of Rep. Van Hilleary (R-TN), 147 Cong. Rec. H2618. "A number of school districts have prohibited the Scouts from meeting on public school property or have pressured local Scouting troops to denounce their very principles on which the organization was founded before they can have meetings there." Testimony of Sen. Michael Enzi (R-WY), 147 Cong. Rec. S6256.

In response, Congress adopted the BSEAA, which provides:

> Notwithstanding any other provision of law, no public elementary school, public secondary school, local educational agency, or State educational agency that has a designated open forum or a limited public forum and that receives funds made available through the Department shall deny equal access or a fair opportunity to meet to, or discriminate against, any group officially affiliated with the Boy Scouts of America, or any other youth group listed in Title 36 of the United States Code (as a patriotic society), that wishes to conduct a meeting within that designated open forum or limited public forum, including denying such access or opportunity or discriminating for reasons based on the membership or leadership criteria or oath of allegiance to God and country of the Boy Scouts of America or of the youth group listed in Title 36 of the United States Code (as a patriotic society).

20 U.S.C. § 7905(b)(1). As is true with the Equal Access Act, the BSEAA does not mandate that public schools provide access to the Boy Scouts or similar organizations. Instead, it provides that *if* a school opens its facilities for use by outside

organizations, *then* it must provide equal access to Boy Scout troops and similar organizations or risk losing federal funding.

Instead of simply integrating the BSEAA into their policies to provide the Scouts, CEF and other groups with equal access, school districts have used the BSEAA to try to circumvent the Equal Access Act and this Court's decision in *Good News Club v. Milford*. In *CEF v. Elk River*, the district decided that the BSEAA effectively overruled *CEF v. Milford* so as to permit the district to grant equal access to the Scouts, but not CEF. *CEF v. Elk River*, 599 F. Supp.2d at 1142. The district argued that because it was compelled to grant equal access to the Boy Scouts under the BSEAA, it was somehow not also compelled to grant equal access to CEF, despite this Court's ruling in *Good News Club v. Milford*. *CEF v. Elk River*, 599 F. Supp.2d at 1141. The court rejected that analysis and correctly held that the BSEAA must be read in concert with *Good News Club v. Milford* so that if the Boy Scouts are granted access to a free speech forum, then CEF must be granted equal access. *CEF v. Elk River*, 599 F. Supp.2d at 1141.

The *CEF v. Elk River* case illustrates how, left unchecked by the courts, school officials will look for every opportunity to restrict or exclude extracurricular religious activities from public school campuses. Hastings' exclusion of the Christian Legal Society in this case is a further illustration of that phenomenon. If its actions are left unchecked by this Court, then school districts

can be expected to adopt similar strategies to restrict or exclude extracurricular religious activities. That result would be antithetical to this Court's long history of protecting the right to engage in voluntary religious speech on public school campuses.

CONCLUSION

The Ninth Circuit's decision poses a substantial threat to First Amendment rights on public school campuses. If left intact, the decision threatens to undermine the wall of protection erected by this Court in *Good News Club v. Milford* and by Congress in the Equal Access Act and Boy Scouts Equal Access Act.

Unless reversed by this Court, Hastings' actions will be replicated in elementary and secondary school districts as officials seek to circumvent their obligation to provide equal access for religious extracurricular activities.

For these reasons, the decision of the Ninth Circuit should be reversed.

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