

No. 05-1508  
In the  
**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

**CHILD EVANGELISM FELLOWSHIP OF MARYLAND INC., et al.**  
Plaintiffs-Appellants

v.

**MONTGOMERY COUNTY PUBLIC SCHOOLS, et al.**  
Defendants-Appellees

On Appeal from the United States District Court  
for the District of Maryland, Southern Division

**BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS  
ASSOCIATION AND MARYLAND ASSOCIATION OF BOARDS OF  
EDUCATION**

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Brief Supporting Appellees and Affirmance of  
Decision of U.S. District Court of Maryland

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
December 14, 2005  
Case Number 05-1508  
Child Evangelism Fellowship of Maryland Inc. v. Montgomery County Public  
Schools

**Disclosure of Corporate Affiliations and Other Entities  
with a Direct Financial Interest in Litigation**

Pursuant to FRAP 26.1 and Local Rule 26.1, the National School Boards Association, who is Amicus Curiae, makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity?  
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2. Does party have any parent corporations?  
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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?  
 YES  NO  
If yes, identify entity and nature of interest:
5. Is party a trade association?  
 YES  NO  
If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a party's stock:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

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Pursuant to FRAP 26.1 and Local Rule 26.1, the Maryland Association of Boards of Education, who is Amicus Curiae, makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity?  
 YES  NO
  
2. Does party have any parent corporations?  
 YES  NO  
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## **INTERESTS OF THE *AMICI CURIAE***

The National School Boards Association (NSBA) is a not-for-profit federation of 49 state associations of school boards, together with the Hawai‘i State Board of Education and the school boards of the District of Columbia, Guam, and the U.S. Virgin Islands. NSBA represents the nation’s 95,000 school board members, who, in turn, govern the 14,890 local school districts serving more than 47 million public school students. NSBA, has long been involved in supporting the authority of local school boards to set policies that preserve schools as nonpublic or limited public fora dedicated to student learning and to regulate access to classrooms and students in a manner that supports this purpose. NSBA’s Council of School Attorneys is the professional association of over 3,000 attorneys who represent the nation’s school districts.

The Maryland Association of Boards of Education (MABE) is a private, not-for-profit organization that represents all of the state's 24 local boards of education and the State Board of Education. MABE advocates for the concerns of boards of education before state and federal courts and agencies, the Maryland General Assembly, and the United States Congress.

*Amici* have a strong interest in the effective implementation of school policies, including policies that maintain parental confidence in public

schools as institutions dedicated primarily to student academic achievement and ensure that students and families are not subjected to the deluge of materials that numerous outside groups seek to direct through school communication channels. To this end, *amici* have an interest in preserving local school boards' autonomy to implement policies that include reasonable, viewpoint neutral restrictions that set limits on access in keeping with both the fundamental purpose of public schools and free speech rights under the First Amendment.

#### **SOURCE OF AUTHORITY TO FILE**

This brief is filed with the consent of both parties.

#### **STATEMENT OF THE CASE**

This case began when Child Evangelism Fellowship of Maryland (CEF), which operates after-school evangelical Good News Clubs in several Montgomery County Public Schools (MCPS) elementary schools, requested that teachers distribute materials promoting the clubs in classrooms for children to take home on the same basis as information from other community organizations. When MCPS officials denied the request based on the concern that distribution of materials aimed at proselytizing young children would violate the Establishment Clause, CEF sued. The federal district court upheld MCPS's refusal. CEF appealed to this Court, which

reversed and remanded the case to the district court. This Court acknowledged that Establishment Clause concerns could justify viewpoint discrimination, but found that MCPS's distribution of CEF materials would not rise to a constitutional violation.

Prior to this Court's first ruling, MCPS began revising its policy to limit distribution of materials for children to take home from school to materials from certain designated speakers: MCPS; county, state, or federal government agencies; parent-teacher organizations; licensed day care providers operating on-campus; and non-profit organized youth sports leagues. The policy places no restrictions on the content of the materials, religious or otherwise. Because CEF does not fit into any of the five specified categories, it, like all other non-designated groups, can gain access only by obtaining the endorsement of its materials and activities by a member of one of the named categories.

On remand, CEF argued that the revised policy continues to violate its free speech rights because it is effectively excluded while other groups have access. MCPS countered that the policy avoids any free speech problems because its restrictions are content neutral. Addressing the question of what type of forum the MCPS policy created, the district court noted that under the former policy, this Court had concluded that MCPS had created a limited

public forum. Under the revised policy, however, the district court found that "MCPS has indicated that it does not wish to create a limited public forum and it no longer opposes [CEF-MD's] flyers on the basis of their religious content." As a result, the court concluded that the revised policy constitutes a nonpublic forum subject only to a constitutional test of reasonableness. In the district court's view, the new policy passes this test because MCPS sought to reduce the "burgeoning number of organizations" distributing their materials in the classroom by "limit[ing] the subject matter to activities of traditional educational relevance to students and the categories of speakers to organizations involved in those activities."

Based on the record, the court concluded that the revised policy is content neutral; the fact that the revision came in response to the current litigation does not alter this conclusion. Even under the new restrictions, CEF could gain access to the classroom distribution forum if an approved group sponsored or endorsed its promotional materials and activities. The court then ruled that CEF's motion for a permanent injunction requiring distribution was moot. CEF now appeals, asserting that MCPS continues to engage in impermissible viewpoint discrimination.

## ARGUMENT

### **I. More than ever, school boards need the discretion to set reasonable, viewpoint neutral criteria for access to nonpublic or limited public fora in public schools.**

The nation's public schools have long fulfilled important functions beyond classroom instruction. As the U.S. Supreme Court observed in *Brown v. Board of Educ.*, public schools serve “as a principal instrument in awakening the child to cultural values, in preparing him [or her] for later professional training, and in helping him [or her] adjust normally to his [or her] environment.” 347 U.S. 483, 493 (1954). *See also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (noting that schools “prepare pupils for citizenship in the Republic [and] inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation”) (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

Today's public schools are being asked to do more than ever before. The federal No Child Left Behind Act and analogous state laws have dramatically increased the accountability of public schools to achieve excellent academic outcomes for every child. 20 U.S.C. § 6301 *et seq.* (holding public schools responsible for ensuring that by 2014 every public

school student meets state academic standards). In a changing society, the nonacademic demands on schools have increased just as significantly. See *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002) (“Today's public expects its schools not simply to teach the fundamentals, but “to shoulder the burden of feeding students breakfast and lunch, offering before and after school child care services, and providing medical and psychological services,” all in a school environment that is safe and encourages learning”) (citing Brief for National School Boards Association et al. as *Amici Curiae* 3-4); Noel Epstein, *The American Kibbutz? Managing the School's Family Role* in Noel Epstein, ed., WHO'S IN CHARGE HERE? THE TANGLED WEB OF SCHOOL GOVERNANCE AND POLICY, at 268 (2004) (noting that many families today demand schools provide universal after-school approach, with most opting for “after-school programs at public schools rather than at boys' or girls' clubs, YMCAs or YWCAs, churches or synagogues, 4-H clubs, or other community sites.”) (citing 2002 advocacy poll for Afterschool Alliance); Noel Epstein, “Of Reading, Writing—and Raising Kids,” *Washington Post*, November 27, 2005 at B1.

In recognizing the numerous roles and burdens public schools must balance, courts also have recognized schools are entitled to necessary deference in the exercise of their “custodial and tutelary” supervision and

control over students. *C.N. v. Ridgewood Bd. of Educ.* \_\_\_F.3d\_\_\_ 2005 WL 3211647, at 19 (3d Cir. Dec. 1, 2005) (citing *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000) (quoting *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 655 (1995)). See also *Gonzaga University v. Doe*, 536 U.S. 273 (2002). From a practical standpoint, school district decisions about how to engage with community agencies is often based not upon constitutional considerations, but on a professional determination about what works best for students. Schools must evaluate the involvement of outside agencies and must make determinations about which partnerships can best serve the children entrusted to their care.

As in *C.N.*, when schools reach out to interact with community groups, administrative and legal questions typically arise about how best to manage the endeavor. The well meaning efforts of local schools involve navigating and coordinating a complex web of discrete “agencies beyond the schools—health groups, community based organizations, Head Start centers, social workers, law enforcement officials, and others.” Epstein at 258-259. Experts recognize the largest coordinating challenges are at the local level, “where needs and resources are often unique and decisions must be made on such questions as whether educators or other agencies should have the ultimate say over non-instructional services provided at schools.” *C.N.* at 4.

Public schools and the children they serve are the focus of the same ubiquitous onslaught of marketing and advertising efforts that characterizes life in 21<sup>st</sup> century American society. Like all institutions, public schools can best carry out their missions around community involvement only if they are not overwhelmed by demands to access school fora. For all public institutions, the ability to manage this dilemma is complicated by the need to be cognizant of First Amendment concerns. Moreover, among public institutions, public schools must contend with an especially complex set of dynamics: the intense demand for access to the captive and impressionable audience that is public school children. *See generally*, Jef I. Richards et al., *The Growing Commercialization of Schools: Issues and Practices*, 557 ANNALS AM. ACAD. POL. & SOC. SCI 148 (1998).

Unlike other governmental bodies, schools have the added responsibility of taking “into account the school’s “pedagogical concerns, such as respecting audience maturity, disassociating [themselves] from speech inconsistent with [their] educational mission and avoiding the appearance of endorsing views, no matter who the speaker is.” *DiLoreto v. Downey Unified Sch. Dist.*, 196 F.3d 958, 967 (9th Cir. 1999) (citing *Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817, 825 (9th Cir. 1991), citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-73

(1988)). Advertisers ranging from religious groups, to psychic readers, to fraternal and charitable organizations, to advocacy organizations like Planned Parenthood routinely seek access to school fora. *See, e.g. Searcy v. Harris*, 888 F.2d 1314, 1316 (11th Cir. 1980). And often diametrically competing interests seek access to the same forum; for example, war protester groups are raising renewed demands for access to school fora where military recruiters are present, such as job fairs. *See, e.g., American Friends Service Comm. Youth and Militarism project, available at <http://www.afsc.org/youthmil>* (providing advocacy and legal resources for “counter-recruitment”).

In the litigation that inevitably arises from these complex dynamics, judicial determinations must avoid imposing what the Supreme Court has characterized as an “all-or-nothing test” that would have the perverse effect of discouraging public schools from opening fora. *Arkansas Educ. Television Com’n v. Forbes*, 523 U.S. 666, 680 (1998). *See also Griffin v. Department of Veterans Affairs*, 274 F.3d 818, 823 (4th Cir. 2001), *cert. denied*, 537 U.S. 947 (2002) (citing agency concern that if permission were granted to outside group to fly flags, other groups inevitably would demand similar rights). This risk is real.

School districts necessarily must have discretion to balance the societal value to providing such fora against the operational practicalities of running schools and teaching children. School fora would be “administratively unmanageable if access could not be curtailed in some reasonable manner.” *Cornelius v. NAACP Legal Def. & Educ.Fund*, 473 U.S. 788, 809 (1985). A school board “may be justified in ‘reserving [its forum] for certain groups or for the discussion of certain topics.’” *Good News Club v. Milford*, 533 U.S. 98, 106 (2001) (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). See also *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 48 (1982) (noting that even if access by groups like Cub Scouts created limited public forum, such forum remains limited to “entities of similar character,” not to employee union) (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (“the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were [the Court] to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.”)); *Grayned v. City of Rockford*, 408 U.S. 104,

117-118 (1972). (“Nowhere [has the Supreme Court] suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes.”); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976) (“[The Court has] often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.”). When the audience is captive and impressionable public school children, schools require reasonable latitude in limiting access.

As this Court observed in *Griffin v. Dep’t of Veterans Affairs*, a government entity is justified in worrying about the logical consequences of its forum rules, including demands from other groups and the expected need to contend with counterspeech. *Griffin* at 823 (citing Supreme Court admonition in *International Soc. Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 685 (1992) that “justifications for restrictions ‘should not be measured by the disorder that would result from granting an exemption solely’ to one group.”).

If public schools are to continue to be “a resource to our community, and our community... a resource to our schools” in the 21<sup>st</sup> century, they will need to be able to exercise reasonable, viewpoint neutral discretion over various types of school fora. Lottie L. Joiner, *Building a Team: Lesson in School and Community Collaboration*, AMERICAN SCHOOL BOARD JOURNAL, September 2001 (quoting, Martin Blank, Director for Community Collaboration at the Institute for Educational Leadership, Washington, D.C.). There is no doubt that by providing materials from various community groups, schools provide a valuable service to parents and students by alerting them to opportunities that may enhance the social and educational development of children. Schools should be able to exercise viewpoint neutral discretion and not be placed in the position of having to permit all or none.

**II. A school board policy setting reasonable, viewpoint neutral criteria for forum access is not invalid because its effect is to grant access to some groups but not to others.**

This Court should consider carefully in this case the need to avoid issuing an opinion that could effectively take another step toward imposing an “all-or-nothing” rule on public school fora. *Forbes* at 680. While criteria in a limited or nonpublic public forum must be both reasonable in light of the purpose of the forum and viewpoint neutral, they may be based on the

speaker's identity or the subject matter of the expression. *Cornelius* at 807. Moreover, as this Court has noted repeatedly, the forum policy "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *American Civil Liberties Union v. Mote*, 423 F.3d 438, 445 (4th Cir. 2005) (citing *Cornelius* at 808) (emphasis in original); *Goulart v. Meadows*, 345 F.3d 239, 255 (4th Cir. 2003) (same).

School boards must have latitude to define both the purpose of the forum and the resulting criteria for access to the forum. A district's policy is defensible based on its treatment of access by "entities of similar character," which amounts to an inquiry into whether the speaker or subject matter for which access to the forum is sought fulfills the criteria for the forum—the "external standard" for evaluating speech restrictions in a limited public forum articulated by this Court in *Warren v. Fairfax County*, 196 F.3d 186, 193-94 (1999). See *Goulart* at 252, n. 23 (acknowledging overlap between "similar character" and "external standard" determinations). Appellants' focus on "analogous activities" among the groups granted or denied access to the forum is not, and cannot be, the touchstone for a finding of viewpoint discrimination. Appellants' Br. 19-23, 44. Nor is the forum defined by the fact that a large number and "broad range" of organizations have access to

school fora. *See* Appellants’ Br. 45-46, 55-57, 59.<sup>1</sup> Still less dispositive are some of the more superficial similarities that Appellants invoke, like the fact that some groups granted access also hold parties or games, Appellants’ Br. 19, 44, or even that they use words like “inspire” and “have faith.”

Appellants’ Br. 18-19

This Court has rejected the argument that forum distinctions among similar activities or speakers are inherently suspect. “These cases illustrate that the government may draw permissible status-based distinctions among different classes of speakers in order to preserve the purpose of the forum, even when the proposed uses by those inside the permitted class of speakers and those outside the permitted class of speakers are quite similar.” *Goulart* at 253 (citing *Forbes* at 679-80 and *Perry* at 46); *see also Mote* at 444 (“While it is obviously true that there could be similarities in the content of speech by an outsider and a member of the campus community, that does not require them both to be treated the same.”). Indeed, different results for different speakers may be reasonable even when their proposed activities are

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<sup>1</sup> That Appellees adopt a “hands-off” approach as to content and permit access for third-party expression sponsored and endorsed by one of the permitted groups does not invalidate the policy. *See Mote* at 445 (upholding university policy restricting access to certain fora unless member of general public speaker is sponsored by member of campus community). At any rate, the result of the revised policy is not that an unlimited number of groups enjoy access to the forum; many groups previously provided access now have no direct access. Appellees’ Br. 17-18.

“essentially indistinguishable.” *Goulart* at 253; *Griffin* at 824, n.3 (rejecting plaintiff’s suggestion that forum rules that limited display of Confederate flag to two days per year were suspect because they did not expressly prohibit display of other flags).

If all of the kinds of factors raised by Appellants were deemed indicative of viewpoint discrimination, they would render suspect virtually any forum criteria based on speaker identity or subject matter. Conflating subject matter criteria with viewpoint discrimination—or bootstrapping the exclusionary consequences of a reasonable and viewpoint neutral rule into evidence of viewpoint discrimination—effectively would render meaningless a school board’s discretion to set criteria for limited public or nonpublic fora on school premises.

The result would be that every denial of any group’s request for forum access could be subject to legal challenge. Any speaker can, of course, posit its own loose purpose of the forum, and any speaker could assert that it or the subject matter of its expression in some way meets the “external” standard for this purpose. For example, an aggrieved speaker could seek access because its expression, like that of all groups granted access, “deals with providing products or services to youth.” Under Appellants’ broad construction, no policy that has the effect of denying Appellants access to

the forum, while allowing access to other community groups bearing any similarities to Appellants, is unblemished by viewpoint discrimination.

A viewpoint neutral policy is not unconstitutional by virtue of that very fact of its viewpoint or content neutrality. Public officials who adhere to the viewpoint or content neutrality required by a forum policy are not being “studiously oblivious” to unconstitutional results, as Appellants argue, invoking *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308-09 (2000). Appellants’ Br. 37, 53-55. Whatever else *Santa Fe* stands for, it is not the proposition that any forum policy that has the effect of excluding some speakers that may bear similarities to other speakers granted access is automatically invalid. Too many subsequent decisions by this Court declare otherwise.

Several school district members of *amicus* MABE have adopted, or are in the process of adopting, policies similar to the policy at issue in this case. Numerous model school board policies offered by state school boards association members of *amicus* NSBA establish criteria for access to school fora that, while reasonable and viewpoint neutral, would or could have the effect of excluding expression from religious groups. These communities across the state of Maryland and the nation are motivated by a need to establish viewpoint neutral policies, not by any hostility to particular

viewpoints. *See Goulart* at 255 (county restriction in use of community centers “does not strike us as hostile to private education or home schooling any more than the County’s policy against for-profit activity in the community centers strikes us as hostile to private business.”).

As it is, school districts frequently are criticized for bureaucratic and over-regulatory administration, school boards for micro-management. *See, e.g., Common Good, available at <http://cgood.org/schools.html>* (providing collection of commentary and resources concerning the “over-legalization” of public education). But these phenomena often originate not in local educational needs but as an attempt to avoid violating the ever-mounting regulatory impositions on local schools by every other level and branch of government, including the courts. *See id.; see also, generally BESIEGED: SCHOOL BOARDS AND THE FUTURE OF EDUCATION POLITICS* (William G. Howell ed. 2005) (discussing school district governance in current environment of unprecedented regulatory intervention and complexity).

*Amici’s* point here is neither to bury local control nor to praise it. The point is that even in non-curricular matters such as the case at bar, school officials need a degree of latitude and deference to best carry out the operational realities of public education. *See San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) (“[E]ducational policy [is

an] area in which [federal courts'] lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels.”).

In the forum context, this Court has correctly characterized judicial review of the reasonableness requirement as a “deferential test.” *Griffin* at 822. School boards and school officials must retain discretion to set and apply reasonable criteria for forum access. *See, e.g., id.* at 823 (“But Congress delegated this determination [as to whether flying of Confederate flag met purpose of national cemetery forum] not to the district court or to [plaintiff], but, rather, to the Secretary [of Veteran’s Affairs].”).

The fact that no rule is likely to satisfy all parties in every circumstance and that any rule inevitably can be subject to some criticism cannot alone give rise to constitutional claims. As this Court instructed in *Goulart* when it declined to require a county “to achieve administrative perfection in order to draw a boundary that [the Court] otherwise deem[ed] permissible,” the inherent “boundary-drawing” problems involved in setting forum rules “should not suggest that the boundary drawn is impermissible or illusory.” *Goulart* at 256-257. In cases such as this one, courts should refrain from rulings that make the perfect the enemy of the good.

**III. School boards have, and need, the discretion to revise forum rules in light of adverse court rulings.**

Appellants characterize Appellees' adoption of the new policy as an attempt to "circumvent" this Court's earlier ruling. Appellants' Br. 3-4, 51.<sup>2</sup> While courts must ensure that revisions to the rules of a forum are made in accordance with the requirements of the First Amendment,<sup>3</sup> the fact that there is a history of dispute over the rules must not automatically preclude a school board from narrowing or otherwise revising the criteria for access, especially when the revision is a good faith attempt to comply with a court ruling.

A public agency is not required to keep a forum open indefinitely. *Perry* at 46 (citing *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981)). Indeed, a school board may narrow forum rules specifically in response to an adverse court ruling. *DiLoreto v. Downey Unified Sch. Dist.*, 196 F.3d 958 (9th Cir. 1999) (finding no First Amendment violation in school district's decision to close forum to all advertising after state attorney general ruled that exclusion of Ten Commandments poster under previous rules was

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<sup>2</sup> Appellees initiated adoption of the revised policy before this Court's ruling out of concerns unrelated to the matters in dispute, namely the increasing demands being placed on the fora in question. Appellees' Br. 8.

<sup>3</sup> Concerning allegations of viewpoint discrimination in such revisions, the Seventh Circuit has concluded that the state's motive in enacting *content-neutral* speech regulation for a *nonpublic* forum is irrelevant, since the policy cannot be a façade for viewpoint discrimination where viewpoint, by definition, has nothing to do with access to the forum. *Grossbaum v. Indianapolis-Marion County Bldg. Authority*, 100 F.3d 1287, 1298-1299 (citing *Cornelius* at 811).

unconstitutional); *Grossbaum v. Indianapolis-Marion County Bldg. Authority*, 100 F.3d 1287 (7th Cir. 1996) (finding no First Amendment violation in public building authority’s adoption of new regulations excluding all private displays in lobby of county building after court enjoined previous regulation prohibiting religious displays). By analogy,<sup>4</sup> school boards also may close limited open fora under the Equal Access Act following an adverse court ruling. *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 240-41 (1990) (“To the extent that a school chooses to structure its course offerings and existing student groups to avoid the Act’s obligations, that result is not prohibited by the Act.”); *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1254 (1993) (“[We] do not hold today that a school district can never close a limited open forum once such a forum has been created.”).

In this case, Appellees revised their policy prior to this Court’s earlier ruling, choosing in the end not to close the forum but instead to adopt reason, viewpoint neutral restrictions on access to it. Several school district members of *amicus* MABE have adopted policies similar to Appellants’

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<sup>4</sup> The U.S. Supreme Court held in *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. at 242, that Congress, although it enacted the Equal Access Act as an extension of the reasoning in *Widmar*, 454 U.S. 263, must have intended to establish a forum standard different from the one established by the Court’s free speech cases since it used the distinct phrase “limited, open forum.”

revised policy. However, under Appellants' framing of this case, this less restrictive choice would be constitutionally invalid by virtue of chronology.

**IV. Isolated mistakes in the implementation of a policy do not necessarily invalidate the policy or entitle a plaintiff to legal remedies.**

To the extent Appellants urge this Court to consider alleged isolated discrepancies in the implementation of Appellees' policy,<sup>5</sup> this Court and others have consistently held that isolated instances of employee failure to apply an employer's policy correctly do not necessarily entitle a plaintiff to a remedy. For example, to establish municipal liability under 42 U.S.C. § 1983 (2005), a plaintiff must show that he or she was deprived of constitutional rights through the execution of a municipal policy or custom. *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). In the Fourth Circuit, a policy or custom for which a school district may be held liable can arise in four ways: (1) through an express policy, such as a written ordinance or regulation; (2) through the decisions of a person with final *policymaking* authority; (3) through an omission that "manifest[s] deliberate indifference to the rights of citizens"; and (4) through a practice

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<sup>5</sup> Appellants' Br. 34. Appellees address each of the incidents cited by Appellants, explaining that they were, in fact, correct applications of the policy. Appellees' Br. 12-18.

that is so “persistent and widespread” as to constitute a “custom or usage with the force of law.” *Carter v. Morris*, 164 F.3d 215, 217 (4th Cir. 1999).

When considering the fourth of these criteria, this Court has said, “Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*.” *Hughes v. Halifax County Sch. Bd.*, 885 F.2d 183 (4th Cir. 1988) (citing *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985)). When a plaintiff is complaining that a school district deprived him or her of a constitutional right under § 1983 through the unconstitutional application of a constitutional policy, the court will find liability only if a widespread custom is found. Most cases brought in the Fourth Circuit fail because the plaintiff is only able to allege isolated instances of constitutional violation. *See, e.g., Lytle v. Doyle*, 326 F.3d 463 (4th Cir. 2003) (holding that while Virginia statute prohibiting loitering on certain bridges was unconstitutionally applied toward plaintiffs, there was no custom or practice supporting § 1983 violation because police only applied statute once, to plaintiffs, and there was no evidence that anyone read memo telling officers to apply statute to protesters until arresting officer read it on day of arrest); *Pachaly v. City of Lynchburg*, 897 F.2d 723 (4th Cir. 1990) (finding no evidence that city’s search of premises was based on policy condoning illegal searches and seizures or routinely conduction searches

beyond incident at issue.); *Hughes v. Halifax County School Board*, 885 F.2d 183 (4th Cir. 1988) (finding no “custom or usage” to support § 1983 violation of free speech rights where terminated school district employee could cite only own instance of retaliation); *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987) (finding § 1983 remedy where there were volumes of evidence of prior incidents and official encouragement of custom of excessive police force).

Other jurisdictions likewise have found no liability for school districts under § 1983 for isolated incidents of a policy being misapplied. *See Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991) (finding no § 1983 liability in case involving strip search, performed in accordance with valid search policy, where “There was no history that the policy has been repeatedly or even sporadically misapplied by school officials in the past.”); *C.H. v. Olivia*, 226 F.3d 198 (1999) (“Moreover, a school board can be held responsible for a constitutional violation of a teacher only if the violation occurred as a result of a policy, custom or practice established or approved of by the board.”) *Denno v. School Bd. of Volusia County, Florida*, 218 F.3d 1267 (11<sup>th</sup> Cir. 2000) (finding no liability under custom or practice prong of *Monell* where district disciplined student for displaying

Confederate flag because plaintiff could cite no evidence that district prohibited Confederate flag at any school before episode).

Where a plaintiff seeks injunctive relief rather than damages under § 1983, such relief is, of course, unnecessary when the incident of which the plaintiff complains was inadvertent. Where this Court has sensibly declined to require public entities “to achieve administrative perfection in order to draw a boundary that [the Court] otherwise deem[s] permissible,” [the Court] should be even less inclined to require administrative perfection in employee observation of such a boundary.<sup>6</sup> *Goulart* at 256

### **CONCLUSION**

For the foregoing reasons, *amici* urge this Court to affirm the District Court in this case.

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<sup>6</sup> *See also Mote* at 445 (holding that one-time exception to forum restriction did not violate viewpoint neutrality but was, in fact, reasonable in light of the purpose served by the forum.).

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Child Evangelism Fellowship of Maryland Inc. v. Montgomery County Public Schools

This Brief of *Amici Curiae* has been prepared using Microsoft Word 2003, Times New Roman, 14 point.

Exclusive of the Corporate Disclosure Statement, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service, this Brief contains 4,961 words.

I understand that a material misrepresentation can result in the Court's striking the Brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the Brief and/or a copy of the word or line printout.

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Naomi E. Gittins

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 14th day of December 2005, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, 1100 East Main Street, Suite 501, Richmond, VA 23219, by first class mail, the required number of this Brief of *Amici Curiae* in support of Appellees. I further certify that the required number of copies were deposited in the United States mail, first class postage pre-paid, addressed to the following:

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