

No. 03-1534  
In the  
**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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

v.

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

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

**BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOC.,  
MARYLAND ASSOC. OF BOARDS OF EDUC., NATIONAL PARENT  
TEACHER ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL  
ADMINISTRATORS AND MONTGOMERY SOCCER, INC.**

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

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
July 1, 2003  
Case Number 03-1534  
Child Evangelism Fellowship of Maryland Inc. v. Montgomery County Public  
Schools

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with a Direct Financial Interest in Litigation**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

July 1, 2003

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

**Disclosure of Corporate Affiliations and Other Entities  
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Schools

**Disclosure of Corporate Affiliations and Other Entities  
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Child Evangelism Fellowship of Maryland Inc. v. Montgomery County Public  
Schools

**Disclosure of Corporate Affiliations and Other Entities  
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If yes, identify all such owners:
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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:

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Schools

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

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2. Does party have any parent corporations?  
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3. Is 10% or more of a party's stock owned by a publicly held corporation or other publicly held entity?  
 YES  NO  
If yes, identify all such owners:
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:

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Signature

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Date

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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, with many other educational and religious organizations, has long been involved in broad-based efforts to find reasonable common ground on divisive issues of religion in public schools.

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.

National PTA is the largest volunteer child advocacy organization in the United States. A not-for-profit association of parents, educators, students, and other citizens active in their schools and communities, PTA is a leader in reminding our nation of its obligations to children.

American Association of School Administrators (AASA) founded in 1865, is the professional organization for over 14,000 educational leaders across America and in many other countries. AASA's mission is to support and develop effective school system leaders who are dedicated to the highest quality public education for all children.

Montgomery County Soccer, Inc. (MSI), a not-for-profit corporation and the largest youth sports organization in Montgomery County, Maryland, is the only soccer club with a mission to provide recreational opportunities for all youth in the county, regardless of age, location, income, or physical ability. Every year, MSI provides soccer participation opportunities for 15,000 children. To serve these children, MSI has traditionally relied on distribution of its promotional materials by the Montgomery County Public Schools (MCPS) and is particularly concerned about the potential implications the outcome of this case may have for other community organizations that rely on MCPS's for.

*Amici* have a strong interest in the effective implementation of school policies, including policies that preserve parental confidence in the religious neutrality of public schools and school officials by maintaining the separation of church and state mandated by the Establishment Clause of the First Amendment of the United States Constitution. To this end, *amici* have

an interest in ensuring that local school boards maintain the autonomy to implement policies that do not infringe on constitutional free speech rights, while at the same time maintaining the constitutionally mandated neutrality in matters of religion essential to ensuring that fora for the dissemination of information from community groups continue to enjoy parental support.

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

This brief is filed with the consent of both parties.

### **STATEMENT OF THE CASE**

Child Evangelism Fellowship of Maryland (CEFM) is a non-profit Maryland corporation affiliated with Child Evangelism Fellowship, Inc. (CEF), a non-profit interdenominational religious organization that provides religious instruction to children between the ages of 6 and 12. CEF operates after-school programs known as Good News Clubs at public school facilities during times when the facilities are open for use by community groups.

CEFM has been operating clubs at two Montgomery County public elementary schools. CEFM sought permission from Montgomery County Public Schools (MCPS) to distribute flyers and other materials regarding its clubs at back-to-school nights and open houses, to post notices on

community bulletin boards located in the schools, and to have MCPS teachers and students pass out flyers to students in the classroom. While MCPS indicated a willingness to allow CEFM to distribute materials at back-to-school nights and open houses and post notices on school bulletin boards set aside for publicizing community events, it rejected CEFM's request to have teachers and children distribute flyers in classrooms on the grounds that this would violate the Establishment Clause.

CEFM filed suit in United States District Court for the District of Maryland. The group brought a motion seeking a preliminary injunction ordering MCPS to allow distribution of the flyers in classrooms, at back-to-school nights, and at open houses, and to allow CFEM to post materials on the schools' community bulletin boards. Pointing out that MCPS had all but conceded CEFM's right to distribute materials at back-to-school nights and open houses and their right to post materials on the schools' community bulletin boards, the district court focused on the issue of classroom distribution. Relying on the U.S. Supreme Court's decision in *Good News Club v. Milford Central School*,<sup>1</sup> CEFM argued that by allowing other secular groups, such as the Boys Scouts or the YMCA, to distribute materials via the classroom, MCPS has created a limited public forum and

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<sup>1</sup> 533 U.S. 98 (2001).

cannot deny CFEM equal access on the basis of its religious viewpoint without violating the group's constitutionally protected free speech rights.

The district court denied CEFM's motion. The court rejected CEFM's contention that the holding in *Good News* resolves the tension between free speech rights and Establishment Clause separation principles wholly in favor of free speech. Noting Justice Breyer's concurring and Justice Souter's dissenting opinions, the district court pointed out that the age of the student may play a critical factor in whether the distribution of religious materials in the classroom, which necessarily involves teachers, in fact sends the message that the school is either sponsoring or endorsing that particular religious group.

The district court granted CEFM's motion for a preliminary injunction in part and denied it in part. The court granted that part of the motion requiring MCPS to allow CEFM to distribute materials at back-to-school nights and open houses and to post materials on the community bulletin boards. However, the court denied that part of the motion seeking a preliminary injunction requiring MCPS to have teachers and children distribute Good News Club flyers in classrooms.

## ARGUMENT

*Amici* do not take positions on the full range of procedural and substantive matters at issue in this case. Rather, *amici* emphasize the need for judicial clarity for school boards and personnel on the question of their participation in the distribution of materials that proselytize to children, an issue fraught with community controversy, legal complexity, political potency, and wasteful litigation.

### **I. Public schools must carefully balance First Amendment rights under the Free Speech Clause with those provided by the Establishment Clause.**

The heart of this case is the balance of First Amendment rights and restrictions within the public school, *i.e.*, the question of where Establishment Clause restrictions end and Free Speech rights begin.

As early as 1943 the U.S. Supreme Court declared that the First Amendment freedoms must receive “scrupulous protection” in schools “if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”<sup>2</sup> The Supreme Court has recognized that First Amendment protections should be afforded to individuals within public schools, tempered by the schools’ primary

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<sup>2</sup> *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943).

mission to educate and instill civic values. Schools thus daily walk the narrow line of respecting First Amendment rights and teaching students the responsibilities concomitant with them. That narrow line is presented in this case: schools must heed First Amendment rights to free speech while adhering to the boundaries imposed upon the public schools by the Establishment Clause.

Substantial litigation has been generated in an attempt to delineate the appropriate church-state relationship vis-à-vis education. Courts have been called upon to review various public school policies and practices to ensure that students are protected from religious inculcation by the state. Cases have dealt with First Amendment implications of such topics as state aid to parochial schools, religious activities and observances in public schools, and curricular accommodations for religious reasons in public education.

The U.S. Supreme Court has often mediated this controversy, and it has used a variety of analyses over the years to determine constitutionality in Establishment cases in the school setting. Three analyses predominate.

#### **A. *Lemon v. Kurtzman***

Although the test set forth in *Lemon v. Kurtzman*<sup>3</sup> has been criticized, decried, and described as a somnolent ghoul, it has not been overruled.

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<sup>3</sup> 403 U.S. 602 (1971).

Decided in 1971, *Lemon v. Kurtzman* incorporated the analyses of earlier cases and formulated a three-pronged test for determining whether the governmental action establishes religion. The first two prongs are derived from *Abington Township v. Schempp*: “The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.”<sup>4</sup> The third prong, derived from *Walz v. Tax Commissioners of City of New York*,<sup>5</sup> proscribes excessive entanglement with religion.

### **B. Coercion**

In 1989 in *County of Allegheny v. Greater Pittsburgh American Civil Liberties Union*,<sup>6</sup> the Supreme Court held unconstitutional the county’s practice of displaying a nativity scene in the county courthouse during the Christmas season. Justice Kennedy dissented, opining that the *Lemon* test should not be “our primary guide in this difficult area” and, instead, a

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<sup>4</sup> 374 U.S. 203, 222 (1963).

<sup>5</sup> 397 U.S. 664 (1970).

<sup>6</sup> 492 U.S. 573 (1989).

"coercion" test should be employed. "Non-coercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage."<sup>7</sup>

### **C. Endorsement**

Justice O'Connor's modification of the *Lemon* test asks whether an objective observer would perceive the policy and its implementation "as a state endorsement" of religion in the public school. Justice O'Connor first propounded her modification of the *Lemon* test in a concurrence in *Lynch v. Donnelly*, in which the Supreme Court held that the inclusion of a nativity scene in a municipal Christmas display had the legitimate secular purposes of celebrating and depicting the origins of that holiday; the benefit to religion was deemed "indirect, remote and incidental."<sup>8</sup> Justice O'Connor asserted that even if a governmental practice has the "primary effect" of advancing or inhibiting religion, "what is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."<sup>9</sup> The central premise of the

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<sup>7</sup> *Id.* at 662-63.

<sup>8</sup> 465 U.S. 668, 669 (1984).

<sup>9</sup> *Id.* at 692.

endorsement test is that the Establishment Clause, “at the very least, prohibits government from appearing to take a position on questions of religious belief.”<sup>10</sup> The appearance of endorsement is particularly invidious in schools, because it conveys to those not of the endorsed religion “that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the community.”<sup>11</sup> Within public schools, all children must feel they are treated and valued equally and fairly.

The common thread of all of these analyses is whether there is such a connection between the religious activity and the school that the imprimatur of the school is unavoidably linked to the religious activity, regardless of whether this connection is characterized as endorsement, coercion, or primary effect. If the activity creates the appearance to the affected audience of a preference for religious activity, a violation of the Establishment Clause has occurred.

In a society of increasing religious diversity, public schools must tread ever more carefully in order to maintain public confidence by avoiding furtherance, inhibition, coercion, entanglement, or endorsement of religion. The question of religion in schools continues to confront schools with

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<sup>10</sup> *Allegheny*, 492 U.S. at 593.

<sup>11</sup> *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000).

divisive and highly litigious issues. The ensuing litigation represents a diversion of scarce resources and a distraction from their mission of academic achievement that our Nation's schools can ill afford.<sup>12</sup>

In this environment, judicial clarity is essential. Courts should be loath to undermine longstanding legal principles that offer at least some measure of readily understood guidance to schools in a complex area.

Among these principles are: 1) School personnel must avoid being placed in the position of compromising the public's perception and confidence that they are strictly neutral in matters of religion; and 2) Heightened care is called for in religious matters where young children are concerned.

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<sup>12</sup> See Marjorie Coeyman, *Are schools more afraid of lawsuits than they should be?*, THE CHRISTIAN SCIENCE MONITOR, May 27, 2003, at 21 available at <http://www.csmonitor.com/2003/0527/p21s01-lepr.html> (reporting findings by Lehigh University professor Perry Zirkel that, although courts are increasingly likely to resolve lawsuits in favor of schools, one important exception is suits involving religion, in which "even the hardest-headed judges have trouble keeping their own feelings about religion out of their decisions," and that many schools probably settle even claims lacking merit in order to minimize legal costs and distractions from their academic mission).

**II. The Good News Club is overtly intended to proselytize to young children, and the distribution of its materials is essential to its proselytizing efforts.**

The Good News Club is a Christian organization for children between the ages of six and twelve. It is affiliated with the Child Evangelism Fellowship, a Christian missionary organization that, in addition to its function as a frequent litigant against schools, has the following stated purpose:

To evangelize boys and girls with the Gospel of the Lord Jesus Christ and to establish (disciple) them in the Word of God and in a local church for Christian living.<sup>13</sup>

In *Good News Club v. Milford Central School*, the Second Circuit described Good News Club meetings.<sup>14</sup> The meetings are religious services and instruction for the children, including prayer, witness, confession, and opportunities for each child to be “saved” by receiving Jesus as his or her savior.<sup>15</sup> The Good News Club adopts a wholly religious demeanor in guiding children through a worship service. This is not instruction about religion, nor is it a program of character development with a religious component akin to a boy scout program: it is religious instruction, religious

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<sup>13</sup> Child Evangelism Fellowship, Inc., Statement of Purpose, at <http://www.gospelcom.net/cef/about/purpose.php>.

<sup>14</sup> 202 F.3d 502, 504-505 (2d Cir. 2000), *disapproved of on other grounds*, 533 U.S. 98 (2001).

<sup>15</sup> *See id.* at 507.

worship, and the inculcation of religion itself. Every Good News Club activity is infused with religious indoctrination, and the entire purpose of the club is to impart religious beliefs.

There is, of course, nothing inherently improper as matter of law in efforts by a religious group to seek to convert other young children to its religious viewpoint, as controversial as this may be to others in the community. The organization's primary purpose and function of religious proselytizing are an important contextual factor, however, in the Establishment Clause analysis discussed below. The purpose and function also distinguish CEFM from other community organizations that have recourse to MCPS's distribution of flyers. CEFM's flyers are an essential component of its proselytizing efforts. The distribution being demanded here would convey a powerful message of endorsement.

**III. Participation by school personnel, and school-organized participation by students, in activity that furthers proselytizing to children compromises school neutrality toward religion.**

What CEFM demands is that MCPS require its teachers and students to participate personally in the distribution of flyers, directly to students, that promote proselytizing to children by an organization that meets on school

grounds. Court decisions, including some of those invoked by CEFM, affirm that schools must avoid placing their personnel in such a position.

This Court, in *Peck v. Upshur County Board of Education* struck the appropriate balance in applying this principle in considering the distribution of religious materials to students.<sup>16</sup> Where a school board had permitted outside groups to make Bibles available to students one per year on tables set up in the school, this Court upheld the practice—as to secondary school students—against an Establishment Clause challenge, noting that “the Board has taken significant steps to prevent ... students from mistakenly concluding that the Board is sponsoring the Bible display ... by setting strict guidelines which forbid any school teacher or employee from participating in any way in making the Bible available.”<sup>17</sup>

In *Rusk v. Crestview Local Schools*, the court held that a school district violated the Establishment Clause when it distributed flyers for outside religious groups that did not even meet on school grounds.<sup>18</sup> The

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<sup>16</sup> 155 F.3d 274, 287 (4<sup>th</sup> Cir. 1998).

<sup>17</sup> *Id.* at 282. *See also, e.g., Berger v. Rensselaer Central School Corporation*, 982 F. 2d 1160, 1166 (7<sup>th</sup> Cir. 1993) (holding that principal’s allowing outside group on to campus to distribute Bibles in classrooms violated effects and entanglement prongs of *Lemon* test); *Jabr v. Rapides Parish School Board*, 171 F. Supp. 2d 653, 662-63 (W.D. La. 2001) (holding that school board’s and principal’s making of Bibles available to fifth graders violated endorsement and coercion tests).

<sup>18</sup> 220 F. Supp. 2d 854 (N.D. Ohio 2002) (appeal pending 6<sup>th</sup> Cir.).

court found that “the practice of distributing religious material to students could be construed as an endorsement of religion by the school or the teachers.”<sup>19</sup> In addition, the court noted that, “[f]orbidding religious organizations from advertising activities at which proselytizing will occur in an elementary school does not equate to denying access to an organization based on viewpoint.”<sup>20</sup>

In another case involving CEF and a Good News Club, *Quappe v. Endry*, the teacher’s involvement in the club, which included recruitment of children, “tainted the Club’s activity and established a symbolic nexus between the school and the Club, thus providing the active government participation necessary to find a constitutional violation.”<sup>21</sup> This led the court to uphold the school’s decision to require the club to meet in the evening rather than right after school.<sup>22</sup> Similarly, in *Doe v. Shenandoah County School Board*, the court held that a school district violated the Establishment Clause by permitting teachers and members of a religious organization to encourage elementary school students to attend religious meetings.<sup>23</sup>

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<sup>19</sup> *Id.* at 858.

<sup>20</sup> *Id.* at 860.

<sup>21</sup> 772 F. Supp. 1004, 1014-15 (S.D. Ohio 1991).

<sup>22</sup> *See id.*

<sup>23</sup> 737 F. Supp. 913, 915, 918 (W.D. Va. 1990).

In another recent case involving CEF and a Good News Club, *Wigg v. Sioux Falls School District 49-5*, a U.S. district court rejected a request for a preliminary injunction ordering the school district to allow an elementary school teacher to lead a Good News Club immediately after school hours.<sup>24</sup> The court held that the teacher’s participation would violate the “primary effect” prong of the *Lemon* test, since a reasonable observer would perceive the school to be endorsing religion.<sup>25</sup> The court rejected the argument that the school’s disallowing such participation, when the school would have allowed the teacher to participate in other groups such as the Girl Scouts, constituted “viewpoint discrimination.”<sup>26</sup>

The U.S. Supreme Court’s decision in *Good News Club v. Milford Central School*,<sup>27</sup> another case involving CEF, does not change the analysis. In holding that a school district could not exclude a Good News Club from holding meetings after school on a school campus where the district allowed other community groups to do so, the Supreme Court expressly noted that teachers were not involved in the club.<sup>28</sup> The Court also distinguished earlier holdings in part by noting that, in those cases, the unconstitutional

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<sup>24</sup> 2003 WL 1961334 (D. S.D. 2003).

<sup>25</sup> *See id.* at 8.

<sup>26</sup> *See id.* at 4.

<sup>27</sup> 533 U.S. 98 (2001).

<sup>28</sup> *See id.* at 117-118.

endorsement of religion at issue occurred “*during the schoolday*” and that, in contrast, all of the disputed activity in *Good News* would “take place *after* the time when the children are compelled by state law to be at the school.”<sup>29</sup>

This Court should preserve this bright line rule that school personnel should scrupulously avoid association with religious recruitment at school because of the strong potential for misunderstanding. That potential and the entanglements that it entails make Establishment Clause violations all but impossible to avoid: even the best of intentions may lead to misunderstandings and perceived endorsement.

**IV. The problems of a perceived endorsement of religion and coercion are heightened since the children involved are of a young and impressionable age.**

The endorsement and coercion problems presented by this case are exacerbated by the fact that the individuals affected here are young children, who would be even more likely than older students to perceive an endorsement of religion when their teachers deliver CEFM’s recruitment literature into their folders. The district court was correct in concluding that children under the age of twelve will not understand the distinction between

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<sup>29</sup> *Id.* at 117 & n.6 (emphasis original).

activities that the school endorses and activities with which the school cooperates under the doctrine of “equal access.”

Courts have reached different conclusions on similar factual settings when the controlling difference has been the age of the children involved as an audience, *i.e.*, when the religious practice at issue has been moved from the university to the high school context, or from the high school to the elementary school context. For example, in *Edwards v. Aguillard*, the U.S. Supreme Court noted:

The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. [Fn. 5 The potential for undue influence is far less significant with regard to college students who voluntarily enroll in courses. “This distinction warrants a difference in constitutional results.”] Furthermore, “[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools....”<sup>30</sup>

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<sup>30</sup> 482 U.S. 578, 583 (1987) (internal citations omitted).

Subsequent Supreme Court holdings have affirmed that the child’s perspective is key where school endorsement of religion is at issue. For example, the Court in *Santa Fe Independent School District v. Doe* considered the perceptions of “an objective Santa Fe High School student.”<sup>31</sup> In *Board of Education of Westside Community Schools v. Mergens*, the Court considered the issue from the perspective of “an objective observer in the position of a secondary school student.”<sup>32</sup>

This Court, in *Peck v. Upshur County Board of Education*, found that an annual display of Bibles for optional student distribution was constitutional at the high school level, but unconstitutional at the elementary level, concluding that “young elementary-age children ... may be unable to fully recognize and appreciate the difference between government and private speech.”<sup>33</sup> Noting what it believed might be the Supreme Court’s holding on this distinction, this Court stated:

In elementary schools, the concerns animating the coercion principle are at their strongest because of the impressionability of young elementary-age children. Moreover, because children of these ages may be unable to fully recognize and appreciate the difference between government and private speech—a difference that lies at the heart of the neutrality principle—the County’s policy could

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<sup>31</sup> 530 U.S. 290, 309-10.

<sup>32</sup> 496 U.S. 226, 249 (1990).

<sup>33</sup> 155 F.3d 274, 287 (4<sup>th</sup> Cir. 1998).

more easily be (mis)perceived as endorsement rather than neutrality.<sup>34</sup>

Other courts weighing similar Establishment Clause issues have similarly recognized the longstanding principle of constitutional jurisprudence that the standards for young children are in many cases different than for adults.<sup>35</sup> Children are more impressionable and vulnerable, and for those reasons, school personnel must be vigilant to guard against

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<sup>34</sup> *Id.* at 288 n\*.

<sup>35</sup> *See, e.g., Sherman v. Community Consol. Sch. Dist 21. of Wheeling Township*, 8 F.3d 1160, 1166 (7<sup>th</sup> Cir. 1993) (finding that dissemination of Cub Scout materials was “sufficiently divorced from the workings of school” so that confusion *to children* unlikely) (emphasis added); *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F. 2d 1160, 1166 (7<sup>th</sup> Cir. 1993) (finding that 5<sup>th</sup> grade children “cannot be expected to make subtle distinctions between speakers or instructors invited by [the public school] and those whose invitations are self-initiated.”); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1381 n.13 (3d Cir. 1990) (holding that school district’s flat ban on distribution of religious literature in limited public forum in its secondary schools was unconstitutional, but expressly refraining from extending this holding to elementary schools); *Bell v. Little Axe Ind. Sch. Dist. No 70*, 766 F.2d 1391, 1404 (10<sup>th</sup> Cir. 1985), *disapproved of on other grounds by Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986) (“We believe that an elementary school cannot be compared to either a university or a high school.”); *Wigg v. Sioux Falls Sch. Dist.* 49-5, 2003 WL 1961334, at \*5 (D. S.D. 2003). (noting that, for Establishment Clause purposes, elementary school children are significantly more impressionable than older students and distinguishing case in which school at issue was only an elementary school from *Good News v. Milford*, which involved a combined elementary, junior high, and high school); *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp.2d. 897, 908 (W.D. Mich. 2000). (recognizing that “the age of the ‘audience’ is an important factor in the [Establishment Clause] analysis....” and that “[e]lementary school students are impressionable and deserve protection from subtle coercive influences”).

violations of their rights. Quite possibly for that very reason, the federal Equal Access Act requiring schools to allow non-curricular groups equal access to school facilities despite their religious and political views applies only to secondary schools, not elementary schools.<sup>36</sup>

Once again, this Court should reject the suggestion that, for purposes of this case, the Supreme Court’s decision in *Good News* eviscerated a longstanding legal principle. In acknowledging the “significance we may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults,” the Court indicated that, “we have never extended our Establishment Clause jurisprudence to foreclose *private* religious conduct during *nonschool* hours.”<sup>37</sup> Neither this guidance, nor the fact that the *Good News* Court took comfort from its expectation that parents would not misperceive the school’s endorsement of the Good New Club, dismisses the Establishment Clause concerns raised by the present case.<sup>38</sup> Here, unlike in *Good News*, all of the students would receive the materials directly, without their parents present; they would receive them directly from teachers and their classmates, rather

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<sup>36</sup> 20 U.S.C. 4071-4074 (2000). Importantly, the Act restricts the role that school personnel may assume with respect to student religious group meetings even though the students are in high school.

<sup>37</sup> *Good News*, 533 U.S. at 115 (emphasis added).

<sup>38</sup> *See id.*

than merely from CEFM; and would directly help distribute them to their peers and their parents.

This scenario should be avoided, particularly where CEFM has access to MCPS’s other fora— fora that are less problematic in terms of the impression they create in the minds of religiously diverse children. Indeed, CEFM overtly acknowledges—and its entire purpose is arguably based on—the greater impressionability of children. The group itself argues that if “a person does not accept Jesus Christ as Savior before reaching the age of 14, the likelihood of ever doing so is slim.” JA 511.

**V. This Court should not further weaken judicial clarity on whether active participation by school personnel and students in the distribution of materials to proselytize to children violates the Establishment Clause.**

Applying the Establishment Clause tests and these principles, courts have found an Establishment Clause violation when schools have distributed religious materials, even at the behest of outside organizations. However, this law is contested, and there are a number of cases, including several currently on appeal, that raise this issue.

In a recent Ninth Circuit decision, *Hills v. Scottsdale*, the court held that a school committed unconstitutional viewpoint discrimination by

refusing to distribute flyers for a religious summer camp, finding that the distribution would not constitute an Establishment Clause violation.<sup>39</sup> The court distinguished its earlier holding in *Culbertson v. Oakridge School District*,<sup>40</sup> noting that, in the new case, the flyers contained an express disclaimer stating that the school did not endorse the camp, the teachers were not involved in distributing permission slips, and the camp was not held on school grounds.<sup>41</sup> However, the court held that the school could have refused to distribute a flyer to the extent that the flyer’s language were to exceed the scope of the forum created by the school district by going beyond a description of the group’s general religious mission “to directly exhort the reader to involve children in religious observance.”<sup>42</sup> This case is still pending in the Ninth Circuit.

In an earlier decision, *Sherman v. Community Consolidated School District*, the Seventh Circuit found that a school did not violate the

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<sup>39</sup> 2003 WL 21197150 (9<sup>th</sup> Cir. 2003) (rehearing pending).

<sup>40</sup> 258 F.3d 1061 (9<sup>th</sup> Cir. 2001) (holding that teacher distribution of Good News Club flyers and permission slips for after-school meetings would impermissibly endorse religion by putting authority of the teachers behind the club).

<sup>41</sup> *See Hills*, at 9.

<sup>42</sup> *Id.* at 7 (making “subtle, but important” distinction between impermissibly refusing “to distribute literature advertising a program with underlying religious content where [the school] distributed quite similar literature for secular summer camps” and permissible refusal “to distribute literature that *itself* contains proselytizing language”).

Establishment Clause by distributing flyers for a Cub Scout troop, in part “because the students encounter nothing overtly religious in the BSA’s flyers or posters.”<sup>43</sup> Significantly, in contrast to the *Hills* holding concerning the language of the flyers, the Seventh Circuit’s finding that the workings of the school were “sufficiently divorced” from the dissemination of the flyers was partly based on the fact that school provided no content guidelines for the group’s handouts and did not attempt to evaluate substantively the group’s message.<sup>44</sup>

In the *Rusk v. Crestview Local Schools* case mentioned above, a U.S. district court ruled that a school district violated the Establishment Clause when it distributed flyers for outside religious groups, and that preventing religious organizations from advertising activities at which proselytizing will occur in an elementary school does not constitute viewpoint discrimination.<sup>45</sup> This decision has been appealed to the Court of Appeals for the Sixth Circuit.

In the other pending CEF lawsuit on this issue, *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District*, another U.S. district court recently permitted the distribution of the group’s flyers in

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<sup>43</sup> 8 F.3d 1160, 1167 (9<sup>th</sup> Cir. 1993).

<sup>44</sup> *See id.* at 1166.

<sup>45</sup> 220 F. Supp. 2d 854 (N.D. Ohio 2002) (appeal pending 6<sup>th</sup> Cir.).

the school.<sup>46</sup> The court found no risk of a perceived endorsement of religion.<sup>47</sup> The case is now pending before the Third Circuit Court of Appeals.

The Fourth Circuit has earlier provided leadership in making reasonable decisions on the issue of Establishment of religion with respect to distribution of literature. In *Peck*, this Court used an endorsement analysis to draw a clear line at school dissemination of religious messages to young children through posters and unattended tables, a practice that involves decidedly less direct school participation than is being demanded in the case at hand.<sup>48</sup> This Court appropriately recognized that young children would have been likely to misperceive the practice as an endorsement of the group's religious messages.<sup>49</sup> Nothing compels this Court to abandon this sensible and clear principle.

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<sup>46</sup> 233 F. Supp. 2d 647 (D.N.J. 2002) (appeal pending 3<sup>rd</sup> Cir.).

<sup>47</sup> *See id.*

<sup>48</sup> 155 F.3d 274, 287 (4<sup>th</sup> Cir. 1998).

<sup>49</sup> A U.S. district court in *Daugherty v. Vanguard Charter School Academy* cited *Peck* in upholding an elementary school's distribution of church advertising materials, but in doing so apparently overlooked the heightened concern for young children this Court articulated in its decision. 116 F. Supp.2d. 897 (W.D. Mich. 2000).

## CONCLUSION

These are difficult questions, which may require that lines be finely drawn.<sup>50</sup> This is particularly true where, on questions like that at issue here, drawing fine lines may be necessary to preserve the vitality of the Establishment Clause’s protections of the rights of all parents and children. *Amici* acknowledge that this Court must do “only what courts must do in many Establishment Clause cases—focus on specific features of a particular government action to ensure that it does not violate the Constitution.”<sup>51</sup>

Nonetheless, the significant costs that subtle and complex line-drawing on this issue—and the inevitable next round of incremental litigation it spawns—continue to inflict on communities and their schools should give this Court pause when it is asked to depart from longstanding, relatively clear judicial maxims concerning either the involvement of school personnel in activities that promote religious activity or the impressionability of young children. As schools wrestle with the challenge of understanding and fulfilling their obligations in this complex and fluid area of the law, the odds increase that their decisions will be seen as promoting—or, for that

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<sup>50</sup> See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 847 (1995) (O’Connor, J., concurring) (“Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case.”).

<sup>51</sup> *Id.* at 852.

matter, as hostile to—religion. For the above reasons, *amici* urge this Court to affirm the district court’s decision in this case.

Respectfully submitted,

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