

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 03-2956 & 03-3107

BARBARA WIGG,

Plaintiff/Appellee/
Cross Appellant

vs.

SIOUX FALLS SCHOOL DISTRICT 49-5; and DR. JACK KEEGAN,
in his individual and official capacity as Superintendent of the
Sioux Falls School District,

Defendants/Appellants/
Cross Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

**BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS
ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL
ADMINISTRATORS, ASSOCIATED SCHOOL BOARDS OF SOUTH
DAKOTA, IOWA ASSOCIATION OF SCHOOL BOARDS AND
MINNESOTA SCHOOL BOARDS ASSOCIATION
SUPPORTING DEFENDANTS/APPELLANTS/CROSS APPELLEES.**

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UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

October 23, 2003

Case Number 03-2956 & 03-3107

Barbara Wigg v. Sioux Falls School District 49-5 and Dr. Jack Keegan

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

Pursuant to FRAP 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?
 YES NO
2. Does party have any parent corporations?
 YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
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:

Signature

Date

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Pursuant to FRAP 26.1, the American Association of School Administrators, 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
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% of more of a party's stock owned by a publicly held corporation or other publicly held entity?
 YES NO
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**Disclosure of Corporate Affiliations and Other Entities
with a Direct Financial Interest in Litigation**

Pursuant to FRAP 26.1, the Associated School Boards of South Dakota, 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
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% of 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:

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Pursuant to FRAP 26.1, the Iowa Association of School Boards, 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
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% of 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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with a Direct Financial Interest in Litigation**

Pursuant to FRAP 26.1, the Minnesota School Boards Association, who is Amicus Curiae, makes the following disclosure:

6. Is party a publicly held corporation or other publicly held entity?
 YES NO
7. Does party have any parent corporations?
 YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
8. Is 10% of 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:
9. 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:
10. 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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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.

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.

The Associated School Boards of South Dakota (ASBSD) is a non-profit corporation that represents the state’s school boards. ASBSD’s mission is to promote excellence in school board governance by providing support, service, knowledge, and training to local school boards. ASBSD

also sponsors a state Council of School Attorneys for attorneys who represent the state's school boards.

The Minnesota School Boards Association (MSBA) is a nonprofit organization representing local boards of education. Although membership is voluntary, all 344 local school boards in Minnesota belong to MSBA.

The mission of the MSBA is to support, promote, and enhance the work of Minnesota's public school boards.

The Iowa Association of School Boards (IASB) is a voluntary school board association representing all 370 Iowa school districts and 15 regional area education agencies. IASB's mission is to assist school boards in achieving their goal of excellence and equity in public education.

Amici share a strong interest in the effective implementation of school policies and practices, including those that (1) preserve parental confidence in the religious neutrality of public schools and school officials, (2) prevent disputes and litigation among school boards, administrators, school employees, and parents and community organizations by maintaining the separation of church and state mandated by the Establishment Clause of the First Amendment to the U.S. Constitution, and (3) protect the First Amendment freedoms of students and employees. To these ends, *amici* have an interest in ensuring that local school boards and administrators maintain

the autonomy to adopt and implement appropriate policies and practices, and thus seek judicial clarity on these complex questions.

SOURCE OF AUTHORITY TO FILE

This brief is filed with the consent of both parties.

STATEMENT OF THE CASE

Child Evangelism Fellowship, Inc. (CEF), is a non-profit, interdenominational Christian missionary organization that provides religious instruction to school children between the ages of six and twelve. 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. CEF 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.¹

Good News Club meetings are religious services and instruction for the children, including prayer, witness, confession, and opportunities for

¹ Child Evangelism Fellowship, Inc., Statement of Purpose, *at* <http://www.gospelcom.net/cef/about/purpose.php>.

each child to be “saved” by receiving Jesus as his or her savior.² Every Good News Club activity is infused with religious indoctrination, and the entire purpose of the club is to impart religious beliefs.

Appellee and Cross-Appellant Barbara Wigg is employed by Appellant and Cross-Appellee Sioux Falls School District 49-5 as an elementary school teacher at Laura B. Anderson Elementary School. Ms. Wigg has been employed by the district for 15 years and has taught at five of the district’s 21 elementary schools.³ In addition, she has served as the facilitator of an in-school tutoring program at seven of the district's elementary schools.⁴

The school district permits religious clubs and organizations access to its elementary school facilities, and Good News Clubs hold meetings at five of the district's elementary schools during non-instructional time.⁵ However, in recognition of its constitutional obligation of neutrality toward religion, the district's policy prohibits school personnel from participating with students in meetings of religious clubs or organizations.⁶

² *Good News Club v. Milford Central School*, 202 F.3d 502, 504-505, 507 (2d Cir. 2000), *disapproved of on other grounds*, 533 U.S. 98 (2001).

³ *See* Appellants’/Cross Appellees’ Appendix (hereinafter “App.”) 60, 192.

⁴ *See id.* at 147.

⁵ *See id.* at 33, 151-52.

⁶ *See id.* at 23, 33.

After Ms. Wigg participated in a Good News Club meeting at Anderson Elementary in 2002, the district informed her of its policy and advised her that she must refrain from participating in future Club meetings. Ms. Wigg filed suit against the school district and Superintendent Jack Keegan, alleging that the district's policy violated her rights to Free Speech, Peaceable Assembly, Free Exercise, and the Establishment Clause.

The United States District Court for the District of South Dakota denied Ms. Wigg's motion for preliminary injunction.⁷ At this point, Ms. Wigg requested that she be allowed to participate in Good News Club meetings at schools other than Anderson Elementary.⁸ The district court concluded that the school district's policy, as applied to Ms. Wigg's participation in the Club at other schools in the district, would violate her free speech rights.⁹ The court therefore granted her request for a permanent injunction and declaratory judgment.

The school district has appealed, among other issues, the district court's invalidation of its policy as applied to a teacher who wishes to participate in proselytizing at a school other than the one to which the

⁷ *Wigg v. Sioux Falls Sch. Dist.*, 259 F. Supp. 2d 967 (D. S.D. 2003) (hereinafter "*Wigg I*").

⁸ *See App.* at 59, 211, 241.

⁹ *Wigg v. Sioux Falls Sch. Dist.*, 274 F. Supp. 2d 1084 (D. S.D. 2003) (hereinafter "*Wigg II*").

teacher is assigned. Ms. Wigg, through her Notice of Cross-Appeal on August 14, 2003, signaled her appeal of, among other issues, the district court's refusal to require the district to permit her to participate in the Good News Club at Anderson Elementary.

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, administrators, and personnel on the question of a school employee's participation in proselytizing to children, the type of issue that, for schools, is fraught with community controversy, legal complexity, political potency, and costly litigation.

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 intersection of religion with public schools continues to confront schools with highly divisive 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.¹⁰

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 and communities in a complex area. Among these principles are: (1) School personnel must avoid 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.

I. This Court should not undermine the longstanding and widely understood principle that active participation by school personnel in on-campus religious activities involving children violates the Establishment Clause.

This Court should affirm that part of the district court's opinion finding that concern over an Establishment Clause violation justifies a school district in preventing a teacher from participating in religious activities involving students at the school where she teaches.

¹⁰ See Marjorie Coeyman, *Are schools more afraid of lawsuits than they should be?*, THE CHRISTIAN SCIENCE MONITOR, May 27, 2003, at 21 (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, and that many schools probably settle even meritless claims in order to minimize legal costs and distractions from their academic mission).

Court decisions affirm that school personnel must avoid compromising school neutrality by advancing their religious views to students in religious activities involving school children at school functions or in school facilities. Such actions compromise school religious neutrality in violation of the Establishment Clause “because of the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure.”¹¹

School districts therefore have the obligation to ensure that teachers paid with public funds do not inculcate religion.¹² School officials have the authority and the duty to prevent school employees from giving students and others the impression that the school favors a particular religious viewpoint over others.¹³ A school district’s need to avoid violating the Establishment Clause can override a teacher’s rights to religious expression.¹⁴

¹¹ *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

¹² *See Lemon v. Kurtzman*, 403 U.S. 602, 618-19 (1971).

¹³ *See, e.g., Marchi v. Board of Cooperative Educ. Services of Albany*, 173 F.3d 469 (2d Cir. 1999) (holding that school district had authority and duty to direct teacher not to inject religion into instruction and communication with parents); *Helland v. South Bend Cmty. Sch. Corp.*, 93 F.3d 327 (7th Cir. 1996) (substitute teacher’s injection of religion into classroom was legitimate, nondiscriminatory reason for school district to remove him); *Pelozza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994) (school district’s concern over Establishment Clause violation warranted prohibiting teacher from talking with students about religion, including when teacher was not teaching), *cert. denied*, 515 U.S. 1173 (1995); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990) (upholding school district’s directive that

These admonitions are limited neither to activities that take place in the classroom nor to school hours and school-sponsored activities.¹⁵ In another case involving a Good News Club, *Quappe v. Endry*, the teacher's leadership of and participation in the club "tainted the Club's activity and established a symbolic nexus between the school and the Club, thus

elementary school teacher refrain from silently reading the Bible during class time, remove religious books from classroom shelves, and remove religious poster from classroom wall to prevent cumulative effect of advancing teacher's religious views); *Karen B. v. Treen*, 653 F.2d 897, 902 (5th Cir. 1981) (finding that state law and school district policy authorizing teachers to implement voluntary classroom prayer program violated Establishment Clause); *Rusk v. Crestview Local Sch. Dist.*, 220 F. Supp. 2d 854 (N.D. Ohio 2002), *appeal docketed*, No. 02-3991 (6th Cir. Sept. 6, 2002) (holding that Establishment Clause prohibits teachers from distributing religious materials to students).

¹⁴ See *Pelozza*, 37 F.3d at 522; compare *Bishop v. Aronov*, 926 F.2d 1066, 1077 (11th Cir. 1991) (finding that university did not violate professor's free speech or free exercise rights by instructing him to refrain from injecting religious beliefs instruction or holding optional sessions to discuss religious views).

¹⁵ See, e.g., *Culbertson v. Oakridge Sch. Dist. No. 76*, 258 F.3d 1061 (9th Cir. 2001) (finding that distribution of religious materials by teachers put teachers in service of religious group in violation of Establishment Clause); *Marchi*, 173 F.3d at 466-67 (finding that school district did not infringe on teacher's Free Exercise rights by directing teacher not to include religious references in letter to student's parent concerning student); *Pelozza*, 37 F.3d at 522 (upholding school's warning to teacher to refrain from expressing his religious views on school grounds, including during non-classroom time); *Jabr v. Rapides Parish Sch. Bd.*, 171 F. Supp. 2d 653 (W.D. La. 2001) (holding that principal's distribution of Bibles to students on school grounds during school hours impermissibly endorsed religion); *Doe v. Shenandoah County Sch. Bd.*, 737 F. Supp. 913, 915, 918 (W.D. Va. 1990) (finding that school district violated Establishment Clause where teachers encouraged elementary school students to attend off-campus religious meetings).

providing the active government participation necessary to find a constitutional violation.”¹⁶ This led the court to uphold the school’s decision to require the club to meet in the evening rather than right after school.¹⁷

Where religious activities involving school children have been upheld, the absence of teacher involvement frequently has been a key factor. In the most prominent of the many cases brought by Good News Clubs, *Good News Club v. Milford Central School*,¹⁸ the U.S. Supreme Court expressly based its holding that a school district could not selectively deny a Good News Club access to school facilities in part on the fact that no teachers were involved in the club.¹⁹ In *Board of Education of Westside Community Schools v. Mergens*, the Supreme Court upheld the federal Equal Access Act, which requires schools to allow non-curricular groups equal access to school facilities regardless of any religious or political views, expressly citing the fact that the Act restricts school personnel from participatory capacity.²⁰

Similarly, in *Good News/Good Sports Club v. School District of the City of Ladue*, this Court held that a former school board member's

¹⁶ 772 F. Supp. 1004, 1014-15 (S.D. Ohio 1991).

¹⁷ *See id.*

¹⁸ 533 U.S. 98 (2001).

¹⁹ *See id.* at 117-18.

²⁰ 496 U.S. 226, 236 (1990) (citing 20 U.S.C. 4071(c)(3) (2000)).

involvement with a Good News Club did not raise the perception of an establishment of religion that would be posed were a teacher involved:

[The school board member] had no classroom from which to recruit; nor would her appearance after instructional hours create the same danger of an appearance of a continuation of the school day as if she were a teacher present throughout the day. More to the point, [she] was no longer involved with the Club [during the time period in question].²¹

This Court should preserve the widely understood, bright line rule that school personnel should scrupulously avoid association with religious activities with students 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. In this case, Ms. Wigg's participation in the Good News Club was announced at various churches, some of her own students participated in the club, and students and parents approached her at school about the club.²²

²¹ 28 F.3d 1501, 1510 (8th Cir. 1994). *See also, e.g., Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582 (N.D. Miss. 1996) (holding that before-school student prayer group meeting on school grounds did not constitute Establishment Clause violation because teachers present were there strictly for monitoring purposes and did not participate).

²² *See App.* at 48, 152, 166-67.

II. Establishment Clause problems are not avoided by school employees' limiting their participation in on-campus religious activities involving children to schools at which the employees are not assigned to teach during the school day.

This Court should reverse that part of the district court's opinion finding that concern over an Establishment Clause violation does not justify a school district's preventing a teacher from participating in religious activities involving students, as long as such participation occurs at a school other than the school where she teaches.

The school district cites significant factual complications that cast doubt on the district court's determination that a teacher's participation at another school avoids Establishment Clause problems. The district's notable concerns include the following:

- There is significant student mobility among the district's schools, as a function both of family mobility and the district's open enrollment policy.²³
- There is significant mobility by faculty members among the district's schools, through transfers, teaching at more than one school, or, as in Ms. Wigg's case, taking on special added responsibilities. Ms. Wigg has tutored at three of the other

²³ See Brief of Appellants/Cross-Appellees at 31.

elementary schools at which Good News Clubs meet.²⁴ She has substitute taught at two of these schools.²⁵

- Students, parents, and staff typically remain on campus during the hours immediately after school in which the Good News Club meetings are held.²⁶ The district's after-school programming does not conclude until 6:00 p.m.²⁷ Staff meetings, parent meetings, student assistant team meetings, and meetings for Individual Education Plans (IEPs) for students with disabilities frequently take place during the hours in which the Good News Clubs meet.²⁸

These are more than minor administrative inconveniences unworthy of consideration when evaluating weighty questions of constitutional rights. They go to the very heart of the issue: what impression a reasonable child or parent observer would have of a school district's endorsement of an on-campus club meeting in which teachers participate. Under circumstances like those presented in this case, an observer would reasonably infer that

²⁴ *See App.* at 155.

²⁵ *See id.*

²⁶ *See Brief of Appellants/Cross-Appellees* at 60.

²⁷ *See App.* at 181.

²⁸ *See id.* at 47, 128-29.

teachers and the district endorse the Good News Club. Just as a professional educator is not transformed from a school employee at 2:30 p.m. in Room 101 to a private volunteer at 2:31 p.m. in Room 102 at one school, so she may not so easily be transformed into a private volunteer at 2:45 p.m. at a nearby school.

Moreover, these factors are not at all uncommon among the Nation's school districts. Over 70% of the Nation's school districts serve student populations of fewer than 2,500, and nearly 50% serve fewer than 1,000 students.²⁹ Families are mobile, students frequently transfer among schools and attend specialty or magnet programs at other schools, and open enrollment policies are quite common among school districts. Additionally, under the requirements of the federal No Child Left Behind Act, the number of students nationwide transferring among public schools within a district can be expected to increase substantially in coming years.³⁰ The boundaries of school attendance zones are regularly revised, sometimes resulting in

²⁹ See NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPARTMENT OF EDUCATION, DIGEST OF EDUCATION STATISTICS, 2002, Table 88 *available at* <http://nces.ed.gov/pubs2003/digest02/tables/dt088.asp> (data are for 2000-2001 school year).

³⁰ The federal government has mandated that public school districts make intra-district school choice available to students attending schools identified under the Act as “in need of improvement.” See No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1116(b)1(E) codified at 20 U.S.C. § 6316.

transfers of significant numbers of students among schools. Teachers and other school personnel are similarly mobile, and, particularly in rural school districts, teachers frequently serve at multiple schools. Many teachers also perform extra duties and supervise extracurricular activities that take place at multiple schools.

Some of the facts highlighted by the school district in this case also point to the possibility of a particular danger for schools in this situation. It is at least plausible that the focus on school-based religious activities, with the proposed teacher involvement, at some level represents a deliberate attempt to accomplish the very kind of symbolic association of public institutions and officials with sectarian viewpoints against which the Bill of Rights protects all Americans. CEF's stated goal is "to take the Gospel to every school, whether through released-time Good News Clubs meeting off school grounds during classroom hours or after-school Good News Clubs meeting on campus after classes have ended."³¹ The Good News Club has indicated that it works "in cooperation with public schools to supplement the children's education with biblical principles."³² In this case, Ms. Wigg's participation in the Good News Club was announced at various churches in

³¹ App. at 40.

³² App. at 41.

the community.³³ While she has expressed willingness to participate in the Good News Club even if it met off campus, neither she nor the Club has apparently acted on an offer by a nearby resident to host the meetings in the resident's home.³⁴

Obviously *amici* are in no position to ascribe an improper motive to the Good News Club and its supporters, who in fact may not intend to create the impression of any link between their faith and the Nation's public institutions. Still, the plausibility of this scenario in this and other school districts suggests the untenable legal position in which school officials may find themselves as they seek to avoid continually being caught in the crossfire among the many litigious groups, on all sides of these issues, who grace our schools with so much of their attention. The challenge is difficult enough under the best of circumstances, let alone where some of the parties involved may specifically seek the symbolic state imprimatur the Constitution forbids and other parties decry.

If the line against teacher participation in religious activities with students is now to be crossed, and if the school district has any affirmative duty to ensure that such participation does not cross some new line delineating acceptable practice under the Establishment Clause, it seems all

³³ See App. at 166.

³⁴ See App. at 168.

too probable that "the very restrictions and surveillance necessary to ensure that teachers play [an appropriate] role [will] give rise to entanglements between church and state."³⁵

These facts also suggest that concern may be warranted to the extent the district court's decision depends on its presumption that "the spirit of changing badges and identities would not be violated by the teacher so she would not tell students that despite her visitor's badge she was a teacher in the school system."³⁶ Ms. Wigg indicated that she did not know what she would tell a child at a Good News Club meeting who asked her what she did for a living.³⁷ An expectation that a teacher be disingenuous in order to make legally acceptable her participation in a Club that purports to impart moral values seems a little unfair.

These are the types of complexities and impracticalities that illustrate why a categorical rule allowing a teacher to assume the role of a private volunteer for Establishment Clause purposes at another school is problematic. They demonstrate all too ominously why any proposed departure from the well-considered rule against teacher involvement in religious activities with students must be handled with extreme caution to

³⁵ *Lemon v. Kurtzman*, 403 U.S. 602, 620-21 (1971).

³⁶ *Wigg II* at 1033.

³⁷ *See App.* at 169.

avoid inviting more litigation over a myriad of hair-splitting factual variations.

Precisely because of these prevalent realities for schools, a significant degree of judicial deference to school boards on these matters is called for. The school district’s brief makes plain that government employers have considerable authority to regulate the speech of the individuals they employ and that courts should afford substantial deference to the judgments made by public employers about appropriate limits on employee speech in different contexts.³⁸ This authority to restrain speech derives directly from the employer’s government function and mission. When the government agency is a school district, the function and mission are key and strengthen the case for judicial deference.

Courts have repeatedly affirmed that special constitutional analysis applies to schools because they are charged with educating children. In their role as “guardian and tutor”³⁹ of students, courts have repeatedly held that schools are permitted to take actions that might cross the line of

³⁸ See Brief of Appellants/Cross-Appellees at 39-41, citing *Waters v. Churchill*, 511 U.S. 661 (1994); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

³⁹ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995).

constitutionality in other settings.⁴⁰ For the very same reason, numerous court decisions have made clear that schools must also pay exacting attention to other constitutional limits on actions implicating the rights of students.⁴¹ The underlying principle that ties these varied cases together is that a school's paramount responsibility for the children under its care is a critical factor in determining the constitutionality of rules governing expression in the school setting.

Because teachers are the primary educators of school children, the messages they convey to students, whether by speech or conduct, have particular potency. It cannot be gainsaid that teachers serve as role models both in and out of the classroom. Because teachers are entrusted with such power over children, school boards are obligated to establish policies and practices designed to ensure that teacher expression and conduct remain

⁴⁰ See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 261 (1988) (holding that schools may control expression bearing the imprimatur of the school for legitimate educational reasons); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that schools may restrict private student speech based on material and substantial interference in school operations); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (holding that regulation of teacher speech permissible where the speech impedes district's interest in performing its public service).

⁴¹ See, e.g., *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (holding that teachers cannot read the Bible or lead prayer in public school classrooms); *Stone v. Graham*, 449 U.S. 39 (1980) (invalidating posting of Ten Commandments in public school classrooms); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding that, without a secular purpose, requiring teaching of "creation science" is unconstitutional).

within appropriate limits. It is well recognized that the authority of boards to do so extends well beyond the classroom and that teachers may be disciplined for violating such rules. For example, the Second Circuit recently upheld the dismissal of teacher for off-campus speech because the nature of the speech—advocating pedophilia—was potentially disruptive of educational process.⁴² This decision is consistent with longstanding precedent that schools may properly exercise control over even out of school conduct when it has a clear effect on the teacher’s ability to do his or her job or has a negative effect on students.⁴³ Certainly, *amici* do not mean to suggest that teachers who participate in religious activities involving students during non-school hours should in any way be equated with teachers disciplined for “immoral” behavior. The point, and the legal principle at issue, is that the effect of a teacher’s conduct in and out of the classroom on students is so profound that school officials must retain the discretion to regulate teacher expression that, for a variety of reasons, may be inappropriate.

⁴² *Melzer v. Board of Educ. of City Sch. Dist. of City of New York*, 336 F.3d 185 (2d Cir. 2003).

⁴³ *See also, e.g., Morrison v. State Bd. of Educ.*, 461 P.2d 375 (Cal. 1969), a case frequently cited for factors that establish connection between off-campus misbehavior and ability to function as a teacher.

This is certainly true when teacher expression raises Establishment Clause concerns. In its *Marchi v. Board of Co-op. Educ. Services of Albany* decision, which upheld a school board's efforts to avoid an Establishment Clause violation by restricting a teacher's religious expression, the Second Circuit expounded on this point as follows:

[W]hen government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause and the limitations it imposes might restrict an individual's conduct that might well be protected by the Free Exercise Clause if the individual were not acting as an agent of government.... The decisions governmental agencies make in determining when they are at risk of Establishment Clause violations are difficult, and, in dealing with their employees, they cannot be expected to resolve so precisely the inevitable tensions between the Establishment Clause and the Free Exercise Clause that they may forbid only employee conduct that, if occurring, would violate the Establishment Clause and must tolerate all employee conduct that, if prohibited as to non-employees, would violate the Free Exercise Clause. When government is both the initiator of some religiously related actions, through the conduct of its employees, and the regulator of the extent of such actions, through the conduct of its supervising employees, it need not determine, at the peril of legal liability, precisely where the line would be drawn if its employees were not involved. Though school boards, like all instrumentalities of government, must observe the basic free exercise rights of its employees, the scope of the employees' rights must sometimes yield to the legitimate interest of the government employer in avoiding litigation by those contending that an employee's desire to exercise his freedom of religion has propelled his employer into an Establishment Clause violation. In discharging its

public functions, the governmental employer must be accorded some breathing space to regulate in this difficult context. For his part, the employee must accept that he does not retain the full extent of free exercise rights that he would enjoy as a private citizen.⁴⁴

The district court in this case appropriately recognized that “deference need be paid to schools when they are thrust into resolving tensions between the different clauses of the First Amendment.”⁴⁵ The court failed, however, to accord the school district this appropriate deference as to the serious concerns the district raised with respect to the factual context in this case—complications that cast serious doubt on the workability of an “identity-changing” rule, that inhere in even greater degrees in many school districts in the states comprising the Eighth Circuit and throughout the Nation, and that local school officials are best placed to evaluate.

Should this Court nonetheless feel compelled to hold that a teacher may step into the shoes of a private volunteer by simply traveling to another school, *amici* urge this Court to set forth clear lines that offer schools and taxpayers reassurance and guidance with respect to avoiding future litigation from *both* sides of these contentious issues. The Sioux Falls School District was sued for allegedly violating employee rights by determining that

⁴⁴ 173 F.3d 469, 476 (2d Cir. 1999) (internal citations omitted).

⁴⁵ *Wigg II* at 1099 (quoting *Marchi* and citing other cases).

participation with students in religious exercises is inconsistent with the rights of parents and the professionalism expected of public school educators. But confusing the bright line rule against such participation increases the risk that schools will find themselves being sued by parents for violating the Establishment Clause by sanctioning such participation.⁴⁶

III. Schools must exercise heightened care concerning problems of a perceived endorsement of religion or coercion where the practice in question affects children 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 include young children, who would be even more likely than older students to perceive an endorsement of religion when teachers join them in religious activities on campus. The district court appropriately recognized this heightened concern when it noted that, for Establishment Clause purposes, elementary school children are significantly more impressionable than older students and

⁴⁶ Indeed, one parent threatened the school district with a lawsuit in response to an earlier incident also allegedly involving Ms. Wigg's desire to impart religious information to students. *See App.* at 51.

distinguished this case from *Good News v. Milford*, which involved a combined elementary, junior high, and high school.⁴⁷

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 context 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...."⁴⁸

⁴⁷ 533 U.S. 98, 118 (2001)

⁴⁸ 482 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.”⁴⁹ In *Mergens*, the Court considered the issue from the perspective of “an objective observer in the position of a secondary school student.”⁵⁰

Other courts weighing similar Establishment Clause issues have similarly recognized the longstanding principle that the standards where young children are concerned are in many cases different than for older students or adults.⁵¹ Children are more impressionable and vulnerable, and

⁴⁹ 530 U.S. 290, 309-10 (2000).

⁵⁰ 496 U.S. at 249.

⁵¹ See, e.g., *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 287, 288 n* (4th Cir. 1998) (noting that, "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—[a policy] could more easily be (mis)perceived as endorsement rather than neutrality."); *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1166 (7th Cir. 1993) (finding that fifth 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 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 (10th Cir. 1985), *disapproved of on other grounds by Memphis Cmty.*

for those reasons, school personnel must be vigilant to guard against violations of their rights. Possibly for that very reason, the Equal Access Act applies only to secondary schools, not to elementary schools.⁵²

Once again, this Court should reject any 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.”⁵³ However, 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.⁵⁴ *Good News*

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.”); *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”).

⁵² 20 U.S.C. § 4071-4074 (2000).

⁵³ *Good News*, 533 U.S. at 115 (emphasis added).

⁵⁴ *See id.*

expressly noted the lack of any teacher involvement in the club.⁵⁵ Here, students would perceive a teacher's participation in the Good News Club, without their parents present. Parents too would be aware of the teacher's involvement. Students and parents were already aware of Ms. Wigg's intent to participate in the Good News Club.⁵⁶

The Good News Club itself overtly acknowledges—indeed, its entire purpose is arguably based on—the greater impressionability of young children. The group 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.”⁵⁷ The Club sets forth the “likelihood of various ages choosing Christ as Savior: ages 5-13 – 32%; ages 14-18 – 4%; ages 19 or older – 6%.”⁵⁸

This Court should strongly affirm that in Establishment Clause inquiries like that presented by this case, heightened concern for the impressionability of young children is crucially important. This principle is widely understood and of particularly vital significance to parents concerned that actions by schools and teachers not undermine their values by compromising religious neutrality.

⁵⁵ *See id.* at 117-18.

⁵⁶ *See App.* at 48, 152, 166-67.

⁵⁷ *App.* at 41.

⁵⁸ *Id.*

CONCLUSION

Difficult questions about religion and public education unfortunately sometimes require that lines be finely drawn, by courts as well as school boards.⁵⁹ On questions like those at issue here, drawing fine lines may be unavoidable 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.”⁶⁰

Nonetheless, this Court should recognize that subtle and complex line-drawing on these issues and the inevitable, successive rounds of incremental litigation strategies it spawns continue to inflict significant costs on communities and their schools. This should also give this Court pause when it is asked to depart from longstanding, relatively clear judicial maxims concerning either the participation of school personnel in promoting religious viewpoints to students or the impressionability of young children. This reality should also engender some judicial hesitancy to invalidate the considered judgment of local school officials as to the factual context

⁵⁹ 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.”).

⁶⁰ *Id.* at 852.

informing their decisions as to how to fulfill their constitutional obligations.

For these reasons, *amici* urge this Court to affirm the district court's opinion in this case in part and reverse in part, as detailed above.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains _____ words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 97, Times New Roman, 14 point.

3. One computer diskette containing the full text of the brief is being provided to the clerk and to each party separately represented by counsel pursuant to 8th CIR. R. 28A(d). The computer diskettes containing the brief have been scanned for viruses and are virus-free.

Dated at Alexandria, Virginia, this _____ day of October 2003.

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CERTIFICATE OF SERVICE

The undersigned, attorney for *Amicus Curiae*, National School Boards Association and its joint amici, hereby certifies that two true and correct copies of the foregoing “Brief of *Amici Curiae* in Support of Appellants/Cross Appellees” were served upon:

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by United States mail, postage prepaid, this ____ day of October 2003. The undersigned further certifies that the original and nine copies of said “Brief of *Amici Curiae* in Support of Appellants/Cross Appellees” was forwarded to the Clerk of the United States Court of Appeals for the Eighth Circuit this ____ day of October 2003.

Julie Underwood

