**No. 14-3172**

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

**CHILD EVANGELISM FELLOWSHIP OF OHIO, INC.,**
***PLAINTIFF-APPELLANT*,**

**v.**

**CLEVELAND METROPOLITAN SCHOOL DISTRICT, and ROY JAMES, in his official capacity as Principal of Miles Cranwood Elementary School ,**
***DEFENDANTS-APPELLEES*.**

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**Appeal from the United States District Court**
**for the Northern District of Ohio, Cleveland Division**
**Case No. 1:13-cv-01765-CAB**
**The Honorable Christopher A. Boyko**

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# BRIEF *AMICUS CURIAE* OF CHRISTIAN LEGAL SOCIETY, NATIONAL HISPANIC CHRISTIAN LEADERSHIP CONFERENCE, NATIONAL ASSOCIATION OF EVANGELICALS, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AND ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION IN SUPPORT OF APPELLANT AND REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-3172 Case Name: Child Evangelism Fellowship v. Clevela

Name of counsel: Kimberlee Wood Colby

Pursuant to 6th Cir. R. 26.1, Christian Legal Society & co-amici on Exhibit A
*Name of Party*
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on May 1, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

**EXHIBIT A**

National Hispanic Christian Leadership Conference

National Association of Evangelicals

General Conference of Seventh-Day Adventists

The Ethics and Religious Liberty Commission of the Southern Baptist Convention

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## STATEMENT OF IDENTITY OF *AMICI CURIAE*, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE[1]

The **Christian Legal Society** ("CLS") is an association of attorneys, law students, and law professors. CLS has long believed that pluralism, essential to a free society, prospers only when the First Amendment rights of all Americans are protected. CLS was instrumental in passage of the federal Equal Access Act that protects the right of students to meet for "religious, political, philosophical or other" speech on public secondary school campuses. 20 U.S.C. §§ 4071-4074. *See* 128 Cong. Rec. 11784-85 (1982). For three decades, CLS's Center for Law & Religious Freedom ("Center") has worked to protect citizens' religious expression from governmental discriminatory treatment. The Center has frequently represented students and community groups engaged in religious expression in public education settings. *See, e.g.*, *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986); *Child Evangelism Fellowship v. Stafford Twp. Sch. Dist.*, 386 F.3d 514 (3d Cir. 2004); *Child Evangelism Fellowship v. Montgomery County Pub.*

[1] Under FRAP 29(c)(5), neither a party nor party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund preparation or submission. No person (other than the *amici curiae*, its members, or its counsel) contributed money that was intended to fund its preparation or submission. All parties have consented to the filing of this brief.

*Schs.*, 457 F.3d 376 (4th Cir. 2006). The Center was a lead drafter of a document joined by diverse civil liberty and religious liberty organizations, *Religion in the Public Schools: A Joint Statement of Current Law*, which became the basis for the Clinton Administration Department of Education's guidance letters regarding *Religious Expression in Public Schools*,[2] and the Bush Administration regulations, *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries.

The **National Hispanic Christian Leadership Conference** ("NHCLC"), The Hispanic National Association of Evangelicals, is America's largest Hispanic Christian organization serving millions of constituents via our 40,118 member churches and member organizations. The NHCLC exists to unify, serve and

[2]http://www.freedomforum.org/publications/first/findingcommonground/B10.USDeptGuidelines.pdf (last visited May 1, 2014).

represent the Hispanic Born Again Faith community by reconciling the vertical and horizontal elements of the Christian message via the 7 directives of Life, Family, Great Commission, Stewardship, Education, Justice and Youth.

The **General Conference of Seventh-day Adventists** is the highest administrative level of the Seventh-day Adventist church and represents nearly 59,000 congregations with more than 18 million members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,200 congregations with more than one million members. The Seventh-day Adventist church has a strong interest in insuring that government officials do not discriminate against religious expression.

The **Ethics & Religious Liberty Commission** ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 autonomous churches and nearly 16 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as freedom of speech, religious freedom, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of equal access to public meeting space within their region of ministry is crucial to

the ability of SBC churches and other religious organizations to fulfill their divine mandate.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the Cleveland School District ("the District") has unconstitutionally discriminated against a religious group for elementary school students, by denying it free access to school facilities after school hours while giving free access to the Boy Scouts of America.

Plaintiff Child Evangelism Fellowship ("CEF") operates the Good News Club ("the Club"), a Christian activity program for elementary school students that encourages learning, spiritual growth and service by providing moral and religious education, Bible memorization, singing, and reading stories. Compl. at ¶ 14. Children must have written parental permission to attend. The Club's teaching promotes moral values, character qualities, and respect for authority among other important traits—many of the same features that the Boy Scouts teach, except that the Club teaches them from a religious perspective. Pl.'s Mot. for Prelim. Inj. at 3; *see* Dist. Ct. Order at 3 ("The Boy Scouts engage in the same type of messaging as Plaintiff, but outside of a religious context."). CEF requested that the District waive fees charged for the use of school facilities, but the District ignored this request. Dist. Ct. Order at 3.

Despite the similarities in the two groups' teachings, the Boy Scouts do not pay a fee to use the school facilities. After CEF sued to challenge this discrimination and moved for a preliminary injunction, the District stated—for the first time, in its opposition to the motion—that instead of a fee waiver, it allowed a group's "in kind" provision of services to substitute for a fee. Def.'s Br. in Opp. at 1. The District claimed that the Boy Scouts cover the fees "by providing a total of $276,900 in supplies, uniforms, camping costs, and books for the approximately 1,420 student participants" ($195 per student). *Id.* at 4. CEF immediately pointed out that it similarly covers the cost of participants in the Club, including for "books, magazines and pamphlets, devotional materials, art and crafts supplies, curriculum development, liability insurance, and background checks as well as training and development for its volunteer teachers." Pl.'s Reply Mem. at 5. CEF had not proposed such an in-kind arrangement, because it was unaware of that alternative option and the District never suggested it in response to CEF's request for a fee waiver. *Id.*

These facts, undisputed in the record, make a showing, sufficient to support a preliminary injunction that CEF is likely to succeed on the merits of its Free Speech claim. In providing access to school facilities for groups engaging in speech activities, the District may not discriminate among groups based on their

viewpoint. This is true if access to an "in-kind" arrangement allowing no-charge use of school rooms creates a "limited public forum"—and the District explicitly concedes that it does. *See* Def.'s Br. in Opp. at 7. In a limited public forum, the government may reasonably restrict the subject matter of speech in light of the purpose of the forum, but "[t]he restriction must not discriminate against speech on the basis of viewpoint." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001); *see id.* at 111-12 ("[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."). Even if the access creates a "nonpublic forum," the school may treat groups different only "so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384, 393 (1993) (quotations omitted). *See Putnam Pit, Inc. v. City of Cookeville, Tenn.*, 221 F.3d 834, 845 (6th Cir. 2000) ("In both designated public fora and nonpublic fora, the government may not discriminate based upon the viewpoint of the speaker.").

The District has committed viewpoint discrimination by charging use fees to the Club, an expressive activity with an explicit religious viewpoint, but not to the Boy Scouts, who "engage in the same type of messaging as Plaintiff, but outside of a religious context"—that is, from a non-religious viewpoint. Dist. Ct. Order at 3.

That discrimination squarely violates the Supreme Court's ruling in *Good News Club v. Milford*, which held that a Good News Club must receive the same access as the Scouts and other comparable groups. The District attempts to defend its discrimination by claiming it has no fee-waiver arrangement, but rather an "in-kind agreement" by which the Scouts provide materials and services for the students participating in scouting activities. But this terminological dodge simply seeks to evade the prohibition against viewpoint discrimination, since the District never informed CEF of any in-kind agreement policy, and since the Club would provide its participants the same materials and services as the Scouts provide theirs. *Amici* file this brief—based on years of participating in and observing "equal access" cases—to make this Court aware that school districts have often searched for ways to circumvent the prohibition against viewpoint discrimination, and that courts have repeatedly refused to allow them to do so. The District's argument here resembles pretexts rejected in numerous cases, and this Court should likewise reject it.

Even if the in-kind agreement actually existed, a secret policy violates the First Amendment because it gives unbridled discretion to the officials implementing it. Furthermore, the policy gives officials unbridled discretion on its

face. For these reasons, this Court should reverse the district court's denial of a preliminary injunction.

## ARGUMENT

### I. UNDER THE SUPREME COURT'S RULING IN *GOOD NEWS CLUB V. MILFORD CENTRAL SCHOOL*, THE DISTRICT IS REQUIRED TO PROVIDE ACCESS TO THE GOOD NEWS CLUB ON THE SAME TERMS THAT IT PROVIDES ACCESS TO THE BOY SCOUTS.

The Supreme Court's decision in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), requires a school district to provide a Good News Club with access on the same terms it gives the Boy Scouts. At Miles@Cranwood Elementary School, the Scouts are allowed to meet without paying a fee, according to the District, because the Scouts provide in-kind materials and services to the children attending the Scout program. Therefore, under Supreme Court precedent, the Good News Club must be allowed to meet at the school without paying a fee, because the Club provides in-kind materials and services to the children attending the Club program.

In *Milford*, the Court found that Good News Clubs and the Boy Scouts provide the same kind of moral instruction, although from different viewpoints. 533 U.S. at 108, 111 ("it is clear" that the Club, like the Scouts, "teaches morals and character development to children"); *accord* Dist. Ct. Order at 3. Under the

Court's calculus, the services (i.e., moral instruction) provided by both groups are equivalent. The Court further found it "quite clear" that giving unequal treatment to these equivalent expressive activities is impermissible viewpoint discrimination. 533 U.S. at 109, 111-12. Cleveland School District, therefore, is bound by *Milford* to treat the in-kind services and materials provided by the Club as the equivalent of the in-kind services and materials provided by the Scouts. Either both satisfy the District's in-kind practice or neither does. What the Supreme Court precludes is the District's attempt to treat the Club and the Scouts differently.[3]

The District claimed below that it treats the Scouts differently because they "proposed the [in-kind] arrangement to cover their Permit Fees, and the goods and services satisfied the District's reasonable criteria." Def.'s Br. in Opp. at 12. But it is plain that, in every way that matters, the Club *has* proposed that the District credit it with providing in-kind materials and services to the children attending the Club program just as the Scouts are credited with providing in-kind materials and services to the children attending the Scout program. In asking for a fee waiver,

[3] Put differently, the fact that the Supreme Court found the two programs to offer equivalent programs ended school districts' discretion to treat the two programs as not equivalent for purposes of access to school facilities. Cf. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 259 (1990) (Kennedy, J., concurring) (the Equal Access Act ended school districts' discretion to give access "only to clubs of a more conventional kind.").

CEF made known to the District that it provided these materials free to participating students and explicitly demanded "equal treatment" as that received by the Scouts; the only reason it did not ask for an "in-kind arrangement" was because it did not know, and had no reason to know, that the District privately used such terminology for its practice of giving the Scouts access without charge. *See* Br. for Appellants at 8-9; *infra* part II. As soon as the District revealed the existence of in-kind arrangements—in its brief in opposition in the district court—the Club immediately pointed out that it would provide the same benefits to participating students. *See* Pl.'s Reply Mem. at 5 ("Like the Boy Scouts, CEF fully bears these costs itself, so that students can participate in the program free of charge.").

In sum: Under *Good News Club v. Milford*, the Club has a free speech right to access to the school for its meetings on exactly the same terms given the Scouts, *i.e.*, it must be credited with providing sufficient in-kind materials and services to have access without having to pay in cash.

## II. COURTS HAVE REPEATEDLY PREVENTED SCHOOL DISTRICTS FROM USING PRETEXTS TO DENY RELIGIOUS GROUPS ACCESS TO SCHOOL FACILITIES BASED ON THEIR RELIGIOUS VIEWPOINT.

The Supreme Court's *Milford* decision resolves this case, since the record here plainly shows that the Club provides in-kind materials and services to its participants as do the Scouts. But the District has continually sought to confuse matters, and evade its clear duty to give equal access, by claiming that the Club here wrongly asked for a "fee waiver" rather than an "in-kind" arrangement. *Amici* are filing this brief because they have seen that kind of ploy before. All too often, school districts attempt to circumvent the equal access requirement in order to exclude a religious group from school facilities without admitting that they are discriminating against the group's viewpoint. The courts have repeatedly rejected such circumvention and school arguments that are pretexts for viewpoint discrimination. The District's assertions here are likewise pretexts; this Court should likewise reject them.

The courts' refusal to allow such circumvention goes back at least to the Supreme Court's decision in *Board of Education v. Mergens*, 496 U.S. 226 (1990), which held that a public high school that denied students access to meet in school rooms as a Christian club violated the Equal Access Act, 20 U.S.C. §§ 4071-4074 (the "EAA"). The EAA prohibits "a public secondary school . . . which has a

limited open forum . . . from discriminat[ing] against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." *Id.* § 4071(a). A school has a limited open forum when it allows "one or more noncurriculum-related student groups to meet . . . during noninstructional time." *Id.* § 4071(b). The school district in *Mergens* argued that all the clubs given access were "curriculum-related" and thus it could deny other groups access. 496 U.S. at 243-44. The groups the district claimed were curriculum-related included:

> Interact (a service club related to Rotary International); Chess; Subsurfers (a club for students interested in scuba diving); National Honor Society; Photography; Welcome to Westside (a club to introduce new students to the school); Future Business Leaders of America; Zonta (the female counterpart to Interact); Student Advisory Board (student government); and Student Forum (student government).

*Id.* The district argued, for example, that "[c]hess 'supplements math and science courses because it enhances students' ability to engage in critical thought processes.'" *Id.* at 244.

The Supreme Court, however, found it "clear that Westside's existing student groups include one or more 'noncurriculum-related student groups.'" *Id.* at 245 (referring to Subsurfers and chess). The Court recognized and rejected the

school's attempt to circumvent the statute: "To define 'curriculum-related' in a way that results in almost no schools having limited open fora, or in a way that permits schools to evade the Act by strategically describing existing student groups, would render the Act merely hortatory." *Id.* at 244.

Just as Westside was "strategically" defining "curriculum-related" to avoid having to open its doors to a religious group, the District here is "strategically describing" its no-cost agreement with the Scouts in order to avoid treating the Club equally. As we will show, the District's claim that the Club placed the wrong label on its request—a "fee waiver" rather than an "in-kind agreement"—is yet another example of a school district attempting to circumvent equal-access requirements through pretexts. The District's claim bears specific resemblances to previous assertions that the courts have rejected as pretextual.

Based on three decades of following equal access cases—as legal counsel and as observers—*amici* present here three sorts of examples of school districts' efforts to circumvent equal access requirements and the courts' refusals to allow such circumvention. First, after *Mergens*, school districts have continued to search for ways to circumvent the EAA by creatively defining their club policies and the statute's phrases. Despite the clear principles against viewpoint discrimination, the District likewise is creatively defining its policy of no-cost access to avoid having

to extend it to the Club. Second, districts also search for ways to allow the Scouts to use their facilities while denying the Club and other religious groups access; this case presents another example of such efforts.[4] Finally, districts have tried to use other policies to prevent religious groups from accessing facilities. Here, the District claims that the Club did not ask for an in-kind agreement and therefore did not follow the procedures to get free access. But the Club, of course, was unable to follow a purported in-kind policy of which it was not, and could not reasonably have been, aware.

### A. In Equal Access Act Cases, Courts Continue to Reject School Districts' Attempts to Evade the Requirements Established by *Board of Education v. Mergens*.

Despite the Supreme Court's clear ruling in *Mergens*, school districts continue attempting to circumvent the EAA's requirements. As in *Mergens*, their primary (although not sole) method has been to define "curriculum-related group" so broadly that they retain discretion to choose groups they favor. As in *Mergens*, the courts have refused to permit such manipulation.

In *Pope v. East Brunswick Board of Education*, 12 F.3d 1244 (3d Cir. 1993), the district attempted to argue that the Key Club was "curriculum-related" and thus

[4] *Amici* hold the utmost respect for the Boy Scouts of America and wish only for the District to treat the groups equally.

a limited open forum did not exist. *Id.* at 1252. The Third Circuit rejected the argument, concluding that the Key Club's subject matter was not curriculum-related but was community-related service, and that the school's definition was too broad. *Id.* at 1253. The court added that "[o]ur view is supported by the policy concerns expressed in the *Mergens* opinions. The *Mergens* majority was justly troubled by the possibility that school systems would evade the Act's requirements." *Id.* *See Straights and Gays for Equality v. Osseo Area Sch. Dist. No. 279*, 471 F.3d 908, 911-13 (8th Cir. 2006) (rejecting claim that cheerleading and synchronized swimming were curriculum-related; holding that gay-straight group was "entitled to the same avenues of communication as those groups");[5] *see also Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 224 (3d Cir. 2003) (holding that strategically describing an activity period as "instructional time" does not allow a district to avoid the EAA); *Prince v. Jacoby*, 303 F.3d 1074, 1092 (9th Cir. 2002) (holding that teaching of "personal, social, civil and cultural growth, from a religious standpoint" may not be excluded based solely on religious nature); *Ceniceros v. Bd. of Trustees*, 106 F.3d 878, 880-81 (9th Cir. 1997) (rejecting

[5] As the *SAGE v. Osseo* case shows, religious groups are not the only groups experiencing denials of equal access and attempts to circumvent the EAA. *See also Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd Cnty*, 258 F. Supp. 2d 667, 686 (E.D. Ky. 2003) (refusing to "condone an interpretation" of EAA that would disregard Bible Club as "noncurriculum" group simply because school claimed it did not know of its meetings).

district's claim that lunch period was "instructional time" and therefore not subject to the EAA; finding that lunch hour fit within "plain meaning" of "noninstructional," since parties stipulated that "no classroom instruction occur[red] during [that] hour," and thus holding that religious student group must receive equal access if other student groups were permitted to meet in classrooms at lunch).

In 2008, a school district in California sought to resurrect essentially the same argument that the Supreme Court buried in *Mergens*. The district claimed the groups allowed access were all curriculum-related and, therefore, did not trigger the EAA. *Bible Club v. Placentia-Yorba Linda Sch. Dist.*, 573 F. Supp. 2d 1291, 1295 (C.D. Cal. 2008). The district's policy required all clubs and organizations to "have a relationship to the curricular and instructional programs" of the school district. *Id.* at 1295. The disputed groups were the Red Cross Club and Students Making a Difference. *Id.* at 1295-96. The court held that the relationship between the two clubs and the curriculum was insufficient to make them curriculum-related. *Id.* at 1298. Indeed, the court noted that the district court's overly broad definition of "curriculum-related" would make the Bible Club curriculum-related as well, and that "[t]his incongruous interpretation of the

*Mergens* rule suggests that the District is behaving strategically and discriminating against groups based upon their viewpoints":

> While the District stretches and contorts its description of the Red Cross Club and its definition of the health curriculum to allow the Red Cross to remain a part of the campus community, it denied the application of the Bible Club when portions of that club's discussions clearly cover material that is covered in its official curriculum. . . .

*Id.* at 1299.

The District here is likewise engaging in creative rule-making to attempt to circumvent the right to equal access, and this Court likewise should reject it. If the District were permitted to rely on an in-kind arrangement with the Scouts—an arrangement that the Club too can satisfy, but of which it never received notice—then the District would be able easily to "evade" the prohibition against viewpoint discrimination. The Third Circuit refused to allow such evasion in *Pope*, 12 F.3d at 1253. Similarly, by claiming it does not waive fees for the Scouts, but instead has an in-kind agreement, the District here "stretches and contorts" its policies to call a fee waiver something else, and it has "strategically approved or denied clubs' applications based upon their viewpoints"—both of which the court refused to allow in *Placentia-Yorba*, 573 F. Supp. 2d at 1299.

Even more relevant here, the *Placentia-Yorba* court recognized that it is viewpoint discrimination to give favored access to another group based on a criterion that the excluded religious group could satisfy too. Just as it was impermissibly "incongruous" for the district in *Placentia-Yorba* to define "curriculum-related" so broadly that the (excluded) Bible Club would qualify, it is impermissible for the District here to rely on an "in-kind" arrangement with Scouts whose asserted "benefits" to the District—namely, Scouting materials provided to the Scout participants—are also satisfied by the Club when it provides its materials to its participants. The District should be prevented from strategically allowing certain groups but not others to participate in this in-kind policy.[6]

[6] Another red herring is the District's claim that it has not discriminated against the Club because it allows one church to use facilities on weekends and evenings. But the church does not receive free access: it not only has expended over $200,000 in capital improvements to the school facility, it also pays $10,000 a year in fees to the District. Def.'s Br. in Opp. Ex. 4 at 3. Moreover, allowing one religious group hardly justifies discriminating against another. Instead, it evinces discrimination among religious viewpoints that violates not only freedom of speech but Establishment Clause norms of equality among religions. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 244 (1982). Indeed, denying one religious group access while permitting access to other religious groups is a common occurrence in equal access cases. *See, e.g.*, *Lamb's Chapel*, 508 U.S. at 391 n.5; *Child Evangelism Fellowship v. Stafford*, 386 F.3d 514, 529 (3d Cir. 2004) (Alito, J.) (finding viewpoint discrimination where "[s]everal of the groups Stafford has allowed to distribute and post materials . . . espouse religious views.").

### B. Courts Have Invalidated School District Practices Allowing the Boy Scouts Access to Use School Facilities But Denying Equal Access to Similar Religious Groups.

The situation in this case, involving the Scouts, is not unique. School districts repeatedly have sought to allow scouting organizations to use school facilities while prohibiting religious groups teaching similar values from using the facilities on the same terms. Again, courts have repeatedly refused to allow such viewpoint discrimination. *See, e.g.*, *Good News Club v. Milford*, 533 U.S. at 111-12.

In *Child Evangelism Fellowship v. Anderson School District Five*, 470 F.3d 1062 (4th Cir. 2006), the school district charged a fee to use its facilities but gave some users free access under the catch-all of being in the "best interest" of the school district. *Id.* at 1065. The Boy Scouts, Girl Scouts, Brownies, and Cub Scouts all received fee waivers under this policy. *Id.* When CEF applied for a fee waiver for a Good News Club under the best interest standard, it was denied because of "the extent and frequency of [its] planned use." *Id.* After asking for reconsideration, CEF was told that although its activities could qualify as in the district's best interest, certain groups received the fee waiver because they had used the facilities for many years; likewise, after CEF filed its complaint, the

district changed the policy so that it waived fees for groups who used the facilities for at least twenty years—a description that only the Scouts fit. *Id.* at 1066.

The court invalidated the original, "best interest," policy because it gave officials unregulated ability to decide who had access and who did not. *Id.* at 1069-70. And the court invalidated the second, "20 year," policy because, among other things, it "seems to incorporate 'best interest' determinations [given in earlier waivers] by reference, denying CEF a fee waiver based upon the very 'best interest' judgments . . . that rendered the old policy unconstitutional." *Id.* at 1073. This suggested the change was "inspired [not] by a sudden commitment to First Amendment values," but by the desire to keep out religious groups while still allowing scouting groups to use the facilities. *Id.* Likewise, the in-kind agreement with the Scouts, which the District never raised as an option with CEF, suggests that it is inspired by a desire to treat the Club less favorably.

Similarly, in *Good News/Good Sports Club v. School District*, 28 F.3d 1501 (8th Cir. 1994), the district adopted a policy "that closed the School District to all community groups, except the Scouts and athletic groups, between 3 and 6 p.m. on school days . . . 'provided [the Scouts do] not include any speech or activity involving religion or religious beliefs.'" *Id.* at 1503. The policy regarding the Scouts was based on the "long-standing tradition of cooperation with scout

programs" and the new policy was adopted after complaints from parents about the Good News Club. *Id.* The court held the policy constituted viewpoint discrimination "because it allowed the Scouts to express their viewpoint on moral and character development but prohibited the Club's religious viewpoint." *Id.* at 1507. The longstanding tradition of cooperation with scouting organizations did not serve as a sufficient reason to treat them differently from other groups that teach on the same subjects from a different perspective. *See Lamb's Chapel*, 508 U.S. at 394; *see also Child Evangelism Fellowship v. Elk River Area Sch. Dist. # 728*, 599 F. Supp. 2d 1136, 1138 (D. Minn. 2009) (holding that school committed viewpoint discrimination when it allowed Scouts but not CEF to distribute literature; rejecting school's claim that it had to include Scouts as a "patriotic youth organizatio[n]" in order to receive federal funding).

Here as in previous cases, the District cannot justify treating the Club less well than the Scouts. The Supreme Court has found that the Club engages in "moral and character instruction"—as the Scouts do—albeit from a religious viewpoint. *See Good News Club*, 533 U.S. at 108-09. And here the Club offers the same types of tangible supplies and benefits to the school as do the Scouts: materials and support for the students participating in the respective activities. Even though the Scouts and the Club provide the same tangible benefits, the

District here chose to offer only the Scouts the "in-kind" arrangement (while hiding behind the assertion that CEF should have asked for an arrangement it was unaware was available). It is difficult to read this as anything other than a judgment by the District that the Scouts' perspective on moral and character issues offers more benefits than does the Club's—in other words, as an impermissible disfavoring of the Club's religious perspective. As in previous cases, the District here may not treat the religious group less favorably than the Scouts when the two groups are similarly situated.

### C. Courts Have Rejected Assertions that Religious Groups Cause Issues that Other Groups Do Not.

Another tactic used by school districts is to claim that religious groups violate a different district policy that would cause problems at the school. In *Child Evangelism Fellowship v. Stafford School District*, 386 F.3d 514 (3d Cir. 2004) (Alito, J.), the district claimed that allowing CEF's materials to be distributed would "tend to create divisiveness." *Id.* at 523. The district also advanced other "purportedly viewpoint-neutral reasons for excluding" CEF:

> Stafford contends that it excludes: (1) all groups representing "special interests" . . . (2) all groups that do not restrict themselves to "mundane recreational activities" . . . (3) all groups whose views are "divisive" or "controversial" . . . (4) all speech that promotes any

> point of view, whether "religious, commercial or secular" . . . (5) all groups that proselytize . . . and (6) all speech about religion.

*Id.* at 527 (citations omitted). The court dismissed "[t]hese rationalizations," finding that they "are either incoherent or euphemisms for viewpoint-based religious discrimination." *Id.*

Similarly, it is incoherent here to claim that the Club needed to style its request as one for an "in-kind" agreement, since the Club did not know that the District characterized its arrangements in those terms. The District, had it informed CEF of the supposed potential "in-kind" arrangement the Scouts enjoyed, would have quickly learned that the Club provided the same services and supplies for its participants as the Scouts do for theirs. The supposed viewpoint-neutral rationale, that the Club used the wrong label for its request, is so patently manipulative that it can only be called a "rationalization" for viewpoint discrimination (*Stafford*, 386 F.3d at 527).

Another school district argued it restricted access to groups with a purpose "consistent with the educational function and mission of the school" or with a civic purpose. *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1374 (3d Cir. 1990). It claimed that "'[s]chools have a powerful interest in rising above religious and political contest.'" *Id.* But the court rejected this contention because the district

had opened its doors to similar groups as the religious group and "[t]he term 'civic' [could] be stretched or contracted to fit whatever the school district decides." *Id.* at 1374-75. Here, the District claims the second prong of the so-called "in-kind" agreement requires the goods or services offered in exchange for a fee waiver must have a tangible benefit to the District. Def.'s Br. in Opp. at 3. The District decided the Scouts offered a tangible benefit when the Scouts provided supplies for its members. But the District never informed CEF of the option to provide a "tangible benefit" and appears to contract the definition of "tangible" to only include the Scouts.

Both a fee for access to facilities and an arrangement for no-cost access based on benefits to staff and students can serve legitimate purposes. These policies, however, may not be manipulated to exclude the Club, which provides the same sorts of benefits as the Scouts but from a religious perspective. *See Satawa v. Macomb Cty. Road Comm'n*, 689 F.3d 506, 524 (6th Cir. 2012) ("the district court should have . . . drawn the reasonable inference that the Board's self-serving (but still questionable) litigation documents were designed to conceal its real reason for denying the permit: the crèche's religious content").

## III. THE DISTRICT'S UNPUBLICIZED "IN-KIND" POLICY VIOLATES THE FIRST AMENDMENT BY FAILING TO GIVE NOTICE OF ITS TERMS AND BY EFFECTIVELY ALLOWING THE DISTRICT TO ENGAGE IN "UNBRIDLED DISCRETION" AND ARBITRARY ENFORCEMENT.

Assuming that the District has a policy of "in-kind" arrangements with groups that provide benefits to the District, the policy is unconstitutionally vague and gives the officials "unbridled discretion." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988). At the very least, a policy that is unknown to groups other than the Scouts gives officials unbridled discretion to decide who gets the benefit of that arrangement. And quite apart from its unpublicized, unknown status, this policy on its face grants officials unbridled discretion.

An unknown policy governing expressive groups' access to school facilities violates the First Amendment principle against regulations that allow the government unbridled discretion. Unbridled discretion creates an unacceptable, inherent risk of viewpoint discrimination:

> [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.

*City of Lakewood*, 486 U.S. at 763. *See also Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992) (a policy that "delegates overly broad discretion to the decisionmaker" is unconstitutional). In *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 845 (6th Cir. 2000), this Court likewise held that a "requirement that Web sites eligible to be linked to the city's site promote the city's tourism, industry, and economic welfare gives broad discretion to city officials, raising the possibility of discriminatory application of the policy based on viewpoint." Standards are necessary to "provide the guideposts" for courts to determine whether the official legitimately denied a request, *City of Lakewood*, 486 U.S. at 758—including whether the denial was made without regard to the applicant's viewpoint.

Unbridled discretion creates a risk of impermissible viewpoint discrimination because a facially neutral policy must also be implemented neutrally. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307 n.21 (2000) (a school district may not "hide behind the application of formally neutral criteria and remain oblivious to the effects of its actions"). Therefore, "[a] close review of the context in which the restriction is imposed, as well as the effect of the restriction itself, is appropriate" where there is "an inherent danger of viewpoint discrimination" in a seemingly viewpoint-neutral restriction. *Sons of*

*Confederate Veterans v. Va. Dep't of Motor Vehicles*, 288 F.3d 610, 624 (4th Cir. 2002). The "existence of reasonable grounds for limiting access . . . [will not] save a regulation that is in reality a façade for viewpoint-based discrimination." *Stafford*, 386 F.3d at 526 (citation omitted).

These principles apply to access to school facilities for expressive activity, as this Court held in *Putnam Pit*, 221 F.3d at 846 (applying principles concerning excessive discretion and viewpoint discrimination to criteria for linking to the city's website, a nonpublic forum). Vesting unbridled discretion in the District allows it to pick and choose which groups may have access to the facilities and is a form of viewpoint discrimination. *See Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000), *on remand*, 307 F.3d 566, 594 (7th Cir. 2002) (criterion under which "historically popular viewpoints are at an advantage compared with newer viewpoints" held unconstitutional). In *Child Evangelism Fellowship v. Montgomery Cnty. Pub. Sch.*, 457 F.3d 376 (4th Cir. 2006), the court found a policy that provided no guidelines regarding how to determine which groups' flyers would be distributed was viewpoint discrimination because it gave the officials unbridled discretion to choose the groups. *Id.* at 387. The court stated that "viewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to *protect*

against the improper exclusion of viewpoints." *Id.* at 384 (citing *Bd. of Regents v. Southworth*, 529 U.S. 217, 229-30 (2000)) (emphasis in original).

As the *Montgomery County* court explained, "The danger of such boundless discretion . . . is that the government may succeed in unconstitutionally suppressing particular protected speech by hiding the suppression from public scrutiny." 457 F.3d at 386 (adding that "the dangers posed by unbridled discretion" include "particularly the ability to hide unconstitutional viewpoint discrimination"). *See also Kaahumanu v. Hawaii*, 682 F.3d 789, 806 (9th Cir. 2012) (agreeing with *Montgomery* and *Southworth* that unbridled discretion is viewpoint discrimination).

### A. An Unpublicized, Secret Policy Gives Officials Unbridled Discretion to Determine Who May Benefit From the Policy and Is a Form of Viewpoint Discrimination.

The District's purported policy for in-kind arrangements was unpublicized; CEF had no reason to know of it or to ask for no-cost access using the "in-kind" terminology. Such a policy creates the most severe dangers of the viewpoint discrimination identified in the "unbridled discretion" cases. An unpublicized, unknown policy completely lacks "safeguards" against official favoritism (*see Southworth*, 529 U.S. at 229-30; *Montgomery County*, 457 F.3d at 384); it "inherently" gives officials "the ability to hide unconstitutional viewpoint

discrimination" "from public scrutiny" (*Montgomery County*, 457 F.3d at 386). The proposition could not be simpler: secrecy enables hiding.

When an access policy for expressive activity is unpublicized, so that groups affected have no notice of it, officials have the ability to offer the policy to groups they favor and then rely on the fact that others do not ask for it. Officials may bank on other groups not asking at all; if another group does ask, officials may be able to point to ways in which the group failed to comply with the unknown policy's terms. Remarkably, that appears to be exactly what has happened here—as the District claims it can reject the Club's request for no-cost access because it was not characterized in the terms of an unknown "in-kind" format.

The unbridled discretion doctrine "requires that the limits the [government] claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." *City of Lakewood*, 486 U.S. at 770. An unknown policy like this one utterly fails that requirement.

### B. Even Setting Aside Its Secret Status, the Purported Policy on Its Face Grants Unbridled Discretion to Officials and Is Unconstitutional.

Even setting aside the problem of secrecy, the purported "in-kind" policy confers unconstitutional discretion. The District described the policy for the first time in its brief in the court below:

> [T]he District in limited instances has agreed to accept goods or services as in-kind payment of the Permit Fee, when requested by the group ("In-Kind Arrangement"). For the District to agree to an In-Kind Arrangement: (1) the goods or services must be of equal or greater value than the Permit Fees; (2) the goods or services must be of tangible benefit to the facilities, staff, students, or academic programs; and (3) the District must not be in a position to readily provide or obtain those goods or services for itself.

Def.'s Br. in Opp. at 3.

As thus stated, the policy fails to provide articulable standards to prevent unbridled discretion. The Supreme Court has identified several features that render a government policy toward speech unconstitutional for leaving too much "to the whim of the administrator." *Forsyth*, 505 U.S. at 133. The policy is impermissible when it provides "no articulated standards," when "the administrator is not required to rely on any objective factors" and "need not provide any explanation for his decision," or when the "decision is unreviewable." *Id.*

The purported in-kind policy displays all these faults. The policy states that goods and services provided by a group must offer a tangible benefit that exceeds

the permit fees, and the District valued the Scouts' benefit at $195 per participating student. But the policy contains no "articulable standards" or "objective factors" for determining the amount of the benefits, and the District provided no explanation for how it did so—let alone any explanation for why the Club does not provide similar benefits to students. This case is very similar to *Child Evangelism Fellowship v. Williamsburg-James City-County Sch. Bd.*, Civ. A. 4:08CV4, 2008 WL 3348227 (E.D. Va. Aug. 8, 2008), where the Scouts received access based on their benefit to students, but CEF did not; the court held that the policy created no "concrete standards" for the school official in determining the benefits. *Id.* at *2, *5. Similarly here, there are no concrete standards for determining the benefits provided by each group. Without such guidelines, there is no safeguard ensuring that an official will follow objective standards and exclude his or her personal views of the good provided by the Scouts versus the Club.

Moreover, even if the three criteria can be applied objectively, the District still retains unacceptable discretion, because the purported policy does not guarantee that the in-kind arrangement will be provided. Instead, the District says it has "in limited circumstances agreed" to an in-kind arrangement. The District does not bind itself to its criteria; it appears to retain discretion to say no even

when a group has met the requirements. This discretion remains unconstitutional on its face.

## CONCLUSION

This Court should reverse the district court's judgment and remand with directions to enter the preliminary injunction for CEF.

Respectfully submitted.

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**Certificate of Compliance with Rule 32**

Pursuant to FRAP 32(a)(7)(C), the undersigned counsel certifies that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B) and 29(d) 6th Cir. R. 32(b)(1) because the brief contains 6,996 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii). Furthermore, this brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) and Circuit Rule 32 because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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## CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2014, I electronically filed the foregoing Brief *Amici Curiae* with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service on those participants will be accomplished by the CM/ECF system.

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