NOTE

Coercion, Misperception and Excessive Entanglement with Religion: A Reexamination of *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*

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INTRODUCTION

Imagine the following situation.[1] A public school institutes a program allowing community groups to distribute fliers that advertise educational or extracurricular activities to students. In addition, the program requires the students to take the fliers home to their parents. An evangelical, white supremacist group wants to participate in the flier program. Its fliers would encourage students to join an after-school program that provides educational and extracurricular activities taught from a religious and racist perspective.

Under the Fourth Circuit's holding in *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools* ("*CEF of Maryland*"), the school must allow this group to participate in its flier program.[2] The school cannot deny the group access to the flier program even though these fliers advocate racism and might offend some parents and students.[3] According to the holding in *CEF of Maryland*, to decide otherwise would amount to viewpoint discrimination.[4]

This Note argues that schools must possess the ability to exclude religious speakers from school flier programs if allowing them access would imply school endorsement of religion.[5] Part I examines the existing law governing free speech in public forums and the view that schools constitute limited public forums.[6] It addresses the interplay between the Establishment Clause and the right to free speech in public

[1] Programs similar to the one in the hypothetical situation have been instituted in school districts throughout the country. *See* Child Evangelism Fellowship of Md. v. Montgomery County Pub. Sch., 373 F.3d 589, 592 (4th Cir. 2004); Rusk v. Crestview Local Sch. Dist., 379 F.3d 418, 419-20 (6th Cir. 2004).

[2] *Child Evangelism Fellowship of Md.*, 373 F.3d at 595-96.

[3] *See* Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 252 (1990) (noting that public school cannot discriminate on basis of viewpoint against community group that seeks access to school program or facilities and that students should know that access does not mean endorsement of message).

[4] *Child Evangelism Fellowship of Md.*, 373 F.3d at 594.

[5] *See id.* at 610 (Michael, J., dissenting) (noting that school should have discretion to exclude certain groups from flier program). To avoid an Establishment Clause violation, schools must have the power to exclude, even if doing so might harm a religious group's free speech rights. *See id.* at 609 (stating that in coercive environments like public schools, Establishment Clause concerns likely supercede free speech concerns).

[6] *See* Hazelwood Sch. Dist. v. Kulmeier, 484 U.S. 260, 267-69 (1988) (determining that schools may be public forums); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44-46 (1983) (discussing fact that private citizens may use certain public property for expressive purposes); *see also infra* Part II.A.

schools.[7] Part II discusses *CEF of Maryland*.[8] Part III argues that the Fourth Circuit Court of Appeals incorrectly decided *CEF of Maryland*.[9] Specifically, it contends that allowing the Child Evangelism Fellowship ("CEF") access to the school's take-home flier program violates the Establishment Clause.[10] The Fourth Circuit's holding in *CEF of Maryland* fosters the unconstitutional religious coercion of students and faculty and risks student misperception of school endorsement of religion.[11] Part III also proposes possible solutions to fix the take-home flier program.[12] By upholding the existing take-home flier program, the Fourth Circuit placed its desire to avoid viewpoint discrimination above the right to be free from religious coercion.

I. BACKGROUND LAW

The First Amendment protects the public's right to free speech.[13] This right is especially sacrosanct in public forums, such as streets and parks, which have traditionally been used for expressive purposes.[14] Under certain circumstances and in certain locations, however, the government may limit free speech.[15] For instance, abridgement of free speech is acceptable when the speech would violate the Establishment Clause and the separation of church and state.[16]

A. Free Speech and the Type of Forum

The Free Speech Clause of the First Amendment requires the government to grant people access to public property that has traditionally been used for expressive purposes.[17] This does not mean,

[7] *See* Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 839-42 (1995) (discussing how Establishment Clause concerns affect free speech access in public university); *see also infra* Part I.B-C.

[8] *See infra* Part II.

[9] *See infra* Part III.

[10] *See infra* Part III.A.

[11] *See infra* Part III.B.

[12] *See infra* notes 257, 272-74 and accompanying text.

[13] U.S. CONST. amend. I; Susan N. Mart, *Protecting the Lady from Toledo: Post USA Patriot Act Electronic Surveillance at the Library*, 96 LAW LIBR. J. 449, 470 (2004).

[14] *See* Harry Klaven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 11-12 (1965) (stating that democratic society requires that public places be open for public discussion and political process).

[15] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

[16] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112-13 (2001).

[17] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."); *see also Perry Educ. Ass'n*, 460 U.S. at 44-46 (describing permissible restrictions

however, that the right to free speech is absolute.[18] The government can restrict speech, but different standards apply depending on the type of property involved.[19] Government-owned property may qualify as a public forum if the government opens it for the purposes of free speech and assembly.[20] Government-owned property not opened for free speech remains a nonpublic forum.[21] Although seemingly straightforward, the U.S. Supreme Court has struggled to differentiate between the different types of forums. Such differentiation is necessary to determine the applicable speech restrictions.[22]

Perry Education Association v. Perry Local Educator's Association is the seminal case involving speech on government property.[23] In *Perry*, the Supreme Court clearly defined the types of forums created in government-owned property.[24] The Court also addressed the speech restrictions allowed therein.[25]

In *Perry*, a rival teachers union ("PLEA") sought access to an interschool mail system and the faculty mailboxes.[26] The school district already permitted one union to utilize the mail system.[27] The school district, however, denied access to PLEA.[28] PLEA sued the district,

on speech on public property).

[18] *Perry Educ. Ass'n*, 460 U.S. at 46.

[19] *Id.* at 44-46 (describing permissible restrictions in each type of forum).

[20] *Id.* at 45-46.

[21] *See* U.S. Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981) ("[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government.").

[22] *See generally* Widmar v. Vincent, 454 U.S. 263, 267-68 (1981) (determining whether university meeting facilities constitute public forums); City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n, 429 U.S. 167 (1979) (addressing whether school board meeting constitutes public forum).

[23] *See* David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 160 (1992) ("The seminal decision in the modern forum doctrine is *Perry* . . . .").

[24] *Perry Educ. Ass'n*, 460 U.S. at 44-46.

[25] *Id.*

[26] *Id.* at 39. The teachers in the school district elected Perry Education Association as their sole representative. *Id.* at 40. Under the terms of the collective bargaining agreement, the union received exclusive access to the mail system. *Id.* at 39.

[27] *Id.* at 39-40. Even though PLEA did not have access to the mail system, it could still communicate with teachers through fliers, mail, and telephone calls. *Id.* at 41. However, PLEA wanted to access the mail system, and it contended that Perry Education Association's exclusive use violated the First Amendment and the Equal Protection Clause. *Id.*

[28] *Id.* at 40-41. A labor agreement between the school district and Perry Education Association, the elected representative union, stipulated that only the elected representative union had access to the mail system. *Id.* at 39. The district used this labor agreement as grounds for its refusal to include PLEA. *Id.*

alleging that its refusal constituted viewpoint discrimination and thereby violated the First Amendment.[29]

The district court ruled that the school district had the right to exclude PLEA.[30] The Seventh Circuit Court of Appeals reversed, holding that the exclusion of PLEA violated the First Amendment.[31] The Supreme Court, however, reversed.[32] In doing so, the Court discussed three types of forums created on government property and the applicable restrictions within each.[33] It described these three forums as: (1) a traditional public forum, (2) a designated or limited public forum, and (3) a nonpublic forum.[34]

A traditional public forum is an area customarily used for free expression.[35] Only parks and streets qualify as traditional public forums.[36] In a traditional public forum, government restrictions on speech must serve an exceedingly important state interest and cannot restrict more speech than necessary.[37] The government must also narrowly tailor the restrictions to ensure that they minimally limit speech.[38]

A related but distinct type of public forum is the designated public forum. The government creates a designated public forum by opting to allow expressive activity on public property that is not a traditional public forum.[39] Often a designated public forum exists when the

[29] *Id.* at 41, 48-49.

[30] *Id.* at 41.

[31] *Id.* (noting that once school district opened mail system to one union, denying equal access to another union violated First Amendment). The Court also noted that without a compelling reason that justified the exclusion of other groups, the school district should not have granted the incumbent union exclusive access. *Id.* at 41-42.

[32] *Id.* at 55.

[33] *Id.* at 44-46.

[34] *Id.*

[35] A traditional public forum includes areas that have immemorially "been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. Comm. for Indus. Org., 307 U.S. 495, 515 (1939), *cited in Perry Educ. Ass'n*, 460 U.S. at 45.

[36] *Perry Educ. Ass'n*, 460 U.S. at 45. Courts have rarely extended this narrow categorization of a traditional public forum; it remains almost exclusively limited to public parks and streets. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680-81 (1992) (refusing to extend traditional public forum doctrine to airports); Adderley v. Florida, 385 U.S. 39, 41-42, 47 (1966) (refusing to classify jail property as traditional public forum).

[37] Carey v. Brown, 447 U.S. 455, 461-62 (1980).

[38] *Id.* at 461.

[39] *Perry Educ. Ass'n*, 460 U.S. at 45-46.

government opens property to the public for meetings or gatherings.[40] Once government-owned property becomes a designated public forum, the same restrictions that govern traditional public forums also apply to the designated forum.[41] The government can always choose to close the property entirely.[42] However, while open for expressive activity, the property remains bound by traditional public forum standards.[43]

The state can also create a limited public forum by intentionally opening up its property to certain groups or topics.[44] The government usually restricts the expressive activity to a particular group of speakers or subject matter.[45] For instance, in *Perry*, the Court held that the mail system could not be considered a designated public forum because the school did not allow access to all groups.[46] Instead, the school expressly opened the mail system to only one group.[47] Once the government designates property as a limited public forum, it may restrict speech if the restrictions are viewpoint neutral and reasonable for the forum's purposes.[48] The speech restrictions can, in limited circumstances, apply to religious speech.[49]

Lastly, the government can choose to restrict all expressive activity on

[40] *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 390-91 (1993) (holding that school district created designated public forum by allowing community groups access to school facilities after hours); *see also* Widmar v. Vincent, 454 U.S. 263, 267 (1981) (holding that university facilities opened for meetings become designated public forums); City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n, 429 U.S. 167, 179 (1976) (stating that school board meetings are designated public forums); Children of the Rosary v. City of Phoenix, 154 F.3d 972, 976 (9th Cir. 1998) (rejecting argument that city bus advertisement space constitute designated public forums).

[41] *Perry Educ. Ass'n*, 460 U.S. at 46.

[42] *See id.*

[43] *Id.*

[44] Dioreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 965 (9th Cir. 1999) (holding that opening high school baseball field fence for advertising created limited public forum).

[45] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107 (2001).

[46] *Perry Educ. Ass'n*, 460 U.S. at 47 (noting that school restricted access to forum and did not open it to general public).

[47] *Id.* (stating that access to mail system is only attainable through permission of school principal).

[48] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (stating that viewpoint discrimination occurs when government uses motivating ideology or when opinion or perspective of speaker acts as reason for government's restriction on speech).

[49] Dan Mbulu, *First Amendment: Extending Equal Access to Elementary Education in the Aftermath of the* Good News Club v. Milford Central School, 16 REGENT U. L. REV. 91, 101 (2003-2004) ("[F]ew . . . loopholes under the Free Speech Clause . . . allow discrimination against religious speech . . . ."). A state can, however, justify religious speech restrictions if its interest in avoiding an Establishment Clause violation amounts to a compelling interest. *See Milford*, 533 U.S. at 112.

its property.[50] Property not classified as a traditional, designated, or limited public forum is a nonpublic forum.[51] In a nonpublic forum, the government may place reasonable restrictions on the subject matter and identity of the speakers.[52] These restrictions, however, must be reasonable and viewpoint neutral.[53] Although the government may not generally exclude speakers from a nonpublic forum on the basis of their viewpoints, in limited circumstances, speech restrictions may apply to religious groups.[54]

B. The Establishment Clause

The Establishment Clause acts to separate church and state.[55] The Clause prohibits certain forms of state intervention in religious affairs.[56] The Establishment Clause prevents the government from: (1) passing laws or establishing programs that aid religion, (2) participating in the affairs of a religious organization, (3) allowing religious organizations to participate in the affairs of government, and (4) forcing anyone to participate in religious activities.[57]

Since 1971, the Supreme Court case of *Lemon v. Kurtzman* has governed cases involving religious expression on public property.[58] *Lemon v. Kurtzman* involved a state-issued salary supplement for teachers in

[50] *See* U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981) ("[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government.").

[51] Hills v. Scottsdale Unified Sch. Dist., No. 48, 329 F.3d 1044, 1049 (9th Cir. 2003).

[52] Children of the Rosary v. City of Phoenix, 154 F.3d 972, 978 (9th Cir. 1998) (noting that in nonpublic forum, government has right to "make distinctions in access on the basis of subject matter and speaker identity").

[53] *Id.*

[54] *See Milford*, 533 U.S. at 112 (noting that avoiding Establishment Clause violation is compelling reason that justifies viewpoint discrimination).

[55] Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879)).

[56] U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."); Lee v. Weisman, 505 U.S. 577, 591 (1992).

[57] *Everson*, 330 U.S. at 15-16.

[58] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (discussing test to determine Establishment Clause violations); *see also* Ralph D. Mawdsley, *Access to Public School Facilities for Religious Expression by Students, Student Groups and Community Organizations: Extending the Reach of the Free Speech Clause*, 2004 BYU EDUC. & L.J. 269, 282-83 (noting courts' continued use of *Lemon* test to evaluate Establishment Clause violations); Chelsea Chaffee, Note & Comment, *Making a Case for an Age-Sensitive Establishment Clause Test*, 2003 BYU EDUC. & L.J. 257, 260 (stating that *Lemon* test is most concrete test for Establishment Clause violation).

private and parochial schools.[59] Taxpayers sued to have the salary supplement declared unconstitutional on the grounds that it violated the Establishment Clause.[60] The district court ruled that the supplement fostered "excessive entanglement" between government and religion.[61] The Supreme Court affirmed this ruling and established the *Lemon* test to analyze possible Establishment Clause violations.[62]

The *Lemon* test consists of three prongs.[63] The first prong asks whether the government's purpose in enacting a restriction is to endorse religion.[64] For instance, in *Stone v. Graham*, the Supreme Court held that a Kentucky statute requiring the posting of the Ten Commandments in public school classrooms violated the first prong of the *Lemon* test.[65] Since the Ten Commandments served no educational function, the Court concluded that the government's only possible motivation for the posting was to endorse religion.[66]

The second prong of the *Lemon* test considers whether the government's action actually endorses religion.[67] In *Berger v. Rensselar Central School Corp.*, a public school violated the second prong when it permitted a religious group to distribute Bibles in public schools pursuant to a flier distribution program.[68] Even though the school did not intend to endorse religion through the distribution program, the program had that effect.[69] Thus, the public school's program violated the second prong of the *Lemon* test.

The third prong of the *Lemon* test examines the statute at issue to determine if it fosters "excessive entanglement" between government

[59] *See Lemon*, 403 U.S. at 607. Specifically, the supplement went toward teachers in private schools where the average per pupil expenditure was less than that in public schools. *Id.* Usually the supplements went to teachers in parochial schools. *See id.* at 608.

[60] *Id.*

[61] *Id.* at 609.

[62] *Id.* at 609, 612-13. The Court held that because parochial schools were an "integral part" of the church's mission, this statutory scheme amounted to "excessive entanglement" between church and state. *Id.* at 609.

[63] *Id.* at 612-13. The Court designed the *Lemon* test to examine the main violations of the Establishment Clause: "sponsorship, financial support, and active involvement in religious activity." *Id.* at 612; *see also* Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970) (discussing evils against which Establishment Clause was intended to protect).

[64] *See Lemon*, 403 U.S. at 612.

[65] Stone v. Graham, 449 U.S. 39, 42-43 (1980).

[66] *See id.* at 42.

[67] *Lemon*, 403 U.S. at 612.

[68] *See* Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160, 1171 (7th Cir. 1993).

[69] *Id.* at 1165-66.

and religion.[70] In *Lemon*, the Court held that giving the salary supplement to parochial school teachers violated the third prong.[71] The salary supplement required the government to examine a school's records to determine the proportion of secular versus religious activities in the classroom.[72] The government inspection of parochial school records resulted in excessive entanglement between church and state, in violation of the third prong of the test.[73]

Courts typically consider the third prong together with the other two prongs when examining a religious activity occurring on public property.[74] A violation of any of the three prongs of the *Lemon* test, however, constitutes a violation of the Establishment Clause.[75] The *Lemon* test proves useful in evaluating Establishment Clause concerns in public schools, especially when contradictory First Amendment rights arise.[76]

C. The Establishment Clause in Public Schools

An inherent tension exists between the Establishment Clause and the Free Speech Clause of the First Amendment.[77] These concerns arise in limited public forums where restrictions on speech must be viewpoint neutral.[78] This often precludes excluding religious speakers solely on the ground that their speech comes from a religious viewpoint.[79]

If a public school opens its property for certain speech-related uses, it becomes a limited public forum subject to certain restrictions.[80] The

[70] *Lemon*, 403 U.S. at 613.

[71] *See id.* at 619.

[72] *Id.* at 620.

[73] *Id.*

[74] *See id.* at 615-20.

[75] *See Lemon*, 403 U.S. at 612-13 (noting that *Lemon* test is amalgamation of prior cases relating to determination of Establishment Clause violations).

[76] *See, e.g.*, Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 383 (1985) (using *Lemon* test to evaluate whether Establishment Clause concerns trumped free speech access of community groups in public schools); Widmar v. Vincent, 454 U.S. 263, 271 (1981) (holding that equal access policy for student religious clubs would not violate Establishment Clause under *Lemon* test); Rusk v. Crestview Local Sch. Dist., 379 F.3d 418, 420 (6th Cir. 2004) (holding that allowing religious group free access to school flier program did not result in excessive entanglement and thus did not violate *Lemon* test).

[77] Lee v. Weisman, 505 U.S. 577, 591-92 (1992). Courts can protect speech by ensuring its full expression. *Id.* In contrast, the Establishment Clause limits speech that is perceived as a government endorsement of religion. *Id.*

[78] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

[79] *See id.* at 842.

[80] *Id.* at 829; Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 391

government must abstain from regulating speech on the basis of viewpoint, whether religious or otherwise.[81] Thus, religious groups have a right to access schools that willingly open their doors and become limited public forums.[82]

In 1995, the Supreme Court addressed the tension between the free speech right to access a forum and the potential Establishment Clause violations in *Rosenberger v. Rector & Visitors of the University of Virginia*.[83] The University of Virginia had a program that paid for the operating costs of pre-approved student groups on campus.[84] The school reimbursed student organizations for costs associated with printing student-written publications.[85] Wide Awake Productions ("WAP"), an approved student group, published a magazine containing articles written from a Christian perspective.[86] WAP requested that the University pay for its printing costs, but the University denied the request on the grounds that WAP resembled a religious organization.[87] WAP sued the University, seeking restitution for the printing costs and injunctive relief.[88] The District Court for the Western District of Virginia ruled in favor of the University, and the Fourth Circuit Court of Appeals affirmed.[89]

The Supreme Court reversed, holding that because the school funded other student group publications, the school had established a limited public forum.[90] The restrictions the school placed on speech, therefore, had to be reasonable and viewpoint neutral.[91] The Court noted that the

(1993); *Widmar*, 454 U.S. at 267; Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1050 (9th Cir. 2003); *see also* Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 235-36 (1990).

[81] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

[82] *Rosenberger*, 515 U.S. at 829.

[83] *Id.* at 830.

[84] *Id.* at 824.

[85] *Id.*

[86] *Id.* at 825-26. The magazine contained articles about racism, stress, homosexuality, Christian missionary work, and other topics, all viewed from a Christian perspective. *Id.* Each page of the magazine and the end of each article contained a symbol of a cross. *Id.*

[87] *Id.* at 827.

[88] *Id.*

[89] *Id.* at 828. The district court held that in restricting funding to WAP, no content or viewpoint discrimination occurred. *Id.* Furthermore, Establishment Clause concerns justified refusal of payment. *Id.* Although the Fourth Circuit found content discrimination, it believed the University was justified in this discrimination. *Id.* The Court of Appeals explained that the University could discriminate against WAP because it had a compelling interest in avoiding an Establishment Clause violation. *Id.*

[90] *Id.* at 829.

[91] *Id.*

University did not exclude religion as a subject matter because it allowed student papers to publish articles about religion in general.[92] Nonetheless, the University refused to fund student papers that addressed everyday subjects from a religious perspective.[93] Therefore, the religious perspective of the articles, not their subject matter, prompted the University's refusal of payment.[94] This amounted to illegal viewpoint discrimination.[95]

Concerned about this type of discrimination against religious groups in public schools, Congress passed the Equal Access Act in 1984.[96] The Act ensures that public schools with limited public forums do not discriminate against religious student groups.[97] If a school allows one group to meet, the Act imposes an obligation on the school to allow all religious groups equal access.[98] The Act is especially important in the context of high schools because of the number and variety of groups that meet on high school campuses.[99]

In *Board of Education of the Westside Community Schools v. Mergens*, the Supreme Court expanded religious groups' access to public high schools by applying the Equal Access Act.[100] *Mergens* involved a school board policy that allowed students to form and join clubs that met on school premises after school hours.[101] School regulations prohibited religious

[92] *Id.* at 831.

[93] *Id.*

[94] *Id.* (stating that prohibited perspective, not general subject matter, resulted in refusal to make third-party payments, although subjects of articles fell within approved categories for publication).

[95] *Id.*

[96] 20 U.S.C. § 4071 (2000).

[97] The Equal Access Act states that public secondary schools that create limited access forums cannot discriminate against students who wish to conduct "religious content" meetings. *Id.* § 4071(a)-(b). Specifically, the Act says:

> It shall be unlawful for any public secondary school which receives federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, philosophical, or other content of the speech at such meetings.

Id. § 4071(a).

[98] Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 236 (1990).

[99] *See* 20 U.S.C. § 4071(b) (discussing fact that limited forum exists whenever public secondary school permits any student group to meet on school premises during noninstructional time); *see also Mergens*, 496 U.S. at 235.

[100] *Mergens*, 496 U.S. at 236.

[101] *Id.* at 231. The board noted that these student organizations constituted a vital part of the education process and provided students with an excellent way of developing important life skills. *Id.* (citing OMAHA, NEB. SCHOOL BOARD POLICY § 5610 (1988)).

organizations from sponsoring the clubs.[102] Students sought permission to form a Christian club and fellowship for Bible study and prayer.[103] The high school denied the request on the grounds that the club violated the Establishment Clause.[104] The students sued, but the District Court for the District of Nebraska ruled in favor of the school.[105] The Eighth Circuit Court of Appeals reversed, holding that the school created a limited public forum and therefore could not discriminate against religious groups.[106]

The Supreme Court affirmed and held that the school district created a limited public forum by allowing student groups access to school premises.[107] Thus, by denying the religious club admittance, the high school violated the Equal Access Act.[108] The club in *Mergens* conducted meetings after school and limited teachers' participation, thereby avoiding any inference of school endorsement of religion.[109]

Although *Rosenberger* and *Mergens* expanded religious groups' access to public schools, their access is not absolute. Numerous decisions have since limited these groups' right of access because of Establishment Clause concerns.[110] A recently decided case, *Culbertson v. Evangelism Fellowship of Oregon*, limits religious groups' right to distribute materials to students.[111] In *Culbertson*, the Oakridge School District encouraged community groups to use its school buildings for educational and

[102] *Mergens*, 496 U.S. at 232 (citing OMAHA, NEB. SCHOOL BOARD POLICY § 5610). The prohibition on sponsorship was not limited to religious organizations. *Mergens*, 496 U.S. at 232. Political organizations and groups that denied membership on the basis of race or gender also could not sponsor a student group. *Id.*

[103] *Id.*

[104] *Id.* at 232-33.

[105] *Id.* at 233 (holding that school did not create limited public forum and denial of students' request related to concerns about separation of church and state).

[106] *Id.* at 234.

[107] *Id.* at 235-36.

[108] *Id.* at 247.

[109] *Id.* at 251 (stating that time of meeting eliminates Establishment Clause concerns and shows neutrality toward religion).

[110] *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) (holding that allowing clergy members to pray at public high school graduation ceremonies violated Establishment Clause); Illinois *ex rel.* McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203, 211-12 (1948) (holding that permitting pupils to attend religious classes during school hours in public school buildings violated Establishment Clause); Culbertson v. Evangelism Fellowship of Or., 258 F.3d 1061, 1065 (9th Cir. 2001) (holding that using public schools to distribute permission slips for religious activities amounted to government endorsement of religion); Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160, 1168 (7th Cir. 1993) (holding that programs distributing Bibles in public schools violate Establishment Clause because such programs used public schools to disseminate religion to students).

[111] *Culbertson*, 258 F.3d at 1065.

recreational purposes.[112] Oakridge Elementary, a school within the district, allowed community organizations, such as the Boy Scouts, the 4-H Club, and a youth sports program, to use its facilities.[113] The Good News Club, a born-again Christian group, ran an extracurricular program for children.[114] It asked the school for permission to distribute brochures and permission slips that allowed students to participate in the club's activities.[115] The school district initially granted permission, but later revoked it when the district became concerned about a potential Establishment Clause violation.[116] The Good News Club sued to regain access to the school.[117] The District Court for the District of Oregon entered an injunction forcing the district to allow the Good News Club access to the school.[118]

The Ninth Circuit Court of Appeals reversed, in part, with respect to the permission slips and brochures.[119] The court held that requiring teachers to distribute permission slips to students put the teachers at the service of the Club.[120] This amounted to government endorsement of religion and violated the Establishment Clause.[121]

These three cases indicate that excluding religious groups from limited public forums may constitute viewpoint discrimination.[122] In certain situations, however, Establishment Clause concerns trump free speech

[112] *Id.* at 1063.

[113] *Id.*

[114] *Id.*

[115] *See id.* at 1063, 1065 (implying that children must have permission slips signed by parents to participate in program).

[116] *Id.* at 1063 (stating that counsel for school district issued opinion that Good News Club access violated U.S. and Oregon Constitutions).

[117] *Id.* at 1063-64.

[118] *Id.* at 1064. The permanent injunction required the school district "to provide plaintiffs the same access to school facilities as it afforded to other non-school community groups." *Id.* The injunction prohibited the school district from examining the "religious content of [the group's] proposed activities or the religious character [of the group]." *Id.* The injunction also required teachers to distribute club brochures and parental permission slips as long as the distribution did not interfere with "the educational process." *Id.*

[119] *Id.* at 1065. The Ninth Circuit upheld the district court's finding that the Good News Club could access school buildings for its meetings. *Id.* The court reasoned that reasonable adults would not misperceive the Good New Club's use of the facilities as an endorsement of religion. *Id*.

[120] *Id.*

[121] *See id.* (noting that school impermissibly crossed fine line between government neutrality toward religion and endorsement of religion).

[122] *See generally* James L. Underwood, *Applying the* Good News Club *Decision in a Manner that Maintains Separation of Church and State in Our Schools*, 47 VILL. L. REV. 281 (2002) (examining group of cases involving attempts to exclude religious groups from public school settings).

concerns.[123] When this occurs, schools can reasonably exclude religious groups.[124] Because they address religious groups' access to public schools, *Rosenberger*, *Mergens*, and *Culbertson* provide the appropriate framework to analyze *CEF of Maryland*.[125]

II. *CHILD EVANGELISM FELLOWSHIP OF MARYLAND, INC. V. MONTGOMERY COUNTY PUBLIC SCHOOLS*

Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools addresses a religious group's indirect access to a public school.[126] Rather than seeking to enter the school premises, the religious group sought to indirectly reach students through fliers that the school distributed to students.[127] The case illustrated how a religious group's access created a conflict between free speech and the Establishment Clause.[128]

A. Factual and Procedural History

In *CEF of Maryland*, the Montgomery County School District permitted community groups to access a take-home flier program in 125 elementary schools throughout the District.[129] It allowed certain governmental and nonprofit groups to take advantage of the program, including some religious groups.[130] After receiving permission from the

[123] *See* Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160, 1168 (7th Cir. 1993), *amended by* 1993 U.S. App. LEXIS 2543 (7th Cir. 1993) (noting that in "coercive context of public school," Establishment Clause concerns trump Free Speech Clause).

[124] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761-62 (1995) ("There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech."); *see also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000) (noting that school's refusal to allow prayer before every football game was necessary to avoid violation of Establishment Clause); *Berger*, 982 F.2d at 1168 (holding that Establishment Clause concerns can trump Free Speech Clause in "the coercive context of public schools").

[125] *See generally* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (discussing use of school funds and facilities to create Christian newspaper); Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990) (discussing Christian club's access to students and school facilities after school hours); *Culbertson,* 258 F.3d 1061 (discussing Child Evangelism Fellowship's desire to gain access to school facilities and students).

[126] *See* Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Sch., 373 F.3d 589, 592 (4th Cir. 2004).

[127] *Id.*

[128] *Id.* at 594 (noting that state interests in avoiding Establishment Clause violation may justify free speech restrictions).

[129] *Id.* at 592.

[130] *Id.*

school principal to participate in the program, community groups provided their fliers to the school.[131] Groups also supplied permission slips, which had to be signed by parents so their children could participate in the advertised programs.[132] The teachers either placed the fliers in the students' boxes or personally distributed them to the students.[133] The District required the students to take the fliers home, but parents did not have to acknowledge receipt of them.[134]

Child Evangelism Fellowship of Maryland ("CEF"), a nonprofit, religious organization, preaches to children about Jesus.[135] Its mission is to create a group of followers in the local CEF church.[136] CEF administers Good News Clubs that meet in elementary schools as after-school programs.[137] During these meetings, children learn about the Bible and recite verses, pray, sing, and play games.[138] In August 2001, CEF requested permission to participate in the take-home flier program to promote its Good News Club.[139] The District denied CEF access to the program because of the Club's religious nature and concerns about the separation of church and state.[140]

CEF sought an injunction to bar the District from excluding it from the take-home flier program.[141] It argued that the District's refusal violated the Free Speech and Equal Protection Clauses of the Constitution.[142] The District Court for the District of Maryland denied CEF's request for a preliminary injunction.[143] It ruled that the District's refusal violated CEF's free speech rights.[144] The Establishment Clause issue, however,

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[131] *Id.*

[132] *Id.*

[133] *Id.* Along with the fliers, teachers placed homework, class work, student artwork, and important school-related information in the students' cubbies. *Id.*

[134] *Id.*

[135] *Id.* at 591-92.

[136] *Id.*; *see also* Child Evangelism Fellowship, History of CEF Webpage, http://www.cefonline.com/about/history.php (last visited Mar. 29, 2006) (explaining mission and purpose of CEF and Good News Clubs).

[137] *Child Evangelism Fellowship of Md.*, 373 F.3d at 592.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.* CEF also argued that the District's refusal violated the Free Exercise and the Equal Protection Clauses. *Id.*

[143] *Id.* at 592-93 (concluding that precedent indicated that denying CEF access would infringe on free speech rights but that further hearings might ultimately lead court to conclude that Establishment Clause concerns trumped these free speech rights).

[144] *See id.* at 593.

presented a more compelling First Amendment violation that trumped the free speech problem.[145] The Fourth Circuit Court of Appeals reversed, holding that the school had to grant CEF access to the take-home flier program.[146]

B. Rationale

The Fourth Circuit held that granting CEF access to the take-home flier program would not violate the Establishment Clause.[147] The court reasoned that if the school granted CEF admittance to the program, CEF would receive the same treatment as other organizations.[148] In allowing CEF to participate in the flier program, the District would not favor CEF over other community groups. Therefore, granting access would not signify that the school supported or participated in CEF's religion.[149]

The Fourth Circuit stressed that excluding CEF from the take-home flier program amounted to viewpoint discrimination.[150] The court determined that CEF's Good News Club activities complied with the District's guidelines for the take-home flier program.[151] Thus, CEF's religious method of instruction was the sole basis for the District's decision and denying CEF access constituted viewpoint discrimination.[152]

The Fourth Circuit also held that requiring students to take home the fliers did not amount to student participation in a religious activity.[153] The fliers contained no overtly religious language.[154] Even if they did, merely receiving a religious invitation did not constitute participation in the religion.[155] The Fourth Circuit emphasized that this holding comported with other cases, which held that granting religious groups

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[145] *Id.*

[146] *Id.* at 602.

[147] *Id.*

[148] *Id.* at 599.

[149] *Id.*

[150] *Id.* at 594.

[151] *Id.* ("CEF's fliers promote educational, cultural, and recreational activities, albeit from a religious perspective, that fit squarely within the contours of the take-home flier forum.").

[152] *Id.*

[153] *Id.* at 599.

[154] *Id.* (stating that fliers had no overt evangelical or religious language, even though they contained invitation to participate in religious activity).

[155] *Id.* at 599-600 ("[R]eceipt of an invitation to a religious activity (with the hope that the students will deliver the invitation to their parents) simply does not rise to the level of 'support or participat[ion] in religion or its exercise.'").

access to similar flier distribution programs was permissible.[156] The court concluded that no violation of the Establishment Clause occurred because students did not actively engage in a religious activity.[157]

III. ANALYSIS

The Fourth Circuit erred in *CEF of Maryland* because it failed to fully examine the potential Establishment Clause violations.[158] Instead, the court relied on prior cases that granted religious groups access to school property and flier programs. In doing so, it ignored the existing cases, which hold that avoiding an Establishment Clause violation can justify viewpoint discrimination.[159]

Allowing CEF access to the take-home flier program constituted error for three reasons.[160] First, the program causes excessive entanglement between the public school and religious affairs.[161] Second, it potentially coerces school children into supporting a religion.[162] Lastly, the program will likely cause students to misperceive the school's distribution of fliers as an endorsement of religion.[163]

A. Allowing CEF Access to the Take-Home Flier Program Violates the Establishment Clause

In *CEF of Maryland*, the Fourth Circuit violated the Establishment Clause by allowing CEF to participate in the take-home flier program.[164] When public schools open their facilities to community groups, they

[156] *Id.* at 596 n.3 (citing Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044 (9th Cir. 2003)). In *Hills v. Scottsdale Unified School District*, the court held that passing out religious summer camp brochures did not violate the Establishment Clause. *Id.*; *see also* Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Township, 8 F.3d 1160, 1167 (7th Cir. 1993) (holding that distributing Boy Scout materials that contained religious statements did not violate Establishment Clause); Daugherty v. Vanguard Charter Sch. Acad., 116 F. Supp. 2d 897, 911 (W.D. Mich. 2000) (noting that passing out religious groups' materials did not violate Establishment Clause).

[157] *Child Evangelism Fellowship of Md.*, 373 F.3d at 601.

[158] *See id.* at 602 (Michael, J., dissenting) (noting that school district's desire to avoid Establishment Clause violation justified denying CEF access to flier program).

[159] *Id.* at 596 n.3 (citing decisions that support Fourth Circuit's opinion, and noting that contrary court decisions were "not persuasive").

[160] *See infra* Part III.A-C.

[161] *See infra* Part III.A.2.

[162] *See infra* Part III.B.

[163] *See infra* Part III.C.

[164] *Child Evangelism Fellowship of Md.*, 373 F.3d at 602-03.

create a limited public forum.[165] When the Montgomery County School District opened its schools to community groups through its take-home flier program, it, too, created a limited public forum.[166] However, in this limited public forum, allowing CEF access to the take-home flier program violates the Establishment Clause.[167] This violation justifies excluding CEF from the program.[168]

To avoid the possibility of promoting religion in schools, courts must carefully examine all potential Establishment Clause violations.[169] The Fourth Circuit should have applied the *Lemon* test in *CEF of Maryland* to determine if the school complied with the Establishment Clause.[170] Instead, the Fourth Circuit relied on a variety of unrelated cases that dealt with Establishment Clause issues.[171] If the court had applied the *Lemon* test, it would have determined that the take-home flier program violated both the second and third prongs.[172]

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[165] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 108 (2001) ("Milford has opened its limited public forum to activities that serve a variety of purposes . . . ."); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 390 (1993) (noting Second Circuit's holding that school property not in use for school purposes became limited public forum open only for designated purposes); Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 235 (1990) (stating that limited forum is created whenever school offers opportunity for noncurriculum-related student groups to meet on school premises during noninstructional time); Widmar v. Vincent, 454 U.S. 263, 267 (1981) ("Through its policy of accommodating their meetings, the University has created a [limited] forum generally open for use by student groups.").

[166] *Child Evangelism Fellowship of Md.*, 373 F.3d at 594 (noting that District engaged in unlawful viewpoint discrimination — hallmark of limited public forum analysis).

[167] *See* Am. Life League, Inc. v. Reno, 47 F.3d 642, 648 (4th Cir. 1995) (acknowledging that compelling government interests, such as avoiding Establishment Clause violations, can justify viewpoint discrimination).

[168] *Child Evangelism Fellowship of Md.*, 373 F.3d at 609 (Michael, J., dissenting) (finding that Establishment Clause can trump Free Speech Clause in public schools).

[169] Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987).

[170] *See* Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160, 1169 (7th Cir. 1993) (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)).

[171] *Child Evangelism Fellowship of Md.*, 373 F.3d at 596-602 (discussing series of cases that led to court's decision). The Fourth Circuit paid special attention to the *Mergens* case. *Id.* at 596 (noting that critical examination of *Mergens* contributed to decision that Establishment Clause concerns were inapplicable in this situation).

[172] *See Lemon*, 403 U.S. at 612-13 (outlining three prongs of *Lemon* test). The second prong of the *Lemon* test says that the primary or principal effect of a government action cannot advance religion. *Id.* at 612. Under the third prong of the *Lemon* test, the government action cannot foster excessive government entanglement with religion. *Id.* at 613.

1. The Evangelical Purpose of CEF

CEF aims to evangelize children and create disciples in its local church.[173] Therefore, many of the Good News Club's activities are religious and resemble proselytizing.[174] Children attending meetings must pray.[175] Club teachers repeatedly tell the children to receive Jesus as their personal savior.[176] Lesson plans instruct teachers on how to lead a child to Christ and emphasize the validity of Bible stories presented in class.[177] Good News Club meetings thus go beyond merely discussing topics from a Christian viewpoint.[178] Instead, by participating in the school's take-home flier program, the Good News Club uses public school premises for evangelical worship and to convert children to Christianity.[179] Therefore, allowing CEF to conduct its meetings at school effectively results in government endorsement of religion, which violates the second prong of the *Lemon* test.[180]

Further examination of the second prong makes it clear that the District should prohibit the Good News Club from participating in the take-home flier program.[181] Proselytizing speech amounts to coerced participation in a religious practice and violates the Establishment Clause.[182] Because CEF's fliers contain an invitation to participate in a

[173] Child Evangelism Fellowship, *supra* note 136. CEF cites its mission as evangelizing children with "the Gospel of Lord Jesus Christ and to establish them in the local church for Christian living." *Id.*

[174] *Child Evangelism Fellowship of Md.*, 373 F.3d at 592 (describing basic activities of Good News Club meetings). The students partake in a variety of activities, including reciting Bible verses, singing songs, playing games, and praying. *Id.* However, the focus of CEF's meetings is to bring the Gospel message to the children present. *Id.* at 603 (Michael, J., dissenting). Club teachers urge the children attending the meetings to accept Jesus Christ as their Savior. *Id.* Additionally, teachers track and report how many children have prayed and accepted Jesus Christ as their personal savior. *Id.*

[175] *Id.*

[176] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 137-38 (2001) (Souter & Ginsburg, JJ., dissenting) (citing Appendix to Appellant's Petition for Certiorari at C17-C18, C21, Good News Club v. Milford Cent. Sch., 531 U.S. 923 (2000) (No. 99-2036)).

[177] *See* source cited *supra* note 176, at C20.

[178] *Milford*, 533 U.S. at 138 (Souter & Ginsburg, JJ., dissenting).

[179] *Id.* (stating that Good News Club intended to use public school premises for evangelical worship and not just for discussion of subjects from Christian viewpoint).

[180] *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (establishing that second prong of *Lemon* test prohibits statute or action from having principle or primary effect of advancing or inhibiting religion).

[181] *See* Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Sch., 373 F.3d 589, 603 (4th Cir. 2004) (Michael, J., dissenting) (discussing school's unlawful coercion of students into promoting CEF's message by forcing students to take home its fliers).

[182] *See* Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092, 1101 (9th Cir. 2000) (determining that school's refusal to allow students to deliver a sectarian speech or prayer

religious activity, they coerce students to engage in religion.[183]

Distribution of religious fliers resembles a form of missionary evangelism.[184] Under the First Amendment, the distribution of religious fliers is as much of a religious activity as worship in churches.[185] Because CEF's fliers invite students to participate in religious activities, distributing them also constitutes a religious activity.[186]

Allowing the Good News Club access to the take-home flier program violates the Establishment Clause because it forces the District to aid or promote religion.[187] This constitutes government endorsement of religion under the second prong of the *Lemon* test.[188] By requiring the children to take home the fliers, the District directly promotes CEF's mission and thus endorses a religious activity.[189] This endorsement of a religious activity violates the Establishment Clause.

The most obvious way to avoid this Establishment Clause violation is to cease the flier program altogether. The District may not simply eliminate religious groups from the program.[190] This would imply that the District is hostile toward religious groups — an unconstitutional stance for the District to take.[191] Additionally, excluding all religious groups from the program would amount to viewpoint discrimination because the District would specifically prohibit groups based on their beliefs.[192] Abolishing the program completely, however, might impose a hardship on students because it hinders their ability to learn about community groups. If students do not receive the fliers, they may not

at graduation ceremony was necessary to avoid violation of Establishment Clause).

[183] *Child Evangelism Fellowship of Md.*, 373 F.3d at 605 (Michael, J., dissenting).

[184] Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943) (holding that hand distribution of religious tracts constitutes "age-old form of missionary evangelism").

[185] *Id.*

[186] *Child Evangelism Fellowship of Md.*, 373 F.3d at 605 (stating that public school cannot coerce students into participating in religious activities through distribution of CEF fliers).

[187] *Id.* at 607.

[188] The second prong of the *Lemon* test states that government action cannot advance or support religion. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[189] *Child Evangelism Fellowship of Md.*, 373 F.3d at 608.

[190] *See* Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Township, 8 F.3d 1160, 1165 (7th Cir. 1993) (noting that schools cannot exclude church groups from facilities open to other community groups).

[191] Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 248 (1990) ("[I]f a state refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.").

[192] *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995) (holding that University's refusal to fund religious student group publication constituted unconstitutional viewpoint discrimination). The "prohibited perspective," not the general subject matter, resulted in the University's refusal to fund that religious publication. *Id.*

know about enriching after-school activities. As a result, some students will not have the opportunity to participate in such programs. This, in turn, may hinder the students' educational experience and personal development.

2. Using State Employees to Distribute Fliers

Requiring the District to allow CEF to participate in the take-home flier program violates the third prong of the *Lemon* test.[193] Using school employees to distribute CEF's fliers causes excessive entanglement between the school and religion.[194] The First Amendment prohibits the state from taking any action that has the primary effect of advancing religion.[195] The District, however, does just this by using school employees to pass out CEF's fliers.[196]

Culbertson v. Evangelism Fellowship of Oregon supports the proposition that using teachers to distribute a religious group's materials ultimately advances the group's religious mission.[197] *Culbertson* held that using teachers to pass out a religious club's permission slips to students violated the Establishment Clause because it put teachers at the service of the club.[198] As a result, the Ninth Circuit found that, even though excluding religious clubs would constitute viewpoint discrimination, the Establishment Clause concerns trumped the free speech right to equal access.[199]

CEF of Maryland mirrors *Culbertson* in that the religious fliers in *CEF of Maryland* are akin to the permission slips in *Culbertson*.[200] To require

[193] *See Lemon*, 403 U.S. at 613 (noting that third prong of *Lemon* test requires that statute or action not foster excessive government entanglement with religion).

[194] *See* Culbertson v. Oakridge Sch. Dist., No. 76, 258 F.3d 1061, 1065 (9th Cir. 2001) ("The requirement that teachers distribute the slips, however, goes beyond opening access to a limited public forum. It puts the teachers at the service of the club."); *see also* Underwood, *supra* note 122, at 295 (stating that granting religious organizations equal access to limited public forums does not require public employees to act as "clerical agents" for religious organizations).

[195] *See, e.g.*, *Lemon*, 403 U.S. at 612 (describing second prong of *Lemon* test for Establishment Clause violations).

[196] *Culbertson*, 258 F.3d at 1065.

[197] *Id.*

[198] *Id.*

[199] *Id.* at 1063.

[200] *See* Child Evangelism Fellowship of Md. v. Montgomery County Pub. Sch., 373 F.3d 589, 592 (4th Cir. 2004) (noting that teachers personally delivered fliers to students or placed them in their students' mailboxes). For a discussion of the problems surrounding the permission slips, see *Culbertson*, 258 F.3d at 1065. For a description of the fliers, see *Child Evangelism Fellowship of Md.*, 373 F.3d at 603.

teachers to distribute Good News Club fliers puts them at the service of CEF, much like the teachers in *Culbertson.*[201] An Establishment Clause violation occurs because state employees directly advance religion by distributing fliers, resulting in excessive government entanglement with religion.[202]

3. Granting CEF Access to the Flier Program Surpasses Viewpoint Discrimination

In *CEF of Maryland*, the potential Establishment Clause violation justified the abridgment of free speech that was otherwise protected under the First Amendment.[203] A government regulation that discriminates against private speakers based on their viewpoints must be necessary to serve a compelling government interest.[204] Protection of the students' right to choose for themselves which religious activities to engage in is a compelling interest that justifies viewpoint discrimination.[205]

On the surface, excluding CEF from the flier program resembles a simple case of viewpoint discrimination.[206] CEF argued that the Good News Club activities met the District's standards for the flier program.[207] CEF claimed that the District denied it access solely because the Club operated from a religious perspective, and this constituted viewpoint discrimination.[208] Assuming that the District committed viewpoint discrimination by excluding CEF from the flier program, the discrimination was justified because it prevented an Establishment Clause violation.[209]

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[201] *Culbertson*, 258 F.3d at 1065.

[202] *See* Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (describing how compliance with third prong of *Lemon* test requires no such excessive entanglement).

[203] *See* Widmar v. Vincent, 454 U.S. 263, 271-72 (1981); *see also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (noting interest of state in avoiding Establishment Clause violation is compelling reason justifying abridgment of free speech otherwise protected by First Amendment).

[204] *See* Am. Life League, Inc. v. Reno, 47 F.3d 642, 648 (4th Cir. 1995) (finding that content and viewpoint based restrictions must be "necessary to serve a compelling government interest by the least restrictive means available").

[205] *Child Evangelism Fellowship of Md.*, 373 F.3d at 610 ("The school system's interest in avoiding an Establishment Clause violation should prevail in order to protect the individual freedom of the students.").

[206] *Id.* at 594 (holding that viewpoint discrimination occurred upon exclusion of CEF).

[207] *See id.* at 592 (noting that District's refusal was rooted solely in CEF's "religious nature" and resulting concerns about separation of church and state).

[208] *Id.*

[209] *Id.* at 594 (noting that state can justify viewpoint discrimination with compelling

B. The District Impermissibly Coerced Students to Support a Religious Activity

The government cannot coerce students to support or participate in religious activities.[210] In *CEF of Maryland*, the District unconstitutionally forced students to support CEF and its religious mission.[211] This violated the First Amendment right of religious freedom.[212]

1. Coercion by the School District

Unconstitutional coercion in schools exists when the government forces a student to support or participate in religion.[213] Even if the religious group receives no special benefit from the coercion, forced participation still constitutes an Establishment Clause violation.[214] The government can coerce students directly or indirectly.[215] Direct coercion occurs when the government forces uninterested individuals to attend or participate in a religious exercise.[216] Indirect coercion exists when

government interest).

[210] *Child Evangelism Fellowship of Md.*, 373 F.3d at 597. Unconstitutional coercion arises if the government singles out a religious group for a special benefit and advances its religious message or activities. *Id.*

[211] *Id.* at 605 (Michael, J., dissenting) ("[a] public school should not be able to coerce its students into participating in the related religious activity of distributing invitations to [CEF's] religious meetings").

[212] *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) ("[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . .").

[213] Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 260 (1990) (Kennedy, J., concurring). If the government coerces an individual to participate in a religious activity, it has committed an Establishment Clause violation. *Id.*

[214] *Child Evangelism Fellowship of Md.*, 373 F.3d at 604 (Michael, J., dissenting).

[215] For direct coercion, see Kerr v. Farrey, 95 F.3d 472, 479-80 (7th Cir. 1996) (holding that state prison directly coerced prisoners when it required them to attend pseudo-religious narcotics program, Narcotics Anonymous). Numerous Supreme Court decisions have invalidated government actions on the grounds that they amounted to indirect coercion in violation of the Establishment Clause. *See, e.g.*, Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989) (holding that state policy giving sales tax exemption for religious periodicals amounted to indirect coercion that required booksellers to give preferences to religious organizations); Wallace v. Jaffree, 472 U.S. 38, 47 (1985) (holding that school's requirement that students observe moment of silence amounted to endorsement of religion and thus violated Establishment Clause); Stone v. Graham, 449 U.S. 39, 42-43 (1980) (noting that posting Ten Commandments on classroom wall in public school resembled indirect coercion that violated Establishment Clause).

[216] Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 814 (5th Cir. 1999) (citing coercion test from *Lee*, 505 U.S. at 586-88). Indirect unconstitutional coercion occurs when the government directs the performance of a religious exercise in such a way as to oblige the participation of objectors. *Doe*, 168 F.3d at 814. Coercion can exist even though it only affects a few citizens. *See Lee*, 505 U.S. at 597. However, the fact that a few citizens find

government action makes it more difficult for an individual to avoid participating in the religious activity.[217]

The Supreme Court has stated that it must protect children from indirect coercion in public schools.[218] The combination of peer pressure and a child's need to please his or her teacher exerts a subtle but real pressure on the child.[219] This pressure is as forceful as overt compulsion and can impermissibly compel students to participate in religious activities.[220] Thus, courts must analyze sponsored religious activities in terms of their potential coercive effect and the subsequent possible benefit to the religious group.[221]

An evaluation of the coercive effect of the school-sponsored religious

state action offensive does not necessarily mean that the government violated the Establishment Clause. *Id.*

[217] Michael W. McConnell, *Exchange; Religious Participation in Public Programs: Religious Freedom at a Crossroad*, 59 U. CHI. L. REV. 115, 160 (1992). For further situations differentiating between direct and indirect coercion, see Mark A. Boatman, Lee v. Weisman*: In Search of a Defensible*, 37 ST. LOUIS U. L.J. 773, 804-06 (1993); Paul E. Pongrace, III, *Justice Kennedy and the Establishment Clause: The Supreme Court Tries the Coercion Test*, 6 J. LAW. & PUB. POL'Y 217, 224 (1994); Gregory M. McAndrew, Note, *Invocations at Graduation*, 101 YALE L.J. 663, 679 n.115 (1991).

[218] *Lee*, 505 U.S. at 592; *see also Mergens*, 496 U.S. at 261-62 (Kennedy, J., concurring) (noting that line between voluntary and coerced religious participation in school is blurry); Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987) ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985) (noting that school cases recognized "sensitivity to the symbolic impact of the union of church and state").

[219] Marjorie A. Silver, *Rethinking Religion and Public School Education*, 15 QUINNIPIAC L. REV. 213, 223 n.67 (1995) (noting that peer pressure and desire to please teachers would make it impossible for students to avoid participating in religious activity); *see also* Brief for Rob Sherman Advocacy as Amicus Curiae Supporting Respondents at 3, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (No. 02-1624), *available at* 2004 WL 314153 (noting that state exerts great power on students because students desire to emulate their teachers as role models). Psychology research also supports the assumption that children are susceptible to peer pressure to conform, especially in matters of social convention. *See generally* Caly Brittain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 AM. SOC. REV. 385 (1963) (examining how children change behavior in response to pressure from parents and peers); B. Bradford Brown, Donna Rae Clasen, & S.A. Eicher, *Perception of Peer Pressure, Peer Conformity Dispositions, and Self-Reported Behavior Among Adolescents*, 22 DEVELOPMENTAL PSYCHOL. 521 (1986) (discussing children's conformity to perceived peer pressure); Donna Rae Clasen & B. Bradford Brown, *The Multidimensionality of Peer Pressure in Adolescence*, 14 J. YOUTH & ADOLESCENCE 451 (1985) (studying various influences and results of peer pressure).

[220] *Lee*, 505 U.S. at 593.

[221] *Id.* at 586 (holding that school improperly coerced unwilling students when it allowed clergy member to give nonsectarian blessings at graduation ceremony). The graduation ceremony serves as an important rite of passage that almost every student attends. *Id.* In *Lee*, students had to choose between attending and thus being forced to listen to religious services and not attending the graduation ceremony. *Id.*

activity in *CEF of Maryland* reveals that CEF directly benefited from its access to the flier program.[222] CEF would have great difficulty accomplishing its religious mission of evangelizing school children and converting them without the flier system.[223] By accepting the fliers and bringing them home to their parents, the children advance CEF's mission by further spreading CEF's religious message.[224] By forcing the students to accept the fliers and deliver them to their parents, the District coerced the children's support of CEF's religious activity.[225]

Arguably, coercion does not exist if children or their parents do not read the fliers.[226] This argument, however, ignores the reality that merely bringing the fliers home constitutes a religious exercise.[227] When the children give CEF's fliers to their parents, they engage in a form of missionary evangelism and take affirmative steps in support of religion.[228] Coercion exists because the children have no choice but to accept and deliver the fliers to their parents.[229] The only relevant issue in the coercion analysis is whether the school knew of the fliers' religious nature.[230] A school that requires students to accept religious materials, even if hidden in envelopes or unread, engages in coercion.[231] This coercion violates the second prong of the *Lemon* test because it implies

[222] Child Evangelism Fellowship of Md. v. Montgomery County Pub. Sch., 373 F.3d 589, 604, 608 (4th Cir. 2004) (Michael, J., dissenting).

[223] *Id.* at 609 (noting CEF's claim that "[u]nless the flyers go forth, Club attendance is small and CEF representatives cannot either evangelize or teach children Biblical character and values" (citing Brief for the Appellant at 30)).

[224] *Child Evangelism Fellowship of Md.*, 373 F.3d at 609.

[225] *Id.* at 608.

[226] *See id.* at 606-07 (countering majority's argument that no coercion exists if fliers go unread, and stating that even if school disguised fliers, coercion would still exist).

[227] *See generally id.* at 604-09 (describing distribution of religious fliers by CEF to children and activity's religious effect).

[228] Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943) (stating that hand billing of religious material constituted form of missionary evangelism); *see also Child Evangelism Fellowship of Md.*, 373 F.3d at 599 (discussing students' affirmative steps taken in support of religion). The receipt of fliers is not just an invitation to participate in religion but also constitutes an affirmative step in support of religion. *Id.* at 599, 607-08; *cf.* Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 247, 249-50 (1990) (stating that students listened to announcements of religious club meeting times, but nothing compelled students to join club or advance its purpose). Unlike the students in *Mergens*, the students in *CEF of Maryland* take affirmative steps when they receive fliers and bring them to their parents, thereby directly advancing religion. *Child Evangelism Fellowship of Md.*, 373 F.3d at 607-08.

[229] *Child Evangelism Fellowship of Md.*, 373 F.3d at 606-07.

[230] *See id*. at 606 (discussing school's knowledge of message and effectiveness of hiding flier in sealed envelope to minimize misperception of school endorsement).

[231] *Id.* (noting that even if school placed fliers in envelopes, unconstitutional coercion would still exist).

government endorsement of religion.[232]

2. Children Are the Relevant Audience, Although Parents Ultimately Receive the Fliers

In other cases addressing CEF's participation in similar school flier programs, some courts have held that parents, not students, were the targets of the fliers' message and thus no impermissible coercion occurred.[233] These courts pointed out that parents must give their permission before their children can attend the Good News Club meetings.[234] Since the children cannot attend without their parents' permission, the school cannot coerce the children into engaging in a religious activity.[235]

This argument is flawed because coercion occurs the moment that the children receive the fliers.[236] Impermissible coercion exists if a reasonable person believes that engaging in the activity could amount to approval of it.[237] Thus, even if only one child believes that taking home the fliers endorses CEF's religious message, impermissible coercion occurs.[238] Furthermore, even though the District did not pressure the students to engage in the religious activity, coercion still occurred.[239]

In *CEF of Maryland*, the school did not tell the students to believe CEF's message, nor did it encourage students to attend Good News Club

[232] *See id.* at 607-08 (discussing effect of coercion); *see also* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (describing second prong of *Lemon* test and prohibition on government endorsement of religion).

[233] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 115 (2001); *see also* Rusk v. Crestview Local Sch. Dist., 379 F.3d 418, 421 (6th Cir. 2004) (stating that flier targets message to parents and parents decide whether their children can attend Good News Club meetings).

[234] *Rusk*, 379 F.3d at 421.

[235] *Milford*, 533 U.S. at 115.

[236] *Child Evangelism Fellowship of Md.*, 373 F.3d at 606-07 (Michael, J., dissenting).

[237] Lee v. Weisman, 505 U.S. 577, 593 (1992).

[238] *See id.* (noting that if reasonable dissenter believes participating in religious activity leads to endorsement of such activity, then Establishment Clause violation and coercion occurred). The *Lee* Court found that coercion occurred when one "reasonable dissenter" believed that standing during the religious speech signified approval of it. *Id. Lee* revolved around just one individual who objected to religious prayers at her graduation ceremony. *Id.* at 581. The Court focused on the coercive effect the religious activity had on that person. *Id.* at 594-95. Thus, impermissible coercion can exist even if it only applies to one person. *Id.* at 595-96.

[239] *See* Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 264 (1990) (stating that this coercive power can exist even if school "does not actually impose pressure upon a student to participate in a religious activity").

meetings.[240] However, distributing the fliers alone was enough to constitute coercion.[241] Further, the District's silence regarding the flier's message may have ultimately caused young children to misperceive this silence as endorsement of the message.

C. Students Will Misperceive that the School District Supports CEF's Religious Message

Young children may have difficulty appreciating the distinction between school neutrality and sponsorship of religion.[242] In particular, they run the risk of misperceiving a religious club's access to a school as school endorsement of that religion.[243] This misperception is distinguishable from mere coercion because misperception will actually shape and influence children's *future* religious views.[244] If the District granted CEF access to the flier program, the children might incorrectly believe that the school is encouraging them to support CEF's message.[245] Thus, the students might adopt CEF's religious beliefs as their own if they incorrectly think that the school is encouraging them to support this religious group.[246]

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[240] *Child Evangelism Fellowship of Md.*, 373 F.3d at 595-96 (noting that "no 'integration and cooperation' between school authorities and the Club" existed).

[241] *Id.* at 606-07.

[242] Brief for Americans United for Separation of Church and State, et al. as Amici Curiae Supporting Respondent at 16 n.8, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (No. 99-2036), *available at* 2001 WL 43353; *see also* Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 389-90 (1985) (noting that "symbolism of a union between church and state" will most likely influence young children with limited experience).

[243] *Mergens*, 496 U.S. at 265 (Marshall, J., concurring).

[244] Stephen Arons & Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309, 312-13 (1980). The possibility of influence on future religious beliefs is pronounced in schools because schools act as a primary means of inculcating social and cultural values in children. *See* Bd. of Educ. Island Trees Unified Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982) (noting that state, through schools, consciously attempts to impart moral, social, and political values on children); Ambach v. Norwick, 441 U.S. 68, 77 (1979) (stating that school is "a principal instrument in awakening the child to cultural values"); *see also* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1953) (holding that education acts to awaken children's cultural values and serves as foundation for good citizenship). However, the First Amendment and Establishment Clause limit a school's ability to instill values in children. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that Constitution mandates that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion").

[245] *See generally* Lee v. Weisman, 505 U.S. 577, 592 (1992) (noting that young students have difficulty making distinction between school sponsoring religion and merely tolerating it).

[246] Arons & Lawrence, *supra* note 244, at 312-13 (stating that educational system can

To determine if the children in *CEF of Maryland* would confuse CEF's access to the flier program with an endorsement of religion, the Fourth Circuit should have examined the children's potential perception of the situation.[247] Even the appearance of a public school endorsing religion violates the Establishment Clause.[248] Thus, actual perception of the situation is critical.[249] Misinterpreting access creates an assumption that the school actually endorses CEF, in violation of the second prong of the *Lemon* test.[250]

Misperception and the resulting potential for improper influence on young children frequently occur when religious activities arise in nonreligious settings.[251] Thus, when religious clubs gain access to a public school, a danger exists that children may view these clubs as part of the school's efforts to inculcate fundamental values into the children.[252] In CEF's case, the danger of misperception occurs in two

undermine students' own cultural values and manipulate their views).

[247] *See Ball*, 473 U.S. at 390 (noting that important consideration is whether children are likely to perceive symbolic union of church and state as endorsement of particular religious message); *see also* Michael D. Baker, *Protecting Religious Speakers' Access to Public School Facilities:* Lamb's Chapel v. Center Moriches School District, 44 CASE W. RES. L. REV. 315, 317-18 (1993) (noting that perceptions about school's endorsement of religion by its students are critical); Chris Brown, Note, *Good News? Supreme Court Overlooks the Impressionability of Elementary-Aged Students in Finding a Parental Permission Slip Sufficient to Avoid an Establishment Clause Violation*, 27 DAYTON L. REV. 269, 283 (2002) (arguing that courts must determine students' perception of religious group access to school). Heightened concerns exist in protecting students from subtle, coercive pressures to avoid a violation of the Establishment Clause. *Lee*, 505 U.S. at 592.

[248] *See* County of Allegheny v. ACLU, 492 U.S. 573, 574 (1989) (holding that Establishment Clause "at the very least, prohibits government from appearing to take a position on questions of religious belief"); Am. United for Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538, 1557 (6th Cir. 1992) ("[A]ppearance of an endorsement, however unintended, violates the establishment clause."); Smith v. County of Albemarle, 895 F.2d 953, 956 (4th Cir. 1990) (noting that government practice violates Establishment Clause when practice "has the appearance or effect of endorsing religion" (emphasis omitted)).

[249] *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (holding that second prong of *Lemon* test finds violation of Establishment Clause if effect of government's action, or perceived action, is endorsement of religion); *see also* Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in part and concurring in judgment) (stating that relevant Establishment Clause inquiry asks whether government conveys, tries to convey, or appears to convey message that religious belief is preferred).

[250] *Lee*, 505 U.S. at 592.

[251] *Ball*, 473 U.S. at 390-92; Brown, *supra* note 247, at 283-84. Misperception problems also arise in schools because students must attend school and are thus a captive audience. Edwards v. Aguillard, 482 U.S. 578, 584 (1987) ("The state exerts great authority and coercive power through mandatory attendance requirements . . . .").

[252] Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 265 (1990) (Marshall, J., concurring). The school should maintain an air of neutrality toward religion and must

ways: (1) the distribution of the fliers occurs during school hours, and (2) the District does not distance itself from CEF's message.[253]

Under the distribution method set out by the District in *CEF of Maryland*, teachers typically pass out fliers right before the end of the school day.[254] Courts have acknowledged that the danger of misperception decreases when the religious activity takes place after the school day ends.[255] In contrast, when a religious activity occurs during school hours, students tend to view it as an endorsement of religion.[256] Because teachers distribute fliers during class time, if CEF has access to the flier program, students will think that their school endorses CEF's message.[257]

The District could easily mitigate this potential misperception by allowing CEF employees, rather than teachers, to distribute the literature.[258] Teachers should not distribute fliers because doing so puts them at the service of the Club.[259] CEF employees, however, cannot personally hand out the fliers on campus in person during school hours

take steps to avoid any indication of endorsement of religion. *Id.* at 265-66.

[253] *See* Santa Fe. Indep. Sch. Dist. v. Doe, 530 U.S. 290, 307-08 (2000) (noting that students will most likely misperceive religious activities held during school hours as endorsement of religion); Rusk v. Crestview Local Sch. Dist., 379 F.3d 418, 424 (6th Cir. 2004) (noting Fourth Circuit's inquiry in *Peck v. Upshur County Board of Education*, 155 F.3d 274 (4th Cir. 1998), as to whether school took sufficient steps to distance itself from religious message to minimize possible inference of endorsement).

[254] Child Evangelism Fellowship of Md. v. Montgomery County Pub. Sch., 373 F.3d 589, 592 (4th Cir. 2004).

[255] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 116 (2001) (holding that religious activity did not violate Establishment Clause because activity took place after state law compelled children to be at school); *Mergens*, 496 U.S. at 251 (stating that Equal Access Act only applies during "non-instructional" times); Hills v. Scottsdale Unified Sch. Dist., No. 48, 329 F.3d 1044, 1054 (9th Cir. 2003) ("[T]here is even less danger of the perception of endorsement . . . because the promoted activity would not even take place on school property, much less during school hours.").

[256] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 841-42 (1995); Prince v. Jacoby, 303 F.3d 1074, 1100 (9th Cir. 2002) (Berzon, J., dissenting); *see also Doe*, 530 U.S. at 307-08 (noting students likely to perceive school endorsement of religious prayer conducted prior to football games because it occurred on school property during school-sponsored event).

[257] *See Milford*, 533 U.S. at 116-17 (noting that state advancement of religion and misperception problem does not occur after school hours); *Hills*, 329 F.3d at 1054 (stating that misperception of endorsement of religion decreases after school hours).

[258] *See Mergens*, 496 U.S. at 251 (noting that school can minimize risk of school endorsement when no school officials actively participate religious activity).

[259] *See* Culbertson v. Oakridge Sch. Dist. No. 76, 258 F.3d 1061, 1065 (9th Cir. 2001) ("The requirement that teachers distribute the [permission] slips, however, goes beyond opening access to a limited public forum. It puts the teachers at the service of the Club.").

because it would still give the impression of school endorsement.[260] Instead, CEF members would have to place the fliers in the children's cubbies after the students have left the school premises.[261] Thus, when the children take the fliers home, they will not receive an implied message that their teachers and school endorse CEF's mission.[262]

Student misperception also arises because the District did not distance itself from CEF's religious message.[263] Students will interpret the District's failure to disassociate itself from CEF's religious message as an endorsement of that message.[264] CEF did not place an express disclaimer on its fliers disavowing any school endorsement of its organization.[265] This may result in students mistakenly believing that their school endorses CEF's message, which may inadvertently encourage students to adopt these religious views as their own.

CEF might insist that a disclaimer is unnecessary because the District distributes fliers from a variety of organizations. As a result, the District would not appear to endorse any particular organization and no misperception of endorsement of religion could occur.[266] Furthermore, CEF might argue that excluding the Good News Club from the program would cause students to infer school hostility toward the Club, rather than support.

These two arguments fail for three reasons. First, based only on the

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[260] *See* Berger v. Rensselaer Cent. Sch. Corp., 928 F.2d 1160, 1166 (7th Cir. 1993) (finding that when religious group came to school to distribute Bibles directly to students, young children could not distinguish group as invitee rather than instructor).

[261] *See id.* at 1170 (noting that critical distinction exists between religious activities that occur during school and those that occur after school).

[262] *See id.*

[263] *Cf.* Rusk v. Crestview Local Sch. Dist., 379 F.3d 418, 419, 422 (6th Cir. 2004) (stating that district court expressed concern about mistaken interference of endorsement because school did not disclaim endorsement of fliers' message).

[264] Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 266 (1990) (Kennedy, J., concurring) (noting that where religious club is sole group or one of limited number of groups permitted on campus, school's failure to disassociate itself from religious club's message would reasonably cause students to misperceive that school supported club's message).

[265] *See* Child Evangelism Fellowship of Md. v. Montgomery County Pub. Sch., 373 F.3d 589, 603 (4th Cir. 2004) (Michael, J., dissenting) (describing Good News Club's language in fliers). The actual text of the Good News Club flier read: "Your kids are invited to come to the Good News Club. Each club is taught by a dedicated Christian teacher." *Id.* Activities included "Bible adventures, missionary adventures . . . Bible-oriented . . . learning and moral object lessons . . . and Bible review games." *Id.* The focus of the flier was to bring "the Gospel message to children." *Id.*

[266] *Rusk*, 379 F.3d at 422 (stating that because school distributed fliers from variety of community organizations, no misperception problem would occur, and noting that no misperception exists in schools with variety of community groups).

fliers they do receive, students have no way of knowing that their school endorses certain organizations but not others whose fliers it also distributes.[267] Second, including the Good News Club in the flier program could imply favoritism more so than excluding it would imply hostility.[268] Third, even if a school district could control student perceptions, the District in *CEF of Maryland* did nothing to mitigate the misperception of endorsement.[269] Nothing in the facts of *CEF of Maryland* indicates that the District provided an express disclaimer denying its endorsement of the messages contained in the fliers.[270] Nor is there any evidence that the teachers who distributed the fliers disclaimed any endorsement of the messages contained in the fliers.[271] While students *should* know the difference between endorsement and tolerance of an activity or group, this does not mean that they will *actually* know the difference.[272]

To circumvent this problem, all fliers, not just CEF's, should contain an express disclaimer that the District does not endorse the messages contained therein.[273] A disclaimer such as "this is not a school-sponsored activity" on the flier would ameliorate the misperception problem.[274]

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[267] *See Child Evangelism Fellowship of Md.*, 373 F.3d at 592 (describing school's flier program, which did not provide identification of groups to which it denied access or disclaimers that it did not endorse messages of those fliers it approved for distribution). The District only permitted "certain governmental and non-profit organizations" to participate in the take-home flier program. *Id.* The flier program expressly excluded commercial fliers and nonapproved community groups. *Id.* at 593.

[268] *But see* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 118 (2001) (determining that under facts of case, Court could not say that danger that children would misperceive endorsement of religion was any greater than danger that they would perceive hostility toward it).

[269] See the description of the CEF flier without any express disclaimer, *supra* note 265. *But see* Child Evangelism Fellowship of N.J., Inc. v. Stafford Township Sch. Dist., 386 F.3d 514, 522, 531 (3d Cir. 2004) (holding that Good News Club fliers distributed through flier program caused no misperception of endorsement, and also noting that fliers expressly stated: "this is not a school-sponsored activity").

[270] *See generally Child Evangelism Fellowship of Md.*, 373 F.3d 589 (discussing school's flier program).

[271] *Id.*

[272] *See Milford*, 533 U.S. at 117-18 (noting that students should know difference between school-sponsored events and events that require parental permission).

[273] Hills v. Scottsdale Unified Sch. Dist., No. 48, 329 F.3d 1044, 1054 (9th Cir. 2003) (suggesting that express disclaimer would lessen danger of misperception of endorsement of religious message); *see also* Prince v. Jacoby, 303 F.3d 1074, 1094 (9th Cir. 2002) (noting that school district can dispel "mistaken inference of endorsement" by expressly stating to students that religious message is not message of school).

[274] *See Stafford Township Sch. Dist.*, 386 F.3d at 533 (stating that while disclaimer message on flier was meaningful, it alone did not avoid endorsement and any misperception problems that might arise from distribution of such fliers).

Teachers could also announce that the school does not sponsor any of the fliers' advertised activities.[275] Nothing in *CEF of Maryland* prevents the school from using these techniques to avoid misperception.

CONCLUSION

Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools violated the Establishment Clause by granting CEF access to the school's take-home flier program. The Establishment Clause ensures that the government does not endorse or support religion. To prevent an Establishment Clause violation, courts may limit religious groups' free speech rights. By upholding CEF's free speech rights on school property in *CEF of Maryland*, the Fourth Circuit unconstitutionally required the school district to support a religious activity. Further, by forcing students to bring the fliers home, the court impermissibly coerced them into supporting religion. This compulsion may have prompted students to misinterpret CEF's access to the program as the District's endorsement of CEF's religious message. CEF's access to the flier program forced students and teachers to participate in religion, resulting in a clear violation of the Establishment Clause. Therefore, the Fourth Circuit erred in *CEF of Maryland*, which should be reversed or overturned.

[275] Rusk v. Crestview Local Sch. District, 379 F.3d 418, 420 (6th Cir. 2004) (noting that whether state action endorses religion depends on how reasonable observer would view and interpret action). By a teacher expressly disclaiming school endorsement of activities listed on the flier, a reasonable observer would not infer state sponsorship of the religious activities. *See id.*