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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

CHILD EVANGELISM FELLOWSHIP OF SOUTHERN CALIFORNIA - POMONA VALLEY CHAPTER, et al.,	CASE # ED-CV-04-839 -VAP-(SGLx)
Plaintiffs,	**UNITED STATES' MEMORANDUM AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**
v.	
P. JOSEPH LENZ, et al.,	Date: October 25, 2004 Time: 10:00 a.m. Courtroom: 2
Defendants.	Judge: Virginia A. Phillips

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I. PRELIMINARY STATEMENT

The United States submits this memorandum of law in support of Plaintiffs' Motion for Preliminary Injunction. This case involves important issues regarding the elimination of discrimination in public schools and public facilities on the basis of religion. Plaintiffs allege, inter alia, that Defendants discriminated against Plaintiffs' religious beliefs by refusing to allow them free access to school facilities even though Defendants permit secular organizations whose speech concerns the same subject matter as the Plaintiffs' free access to school facilities.

The United States is charged with enforcing Title IV of the Civil Rights Act of 1964, which authorizes the Attorney General to seek relief if a school deprives students of the equal protections of the laws. See 42 U.S.C. § 2000c-6. The United States is also charged with enforcing Title III of the Civil Rights Act of 1964, which authorizes the Attorney General to seek relief when persons are denied equal use of public facilities on the grounds of race, color, religion, or national origin. 42 U.S.C. §§ 2000b. The United States also is authorized under Title IX of the Civil Rights Act of 1964 to intervene in cases alleging violations of the Equal Protection Clause that are of general public importance. See 42 U.S.C. § 2000h-2.

Because of the United States' statutory mandate to prevent discrimination on suspect criteria such as religion, this memorandum focuses on the issues asserted in the Complaint concerning unconstitutional discrimination against religious points of view.[1]

[1]Because most claims of religious viewpoint discrimination are addressed in the context of the First Amendment, few opinions address claims of religious viewpoint discrimination under the Fourteenth Amendment independently of the First Amendment. Nevertheless, "[c]ontent-based restrictions also have been held to raise Fourteenth Amendment equal protection concerns because, in the course of regulating speech, such restrictions differentiate between types of speech." Burson v. Freeman,

II. STATEMENT OF FACTS

The relevant facts are straightforward.[2] Plaintiff Child Evangelism Fellowship ("CEF") of Southern California, Pomona Valley Chapter is a nonprofit youth organization that attempts to counsel young people on coping with issues such as bullying, leading by example, treating others with respect, and becoming responsible. See Complaint ¶¶ 9, 27; Miralee Hossie Affidavit ("Hossie Aff.") ¶ 5. CEF addresses these issues from a religious perspective, using the Bible as a text, via voluntary after-school meetings that are free of charge and open to everyone. Complaint, ¶¶ 28, 31-32.

Defendants are school board members and officials of the Upland Unified School District (the "District"), a public school district. Id. ¶¶ 11-20. The District has adopted a facility-use policy under which school facilities are "civic centers" available to citizens and groups for, among other things, "public . . . recreational [and] educational . . . meetings," "[t]he discussion of matters of general or public interest," and "[t]he conduct of religious services for temporary periods on a one-time or non-renewable basis, by any church or religious organization which has no suitable meeting place for the conduct of its services. See Community Relations: Use of School Facilities (the "Policy"), attached as Ex. 2 to Plaintiffs' Complaint.

The District's policy provides that facilities shall be available without charge

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504 U.S. 191, 197 n.3, 112 S. Ct. 1846, 1850 n.3, 119 L. Ed. 2d 5, 13 n.3 (1992); see also Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972) (exemption of labor picketing from ban on picketing near schools violates Fourteenth Amendment right to equal protection).

[2]For the purposes of this Memorandum, the United States relies on the facts alleged in Plaintiffs' Verified Complaint ("Complaint"), and those alleged in Plaintiffs' Request for Preliminary Injunction ("Pls' Req.") and not contested by Defendants' Memorandum of Points and Authorities in Support of Response and Opposition to Plaintiffs' Request for Preliminary Injunction ("Defs' Opp."), and the public record.

to "non-profit organizations, clubs or associations, with a participation of at least 50% Upland youth, which promote youth and school activities. These groups include, but are not limited to, Girl Scouts, Boy Scouts, Campfire, Inc., Parent-Teacher's Associations, and school-community advisory councils." Policy. Groups sponsoring "religious activities," however, are charged rent, equal to "direct costs," for using school facilities. See Policy; Defs' Opp. at 1-2.

The District's facility-use policy is based on state law. Sections 38131 and 38134 of the California Education Code (the "California Statute" or "Civic Center Act") deem school facilities to be designated public fora. Cal. Educ. Code §§ 38131, 38134 (West 2004). The Act permits groups to use schools to meet and discuss "any subjects and questions which in their judgment pertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside," and "matters of general or public interest." Cal. Educ. Code §§ 38131(a), (b). School facilities used for "religious purposes," on the other hand, can be used only "for temporary periods, on a one-time or renewable basis" if "no suitable meeting place is otherwise available." Id. at § 38131(b)(3). Furthermore, groups using school facilities in this fashion must be charged an amount at least equal to the school district's direct costs." Id. at § 38134(d).[3]

In February 2004, CEF asked the Defendants to use Sycamore Elementary School for a weekly after-school meeting to discuss how the Bible addresses issues facing students. See Complaint ¶¶ 65-67. The District approved the request. Subsequently, the Defendants sent CEF an invoice for $304 representing 16 weeks of use. See Def's Opp. at 2. CEF objected to this fee but again asked to use

[3]The Code also permits, but does not require, school districts to charge groups using facilities for non-religious purposes. Id. at § 38134 (b). The District, under its policy, does not do so for at least the groups identified above.

Sycamore for four meetings in May and June. The Defendants again charged CEF $19 for each use and sent an invoice for $95. See id. CEF paid this invoice but is unable to pay the outstanding $304 balance. See Complaint ¶¶ 70-76.

In September 2004, CEF again sought to use District schools for weekly meetings. This time, the Defendants advised CEF that it could use the facilities if it paid the rental fees in advance, which amount to $768. See Defs' Opp. at 2. CEF is unable to pay the fees, which now total $1,072, and, consequently, the Defendants are prohibiting CEF from holding its meetings in District facilities. See Hossie Aff. ¶¶ 36-37.

The California Statute and similar school facility-use policies have been subject to two previous challenges in this Court. Both actions were ultimately settled and dismissed.

On July 5, 2002, this Court granted a motion for a preliminary injunction in Child Evangelism Fellowship, Inc., San Fernando Valley Chapter v. Los Angeles Unified Sch. Dist. ("LAUSD"), Case No. CV 02-1329-MMM-(VEKx). The Court concluded that the "plaintiff has demonstrated it will likely be able to prove that the District's decision to charge a direct-costs fee for its use of school facilities was based on the religious nature of the meetings it proposed to hold, and that the decision constitutes unconstitutional viewpoint discrimination." Order Granting Plaintiff's Application for Preliminary Injunction, at 28. On March 17, 2003, this Court ordered "entry of final judgment" in accordance with the terms of a Joint Settlement Agreement and Stipulated Judgment. The LAUSD agreed to "allow Plaintiff to meet in school facilities within the LAUSD at times and in places on an equal basis with groups such as the Boy Scouts that meet free of charge under the policy." Joint Settlement Agreement and Stipulated Judgment, at 2.

On January 10, 2002, Ditty v. Glendale Unified Sch. Dist. Bd. of Educ. et al., Case No. CV 00-11624-NM-E, settled in a "stipulated dismissal" *not* signed by

the Court where the Defendants agreed to provide the Plaintiff "equal access . . . on the same terms and conditions as other similarly categorized nonprofit groups." Stipulated Dismissal, at 3.

III. ARGUMENT

At issue is whether the Defendants can constitutionally charge religious groups to use school facilities for activities serving local youth when it does not charge secular groups to use school facilities for meetings serving local youth. The answer, simply put, is no.

When the District made the "school facilities and grounds under its jurisdiction available as a civic center to citizens and community groups" in its Policy, in accordance with the California Statute, the District created a public forum for speech. Complaint ¶¶ 37-38. "The District was not obligated to create such a forum. Having created this public space, however, the District cannot discriminate within it on the basis of viewpoint." Culbertson v. Oakridge Sch. Dist. No. 76, 258 F.3d 1061, 1064 (9th Cir. 2001) (citing Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106, 121 S. Ct. 2093, 2100, 150 L. Ed. 2d 151, 163 (2001)). Even if the community use policy were considered to be a limited public forum, as urged by the Defendants, see Defs' Opp. at 6, the California Statute and the Policy are required by the First Amendment, as applied by the Fourteenth Amendment to the states, to be (1) viewpoint neutral and (2) "reasonable in light of the purpose served by the forum." Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392-93, 113 S. Ct. 2141, 2147, 124 L. Ed. 2d 352, 361 (1993).[4] The Statute and the Policy fail both requirements.

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[4]The Plaintiffs have argued that the District created a designated public forum subject to strict scrutiny. See Pls' Req. at 9-10. The California Attorney General has interpreted the Statute as creating a "'designated public forum' for purposes of the First Amendment." 79 Ops. Cal. Att'y Gen. 248, 1996 WL 676083, at *1 (1996) ("1996 Attorney General Opinion").

A. The California Statute and the Defendants' Policy Discriminate Against Religious Viewpoints in Violation of the First and Fourteenth Amendments.

The Plaintiffs seek "nothing more than to be treated neutrally and given access to speak about the same topics as are other groups." Good News Club, 533 U.S. at 114. Instead of treating the Plaintiffs neutrally, however, both the Statute and the Policy discriminate against the Plaintiffs solely because of their religious viewpoint. This violates the First Amendment as set forth in clear Supreme Court precedent.

1. Imposing a Fee on Religious Users Like the Plaintiffs Because of Their Religious Approach Constitutes Viewpoint Discrimination.

In Good News Club, the Supreme Court rejected a school district's argument that its exclusion of a Good News Club under a facilities-use plan in substance identical to the one at issue here was not viewpoint discrimination. The policy at issue in Good News Club permitted access broadly to activities "pertaining to the welfare of the community," 533 U.S. at 108, and the school district had interpreted this phrase to encompass groups such as the Boy Scouts that "promote[ ] the moral and character development of children." Id. The Supreme Court ruled that excluding the Good News Club, which sponsors activities pertaining to the welfare of the community and "teach[es] morals and character development to children," because it did so from a religious perspective was viewpoint discrimination. Id. at 108-09. The Court held that there is "no logical difference in kind between the invocation of Christianity" by Good News Clubs "and the invocation of teamwork, loyalty, or patriotism by other associations," such as the Boy Scouts, "to provide a foundation for their lessons." 533 U.S. at 111. Both Good News Clubs and the Boy Scouts "teach[] morals and character development to children." Id. at 108. Here, the Defendants permit free access to groups like Camp Fire, the Boy Scouts and the Girls Scouts which promote youth activities for Upland children, but have

treated the Good News Club differently because of its religious message. This is plainly viewpoint discrimination.

Defendants attempt to distinguish Good News Club by claiming that they are not discriminating against religious viewpoints about youth activities, but merely are discriminating against "direct exhortation to religious observance" which is "a permissible exclusion based on the subject matter of the speech." Def. Op. at 10. The school district in Good News Club presented the same argument to the Supreme Court, and the Court squarely rejected it. 533 U.S. at 112 n.4. The Court dismissed the view "that something 'quintessentially religious' or 'decidedly religious in nature"'cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint." Id. at 112. The Court added, anticipating the "direct exhortation to religious observance" argument posited by Defendants here, that "we see no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys." Id. at 112 n.4.

Instead, the Supreme Court focused on the fact that Good News Club was engaging in activities "pertaining to the welfare of the community" from a religious viewpoint, and more particularly that it was engaged in the teaching of morals and values, activities which the defendants in Good News Club specifically permitted by providing access to groups like the Boy Scouts. That the Good News Club did this through "storytelling and prayer," id. at 110, singing religious songs and reading the Bible, id. at 103, and that some might label this "an evangelical service of worship," id. at 112 n.4, did not alter the fact that its meetings amounted to the same sorts of activities as those permitted in the forum, only from a religious perspective. Here, just as in Good News Club, the forum of free access is open to activities "with a participation of at least 50% Upland youth, which promote youth and school activities," and free access has been given to groups teaching values,

such as Camp Fire, the Boy Scouts, and the Girl Scouts. The Good News Club, which teaches values to Upland youth from a religious perspective, is excluded from the free-access forum. This is classic viewpoint discrimination. Similarly, the California Statute permits schools to give free access to activities about "any subjects and questions which in their judgment pertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside," and "matters of general or public interest," but require charging a fee for "religious purposes." Cal. Educ. Code §§ 38131 (a), (b), (d). This, too, is classic viewpoint discrimination.

Defendants seek to distinguish its discrimination from that in Good News Club because they did not deny the Good News Club access completely, only free access. This argument is undercut by the Supreme Court's decision in Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995), which involved not access to a physical forum at all, but access to a pool of funds for student activities. Indeed, the defendants in Rosenberger made the same argument made by Defendants here that "provision of funds" should be treated differently from "access to facilities" in determining if the government has engaged in unconstitutional viewpoint discrimination. 515 U.S. at 832. The Court rejected this, finding the University's denial of funding to a Christian publication on public affairs to be unconstitutional viewpoint discrimination: "Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints." Id. at 835. Accord Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 115-16, 112 S. Ct. 501, 508, 116 L. Ed. 2d 476, 486-87 (1991) (stating that a "statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech" and that "[t]his is a

1 notion so engrained in our First Amendment jurisprudence" and "so 'obvious' as to
2 not require explanation").
3 While Rosenberger is sufficient to demonstrate why Defendants
4 discriminatory fee policy constitutes viewpoint discrimination, Good News Club
5 itself, as well as lower court decisions, make plain that viewpoint discrimination
6 exists when equal access is denied based on viewpoint, not merely when complete
7 access is denied, as suggested by defendants. In Good News Club, the school
8 argued that it was not denying the Good News Club access to school facilities, but
9 only denying it access immediately after school was dismissed. 533 U.S. at 114,
10 n.5. The Court found that such disparate treatment would nonetheless constitute
11 viewpoint discrimination: "Consistent with Lamb's Chapel and Widmar, the school
12 could not deny equal access to the Club for any time that is generally available for
13 public use." Id. Similarly, the Ninth Circuit in Prince v. Jacoby, 303 F.3d 1074
14 (9th Cir. 2002), held that a school engaged in viewpoint discrimination when it
15 provided religious groups with access to school facilities, but denied such groups
16 equal access to other benefits provided to student groups including use of school
17 vehicles for trips, priority use of audio-visual equipment, use of school supplies
18 such as posterboard, paper and markers, and meeting space during student/staff
19 time. Id. at 1091. In a case directly on point here, in Fairfax Covenant Church v.
20 Fairfax County School Board, 17 F.3d 703 (4th Cir. 1994), the court held that it
21 was discrimination against religious speech to charge religious users but not others
22 a fee for after-hours activities on school property.[5] And in Gentala v. City of
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24
25 [5]The Defendants' attempt to distinguish Fairfax Covenant Church as concerning
an escalating fee whose stated purpose was to encourage the church to meet elsewhere
26 misses the mark. See Defs' Opp. at 9. Just like the Defendants in the present case,
the Fairfax Covenant Church school board expressed a "concern for violating the
27 Establishment Clause" and determined that religious organizations "should not be
28 permitted to use the schools indefinitely." 17 F.3d at 706. There was no indication

Tucson, 325 F. Supp. 2d 1012, 1018 (D. Ariz. 2003), the court held that a civic-events fund which paid the mandatory park usage fee for groups holding civic activities was a forum, and that refusing to use these funds to give a group seeking to hold a National Day of Prayer event for the community park access without charge constituted viewpoint discrimination. As here, the City permitted access to the park, only charged a fee that was not charged to similar secular activities. This, the court held, was insufficient, and found that the City had engaged in unconstitutional viewpoint discrimination.

Under the precedents of the Supreme Court, the Ninth Circuit and other courts, the Defendants and the California Statute discriminate based on viewpoint by requiring the Good News Club to pay a fee that is waived for equivalent secular groups.[6]

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that the Fairfax Covenant Church school board harbored any particular animus towards religion.

[6]The Statute and the Policy's requirement that religious organizations have no other suitable meeting place available in order to use school facilities is similarly discriminatory because secular organizations like the Boy Scouts, whose speech concerns the same subject matter as the Plaintiffs, are not under this requirement. The California Attorney General appears to agree. In a 1996 opinion regarding the Statute, the Attorney General stated that "[w]hether there exists another suitable place for the conduct of religious services simply has no bearing upon the compatibility of such a use on the other uses of a school's civic center" and "such a limitation imposed upon an otherwise permitted use is constitutionally infirm." 1996 Attorney General Opinion, at *3-4.

2. Defendants have no Compelling Justification for their Viewpoint Discrimination.

The Defendants have not offered any compelling justification for their viewpoint discrimination against the Plaintiffs. They cannot justify their discriminatory fee policy by claiming that it is necessary to avoid violating the Establishment Clause. First, it is an open question whether Establishment Clause concerns can ever justify viewpoint discrimination against religious speech. In Good News Club, the Court stated: "it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination." 533 U.S. at 113. In any event, as in Good News Club, this issue need not be decided, because Defendants have "no valid Establishment Clause interest" here. Good News Club, 533 U.S. at 113.

Both the Supreme Court and the Ninth Circuit have rejected the idea that allowing equal access to school facilities violates the Establishment Clause. In Culbertson, which also involved a Good News Club seeking access to school facilities, the Ninth Circuit held that the issue was "whether a reasonable adult would see an endorsement of religion in letting a community religious group use the facilities." 258 F.3d at 1065 (citing Good News Club, 533 U.S. at 114). The Court held that in both Good News Club and the case before it, there was no unconstitutional endorsement. Id.

A state endorses religion when it "sends a message to nonadherents that they are outsiders, * * * and an accompanying message to adherents that they are insiders[.]" Lynch v. Donnelly, 465 U.S. 668, 688 (1984). To evaluate a state's actions, courts ask "whether an objective observer, acquainted with the text, * * * history, and implementation of the [policy], would perceive it as a state endorsement of" religion. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000); see also Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780, 115 S. Ct. 2440, 132 L. Ed.2d 650

(1995) ("[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place].") (O'Connor, J., concurring).

Under this analysis, the informed, reasonable observer would not see any endorsement in treating the Good News Club the same as the Boy Scouts, the Girl Scouts, Camp Fire, or other groups providing activities for Upland youth. Indeed, to the contrary, a reasonable observer might very well "perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum." Good News Club, 533 U.S. at 118. Rather than suggesting any endorsement of religion, treating the Good News Club equally would have the opposite effect. The fact that this case involves a forum involving free access does not alter the analysis. See Rosenberger, 515 U.S. at 845-46; Prince, 303 F. 3d. at 1092-94; Gentala, 325 F. Supp. 2d at 1020-23. Granting the Plaintiffs free access would, as in all of the cases cited above, ensure the State's "neutrality toward religion," the very opposite of endorsement. Prince, 303 F.3d at 1092 (citing Rosenberger, 515 U.S. at 839; Good News Club, 533 U.S. at 114).

Defendants argue that the Policy and the California Statute on which it is based are permissible measures to advance the separation of church and state beyond that required by the Establishment Clause. Def. Opp. at 6-7. This argument is misplaced. "State constitutions can be more protective of individual rights than the federal Constitution. . . . However, states cannot abridge rights granted by federal law." Garnett v. Renton Sch. Dist., 987 F.2d 641, 646 (9th Cir. 1993) (citations omitted). See also Good News Club, 533 U.S. at 107 n.2; Church on the Rock v. City of Albuquerque, 84 F.3d 1273, 1280 (10th Cir. 1996). In Widmar v. Vincent, the Court reserved the question "whether, under the Supremacy Clause, a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment." 454 U.S. 263,

275-76, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981) (footnote omitted). However, with regard to the Free Speech rights of a group seeking access to a forum and a state interest in greater separation of church and state than required by the Establishment Clause, the Court held that the latter must yield:

> On one hand, respondents' First Amendment rights are entitled to special constitutional solicitude. Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content. On the other hand, the state interest asserted here--in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution--is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech.

Id. at 277-78 (internal citation omitted). The same principle controls here.[7]

Nor are Defendants compelled to enforce an unconstitutional statute. The California Attorney General has declined in the past to intervene on behalf of the Statute. Moreover, both the Los Angeles Unified School District, one of the largest school districts in the country, and the Glendale Unified School District have granted religious organizations free access to their civic centers for years now in spite of the Statute without any apparent problems.

For the Defendants to suggest that it may charge religious groups for use of

[7] Defendants' invocation of Locke v. Davey, 540 U.S. 712, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004), is misplaced. Def. Opp. at 7. Locke held that there was no violation of the federal constitution in the case before it. It did not hold that a state's interest in the separation of church and state could justify a violation of an individual's federal constitutional rights.

1 the District's facilities while not charging secular groups because it is compelled
2 by state statute simply begs the question. See Defs' Opp. at 4-6. The Statute itself
3 is unconstitutional, as is the Policy derived from it. The California Statute
4 provides no more safe harbor to the Plaintiffs than statutes mandating segregated
5 schools provided to districts continuing to operate dual schools. See,
6 e.g., Brown v. Board of Educ. of Topeka, 349 U.S. 294, 298, 75 S. Ct. 753, 755, 99
7 L. Ed. 1083, 1105 (1955).

8 Defendants' Policy and the California Statute have thus subjected Plaintiffs
9 to unconstitutional viewpoint discrimination.

10 **B. The Exclusion of the Plaintiffs and Other Religious Speakers from the Forum is Not Reasonable in Light of the Purpose of the**
11 **Forum.**

12 As set forth above, the Defendants' Policy and the California Statute
13 unconstitutionally discriminate against religious viewpoints. The exclusion of the
14 Plaintiffs is invalid for this reason alone.

15 However, the exclusion of the Plaintiffs is impermissible for the additional
16 reason that Defendants' Policy and the California Statute are not reasonable in
17 relation to the purpose of the fora they create. The "'reasonableness' analysis
18 focuses on whether the limitation is consistent with preserving the property" in
19 light of "the purpose of the forum and all the surrounding circumstances."
20 Diloreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 967 (9th Cir.
21 1999) (citing Cornelius v. NAACP Legal Def. Fund & Educ. Fund, Inc., 473 U.S.
22 788, 809, 105 S. Ct. 3439, 3453, 87 L. Ed. 2d 567, 584 (1985)).

23 California courts have already articulated the purpose of the California
24 Statute's enabling legislation, the Civic Center Act:

25 > The legislative purpose of the Civic Center Act . . . is "to make school
26 > buildings centers of free assembly insofar as such assembly does not
27 > encroach upon the educational activities, which constitute the primary

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purpose of the schools."

Howard Jarvis Taxpayers Ass'n v. Whittier Union High Sch. Dist., 15 Cal. App. 4th 730, 735, 19 Cal. Rptr. 2d 109, 113 (1993) (quoting Ellis v. Bd. of Educ. of San Francisco Unified Sch. Dist., 27 Cal. 2d 322, 329, 164 P.2d 1, 5 (1945)).

The California Attorney General has stated that the "Civic Center Act . . . expresses the Legislature's intent to create a public forum for virtually all forms of expression — artistic, political, religious, economic, educational, and moral — at each public school in the state." 1996 Attorney General Opinion, at *1. The Attorney General explained:

> Historically, California has opened its school facilities to the public to encourage the exchange of ideas. The Civic Center Act . . . expresses California's intent to create a forum for the purpose of free speech and association. Permissible activities listed in the Civic Center Act encompass virtually all forms of expression: artistic, political, religious, economic, educational and moral. Indeed, this forum established in California schools was deemed by the California Supreme Court as "no less public" than public parks or streets.

76 Ops. Cal. Att'y Gen. 52, 1993 WL 122644, at *1 (1993) ("1993 Attorney General Opinion") (quoting Danskin v. San Diego Unified Sch. Dist., 28 Cal.2d 536, 547, 171 P.2d 885, 892 (1946)) (other citations omitted).[8]

Excluding the Plaintiffs from free access otherwise granted to secular organizations like the Boy Scouts whose speech concerns the same subject matter as the Plaintiffs is simply not reasonable in light of the Civic Center Act's purpose

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[8]The Civic Center Act was first enacted in 1913. See Danskin, 28 Cal.2d at 555. The provisions concerning religious organizations in the California Statute were apparently added by a 1963 amendment to the Civic Center Act. See 43 Ops. Cal. Att'y Gen. 62, 62 (1964), discredited on other grounds by, 1993 Attorney General Opinion, at *3.

of encouraging the exchange of ideas.

The fact that some other organizations may also be charged direct cost fees is immaterial so long as other organizations engaging in activities that are in substance like that of the Plaintiffs are granted free access. See Defs' Opp. at 2 (asserting that some secular groups are also charged a usage fee). In Rosenberger, the University's policy also excluded certain categories, such as "political activities" and "philanthropic contributions and activities," from the reimbursement program. 515 U.S. at 825. The Supreme Court nevertheless focused upon the fact that the religious student group was engaged in producing a public policy magazine, an activity otherwise fundable under the policy. See id. at 846.

Considering that the Supreme Court has already concluded that there is "no logical difference" between the Good News Clubs and the Boy Scouts, Good News Club, 533 U.S. at 111, granting free access to the Boy Scouts but not the Plaintiffs is patently unreasonable. See also Gentala, 325 F. Supp. 2d at 1019 (commenting that "[i]t is unclear how" denying funding to religious organizations that engage in religious activities is "'reasonable' in light of the purpose of the forum — encouraging and supporting civic events").

III. CONCLUSION

For the reasons set forth above, appropriate relief should be granted.

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

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