

No. 05-1508

**In the
United States Court of Appeals
For the Fourth Circuit**

CHILD EVANGELISM, *et al.*,

Plaintiffs-Appellants,

v.

MONTGOMERY COUNTY PUBLIC SCHOOLS, *et al.*

Defendants-Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR MARYLAND**

**BRIEF *AMICUS CURIAE* OF
THE NATIONAL LEGAL FOUNDATION,
Supporting Appellant,
Urging reversal**

Steven W. Fitschen
Counsel of Record for Amicus Curiae
Colleen M. Holmes
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
(757) 463-6133

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
ARGUMENT.....	1
I. THE TAKE HOME FLYER POLICY ALLOWS FOR IMPROPER SPEAKER IDENTITY DISCRIMINATION BECAUSE IT VIOLATES BOTH THE INTERNAL AND EXTERNAL STANDARDS FOR A LIMITED PUBLIC FORUM	2
A. <u>The District Court erred when it held that MCPS’s changes to the take home flyer policy changed the nature of the forum from a limited public forum to a non-public forum.</u>	2
B. <u>MCPS’s take home flyer policy does not meet either the internal or the external standard, because it excludes CEF, which is of similar character to sports groups, which the policy allows access to the forum.</u>	4
II. EVEN IF THE TAKE HOME FLYER FORUM WAS A NON-PUBLIC FORUM, MCPS’S POLICY IS STILL IMPERMISSIBLE BECAUSE IT IS MERELY A FAÇADE FOR VIEWPOINT BASED DISCRIMINATION.....	7
CONCLUSION.....	9

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Arkansas Educ. Television Comm'n v. Forbes</i> , 523 U.S. 666 (1988).....	3
<i>Child Evangelism Fellowship of Maryland v.</i> <i>Montgomery County Public Schools</i> , 373 F.3d 589 (4 th Cir.)	3, 4, 7, 8
<i>Child Evangelism Fellowship v.</i> <i>Montgomery County Public Schools</i> , 368 F. Supp. 2d 416 (D. Md. 2005).....	3, 4, 5, 7, 8
<i>Child Evangelism Fellowship v.</i> <i>Stafford Township School District</i> , 386 F.3d 514 (3 rd Cir. 2004).....	6
<i>Cornelius v. NAACP Legal Defense and Ed. Fund</i> , 473 U.S. 788 (1985).....	3, 5, 7
<i>Perry Education Ass'n v. Perry Local Educators' Ass'n</i> , 460 U.S. 37	2
<i>Warren v. Fairfax</i> , 196 F.3d 186 (4 th Cir. 1999)	2, 3, 5

INTEREST OF *AMICUS CURIAE*

The National Legal Foundation (NLF) is 501c(3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of the effect it will have on religious liberty and the potential it has to protect or limit Christian organizations from *de facto* discrimination within public schools. This Brief is filed pursuant to the consent of the parties in this case.

ARGUMENT

Several issues are before the Court in the present case, however, this brief will only address the Montgomery County Public School's (hereinafter, "MCPS") flyer take home policy, as it has been modified following this Court's determination that Child Evangelism Fellowship (hereinafter, "CEF") was entitled to a preliminary injunction to prevent MCPS from excluding it from the take home forum.

This brief will demonstrate that the District Court erred in upholding the take home policy, because it facilitates impermissible discrimination against CEF and other groups of similar character and; despite the District Court's dismissal of the notion, evidence indicates that MCPS's changes to the policy changes are, in reality, merely a façade for viewpoint based discrimination.

I. THE TAKE HOME FLYER POLICY ALLOWS FOR IMPROPER SPEAKER IDENTITY DISCRIMINATION BECAUSE IT VIOLATES BOTH THE INTERNAL AND EXTERNAL STANDARDS FOR A LIMITED PUBLIC FORUM.

A. The District Court erred when it held that MCPS's changes to the take home flyer policy changed the nature of the forum from a limited public forum to a non-public forum.

The District Court cites *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), which identifies three types of government fora, and sets forth the level of scrutiny with which exclusions from each forum will be evaluated. As this Court well knows, the first category set forth in *Perry* is the traditional public forum, which includes public places such as parks, sidewalks and other public areas that have traditionally been open to speech and debate. In a traditional public forum, content-based exclusion must be narrowly drawn to serve a compelling state interest. 460 U.S. at 45. The second category is the non-public forum, where the government “has [the] power to preserve the property under its control for the use to which it is lawfully dedicated,” subject only to a “reasonableness” test. *Id.* at 46 (quotation marks and citations omitted).

The third category is known as a limited or designated public forum. This is essentially a “hybrid” forum. *Warren v. Fairfax*, 196 F.3d 186 (4th Cir. 1999). It is not a traditional public forum, but one that government has opened as a place for expressive activity. *Id.* “A designated public forum can be opened only to a limited class of speakers or for limited topics.” As this Court explained in *Warren*,

two levels of First Amendment analysis are applied to limited public fora. The first is the “internal standard,” which dictates that “[i]f the government excludes a speaker who falls within a class to which a designated [limited] public forum is generally made available, its action is subject to strict scrutiny.” 196 F.3d at 193 (quoting *Arkansas Educ. Television Commission v. Forbes*, 523 U.S. 666 (1988)). The second standard, the “external standard” states that “once a limited forum has been created, entities of a ‘similar character’ to those allowed access may not be excluded.” *Warren*, 196 F.3d at 194.

The District Court erroneously held that MCPS intended to create a non-public forum through its revised take home flyer policy. The District Court cites *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 803 (1985), which declares that, “[n]ot every instrumentality used for communication . . . is a . . . public forum.” No public forum will be found “in the face of clear evidence of a contrary intent” *Id.* The District Court asserts that MCPS intended to create a non-public forum. *Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools*, 368 F. Supp. 2d 416, 425 (D. Md. 2005). However, there is no “clear evidence” that the nature of the forum has changed.

Rather, the clear evidence indicates that MCPS maintained a limited public forum, as it kept the forum open to outside groups. This Court held in *Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools*, 373

F.3d 589 (4th Cir. 2004) that the take home folder forum was a limited public forum. The new policy, at least under MCPS’s reading of it even makes provision for excluded entities to access the forum if they could obtain sponsorship from one of the specifically included groups. *Child Evangelism*, 368 F. Supp. 2d at 425. Thus, *all* entities *except* those that for whatever reason—including a cabal between MCPS and some or all of the other entities—cannot find a sponsor get to participate. *Only* CEF and other “black balled” entities are shut out.

This policy change does nothing to correct the discrimination this Court sought to eradicate when it ruled that CEF was entitled to a preliminary injunction to prevent MCPS from excluding it from this forum, instead, it underscores the discrimination by treating sports leagues differently from other groups of similar character.

B. MCPS’s take home flyer policy does not meet either the internal or the external standard, because it excludes CEF, which is of similar character to sports groups, which the policy allows access to the forum.

As this Court has already ruled, the take home flyer forum is a limited public forum. For the reasons just stated above, following the policy change, the forum remains a limited public forum. However, because of the peculiarities of the sponsorship provisions, the forum is only “facially” open to Montgomery County Public Schools, agencies or departments within the county, state or federal government, parent teacher associations/organizations, licensed day care operating

on the schools' campuses and nonprofit organized youth sports leagues. *Child Evangelism*, 368 F. Supp. 2d at 423.

Because CEF does not fall directly within one of these categories, the “internal standard” arguably does not apply. However, as the following argument will show, because CEF is of a “similar character” as nonprofit organized youth sports leagues, an included entity, the “external standard” applies, and MCPS’s policy falls short of this standard. Clearly, if the policy fails the lesser external standard, it would also fail the internal standard’s strict scrutiny requirements.

The external standard dictates that “entities of a ‘similar character’ to those allowed access may not be excluded.” *Warren*, 196 F.3.d at 194. The objective purposes of the forum are to be discerned from the types of groups included in the forum. *Cornelius* is instructive on this issue, as it involved the Combined Federal Campaign, an organized effort to enable government employees the ability to easily contribute to various social welfare organizations. The NAACP challenged the government excluding it from the fund. The Court held that the forum at issue was the CFC, itself, not the federal workplace overall. *Cornelius*, 473 U.S. at 800-01. Similarly, in the present case, the forum at issue would be the take home flyers, not the school system.

The entities that MCPS has allowed to access the take-home flyer forum are very diverse. Thus some might claim that it is difficult to ascertain the similarities

of character of these entities. However, some commonalties among the included groups are that they provide convenience and expediency in conveying information to the parents and have the capacity to provide parents and students with information about resources pertaining to students' general well-being. Certainly CEF, and many other entities partake of a similar character. In particular, sports leagues are extracurricular and share many characteristics with CEF.

The following are some of CEF's Good News Clubs' objectives, as stated in a Third Circuit opinion involving a different issue:

[I]nstilling or cultivating, "self-esteem, character, and morals in children," providing children with a "positive recreational experience, " providing a community where "children feel loved, respected, and encouraged," teaching children "life skills and healthy choices," teaching children to "encourage and lead other children" to the same sorts of choices, improving "memory skills, grades, attitudes, and behavior at home," improving relations among the races, instructing children to overcome feelings of jealousy" and to treat others as they want to be treated themselves, teaching children to be "obedient and to respect persons in authority."

Child Evangelism Fellowship v. Stafford Township School District, 386 F.3d 514, 521-22 (3rd Cir 2004) (quoting the case's Joint Appendix). This list—in addition to describing CEF—describes the ideals that many recreational or extracurricular entities, including sports leagues, strive to instill in students. Yet MCPS is treating sports leagues differently from among all the various activities. Allowing sports leagues access to the take home flyer forum, while excluding all other entities that could equally serve the students' best interests violates the external standard.

II. EVEN IF THE TAKE HOME FLYER FORUM WERE A NON-PUBLIC FORUM, MCPS'S POLICY IS STILL IMPERMISSIBLE BECAUSE IT IS MERELY A FAÇADE FOR VIEWPOINT BASED DISCRIMINATION.

The Supreme Court set a relatively low bar for government entities desiring to limit access to non-public fora, “The Government’s decision to restrict access to a non-public forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.” *Cornelius*, 473 U.S. at 808. However, the Supreme Court also clearly stated in *Cornelius* that in a non-public forum, even if there were reasonable grounds for limiting access, regulations would not be upheld if they were merely “a façade for viewpoint-based discrimination.” *Id.* at 811.

The District Court stated that MCPS, “no longer opposes CEF's flyers on the basis of their religious content.” *Child Evangelism*, 368 F. Supp. 2d at 430. The fact is, however, that the take home policy was changed *immediately* after MCPS lost a hard fought legal battle specifically opposing CEF flyers on the basis of their religious content. This Court declared on June 30, 2004, that CEF was entitled to an injunction preventing MCPS from denying them access to this forum because such denial was impermissible viewpoint discrimination, *Child Evangelism Fellowship of Maryland*, 373 F.3d 589, and MCPS changed the policy, in July 2004 to avoid this Court’s ruling, *Child Evangelism Fellowship*, 368 F. Supp. 2d at 424.

MCPS presented extensive arguments supporting their concern over Establishment Clause issues when in prior litigation before this Court. *Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools*, 373 F.3d 589 (4th Cir.). It is difficult to accept the notion that MCPS has abandoned all of these specifically litigated concerns in light of the fact that despite this Court’s ruling, they found a way to deny CEF access to the take home flyer forum, and chose to continue the legal battle against this Court’s ruling claiming that they are merely working to counteract the “burgeoning” number of organizations who seek to send materials home in their children’s backpacks, *Child Evangelism*, 368 F. Supp. 2d at 430. Furthermore, MCPS’s “burgeoning organizations” argument is problematic. While one hesitates to cast disparagement on MCPS’s proffered argument, the Supreme Court’s “façade” test requires one to consider the genuineness of the assertion. Given that all entities except non-sponsored, “black balled” entities still have access to the forum (according to MCPS) and given the just-described timing of the forum regulation change, MCPS’s argument should be seen as the quintessential façade.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's order on the take-home flyer issue.

Respectfully submitted,
This 27th day of October, 2005

Steven W. Fitschen
Counsel of Record for Amicus Curiae
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454
(757) 463-6133