Nos.: 03-2956 & 03-3107

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BARBARA WIGG,
Plaintiff/Appellee/Cross-Appellant,

vs.

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

On Appeal From the United States District Court
For the District of South Dakota, Southern Division
District Court Case No.: CIV 03-4034

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION,
in support of *Plaintiff/Appellee/Cross-Appellant*
Supporting Reversal in Part.

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INTEREST OF AMICUS

The National Legal Foundation (NLF) is a non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of its public interest litigation and educational activities relating to the public schools. The NLF litigated *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), the so-called Bible Club case. In addition to this Supreme Court case, the NLF routinely interacts with public schools on issues of religious liberty—both in support of and in opposition to these schools as the individual case may require.

This Brief is filed pursuant to the consent of the Counsel of Record for both parties.

ARGUMENT

While many issues have been raised in the cross appeals now before this Court, Amicus will address only one. The District Court erred when it held that the School District had a valid Establishment Clause defense that allows it to forbid Mrs. Wigg to participate in the Good News Club that meets at the school where she is employed, *Wigg v. Sioux Falls*, 274 F. Supp. 2d 1084, 1102-04 (S.D.S.D. 2003). In finding this violation, the District Court employed the *Lemon* test. *Id*. (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)). Under *Lemon*, the District Court held that compelling the School District to allow Mrs. Wigg to participate in the Good News Club at her school would not violate *Lemon's* first prong but would violate the second and third prongs. *Wigg,* 274 F. Supp. 2d at 1102-04. The court employed the reasonable observer approach in analyzing both of these prongs. *Id*.

Amicus believes that the District Court erred in its holding concerning both of these prongs. However, due to the District Court's cursory treatment of the third prong, and Mrs. Wigg's own factual argument in her Initial Brief, Amicus will merely point out that the District Court's three sentence analysis, *id*. at 1103, appears to be made up out of whole cloth before interacting more thoroughly with the District Court's second prong analysis.

I. THE DISTRICT COURT ERRED WHEN IT HELD THAT PERMITTING MRS. WIGG TO PARTIPATE WOULD VIOLATE LEMON'S THIRD PRONG BECAUSE THE COURT'S ANALYSIS WAS CONCLUSORY, COUNTER-FACTUAL, AND NOT SUPPORTED BY AUTHORITY.

The District Court cited neither any authority nor the record for the proposition that

> [w]hen the school's own teacher goes from teaching in her class in her school to teaching the students in her same school, it is as if school never ended. It would appear to a reasonable adult observer that a child would view this as just another class at the end of the day. A reasonable observer would consider this excessive government entanglement with religion.

Each sentence is problematic. The first sentence is counter-factual:

> The reasonable observer understands that the District allows teachers and staff to participate in all private clubs, without censorship, on the teacher's own time after school. The reasonable observer understands that Plaintiff is participating on her own time, after she is "off-the – clock," and is not being paid by the District. The reasonable observer understands that school closes each day a 2:45, that the Club doesn't begin until 3:00, and that Plaintiff would not even be at the Club until 3:30 at the earliest. This observer would also know that students may attend the Clubs only with a signed parental permission, which states that any employee who may be present is on her own time, does not represent the school, that students cannot roam the halls after school, cannot observe what takes place in the meeting, and that Plaintiff can wear a "Visitor" badge during the meeting.

(Appellee/Cross Appellant's Initial Brief at 34.) It is simply not factually true that "it is as if school never ended," *Wigg*, 274 F. Supp. 2d at 1103.

The second sentence transforms the reasonable observer standard into something unrecognizable. The reasonable observer is an adult who views the school's policy, *Good News Club v. Milford*, 533 U.S. 98, 115 (2001), not an adult who passes judgment on how a child interprets the school's policy. Not surprisingly, the District Court offered no authority for this definition of the reasonable observer.

Finally, the third sentence is nothing more than a bald assertion. Again, the District Court cited neither authority nor the record for this pronouncement. Even assuming *arguendo* the validity of the first two sentences, the third sentence represents a leap of logic of the first magnitude.

II. THE DISTRICT COURT ERRED IN HOLDING THAT PERMITTING MRS. WIGG TO PARTICIATE WOULD VIOLATE LEMON'S SECOND PRONG BECAUSE HER PARTICIPATION WOULD NOT "APPEAR" TO ESTABLISH A RELIGION.

In holding that *Lemon's* second prong would be violated, the District Court relied on the Supreme Court's opinion in *County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989).[1] The District Court stated that "'[a]ppearing' to endorse religion is enough for an Establishment Clause violation." *Wigg v. Sioux Falls*, 274 F. Supp. 2d 1084, 1103 (S.D.S.D. 2003). However, while the word "appearing" certainly exists in the *Allegheny* opinion, the District Court's invocation of it

proves too little. Appearance *per se* does not violate the Establishment Clause in all contexts. As the Supreme Court pointed out in *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984), "In each [Establishment Clause] case, the inquiry calls for line drawing: no fixed, *per se* rule can be framed." Surrounding factors can remove or dilute the effects of an appearance of government endorsement of religion. In relying on *Allegheny,* the District Court ignored factual differences between the instant case and *Allegheny* and ignored a more factually similar case that applies a more precise rule on appearance, namely *Lynch*.

In both *Allegheny* and *Lynch*, the Supreme Court dealt with situations in which the government had either put up a crèche for the Christmas season, *Lynch* at 671, or had allowed an organization to erect the crèche on prominent government property, *Allegheny* at 579.

In *Lynch*, the city of Pawtucket annually erected a crèche as part of its Christmas display throughout the holiday season. Also included in this display were reindeer, a Santa Claus house, candy-striped polls, a Christmas tree and other secular symbols of the Christmas season. 465 U.S. at 680. The majority looked at the crèche in the context of the entire Christmas display. The *Lynch* District Court, according to the Supreme Court, erred when it looked exclusively at the crèche.

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[1] The District Court's opinion gave a pinpoint cite of 574. The proper pinpoint is 594.

Id. When the Supreme Court looked at all the surrounding factors regarding the crèche, it concluded that Pawtucket's secular purpose in including the crèche outweighed any appearance of government endorsement of religion that the crèche may have had. *Id.* at 686.

In *Allegheny*, the facts were similar to the facts presented in *Lynch*. However, there was one important difference. In *Allegheny*, the government had allowed The Holy Name Society to erect a crèche in the main staircase of the county courthouse. 492 U.S. at 579. In explaining why the *Lynch* crèche was permissible while the one then in dispute was not, the *Allegheny* Court noted that

> [u]nder the Court's holding in *Lynch*, the effect of a crèche display turns on its setting. Here, unlike in *Lynch*, nothing in the context of the display detracts from the crèche's religious message. The *Lynch* display comprised a series of figures and objects, each group of which had its own focal point. Santa's house and his reindeer were objects of attention separate from the crèche, and had their specific visual story to tell. Similarly, whatever a "talking" wishing well may be, it obviously was a center of attention separate from the crèche. Here, in contrast, the crèche stands alone: it is the single element of the display on the Grand Staircase.

Id. at 598.

While *Lynch* and *Allegheny* were religious display cases and the instant case is not, the application of the principles is clear. Here, the School District would not "appear" to be establishing religion because district employees' participation in the Good News Club does not "stand alone." Germane to Mrs. Wigg's facial challenge, the district's policy permits employees to use the building in which they

work for innumerable non-school organizations. *Wigg*, 274 F. Supp. 2d at 1087. Germane to Mrs. Wigg's as-applied challenge, the district has permitted *her* to participate in other non-religious organizations' meetings at her school, namely the Sioux Reading Council, the Girl Scouts, and a book club. In addition, she gives free guitar lessons in the building. (Appellee/Cross Appellant's Initial Brief at 15.) Thus, neither Mrs. Wigg's nor all employees' participation in religious organizations stand alone, and thus, do not violate the Establishment Clause.

III. THE DISTRICT COURT ERRED IN HOLDING THAT PERMITTING MRS. WIGG TO PARTICIATE WOULD VIOLATE LEMON'S SECOND PRONG BECAUSE THERE IS NO FEAR OF AN ESTABLISHMENT CLAUSE VIOLATION THAT JUSTICFIES VIOLATING HER FIRST AMENDMENT RIGHTS.

However, there is a further problem with the District Court's analysis. In inappropriately, *i.e*., superficially, invoking *Allegheny's* use of the word "appear," the District Court purported to find an actual violation of the Establishment Clause would occur if the School District were compelled to allow Mrs. Wigg to participate in the Good News Club at her school. However, other parts of the District Court's opinion indicate that the District Court seemed to actually be more concerned with allowing the School District to protect against the *fear* of an Establishment Clause violation.

For example, the District Court quoted extensively from *Marchi v. Board of Cooperative Educational Services of Albany*, 173 F.3d 469 (2d Cir. 1999):

> When government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause . . . . The decisions governmental agencies make in determining when they are *at risk of* Establishment Clause violations are difficult . . . .

Wigg, 274 F. Supp. 2d at 1099-1100 (citing *Marchi*, 173 F.3d at 476 (emphasis added)).

Thus, the District Court's entire opinion seems to be animated by concerns about the School District "appearing" to violate the Establishment Clause or "fearing" to violate the Establishment Clause. Whether the School District actually argued in terms of fear of a violation or whether the District Court merely analyzed the argument this way is immaterial since such a fear provides even less of a defense than an actual violation (which, as discussed above, does not exist in this case). Just as the District Court interacted with the *Allegheny* opinion in a superficial manner, so here it interacted with the persuasive authority of *Marchi* in a superficial manner. *Marchi* is simply not on point. The very passage the District Court quoted shows as much. The situation in *Marchi* was one in which the teacher discussed "forgiveness, reconciliation, and God", 173 F.3d at 472, during instructional time. Thus, the situation was accurately described by the *Marchi* court (in the passage quoted by the court below in the instant case) as one in which "government [was] both the initiator of some religiously related actions, through

the conduct of employees, and the regulator of the extent of such activities . . . ." *Id.* at 476. However, Mrs. Wigg's desire to participate in the Good News Club when not on contract time is utterly different. Indeed under the *Marchi* analysis, such participation is not problematic.

In erroneously invoking *Marchi* in this context, the District Court has taken language from a case involving a straightforward and obvious Establishment Clause violation and given it an entirely different "flavor." What the District Court should have done was to look at what courts have really said about the legitimacy of using the *fear* of an Establishment Clause violation as a defense. Admittedly, the line between a defense based upon an Establishment Clause violation and the *fear* of such a violation can be a fine one. In fact, sometimes a party may characterize its defense as being based upon a violation of the Establishment Clause, while the *court* will characterize it as a fear of such a violation. *See, e.g.*, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 362-63, (1993); and *Widmar v. Vincent*, 454 U.S. 263, 270-71, 273 (1981).

However, some cases clearly explain the difference between an Establishment Clause violation and the fear of an Establishment Clause violation. One such case is *Tenafly Eruv Ass'n v. Borough of Tenafl*y, 309 F.3d 144 (3d Cir. 2002). There, the Borough of Tenafly, New Jersey, was sued when it refused to

allow the Tenafly Eruv Association to use postings on utility poles to create an eruv. *Id*. at 151. The *Tenafly* court succinctly described an eruv:

> The plaintiffs in this case are Orthodox Jewish residents of Tenafly whose faith forbids them from pushing or carrying objects outside their homes on the Sabbath or Yom Kippur. In accordance with a religious convention practiced by Orthodox Jews for over two thousand years, however, the plaintiffs believe they may engage in such activities outside their homes on the Sabbath within an eruv, a ceremonial demarcation of an area. An eruv extends the space within which pushing and carrying is permitted on the Sabbath beyond the boundaries of the home, thereby enabling, for example, the plaintiffs to push baby strollers and wheelchairs, and carry canes and walkers, when traveling between home and synagogue. Without an eruv Orthodox Jews who have small children or are disabled typically cannot attend synagogue on the Sabbath.

Id. at 152 (citations and footnotes omitted). The Borough argued that it could refuse to allow the eruv even though doing so would impinge on the Association's First Amendment rights.

Tenafly is particularly helpful here, since the Third Circuit explicitly noted the difference between a violation of the Establishment Clause and the fear of such a violation:

> The Borough maintains that its decision to remove the eruv is justified by its "compelling" interest in avoiding "an Establishment Clause controversy." Contrary to the Borough's position, however, a government interest in imposing greater separation of church and state than the federal Establishment Clause mandates is not compelling in the First Amendment context. . . .
>
> . . . .

> The Borough further argues, however, that leaving the eruv in place would constitute an actual Establishment Clause violation, and that the need to avoid such a violation justifies discriminating against the plaintiffs' religiously motivated conduct.

Id. at 172-73.

The Third Circuit clearly distinguished between an actual violation of the Establishment Clause and the fear of violating the Establishment Clause. Because the latter would constitute imposing a greater separation of church and state than that required by the Establishment Clause, it could not justify violating the Eruv Association's First Amendment rights. So here, the School District's fear of an Establishment Clause violation cannot justify violating Mrs. Wigg's First Amendment rights. This Court should adopt the reasoning of the *Tenafly* Court and hold that the School District's fear of an Establishment Clause violation cannot serve as a reason to prohibit her participation in the Good News Club at her school.

Admittedly, not all courts have held that fear of an Establishment Clause violation is *never* sufficient to override other First Amendment rights. Some courts, at least implicitly, distinguish between "unfounded fears" and more serious fears. So for example, in analyzing whether a baccalaureate service held on school property would violate the Establishment Clause, the court in *Shumway v. Albany School District No. One*, 826 F. Supp. 1320 (D. Wyo, 1993), distinguished between realistic and unfounded fears that members of the community would

perceive an Establishment Clause issue. *Id.* at 1326-27. In so doing, the court actually relied upon the language from *Lamb's Chapel* in which the United States Supreme Court noted that under the circumstances of that case, there had been "no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental." *Id.* at 1326 (citing *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993)).

It is important to note that the *Shumway* court was citing the reasoning of the *Lamb's Chapel* Court as it analyzed an Establishment Clause violation defense. However, school districts then began to seize upon this language and explicitly argue that fear (at least a realistic fear) itself was sufficient to violate the First Amendment rights of those in the surrounding communities. So for example in *Shumway*, "the Board argued that it feared for an Establishment Clause violation . . . ." *Id*.

Arguably, the *Shumway* Court used the "no realistic danger" language from *Lamb's Chapel* in a superficial manner by failing to realize that in *Lamb's Chapel* the School District had asserted a defense of an Establishment Clause violation whereas the school board in its case was arguing a fear of such a violation. In other words, the *Shumway* court missed the distinction explicitly noted by the *Tenafly* court.

Nonetheless, should this Court decide to adhere to the unfounded/realistic distinction, the *Shumway* court's analysis is instructive in the instant case. The *Shumway* court was faced with a school district that had made a fear of Establishment Clause violation defense. On this basis, it had refused to allow the baccalaureate service to take place on its property. The court noted that

> [i]n this case, the Board argued that it feared for an Establishment Clause violation, and that the circumstances were such that, if the baccalaureate ceremony were to be held at Laramie High gymnasium, it would appear the Board was endorsing or sponsoring religion. It does not appear to be in dispute that the Board could have disclaimed its association with the baccalaureate ceremony by doing something other than denying the baccalaureate group the right to rent the gymnasium on the same terms and conditions as all other groups renting the same gymnasium.

Shumway, 826 F. Supp. at 1326.

The *Shumway* court believed that the school board would be able to disclaim its association despite the existence of "indicia that might have caused certain community members to believe the baccalaureate ceremony was being sponsored by the school rather than private individuals." *Id.* at 1326-27.

Thus, even should this court adopt *Shumway's* unfounded/realistic distinction, the School District in the instant case can disclaim its association with Mrs. Wigg's participation in the Good News Club at her school by "doing something other than denying [her] the right," *id.*, to participate there at all.

Indeed, the permission slip, *Wigg*, 274 F. Supp. 2d at 1088, already serves that purpose.

In fact, this is a mush easier case than *Shumway*. There, the indicia of school sponsorship included the following:

> a single written announcement was printed for the graduation and baccalaureate ceremonies, a letter from the school principal which referred to baccalaureate, participation of the school choir and orchestra in the baccalaureate ceremony, and the fact that parents of some graduating seniors who planned to participate in the baccalaureate ceremony were also School District employees.

Shumway, 826 F. Supp. at 1327.

The *Shumway* court admitted that "[t]hese factors suggest an 'aura of affiliation' with the school . . . [and that] the Board's dissociation from the baccalaureate ceremony could have been more unequivocal . . . ." *Id.* (citation omitted). The court still found that there was no realistic fear of an Establishment Clause violation because of the baccalaureate's private sponsorship. *Id*.

In the instant case, the Good News Club is sponsored by the private organization, Child Evangelism Fellowship, *Wigg*, 274 F. Supp. 2d at 1087, and the indicia of sponsorship are far less pervasive. Furthermore, another point that the *Shumway* court made is relevant to a defense of the fear of an Establishment Clause violation (although arguably not to a defense of an actual Establishment Clause violation): "[T]he Board's able and vigorous defense to plaintiffs' complaint in this case aids in disseminating the message to the community that the

Board is not endorsing or sponsoring religion . . . ." *Shumway*, 826 F. Supp. at 1327. Thus, there is no *realistic* fear of an Establishment Clause violation and Mrs. Wigg's rights cannot by violated.

CONCLUSION

Because allowing Mrs. Wigg to participate in the Good News Club at her school does not violate the Establishment Clause, the School District's Establishment Clause violation defense must fail. To the extent that the School District has argued (or that the District Court has construed the School District's argument to mean) a fear of an Establishment Clause defense, that defense is also invalid for the reasons stated above. Since neither of these defenses can avail, the District Court should be reversed to the extent that it upheld the ban on Mrs. Wigg's participation in the Good News Club at the school at which she is employed.

Respectfully submitted,
this 4th day of December, 2003,

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Amicus Brief and accompanying disk in the case of *Wigg v. Sioux Falls*, No. 03-2956 & 03-3107, on all required parties by depositing the required number of copies of the same in the United States mail, first class postage, prepaid on December 4, 2003, addressed as follows:

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