02-3897

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MELISSA DONOVAN, A Minor, By MICHAEL DONOVAN
and JULIE DONOVAN, Her Parents,

Plaintiff-Appellant,

v.

Punxsutawney Area School District; THOMAS FRANTZ, Individually And In His Capacity As Superintendent of The Punxsutawney Area High School; ALLEN TOWNS, Individually and In His Capacity As Principal of The Punxsutawney Area High School; And DAVID LONDON, Individually And In His Capacity As Principal Of The Punxsutawney Area High School,

Defendants-Appellees

ON APPEAL FROM THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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v.

PUNXSUTAWNEY AREA SCHOOL DISTRICT, et al.,

Defendants-Appellees

ON APPEAL FROM THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF APPELLANT

INTEREST OF THE UNITED STATES

This case presents important questions concerning the application of the Equal Access Act (EAA), 20 U.S.C. 4071-4074. Specifically, the case addresses what constitutes a "limited open forum" as defined by the EAA, and whether the EAA applies to activities conducted during the school day, or is limited to before or after school hours. This case also presents important questions of how First Amendment principles relating to viewpoint discrimination should be applied to religiously-based activities in a public school setting.

The United States has participated in two cases involving the scope of the Equal Access Act, *Board of Education* v. *Mergens*, 496 U.S. 226 (1990) and

Ceniceros v. *Board of Trustees*, 106 F.3d 878 (9th Cir. 1997), and numerous cases addressing similar First Amendment issues of equal access for religious speakers, including *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Bronx Household of Faith* v. *Board of Education*, No. 02-7781 (pending in 2d Cir.). In addition, as we stated in *Lamb's Chapel*, "[t]he United States is the proprietor of numerous non-public and 'designated' or 'limited' public forums," and accordingly has an interest in the outcome of cases involving this subject matter. U.S. Amicus Brief at 1.

In addition, the United States has an interest in enforcement of First Amendment principles providing equal treatment of persons irrespective of their religious beliefs. This is especially true when, as here, a complaint also raises parallel Fourteenth Amendment equal protection claims. This interest arises from the United States' ability to intervene, pursuant to Title IX of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2, in equal protection cases of general public importance.[1]

The United States files this brief as amicus curiae pursuant to Fed. R. App.

[1] Because most claims of religious discrimination are addressed in the context of the First Amendment, few opinions address religion under the Fourteenth Amendment. The Supreme Court has, however, often referred to discrimination on the basis of religion as a suspect classification subject to strict scrutiny. See, *e.g.*, *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (prosecution may not be based on an "unjustifiable standard such as race, religion, or other arbitrary classification") (quoting *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962)); *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) (rational basis review of economic legislation contrasted with "inherently suspect distinctions such as race, religion, or alienage").

P. 29(a).

STATEMENT OF THE ISSUES

1. Whether the Equal Access Act, 20 U.S.C. 4071 *et seq.*, requires that Punxsutawney Area High School permit students to hold meetings of a Bible club during the school's activity period when other student clubs are permitted to meet.

2. Whether the school's refusal to allow students to hold Bible club meetings during the activity period on an equal basis with other student groups violates the First Amendment.

STATEMENT OF THE CASE

Plaintiff Melissa Donovan, through her parents, filed this suit against the Punxsutawney Area School Board and various school officials claiming that the school officials violated her rights under the Equal Access Act, 20 U.S.C. 4071, *et seq.* (EAA), and the First and Fourteenth Amendments of the Constitution. R. 1; App. 2 at 1-4; 10-11.[2] The complaint alleges that Donovan is a student at the Punxsutawney Area High School (PAHS) and is involved in a Bible club that focuses on "community services and other issues of concern to students of Punxsutawney High School from a Christian perspective." App. 2 at 2. The club, known as FISH, begins and ends every meeting with a prayer. App. 2 at 14-15 (testimony of Melissa Donovan). FISH has a faculty advisor who attends every

[2] References to "R. __" are to entries on the district court docket sheet; references to "App. 1 at __" and "App. 2 at __" are to pages in the appendix volumes attached to Appellant's opening brief.

meeting but does not participate in or run the meetings. *Id.* at 15-16. The School District has allowed FISH to meet before the school day begins. *Id.* at 17.

PAHS holds homeroom period from 8:05 a.m. until 8:15 a.m., followed by an "activity period" from 8:15 a.m. until 8:54 a.m. (the period at issue here), after which the first classroom period begins. *Id.* at 92. During the activity period, students are free to attend club meetings, study hall, student government meetings, meet with teachers or counselors, go to the gymnasium or library, stay in homeroom, make up tests, engage in behind-the-wheel driver's education instruction, or attend a tutoring program, math or English clinics for college tests, or assembly programs. *Id.* at 106-112. Students are not, however, permitted to leave the campus. *Id.* at 51 (testimony of David London, PAHS principal). Clubs permitted to meet during the activity period are official school clubs with faculty sponsors, *id.* at 53, and include a ski club, an anti-alcohol and tobacco group called Students Against Destructive Decisions, and the Future Health Services club. *Id.* at 108.

On January 23, 2002, plaintiff filed suit against the defendant school officials, claiming that because of the religious nature of the club, PAHS denied FISH access to school facilities during the activity period. Plaintiff moved for a preliminary injunction. The district court denied the motion, concluding that the plaintiff was not likely to succeed on the merits of her claims. R. 14; App. 1 at 8-18. The district court found that the EAA did not apply to the activity period at PAHS because the activity period was not "noninstructional time" as that term is

defined in the statute. R. 14 at 6; App. 1 at 13. The district court also held that the school's refusal to allow the club to meet during the activity period did not violate the First Amendment because the school officials have a compelling interest in not violating the Establishment Clause, which outweighed plaintiff's First Amendment interests. R 14 at 10; App. 1 at 17.

On October 10, 2002, upon the agreement of the parties that the district court's denial of the preliminary injunction resolved all the issues, the case was closed. R. 18; App. 1 at 19-20. On October 16, 2002, plaintiff filed a timely notice of appeal of the district court's October 10 final order. R. 19; App. 1 at 1.

SUMMARY OF ARGUMENT

The Equal Access Act (EAA), 20 U.S.C. 4071(a), prohibits covered secondary schools that have created a "limited open forum" from denying students the permission to conduct meetings because of the "religious, political, philosophical, or other content of the speech at such meetings." A "limited open forum" exists under the EAA whenever a covered school permits "one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. 4071(b). The district court improperly concluded that because some instructional courses are offered during the activity period, student attendance at school during this period is required, and the school counts this time toward state mandated minimum hour requirements, the activity period was instructional time for purposes of the EAA. None of these factors supports such a conclusion.

First, because school officials have permitted student groups that are clearly "noncurriculum related" to hold meetings during the activity period, they have created a "limited open forum" as that term is used under the EAA. See *Board of Educ.* v. *Mergens*, 496 U.S. 226, 245-246 (1990). The fact that instructional activity for some students such as tutoring or make-up exams also takes place does not mean that, taken as a whole, the activity period is "instructional time." Second, while the activity period is held during the school day, mere mandatory presence in the school building is not sufficient to make the activity period "instructional." Instead, the EAA and Supreme Court precedent focus on whether *all* students are engaging in curriculum-related activities. Finally, the fact that PAHS and state officials count the "activity period" toward the minimum number of hours of "instructional time" state law requires, does not and cannot define the EAA's applicability. Allowing state actors to define the school day in a way that clearly conflicts with the plain meaning of the EAA is impermissible under Supremacy Clause principles.

The refusal to allow FISH to hold meetings during the activity period also violates plaintiff's First Amendment rights. By opening up the school to a broad range of student groups during the activity period, school officials similarly created a "limited public forum" for purposes of First Amendment analysis. In such a forum, the government "must not discriminate against speech on the basis of viewpoint, and [any] restriction must be 'reasonable in light of the purposes served by the forum.'" *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 106-

107 (2001) (citation omitted). Denying FISH access to the activity period simply because of its religious perspective constitutes impermissible viewpoint discrimination in violation of the First Amendment.

While the government may be able to justify excluding some speech from a limited public forum based on viewpoint if there is a compelling state interest to do so, see *Widmar* v. *Vincent*, 454 U.S. 263, 270 (1981), the school officials here have utterly failed to establish such an interest. The Supreme Court has repeatedly held that granting equal access to a religious group does not necessarily violate the Establishment Clause. See *e.g.*, *Widmar*, 454 U.S. at 274-275; *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993); *Good News Club*, 533 U.S. at 114. Permitting FISH to meet during the activity period does not lend an imprimatur of school approval or endorsement of its activities. Instead, providing equal access to all student groups without regard to their religious viewpoint respects the very neutrality the Establishment Clause requires and avoids unnecessary government entanglement with religion. See *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 845-846 (1995).

Finally, that school officials count the activity period toward the mandatory state minimum hours of instruction does not present an Establishment Clause problem. Students are not required to attend FISH meetings during the activity period; instead, the school has determined that there is value in creating a forum for the free exploration and expression of student interests by offering students a broad array of student and faculty-led activities from which they are free to

choose. That some students may exercise their choice by participating in a religious-oriented group during the activity period does not in any way represent official endorsement of religion by the school.

ARGUMENT

I

DENYING FISH ACCESS TO THE LIMITED OPEN FORUM THE SCHOOL HAS CREATED DURING THE ACTIVITIES PERIOD VIOLATES THE EQUAL ACCESS ACT

The Equal Access Act (EAA) states:

> 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 forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. 4071(a). The issue here is whether the "activity period" PAHS offers during the school day is a "limited open forum" as defined by the EAA.

Under the EAA, a "limited open forum" is created "whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. 4071(b). The EAA defines "noninstructional time" as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." 20 U.S.C. 4072(4).

The Supreme Court, in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), provided guidance for deciding when an "activity period" is a limited open

forum. In *Mergens*, high school students sought to use their high school classrooms after school hours for meetings of their Christian group. While other student clubs were allowed to use school facilities after school hours, the school board denied the students' request based on the religious nature of their club. In concluding that the school board's denial of this request violated the EAA, the Supreme Court held that the term "noncurriculum related student group" means "any student group that does not *directly* relate to the body of courses offered by the school." *Id.* at 239 (emphasis in original).

The Court in *Mergens* noted that a number of the student groups the Westside Community Schools permitted to use school facilities after school hours qualified as "noncurriculum related student groups." *Id.* at 245-246 (noting that Subsurfers (a club for students interested in scuba diving), the Chess Club, and the Peer Advocate program (a service group that works with a special education class), were all noncurriculum related groups). By allowing these groups to use the school's facilities, the Court held the Westside school board created a limited open forum. *Id.* at 236.

The activity period at PAHS is virtually identical to that created in *Mergens*, differentiated only by the fact that it is conducted during the school day, as opposed to after school. By permitting student clubs whose content is not directly related to the high school's curriculum – such as the Ski Club and Students Against Destructive Decisions – to use school facilities during the activity period, school officials have created a "limited open forum."

The district court relied heavily on the fact that the activity period was held during the school day in concluding that the activity period was not "noninstructional time." The court held that "because there is instructional activity conducted during the activity period (i.e. classes and make-up classes), that attendance is required, and that this time is counted toward the state mandated hourly requirement (22 Pa. Code, § 11.3), the activity period at the PAHS is instructional time * * * [and therefore] the activity period at the PAHS is not a limited open forum as defined by the EAA." R. 14 at 6; App. 1 at 13. None of these factors, however, establishes that the activity period at PAHS, even if held during the school day, is not a "limited open forum" as defined by the EAA.

First, while the district court correctly observed that some of the activities held during the activity period, such as "classes and make-up classes," constitute "actual classroom instruction," other activities clearly do not. The fact that some students may be participating in instructional activity does not mean that the activity period is instructional time when other students are permitted to participate in noncurriculum related activities. As the Court stated in *Mergens*, "even if a public secondary school allows only *one* 'noncurriculum related student group' to meet, the Act's obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time." 496 U.S. at 236 (emphasis added). Because PAHS students are free to, and do, participate during the activity period in student clubs that do not offer actual classroom instruction and are in no way

related to the school's curriculum, the time (at least for these students) clearly falls within the term "noninstructional time" as defined by the EAA and *Mergens*.

Second, the district court appeared to believe that because the activity period was held during the school day it *necessarily* was instructional time and not a "limited open forum." This conclusion, however, cannot be squared with the plain text of the EAA. Congress did not limit "noninstructional time" to activity "before and after the school day" or "when student attendance at school is not required." Rather, Congress chose a very specific phrase to describe what "noninstructional time" meant: times other than "actual classroom instruction." In so doing, Congress established that mandatory presence in a school, or even in a classroom, does not automatically mean that the time is "instructional time." Rather, the text of the act clearly indicates that instructional time is a period of *actual* instruction. Because the plain language of the EAA is clear on what constitutes "instructional time," this Court need not resort to the Act's legislative history. *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear.").

The Ninth Circuit has held that conducting student activity during the school day does not insulate the period from applicability of the EAA or the First Amendment. In *Ceniceros* v. *Board of Trustees,* 106 F.3d 878 (9th Cir. 1997), school officials allowed a number of noncurriculum related student clubs to meet on high school premises during lunch period, but denied plaintiff's religious club similar access. The court of appeals held that a school's lunch period, when no

actual classroom instruction occurs, was “noninstructional time” for purposes of the EAA. *Id.* at 880. The court noted that “because the plain meaning of ‘noninstructional time’ is unambiguous, we need not look to the Act’s legislative history.” *Ibid.* In *Prince* v. *Jacoby*, 303 F.3d 1074, 1087 (9th Cir. 2002), the court of appeals considered whether school officials’ refusal to permit plaintiff’s Bible club to meet during the high school’s “student/staff time,” but to allow other student groups to meet during that time, violated the First Amendment. The court concluded that First Amendment constitutional standards did not have a temporal limitation, and held that the religious club had to be permitted to meet during the school’s student/staff period. *Id.* at 1091-1092.[3]

Third, that the activity period is held during a time when students must be in school similarly is no basis for holding that the activity period *necessarily* is instructional. While students must be in the school building, they are not required to participate in any of the activities conducted during that time – they are even free to choose simply to remain in homeroom. And of course no student would be required to participate in FISH were it offered during the activity period. In this

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[3] While the Ninth Circuit in *Prince* held that the EAA did not apply to a “student/staff” period held during the school day, the court relied on the legislative history of the EAA in concluding that the EAA should not be applied to activities held after student attendance was taken. 303 F.3d at 1088-1089. Because the text of the EAA is unambiguous on this point, see discussion, *supra*, this aspect of *Prince* is erroneous. In fact, in *Mergens*, the Court noted that reliance on the legislative history of the EAA “is hazardous at best,” 496 U.S. at 242, and instead relied only on the clear text of the EAA in determining what constitutes a “noncurriculum related student group.”

respect, this case is significantly different from those cases where the Supreme Court held the Establishment Clause was violated where students were involuntarily subjected to religious activities during the school day. See *e.g.*, *Edwards* v. *Aguillard*, 482 U.S. 578 (1987) (state statute forbidding the teaching of the theory of evolution in public schools unless accompanied by instruction in creationism); *School Dist. of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985) (school district's use of religious school teachers in public schools); *School Dist. of Abington* v. *Schempp*, 374 U.S. 203 (1963) (daily mandatory reading of Bible).

Finally, the fact that the school district and the State School Board count the "activity period" toward the state's minimum number of hours of "instruction time" is irrelevant.[4] There is simply no reason that "noninstructional time" under the EAA and noninstructional time under Pennsylvania law must be read as coextensive. To the extent that counting the hours as instructional time may conflict with the EAA, it is impermissible. The Supremacy Clause establishes

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[4] The Punxsutawney school district counts the activity period as "instruction time" for purposes of complying with Pennsylvania's minimum length of an instructional school day, see 22 Pa. Code § 51.61 (2002), and Pennsylvania law appears to permit schools to count activity other than "actual classroom instruction" in calculating the length of the school's instructional day. Under Pennsylvania law, "instruction time" is defined as "the time during the school day which is devoted to instruction and activities provided as an integral part of the school program under the direction of certified school employees." 22 Pa. Code § 51.61 (2002). State School Board Guidelines include "[a]ssemblies, clubs, student councils, and similar activities conducted during school hours" as among those activities which may be counted as pupil instruction time. Basic Education Circulars, Instruction Time and Act 80 Exceptions, 24 P.S. § 15-1504 (July 1, 2001).

that, for purposes of application of the EAA, state law cannot be used to frustrate application of federal law. For example, in *Mergens,* the Court stated that permitting school systems to define "'curriculum related' in a way that results in almost no schools having limited open fora, or in a way that permits schools to evade the Act by strategically describing existing student groups, would render the Act merely hortatory." 496 U.S. at 244. School systems similarly cannot be permitted to evade application of the EAA by stating that a period that otherwise clearly is a "limited open forum" is not "noninstructional time" under the EAA simply because the school system chooses to count that time toward the state minimum number of hours of instruction time.

Defendants argued below that counting a time at which religiously-based clubs meet as instructional time for purposes of complying with state law would violate the Establishment Clause. As discussed in Part III, *infra*, this would not violate the Establishment Clause, but even if there were Establishment Clause difficulties raised by counting these hours, the answer would not be to frustrate application of the federal law. Rather, it would be to require the school system, as it easily can here, to adjust its effort to comply with state laws or regulations in a way which accommodates the requirements of the EAA.

II

DENYING PLAINTIFF AN EQUAL OPPORTUNITY TO HOLD CLUB MEETINGS DURING THE ACTIVITY PERIOD VIOLATES THE FIRST AMENDMENT

A. Schools That Permit Non-curricular Student Clubs May Not Discriminate Against A Club Based Solely On Its Religious Viewpoint

In order to prevail on her First Amendment claim, plaintiff must first establish that she enjoys a free speech right that was abridged by the school officials' refusal to grant FISH permission to meet during the activity period. The standards to determine whether a State has unconstitutionally excluded a private speaker from use of a government-controlled forum depend on the nature of the forum. *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) (holding that Christian children's club could not be denied use of school facilities after school). In *Good News Club*, the parties stipulated that the school had created a limited public forum for after school activities by community groups, so the Court did not squarely address the issue of when opening school facilities for expressive activities would create a limited public forum. 533 U.S. at 106. However, there is strong support for the conclusion that school officials here have done so by opening activities period to a variety of non-curriculum related student groups in the activity period. See *e.g.*, *Widmar* v. *Vincent*, 454 U.S. 263, 267 (1981) (university's policy making its facilities generally available for activities of student groups created a limited public forum); *Gregoire* v. *Centennial Sch. Dist.*, 907 F.2d 1366, 1378 (3d Cir.) (by allowing a variety of community groups to use

high school auditorium on weekends, school district created a designated open public forum), cert. denied, 498 U.S. 899 (1990); *Bender* v. *Williamsport Area Sch. Dist.*, 741 F.2d 538, 549 (3d Cir. 1984) (recognizing high school's activity period as limited public forum), vacated on other grounds, 475 U.S. 534 (1986); see also *Prince*, 303 F.3d at 1091 (holding that high school had created limited public forum during "student/staff time" period for student groups to meet).

When a limited public forum is created, the government can restrict the forum to certain subjects and certain speakers, but restrictions on speech "must not discriminate against speech on the basis of viewpoint, and the restriction must be reasonable in light of the purpose served by the forum." *Good News Club*, 533 U.S. at 106-107 (internal quotations and citations omitted). In *Good News Club*, in holding that exclusion of the club based on its religious nature was unconstitutional viewpoint discrimination, the Court reaffirmed its holdings in *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993) (school's refusal to permit an organization access to school facilities at night to show a film about family issues from a religious perspective was held to be impermissible viewpoint discrimination), and *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995) (university engaged in improper viewpoint discrimination when it denied student activities funds to student magazine addressing public policy issues from a Christian perspective). The Court in *Good News Club* concluded that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the

ground that the subject is discussed from a religious viewpoint." 533 U.S. at 112.

The purpose of FISH's activities – to meet and discuss current issues from a Biblical perspective – clearly falls within defendants' articulated qualification that student groups "present opportunities for self-directed, democratic citizenship." App. 2 at 98 (PAHS Student Handbook). Further, school officials acknowledge that plaintiff's Bible study group was denied equal access to meet on school premises during the activity period solely because of the club's religious nature. Such a denial is plainly viewpoint discrimination.

Significantly, because the defendants have engaged in viewpoint discrimination, the question whether or not the defendants have created a limited public forum does not affect the ultimate analysis, because the government is forbidden from discriminating based on viewpoint even in a nonpublic forum absent a compelling justification. See *Lamb's Chapel*, 508 U.S. at 392-93; *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985); *Perry Educ. Ass'n* v. *Perry Local Educator's Ass'n*, 460 U.S. 937, 955 (1983). See also *Prince*, 303 F.3d at 1091. Thus, whether the activities period is a limited public forum or a non-public forum, the exclusion of FISH is unconstitutional unless supported by a compelling government justification.

B. Granting Equal Access To Plaintiff's Group During An Activity Period Held During The School Day Does Not Violate The Establishment Clause

1. In order to justify exclusion from a public forum based on the content of speech, the state must establish that the exclusion is "necessary to serve a

compelling state interest and [] is narrowly drawn to achieve that end." *Widmar* v. *Vincent*, 454 U.S. 263, 270 (1981). The district court erroneously concluded that school officials' concern over violating the Establishment Clause justified their denial of plaintiff's request to hold FISH group meetings during the activity period. R. 14 at 10; App. 1 at 17. This is not a compelling justification for discriminating against plaintiff's speech.

The Supreme Court has held consistently that a policy of equal, content-neutral access does not violate the Establishment Clause. In *Widmar*, for example, a state university denied members of a religious group the use of university facilities that were generally available to other student groups. The Court held that the university would not violate the Establishment Clause by providing equal access to religious speakers, since an open forum that permits religious and non-religious groups to use university facilities does not confer "any imprimatur of state approval" on any of the organizations, including the religious group. 454 U.S. at 274. Similarly, in *Lamb's Chapel*, a high school barred an organization from using its facilities after school hours to show a family film series that had a religious perspective. The Supreme Court found that "the posited fears of an Establishment Clause violation [we]re unfounded" since the school property had "repeatedly been used by a wide variety of private organizations," and so "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed." 508 U.S. at 395.

And, most recently, in *Good News Club*, the Supreme Court rejected the

school district's reliance on the possibility of violating the Establishment Clause when it denied a Christian club for children access to school facilities after school hours. The Court explained that the "implication that granting access to the Club would do damage to the neutrality principle defies logic" since "allowing the Club to speak on school grounds would ensure neutrality, not threaten it." 533 U.S. at 114.

As in these cases, allowing equal access to FISH during the activity period at PAHS would not create an imprimatur of government approval or endorsement of FISH's activities, or otherwise send a message that the school has departed from the required "course of neutrality among religions, and between religion and nonreligion." *School Dist. of Grand Rapids* v. *Ball*, 473 U.S. 373, 382 (1985); see also *Gregoire*, 907 F.2d at 1380 (recognizing that a policy of equal access communicates a message of neutrality).

The *Mergens* decision supports this conclusion as well. *Mergens* held that allowing a student religious group to meet on an equal basis with all other student clubs pursuant to the Equal Access Act did not violate the Establishment Clause. The plurality, focusing on whether a school allowing equal access to a religious group would be perceived as endorsing a religious message, emphasized that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis," *id.* at 250, and that a school can address mistaken impressions of school sponsorship of religion, if there are any, by "mak[ing] clear

that its recognition of [a religious] club is not an endorsement of the views of the club's participants * * *." *Ibid.* The proposition that schools do not endorse everything they fail to censor is not complicated." *Id.* at 250 (plurality opinion) (citations omitted). The plurality also noted that while the EAA permits school officials to exercise custodial oversight of student-initiated religious groups, such supervision "does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities." *Id.* at 253 (plurality opinion). Justice Kennedy's concurring opinion stressed that permitting student groups to form and meet on an equal basis with other student groups simply did not involve any of the state coercion to participate in religious activity that he believed was necessary to create an Establishment Clause violation. *Id.* at 261.[5]

Allowing equal access for FISH would not constitute endorsement of a religious message by the school, would not involve any coercion of students to engage in religious activities, and would not entangle the school with religion.

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[5] In *Illinois ex rel McCollum* v. *Board of Education*, 333 U.S. 203 (1948), the Court struck down a policy under which a school district created a period during the school day in which students were excused from their studies to attend religion classes on school premises taught by outside religious teachers invited in for that purpose. The Court found that "[t]he operation of the State's compulsory education system * * * assist[ed] and [wa]s integrated with the program of religious instruction carried on by separate religious sects." *Id.* at 209. In the present case, in contrast, defendants simply permit students to participate in a broad range of student activities, and plaintiff merely seeks an equal opportunity to express herself along with other like-minded students. The varied options available to PAHS students, the voluntariness of student participation, and the fact that any religious speech engaged in would be initiated by students themselves, prevent any government endorsement of or entanglement with religion were FISH permitted to meet during the activity period.

Quite to the contrary, allowing FISH equal access to the activity period would help avoid any entanglement by the school with religion and would help preserve the government neutrality toward religion that the Establishment Clause requires. In *Rosenberger*, the Court warned that government officials parsing religious expression implicated both the Free Speech Clause and the Establishment Clause:

> The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.

Id. at 845-846. The Punxsutawney school officials' exclusion of student groups with a religious perspective from its otherwise extremely broad access policy presents similar risks of unnecessary entanglement with religion. Furthermore, the current policy of excluding student speech based solely on its religious content "foster[s] a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Ibid.*

The district court here relied heavily on *Bender* v. *Williamsport Area School District*, 741 F.2d 538 (1984), vacated on other grounds, 475 U.S. 534 (1986), to support its conclusion that permitting FISH to meet during the activity period would violate the Establishment Clause. R. 14 at 8-10; App. 2 at 15-17. In *Bender,* this Court held that the school district was justified in denying a student-initiated nondenominational prayer club to meet during a school's regularly scheduled activity period to avoid the possibility of conveying a message of state

endorsement of religion. 741 F.2d at 554-556. This Court concluded that the "presence of school-appointed monitors [] carries with it the impression of official approval and endorsement, particularly when the state compulsory educational system encourages attendance at meetings of such groups." *Id.* at 555. In light of subsequent Supreme Court decisions, and the actions of Congress in enacting the EAA, concerns about perceived "official endorsement" are not persuasive in cases simply involving equal access in a public secondary school for all noncurriculum-related groups.

Although David London, principal of PAHS, testified that faculty sponsors "participate" in the activities of those student groups meeting during the activity period, see App. 2 at 53, nothing in the school district policy governing the activity period requires any active participation by faculty sponsors. Instead, it appears that school officials could grant FISH access to the activity period, provided the group's faculty sponsor simply monitors group meetings. As the Court observed in *Mergens*, the EAA's restriction of the role of school officials to that of monitors at meetings of student religious groups avoids the entanglement of the school in the religious message of the meetings. 496 U.S. at 251. At the same time, the use of faculty sponsors to monitor FISH meetings during the activity period recognizes the school's interest in maintaining order and the proper use of its facilities during the school day.

2. As stated above, none of the factors on which the district court appears to have relied – that the activity period was held during the school day, that students

were required to be in the school building, and that some instructional activities were being conducted – support the school district's decision not to permit FISH to hold meetings during the activity period. One other factor, however – that the school system counts the activity period as part of the state-mandated minimum numbers of instructional hours – raises an issue not addressed directly by the decisions cited above.[6]

It does not appear to us that permitting FISH to meet during the activity period, even if it is counted as part of the state-mandated instructional day, violates the Establishment Clause. This school district appears to give a broader reading of "instructional time" for purposes of state minimum hour requirements than does the Equal Access Act. That Pennsylvania may permit school systems to count an activity period – in which they have created a forum for students to form groups to pursue a variety of interests unrelated to the school curriculum – towards minimum state mandatory instructional time does not present an Establishment Clause impediment to students choosing to use that time for meetings of a religious group like FISH. Counting such activities as educational would no more create an Establishment Clause problem than would a student receiving credit for writing a music appreciation paper on Handel's *Messiah* or a term paper on St. Augustine's *City of God*. If the school, and the state, see a benefit in providing a forum for students to take the initiative to form groups of interest to them, and to

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[6] Although the district court mentioned this factor in its discussion of the EAA, it did not do so in its Establishment Clause discussion.

engage in the organizational and social skills that club participation involves, it is of no constitutional moment that some students direct their energies toward participation in a religious club.[7] Instead, the neutrality principle reflected in *Good News Club, Widmar,* and *Lamb's Chapel* makes clear that the religious decisions of students in a forum for free exploration of interests are not to be imputed to a school that has, on a religion-neutral basis, created such a forum.

[7] We note that Pennsylvania law requires activities counted as instruction to be "under the direction of certified school employees." 22 Pa. Code § 51.61 (2002). While a teacher could not under the Establishment Clause lead or actively "direct" a Bible study during the activities period, the wide range of student activities that PAHS permits during the activities period, as well as the lack of active direction by certified school employees in activities such as study hall and remaining in homeroom that occur during this period, indicate that such active leadership is not how the term "under the direction of" in the statute has been interpreted by the defendants.

CONCLUSION

The order of the district court denying plaintiff's request for a preliminary injunction should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 29(d), that the attached Brief for the United States as Amicus Curiae in Support of Appellant is proportionally spaced, has a typeface of 14 points, and contains 6,274 words.

January 9, 2003______________________________________

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CERTIFICATE OF SERVICE

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