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No. 99-2036

IN THE

Supreme Court of the United States

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GOOD NEWS CLUB, *et al.*,
Petitioners

v.

MILFORD CENTRAL SCHOOL,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE LIBERTY LEGAL INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE [1]

Amicus Liberty Legal Institute is an organization committed to the defense of religious liberty and the protection of rights under the First and Fourteenth Amendments. Among its activities, the Institute assists individuals, students, and organizations in challenging state restrictions on, or discriminatory treatment on the basis of, religious beliefs or expression. The decision of the Second Circuit in this case hinders the Institute's ability to assert the right of its clients and members to gain equal access to school facilities and other expressive fora, regardless of the religious viewpoint contained in their message.

STATEMENT OF THE CASE

Amicus adopt the statement of the case presented in the Brief for Petitioners. For the Court's convenience, amicus sets forth below the facts most salient to the analysis that follows.

In August 1992, the Milford Central School adopted the Community Use Policy. Under the Policy, district residents may use the school's facilities for "holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public." *Good News Club* v. *Milford Cent. Sch.*, 202 F.3d 502, 504 (2d Cir. 2000). Pursuant to the Policy, the Milford Central School opened its facilities to such private organizations as the Boy Scouts, the Girl Scouts, and the 4-H Club. See *id.*

The School, however, denied access to the Good News Club, a community-based Christian youth organization. That decision was based on an exclusion contained in the Policy: "School

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[1] Petitioners and Respondent have consented to the filing of this brief. Consistent with Rule 37.6, this brief has not been authored in whole or in part by counsel for a party. No person, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

premises shall not be used by any individual or organization for religious purposes." *Id.* This exclusion is essentially identical to school district Rule 7 at issue in *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993): "The school premises shall not be used by any group for religious purposes." *Id.* at 387.

School Superintendent Robert McGruder also based his decision to exclude the Good News Club on an interpretation of New York Educ. Law § 414 that precludes the use of school property for religious purposes. See *Good News Club* v. *Milford Cent. Sch.*, 21 F. Supp. 2d 147, 149 (N.D.N.Y. 1998). This interpretation is the same as the reading of § 414 addressed by the Court in *Lamb's Chapel*. See 508 U.S. at 386-87 (quoting *Trietley* v. *Board of Educ. of Buffalo*, 409 N.Y.S.2d 912, 915 (N.Y. App. Div. 1978)).

The Good News Club filed suit, alleging an infringement of the First and Fourteenth Amendments. The district court held that the School could properly exclude the Club because it had not opened its facilities to religious instruction or prayer. The Second Circuit found that the "activities of the Club clearly and intentionally communicate Christian beliefs by teaching and by prayer" and affirmed. *Good News Club*, 202 F.3d at 509. The court suggested that exclusion of the Club's religious message was especially necessary because "those who attend the school are young and impressionable." *Id.*

SUMMARY OF ARGUMENT

This case is about equal access to physical facilities. It is not about government aid to religion. It is not about the impressionability of schoolchildren.

This case is a straight-line descendant of *Widmar* v. *Vincent*, 454 U.S. 263 (1981); it is the near-identical twin of *Lamb's Chapel*, *supra*. These antecedents establish that the Free Speech and Free Exercise Clauses prescribe, and the Establishment

Clause does not proscribe, equal access to school facilities regardless of the religious content of the speaker's message.

To decide this case, the Court need only apply the settled rule "that schools may not discriminate against religious groups by denying them access to facilities that the schools make available to all." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring) (citing *Lamb's Chapel*, *supra*, and *Widmar*, *supra*). Respecting the Good News Club's right of equal access to the school's physical facilities would in no way contravene the prohibition on direct state funding of religious activities. This case, therefore, is not one that "requires courts to draw lines, sometimes quite fine," *id.* at 847, in order to delimit the boundaries of competing constitutional principles.

The impressionability of schoolchildren is irrelevant to the endorsement analysis. It defies logic to suggest that the government should act in a less neutral or more discriminatory manner toward impressionable children. Impressionability works both ways. If students would misinterpret neutrality as endorsement, then they would doubly interpret official discrimination against the Good News Club as disapproval of its religious message. Doubly, because first they would correctly interpret the exclusion as evincing hostility toward religion and second their impressionability would graft an extra layer of intensity onto this message of disapproval. A constitution that requires "that a government practice not have the effect of communicating a message of government . . . disapproval of religion," *Lynch* v. *Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring), perforce prohibits a message that is doubly effective in disapproving of religion. Neutrality through equal access protects against both an incorrect perception of endorsement and a justified perception of stark hostility toward religion.

In any event, the relevant audience for any message the school sends by erecting the forum for private speech and

respecting the Good News Club's right of access thereto is the reasonable, informed observer, and not the students. Here, as in all forum access cases, the government sends a message only by erecting and maintaining the forum; that message is transmitted to the community at large and is judged by the objective standard of the reasonable, informed observer. See *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 780-81 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

Even if students were the relevant audience, their impressionability would not lead them to misinterpret a message of neutrality. "The proposition that schools do not endorse everything they fail to censor is not complicated."*Board of Educ. of Westside Cmty. Sch.* v. *Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion). There is little reason to assume that children who can exercise the right to protest against the Vietnam War, see *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969), or to refuse, based on religious scruples, to salute the flag, see *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943), cannot appreciate that neutrality means neutrality. Any confusion in this simple message would not be cleared up by discrimination. Schools have a pedagogical obligation to educate students about the Constitution, not to violate it.

ARGUMENT

I. RESPECTING THE GOOD NEWS CLUB'S RIGHT OF EQUAL ACCESS TO SCHOOL FACILITIES WOULD SEND A MESSAGE OF NEUTRALITY TOWARD AND NOT ENDORSEMENT OF RELIGION.

Any message sent by respecting the Good News Club's right of equal access would be "one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248 (plurality opinion). The Good News Club asks only that the Milford Central School provide access to its facilities equally to private organizations, that the school remain neutral as to the secular or religious content of their message. To deny this simple request, as the school did, is to impermissibly "treat people differently based on the God or gods they worship, or do not worship." *Board of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

Fealty to neutrality in this case would not brush up against the prohibition of direct aid to religion. In order to remain neutral here, the government would not need to fund religious activities directly. The school would need only to provide access on equal terms to religious and nonreligious groups alike. This case, therefore, is a garden-variety facilities access case controlled by *Lamb's Chapel* and *Widmar*.

A. Providing Equal Access Sends a Message of Neutrality, Whereas Exclusion Bespeaks Hostility Toward Religion.

The School has created a forum to further secular purposes by opening school doors for "holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community." *Good News Club* v. *Milford Cent. Sch.*, 202 F.3d 502, 504 (2d Cir. 2000). Granting religious groups access to the forum does not violate the Establish ment Clause because "the message is one of neutrality rather than endorsement." *Mergens*, 496 U.S. at 248 (plurality opinion).

Respecting the Club's right of access would say only that the School is consistent and neutral in applying the Community Use Policy, that it neither endorses nor approves of the Club's message. "Under these circumstances, as in *Widmar*, there would have 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." *Lamb's Chapel*, 508 U.S. at 395; see also *Widmar*, 454 U.S. at 274 ("[A]n open forum in a public university does not confer any imprimatur of state approval on religious sects or practices."). "When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker," *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 786 (1995) (Souter, J., concurring in part and concurring in the judgment), and thus in creating the forum the school "does not thereby endorse or promote any of the particular ideas aired there." *Widmar*, 454 U.S. at 272 n.11.

That access does not equal endorsement is readily apparent here, where groups such as the Boy Scouts, the Girl Scouts, and the 4-H Club had used school property well before the Good News Club sought to hold meetings there. In this case, as in *Lamb's Chapel*, "District property had repeatedly been used by a wide variety of private organizations." 508 U.S. at 395. Granting the Club access would simply put it on par with other private organizations and require it to compete with other groups so that its message would be heard and heeded. In this cacophonous bazaar, "any perception that the [school] endorses one particular viewpoint would be illogical." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 850 (1995) (O'Connor, J., concurring). The only natural perception would be that the school, by creating the forum, has remained neutral through a hands-off policy.

But, of course, the School did not keep its hands off this particular forum. Rather, it expressly silenced religious voices by excluding them: "School premises shall not be used by any individual or organization for religious purposes." *Good News Club*, 202 F.3d at 504.

Exclusion bespeaks hostility: "Withholding access would leave an impermissible perception that religious activities are

disfavored." *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring). The words and actions of the School in this case project a clear message to the community that religion is a second-class viewpoint on moral and personal development, not worthy to share company with secular private organizations. "[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248 (plurality opinion).

Such discrimination is unconstitutional. "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion." *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis in original). Because "government generally may not treat people differently based on the God or gods they worship, or do not worship," *id.* at 714, the Court has consistently required that "a government practice not have the effect of communicating a message of endorsement or disapproval of religion." *Lynch* v. *Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring); see also *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring) ("This insistence on government neutrality toward religion explains why we have held that schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all.").

This is not a case "where religious speech threatens to dominate the forum." *Rosenberger*, 515 U.S. at 850-51 (O'Connor, J., concurring). The school facilities are used by private groups such as the Girl Scouts, the Boy Scouts, and the 4-H Club. The Good News Club would compete with these and other groups for space and time allocation, the students' interest, and, yes, their agreement with the Club's message. Such robust competition in a relatively open forum minimizes the risk that "a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval." *Capitol Square*, 515 U.S. at 777

(O'Connor, J., concurring in part and concurring in the judgment).

None of the red flags that would signal forum domination—"the fortuity of geography, the nature of the particular public space, or the character of the religious speech at issue," *id.* at 778—are raised in this case. On the contrary, the specific characteristics of the forum at issue here significantly minimize the danger of religious domination. The Milford Central School is just like the public schools the Court has seen in past equal access cases; it teaches children of all ages from kindergarten through high school. The Good News Club requested access not to classroom facilities but to the school cafeteria, see *Good News Club* v. *Milford Cent. Sch.*, 21 F. Supp. 2d 147, 149 (N.D.N.Y. 1998), a non-instructional space used by students of all grades. For the period when the District Court's preliminary injunction granted the Club access to school facilities, meetings were held in an upper-level resource room: "one half of it is for a high school resource room, the other half is taught by another special education teacher for kids that are slightly younger than high school age, 12 and 13 years." J.A. N12-N13 (testimony of Peter Livshin). Participation in the Good News Club would occur after school, outside of instructional class time, and would require written parental permission. See *Good News Club* v. *Milford Cent. Sch.*, 202 F.3d 502, 507 (2d Cir. 2000).

Moreover, the Good News Club advocates morals from a Christian perspective just as the films in *Lamb's Chapel* promoted child rearing according to Christian family values. The Second Circuit distinguished religious viewpoint from religious instruction and held that the Good News Club falls into the latter category because it adds an "additional layer" of religiosity to its moral message by insisting that "these morals or these values are senseless without Christ." *Good News Club*, 202 F.3d at 509-10. This distinction, however, is logically meaningless and constitutionally problematic. The Good News Club's call to faith is no different from an entreaty for "returning to traditional, Christian family values instilled at an early stage." *Lamb's Chapel*, 508 U.S. at 388. Any viewpoint worth its salt asserts its truth; all theories entreat adherence; and all teachings seek converts. Moreover, "[t]here is no indication when 'singing hymns, reading scripture, and teaching biblical principles' cease to be 'singing, teaching, and reading'—all apparently forms of 'speech,' despite their religious subject matter–and become unprotected 'worship.'" *Widmar*, 454 U.S. at 270 n.6. Allowing (or requiring, as the Second Circuit would) school officials to make these fine metaphysical distinctions invites excessive entanglement with religion and heightened viewpoint discrimination.

B. Granting the Good News Club Equal Access to School Facilities Would Not Implicate the Prohibition on Direct Aid to Religion.

Governmental neutrality toward religion, "one hallmark of the Establishment Clause," *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring), holds even in a hard case, where faithful application of the neutrality principle brushes up against the prohibition on direct aid to religion. That situation "requires courts to draw lines, sometimes quite fine," *id.* at 847, in order to delimit the boundaries of competing constitutional principles. See *Mitchell* v. *Helms*, 120 S. Ct. 2530, 2560 (2000) (O'Connor, J., concurring in the judgment) ("Our school-aid cases often pose difficult questions at the intersection of the neutrality and no-aid principles and therefore defy simple categorization under either rule.").

This is not that hard case. The Court need not draw any new boundaries here. It need only hew to the clear line of precedent established by *Widmar*, *Lamb's Chapel*, and other equal access cases. Respecting neutrality in this case would in no way implicate the traditional prohibition on direct funding of religious activities. Any benefit flowing to religion from the provision of equal access to school facilities is neither direct nor funding.

The Court's Establishment Clause cases draw two distinctions in addressing cases dealing with governmental assistance, most notably for educational purposes. The first is whether the assistance is in kind or in money. Where the government gives money to religious organizations, the Court asks the second question, whether the funding is direct or indirect. Both inquiries serve the same purpose—to ensure that the government does not take money from some taxpayers and give to others to finance their religious activities.

Access to school and other public facilities falls on the constitutional side of both these distinctions; denial of access, on the other hand, violates the religious speaker's Free Speech and Free Exercise rights and the Establishment Clause prohibition on government discrimination against religion.

First, by providing access to its facilities, the school would not be funding the religious activities of the Good News Club. The constitutional concern is that the government is using its coercive power to require one taxpayer to finance the religious activities of another. See *Rosenberger*, 515 U.S. at 851 (O'Connor, J., concurring) (distinguishing student activities fees from "general assessments in support of religion that lie at the core of the prohibition against religious funding and from government funds generally") (citations omitted).

That concern is not present where the government provides nonmonetary benefits to religious and nonreligious groups alike in a neutral program, such as the provision of equal access to school facilities. Because no government funds flow to the religious group, there is little danger that the government is financing private worship. Access does not require the state to open its coffers, only that the school open its doors. Facilities access cases instead pose a different constitutional danger: "Withholding access would leave an impermissible perception that religious activities are disfavored." *Id.* at 846.

Second, giving the Good News Club access to the school's physical facilities would not provide direct support to religion.

Rather, any benefit to the Good News Club would only be incidental to the direct secular goal of establishing a neutral forum for healthy expression of views under the First Amendment.

Even where the state funds religious groups, such monetary payments are permissible if the aid to religion is indirect. In *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), the Court unanimously upheld state payment of a blind student's tuition at a sectarian theological institution. The Court emphasized that the tuition money "is paid directly to the student, who transmits it to the educational institution of his or her choice." *Id.* at 487. Likewise, the Court approved state reimbursement of children's bus fares to attend Catholic schools. See *Everson* v. *Board of Educ. of Ewing*, 330 U.S. 1, 17-18 (1947). That the funding to the religious schools was indirect permits the injection of the critical element of private decisionmaking: "The aid to religion at issue here is the result of petitioner's private choice." *Witters*, 474 U.S. at 493 (O'Connor, J., concurring in part and concurring in the judgment). Any "endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid" and not those who simply distribute such aid. *Mitchell*, 120 S. Ct. at 2559 (O'Connor, J., concurring in the judgment).

The distinction between direct and indirect funding underlies the Court's insistence that "secular government aid not be diverted to the advancement of religion." *Id.* at 2558. The Court in *Tilton* v. *Richardson*, 403 U.S. 672, 683 (1971), upheld federal building subsidies to religious institutions only with the insistence that the subsidized buildings not be used for religious purposes. However, the "Court has similarly rejected 'the recurrent argument that all aid [to parochial schools] is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.'" *Widmar*, 454 U.S. at 275 n.15 (quoting *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973)) (alterations in original). That is why "nothing in *Tilton* suggested a limitation on the State's capacity to maintain open

forums equally open to religious and other discussions." *Id.* at 272 n.12.

Respecting religious speakers' right of access to an expressive forum does not have the primary effect of advancing religion. Rather, any benefit to religion is "merely incidental" to the goal of establishing an expressive forum, even if it is "foreseeable" that religious groups would seek access to the forum. See *id.* at 273. Thus, the Court in *Agostini* v. *Felton*, 521 U.S. 203 (1997), upheld New York's Title I funding program because "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* at 231. Under those circumstances, the "aid is less likely to have the effect of advancing religion." *Id.*

This case, of course, is steps removed from school aid cases like *Agostini* and *Mitchell*. The school is public and not a private religious institution. No funds go to religious organizations. If the Constitution permits religious organizations to obtain access to generally available government programs in those cases, as the Court has rightly held, then it requires such access here because "schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all." *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring). Indeed, this case is easier than *Rosenberger* because the Good News Club seeks equal access to school facilities and not to government funds. Here, no "bedrock principles collide," *id.* at 852, and the Court need only stay the course charted by *Widmar* and *Lamb's Chapel*.

II. THE IMPRESSIONABILITY OF SCHOOLCHILDREN IS IRRELEVANT TO THE ENDORSEMENT ANALYSIS.

There is no logical reason why a message of neutrality changes to one of religious endorsement because schoolchildren are "impressionable." Impressionability works both ways. If

schoolchildren are indeed impressionable, then they would be as susceptible to perceiving any action that disfavors religious speech as disapproval of religion as they would be to perceiving any action that favors religious speech as endorsing religion. Access to school facilities on equal terms, neither favoring nor disfavoring religious speech, avoids the danger of both types of impressions. If schoolchildren, or any other persons, would misinterpret neutrality as endorsement, then they would doubly interpret official discrimination against the Good News Club as disapproval of its religious message. They would correctly interpret the exclusion as evincing hostility toward religion. Their putative impressionability would then graft an extra layer of intensity onto this message of disapproval. If impressionability mattered, then denying the Good News Club access would indeed doubly violate the requirement "that a government practice not have the effect of communicating a message of government . . . disapproval of religion." *Lynch* v. *Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

In any event, the relevant audience for any message the school sends by erecting the forum for private speech and providing equal access thereto is the reasonable, informed observer, and not the students. By providing equal access, the government simply sends a message to the community at large. That message is judged from the perspective of a hypothetical observer who is well informed and reasonable. *Capitol Square*, 515 U.S. at 773, 780 (O'Connor, J., concurring in part and concurring in the judgment). To focus on the impressionability of schoolchildren here would be to abandon the objective standard of a hypothetical observer in favor of the subjective impressions of specific persons who by happenstance observe the government action.

Even if students were the relevant audience, neutrality does not transform into endorsement when viewed by impressionable eyes. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Board of Educ. of*

Westside Cmty. Sch. v. *Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion). A child is not "a dimwit as a matter of law." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 785 (1995) (Souter, J., concurring in part and concurring in the judgment). There is little reason to assume that children who can exercise the right, say, to protest against the Vietnam War, see *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969), or to refuse, based on religious objections, to salute the flag, see *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943), cannot appreciate that neutrality means neutrality.

A. Impressionability Works Both Ways: Schoolchildren Would Interpret the Exclusion of the Good News Club as Disapproval of Religious Viewpoints.

Any argument against equal access predicated upon the schoolchildren's impressionability crumbles under its own weight. An impressionable person would more readily perceive the denial of access to school facilities as a message of hostility toward the Club's religious viewpoint. The Establishment Clause requires "that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." *Lynch* v. *Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). If the age and maturity of children mattered, then they would matter for deviations in both directions from the neutral benchmark, toward either impermissible endorsement or impermissible disapproval. Respecting neutrality protects against both dangers.

In fact, an argument that impressionable children would misconstrue a neutral message as one of religious endorsement works doubly against its proponents. If impressionability is so strong that it would, by its own force, move a child's perception away from the baseline of neutrality into the realm of endorsement, then its strength would double the perception that denial of access sends a message of hostility toward religion. Children

would first correctly perceive the discrimination against the Good News Club as a message of disapproval; "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248. Impressionability would graft onto this correct perception an extra layer of intensity that no amount of naysaying by school administrators could plausibly counteract.

At its core, the Establishment Clause is about the value of inclusion in our pluralistic society. "If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community." *County of Allegheny* v. *ACLU, Greater Pittsburgh Chapter* 492 U.S. 573, 627 (1989) (O'Connor, J., concurring). Correspondingly, the government cannot disapprove of the religious practices and beliefs of adherents without sending a clear message that they are outsiders and less than full members of the political community. The clarity of the message of hostility is only sharpened when delivered to impressionable schoolchildren.

B. Constitutionality Turns on the Objective Perceptions of a Hypothetical Reasonable, Informed Observer and Not on the Subjective Impressions of Particular Persons.

In any event, the suggestion that the impressionability of schoolchildren matters in this case rests on a fundamental fallacy—that the students are the relevant audience for constitutional analysis. Endorsement instead is determined by an objective standard of a hypothetical reasonable observer and not the subjective perceptions of particular persons. Thus, whether the government message in this case endorses religion depends not on the impressions of students but on the objective

perceptions of a reasonable observer. This hypothetical observer is not impressionable or obtuse, but well-informed and "aware of the history and context of the community and forum." *Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment).

Whether the government has endorsed religion turns on the objective perceptions of the reasonable observer, and not on the subjective impressions of any specific person or group of persons. See *id.* at 773. Constitutionality therefore does not depend on the perspective of an "eggshell" observer or, indeed, of any particular observer. As Justice O'Connor explained, "we do not ask whether there is any person who could find an endorsement of religion, whether some people may be offended by the display, or whether some reasonable person might think the State endorses religion." *Id.* (internal quotations and alterations omitted).

In this case, as in *Capitol Square* and other equal access cases, the state creates and maintains a forum in which private speech can be expressed. The question, therefore, is whether by providing religious speakers access to the forum the government has endorsed religion. Save the possibility of forum domination by religious speakers, the Court's answer to this question has been consistently in the negative, that the message is "one of neutrality rather than endorsement." *Id.* at 776 (quoting *Mergens*, 496 U.S. at 248 (plurality opinion)).

Observers of the government action need not participate in the forum in order to perceive any message–of neutrality, endorsement, or hostility—that the government sends by creating and maintaining the forum. And, of course, the "hypothetical" reasonable observer does not actually participate in the forum in order to receive and judge the government message. Therefore, particular characteristics of specific forum participants–be they obtuse or keenly observant, impressionable or obdurate—simply do not matter for Establishment Clause analysis. The only government action here is the creation and

maintenance of the forum for such private speech; the only message equal access sends is one of neutrality; and the audience for this message is the community at large and not the forum participants specifically. To account for particular characteristics of students or other persons at the place where the forum happens to be would be to abandon the objective standard of the reasonable observer for the subjective impressions of specific observers.

The constitutional focus on a hypothetical observer who is informed and reasonable explains why the concurring justices in *Capitol Square* did not share the concern expressed by Justice Stevens in dissent that children may see the unattended display of a cross and form an impression that the government was endorsing religion. See *id.* at 808 n.14 (Stevens, J., dissenting) ("But passersby, including schoolchildren, traveling salesmen, and tourists as much as those who live next to the statehouse, are members of the body politic, and they are equally entitled to be free from government endorsement of religion."). State action does not violate the Establishment Clause simply because "some passersby would perceive a governmental endorsement" of religion. *Id.* at 779 (O'Connor, J., concurring in part and concurring in the judgment). "There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable." *Id.* at 780 (emphasis in original).

There is little danger in this case that a reasonable observer would perceive that "the State's own actions (operating the forum in a particular manner and permitting the religious expression to take place therein), and their relationship to the private speech at issue, *actually convey* a message of endorsement." *Id.* at 777 (emphasis in original. The plurality in *Mergens* did note 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." 496 U.S. at 250. As explained above, younger students would just as likely understand that neutrality means neutrality; their impressionability works both ways to heighten any perception of endorsement or hostility engendered by deviations from this neutral benchmark. That students may participate in the activities of the Good News Club only with parental permission, see *Good News Club* v. *Milford Cent. Sch.*, 202 F.3d 502, 507 (2d Cir. 2000), eliminates any residual danger that the school, and not the parents, is endorsing the Club's message.

Moreover, attributes of the forum at issue in this case mitigate against any perception that the state is endorsing religion to impressionable schoolchildren. Meetings would be held after school. The school is not an elementary school. Rather, it teaches children from kindergarten through high school. And The Good News Club requests access not to classroom facilities but to the school cafeteria, a non-instructional space used by students of all ages and grades. And while the Club has access to school facilities under the preliminary injunction, meeting were held in an upper-level resource room: "one half of it is for a high school resource room, the other half is taught by another special education teacher for kids that are slightly younder than high school age, 12 and 13 years." J.A. N12-N13 (testimony of Peter Livshin). If recognizing a religious student group and granting it equal access to classroom facilities after instructional hours does not convey a message of endorsement, as the Court rightly held in *Mergens*, then simply granting the Good News Club, a private organization, equal access to non-instructional space after school *a fortiori* would not endorse religion.

It is of little moment that the Good News Club seeks access to school facilities from 3:00 p.m. to 4:00 p.m. There is no reason why it is permissible for a club to meet at 8:00 p.m. but not earlier, when it is more convenient. The Court's cases clearly distinguish noninstructional time from classroom time because the latter present "problems of 'the students' emulation

of teachers as role models' and 'mandatory attendance requirements.'" *Mergens*, 496 U.S. at 251 (quoting *Edwards* v. *Aguillard*, 482 U.S. 578, 584 (1987) and citing *Illinois* ex rel. *McCollum* v. *Board of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 209-10 (1948)). None of those problems are presented in this case because no teachers are involved and attendance is entirely voluntary, with parental permission.

And there is good reason for parents to want their children to participate in afterschool youth activities such as those offered by the Scouts, the 4-H Club, the Good News Club, and other private organizations. "[T]he prime-time for juvenile crime is during the afterschool hours, and . . . . specifically, 40 percent of the juvenile violent offenses occurred after 3 PM and before 8 PM." JAMES ALAN FOX, U.S. DEPARTMENT OF JUSTICE, TRENDS IN JUVENILE VIOLENCE 3 (1996). "It doesn't take a Ph.D. to figure out that young people need some place positive to go afterschool to stay off the streets and out of their empty homes." Jonathan Alter, *It's 4:00 p.m.; Do You Know Where Your Children Are?*, NEWSWEEK, Apr. 28, 1998, at 29.

Nothing stops schools from opening their premises on a nondiscriminatory basis so that outside groups can provide programs for children during the time period when parental demand is highest. Nothing in the Constitution forces the school to close its facilities to religious groups, and religious groups alone, during children's waking hours. Any message that the school would send by such equal access is one of neutrality, that the school respects the work of the private organizations without regard to their religious viewpoints, or lack thereof.

C. Schoolchildren, However "Impressionable," Would Not Misinterpret the Provision of Equal Access as an Endorsement of Religion.

The impressionability of schoolchildren would not lead them to misinterpret a message of neutrality. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250 (plurality opinion). The

simplicity of this proposition is even more apparent when a school provides a variety of groups equal access to its facilities. The school cannot be seen as endorsing the diverse (and potentially conflicting) views of all the groups. If children are impressionable to one group's message, then they are equally impressionable to those of the other groups. Impressionability thus would enhance the clarity of conflict among the viewpoints of the various speakers vying for the children's attention and agreement and, if anything, would better underscore the neutrality of the school's hands-off policy.

Permission does not equal endorsement. That is especially true in the educational context, where space is needed for student expression that is neither enjoined nor endorsed by the school. "The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee* v. *Weisman*, 505 U.S. 577, 589 (1992). Providing such an expressive space by allowing equal access to school facilities does not implicate the school in any speech that may be delivered in that forum. See *Widmar* v. *Vincent*, 454 U.S. 263, 272 n.10 (1981) (noting that "by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there"). The reason for this is simple: "When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker," *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 786 (1995) (Souter, J., concurring in part and concurring in the judgment).

That the school does not endorse the message of private speakers is especially clear where, as here, the forum accommodates a variety of divergent viewpoints. The Scouts advocate moral and personal development through service and devotion to God and country; the 4-H Club through agrarian pursuits; the Good News Club through a life in Christ. Given this wide array of viewpoints, "any perception that the [school] endorses one particular viewpoint would be illogical." *Rosenberger* v. *Rector*

& Visitors of Univ. of Va., 515 U.S. 819, 850 (1995) (O'Connor, J., concurring). The illogic of such a perception is only more apparent in the eyes of "impressionable" schoolchildren. If children are impressionable to the message of the Good News Club, then they would be equally impressionable to that of the Scouts, the 4-H Club, and whomever else may use the school facilities.

The suggestion of impressionability betrays a suspicion of children unsupported by the Court's precedent. A child has the right, based on religious scruples, not to salute the flag. See *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). The Court did not assume that children were too impressionable to appreciate their freedom of religious expression and to exercise their right not "to declare a belief." *Id.* at 631. Nor was there any suggestion that classmates would perceive permission to abstain from saluting the flag as an endorsement of the objecting student's religion. Likewise, the Court respected children's right to protest against the war in Vietnam, see *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969), without concern that the impressionability of children would distort the message.

To be sure, certain characteristics—"the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing," *Bellotti* v. *Baird*, 443 U.S. 622, 634 (1979) (plurality opinion)—may justify different treatment of children. This solicitude of children's immaturity, however, stems from the need to protect them from societal threats. See *Ginsberg* v. *New York*, 390 U.S. 629, 638 (1968) (obscenity); *Prince* v. *Massachusetts*, 321 U.S. 158, 168 (1944) (child safety); *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 266 (1988) (disruption of school); *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 682 (1986) (same); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 346-48 (1985) (same). Here, the only threat presented is that children, who attend meetings voluntarily with

parental permission, would agree with the message of one or the other speakers in the school's forum. That is not a threat. It is the First Amendment working, and well.

All this, of course, is not to deny that schoolchildren are different from adults or that schools have an important role in their development. It is precisely because children are still in the formative stages of life that the right message must be sent by school officials and state action. That right message is straightforward: "The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee* v. *Weisman*, 505 U.S. 577, 589 (1992).

Clearing up any confusion in this message is the essence of civic education: "the risk of misunderstanding can be minimized by explaining what is misunderstood—by teaching students about the values of free speech, public fora, disestablishment, and government neutrality toward religion." Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 20 (1986). Especially where children are impressionable, schools have a pedagogical obligation to educate them about the Constitution, not to violate it.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief for Petitioners, the decision below should be reversed.

Respectfully submitted,

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