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9  
10 **UNITED STATES DISTRICT COURT**  
11 **CENTRAL DISTRICT OF CALIFORNIA**  
**EASTERN DIVISION**

12 CHILD EVANGELISM FELLOWSHIP OF  
SOUTHERN CALIFORNIA - POMONA  
13 VALLEY CHAPTER, et al.,

14 Plaintiffs,

15 v.

16 P. JOSEPH LENZ, et al.,

17 Defendants.  
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) CASE # ED-CV-04-839  
) -VAP-(SGLx)

) **UNITED STATES'**  
) **MEMORANDUM AS**  
) **AMICUS CURIAE IN**  
) **SUPPORT OF**  
) **PLAINTIFFS' MOTION**  
) **FOR PRELIMINARY**  
) **INJUNCTION**

) Date: October 25, 2004  
) Time: 10:00 a.m.  
) Courtroom: 2

) Judge: Virginia A. Phillips

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1 **I. PRELIMINARY STATEMENT**

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

9 The United States is charged with enforcing Title IV of the Civil Rights Act  
10 of 1964, which authorizes the Attorney General to seek relief if a school deprives  
11 students of the equal protections of the laws. See 42 U.S.C. § 2000c-6. The  
12 United States is also charged with enforcing Title III of the Civil Rights Act of  
13 1964, which authorizes the Attorney General to seek relief when persons are  
14 denied equal use of public facilities on the grounds of race, color, religion, or  
15 national origin. 42 U.S.C. §§ 2000b. The United States also is authorized under  
16 Title IX of the Civil Rights Act of 1964 to intervene in cases alleging violations of  
17 the Equal Protection Clause that are of general public importance. See 42 U.S.C. §  
18 2000h-2.

19 Because of the United States’ statutory mandate to prevent discrimination on  
20 suspect criteria such as religion, this memorandum focuses on the issues asserted in  
21 the Complaint concerning unconstitutional discrimination against religious points  
22 of view.<sup>1</sup>

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23  
24 <sup>1</sup>Because most claims of religious viewpoint discrimination are addressed in the  
25 context of the First Amendment, few opinions address claims of religious viewpoint  
26 discrimination under the Fourteenth Amendment independently of the First  
27 Amendment. Nevertheless, “[c]ontent-based restrictions also have been held to raise  
28 Fourteenth Amendment equal protection concerns because, in the course of regulating  
speech, such restrictions differentiate between types of speech.” Burson v. Freeman,

## II. STATEMENT OF FACTS

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

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

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

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

<sup>2</sup>For the purposes of this Memorandum, the United States relies on the facts alleged in Plaintiffs’ Verified Complaint (“Complaint”), and those alleged in Plaintiffs’ Request for Preliminary Injunction (“Pls’ Req.”) and not contested by Defendants’ Memorandum of Points and Authorities in Support of Response and Opposition to Plaintiffs’ Request for Preliminary Injunction (“Defs’ Opp.”), and the public record.

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

7 The District’s facility-use policy is based on state law. Sections 38131 and  
8 38134 of the California Education Code (the “California Statute” or “Civic Center  
9 Act”) deem school facilities to be designated public fora. Cal. Educ. Code §§  
10 38131, 38134 (West 2004). The Act permits groups to use schools to meet and  
11 discuss “any subjects and questions which in their judgment pertain to the  
12 educational, political, economic, artistic, and moral interests of the citizens of the  
13 communities in which they reside,” and “matters of general or public interest.”  
14 Cal. Educ. Code §§ 38131(a), (b). School facilities used for “religious purposes,”  
15 on the other hand, can be used only “for temporary periods, on a one-time or  
16 renewable basis” if “no suitable meeting place is otherwise available.” Id. at §  
17 38131(b)(3). Furthermore, groups using school facilities in this fashion must be  
18 charged an amount at least equal to the school district’s direct costs.” Id. at §  
19 38134(d).<sup>3</sup>

20 In February 2004, CEF asked the Defendants to use Sycamore Elementary  
21 School for a weekly after-school meeting to discuss how the Bible addresses issues  
22 facing students. See Complaint ¶¶ 65-67. The District approved the request.  
23 Subsequently, the Defendants sent CEF an invoice for \$304 representing 16 weeks  
24 of use. See Def’s Opp. at 2. CEF objected to this fee but again asked to use  
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27 <sup>3</sup>The Code also permits, but does not require, school districts to charge groups  
28 using facilities for non-religious purposes. Id. at § 38134 (b). The District, under its  
policy, does not do so for at least the groups identified above.

1 Sycamore for four meetings in May and June. The Defendants again charged CEF  
2 \$19 for each use and sent an invoice for \$95. See id. CEF paid this invoice but is  
3 unable to pay the outstanding \$304 balance. See Complaint ¶¶ 70-76.

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

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

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

26 On January 10, 2002, Ditty v. Glendale Unified Sch. Dist. Bd. of Educ. et  
27 al., Case No. CV 00-11624-NM-E, settled in a "stipulated dismissal" *not* signed by  
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1 the Court where the Defendants agreed to provide the Plaintiff “equal access . . . on  
2 the same terms and conditions as other similarly categorized nonprofit groups.”  
3 Stipulated Dismissal, at 3.

### 4 III. ARGUMENT

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

9 When the District made the “school facilities and grounds under its  
10 jurisdiction available as a civic center to citizens and community groups” in its  
11 Policy, in accordance with the California Statute, the District created a public  
12 forum for speech. Complaint ¶¶ 37-38. “The District was not obligated to create  
13 such a forum. Having created this public space, however, the District cannot  
14 discriminate within it on the basis of viewpoint.” Culbertson v. Oakridge Sch.  
15 Dist. No. 76, 258 F.3d 1061, 1064 (9th Cir. 2001) (citing Good News Club v.  
16 Milford Cent. Sch., 533 U.S. 98, 106, 121 S. Ct. 2093, 2100, 150 L. Ed. 2d 151,  
17 163 (2001)). Even if the community use policy were considered to be a limited  
18 public forum, as urged by the Defendants, see Defs’ Opp. at 6, the California  
19 Statute and the Policy are required by the First Amendment, as applied by the  
20 Fourteenth Amendment to the states, to be (1) viewpoint neutral and (2)  
21 “reasonable in light of the purpose served by the forum.” Lamb’s Chapel v. Center  
22 Moriches Union Free Sch. Dist., 508 U.S. 384, 392-93, 113 S. Ct. 2141, 2147, 124  
23 L. Ed. 2d 352, 361 (1993).<sup>4</sup> The Statute and the Policy fail both requirements.

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25 <sup>4</sup>The Plaintiffs have argued that the District created a designated public forum  
26 subject to strict scrutiny. See Pls’ Req. at 9-10. The California Attorney General has  
27 interpreted the Statute as creating a “‘designated public forum’ for purposes of the  
28 First Amendment.” 79 Ops. Cal. Att’y Gen. 248, 1996 WL 676083, at \*1 (1996)  
 (“1996 Attorney General Opinion”).

1                   **A. The California Statute and the Defendants’ Policy**  
2                   **Discriminate Against Religious Viewpoints in Violation of the**  
3                   **First and Fourteenth Amendments.**

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

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

13                   In Good News Club, the Supreme Court rejected a school district’s argument  
14 that its exclusion of a Good News Club under a facilities-use plan in substance  
15 identical to the one at issue here was not viewpoint discrimination. The policy at  
16 issue in Good News Club permitted access broadly to activities “pertaining to the  
17 welfare of the community,” 533 U.S. at 108, and the school district had interpreted  
18 this phrase to encompass groups such as the Boy Scouts that “promote[ ] the moral  
19 and character development of children.” Id. The Supreme Court ruled that  
20 excluding the Good News Club, which sponsors activities pertaining to the welfare  
21 of the community and “teach[es] morals and character development to children,”  
22 because it did so from a religious perspective was viewpoint discrimination. Id. at  
23 108-09. The Court held that there is “no logical difference in kind between the  
24 invocation of Christianity” by Good News Clubs “and the invocation of teamwork,  
25 loyalty, or patriotism by other associations,” such as the Boy Scouts, “to provide a  
26 foundation for their lessons.” 533 U.S. at 111. Both Good News Clubs and the  
27 Boy Scouts “teach[ ] morals and character development to children.” Id. at 108.  
28 Here, the Defendants permit free access to groups like Camp Fire, the Boy Scouts  
and the Girls Scouts which promote youth activities for Upland children, but have

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

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

16 Instead, the Supreme Court focused on the fact that Good News Club was  
17 engaging in activities “pertaining to the welfare of the community” from a  
18 religious viewpoint, and more particularly that it was engaged in the teaching of  
19 morals and values, activities which the defendants in Good News Club specifically  
20 permitted by providing access to groups like the Boy Scouts. That the Good News  
21 Club did this through “storytelling and prayer,” id. at 110, singing religious songs  
22 and reading the Bible, id. at 103, and that some might label this “an evangelical  
23 service of worship,” id. at 112 n.4, did not alter the fact that its meetings amounted  
24 to the same sorts of activities as those permitted in the forum, only from a religious  
25 perspective. Here, just as in Good News Club, the forum of free access is open to  
26 activities “with a participation of at least 50% Upland youth, which promote youth  
27 and school activities,” and free access has been given to groups teaching values,  
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1 such as Camp Fire, the Boy Scouts, and the Girl Scouts. The Good News Club,  
2 which teaches values to Upland youth from a religious perspective, is excluded  
3 from the free-access forum. This is classic viewpoint discrimination. Similarly,  
4 the California Statute permits schools to give free access to activities about “any  
5 subjects and questions which in their judgment pertain to the educational, political,  
6 economic, artistic, and moral interests of the citizens of the communities in which  
7 they reside,” and “matters of general or public interest,” but require charging a fee  
8 for “religious purposes.” Cal. Educ. Code §§ 38131 (a), (b), (d). This, too, is  
9 classic viewpoint discrimination.

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

3 While Rosenberger is sufficient to demonstrate why Defendants  
4 discriminatory fee policy constitutes viewpoint discrimination, Good News Club  
5 itself, as well as lower court decisions, make plain that viewpoint discrimination  
6 exists when equal access is denied based on viewpoint, not merely when complete  
7 access is denied, as suggested by defendants. In Good News Club, the school  
8 argued that it was not denying the Good News Club access to school facilities, but  
9 only denying it access immediately after school was dismissed. 533 U.S. at 114,  
10 n.5. The Court found that such disparate treatment would nonetheless constitute  
11 viewpoint discrimination: “Consistent with Lamb’s Chapel and Widmar, the school  
12 could not deny equal access to the Club for any time that is generally available for  
13 public use.” Id. Similarly, the Ninth Circuit in Prince v. Jacoby, 303 F.3d 1074  
14 (9th Cir. 2002), held that a school engaged in viewpoint discrimination when it  
15 provided religious groups with access to school facilities, but denied such groups  
16 equal access to other benefits provided to student groups including use of school  
17 vehicles for trips, priority use of audio-visual equipment, use of school supplies  
18 such as posterboard, paper and markers, and meeting space during student/staff  
19 time. Id. at 1091. In a case directly on point here, in Fairfax Covenant Church v.  
20 Fairfax County School Board, 17 F.3d 703 (4th Cir. 1994), the court held that it  
21 was discrimination against religious speech to charge religious users but not others  
22 a fee for after-hours activities on school property.<sup>5</sup> And in Gentala v. City of

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25 <sup>5</sup>The Defendants’ attempt to distinguish Fairfax Covenant Church as concerning  
26 an escalating fee whose stated purpose was to encourage the church to meet elsewhere  
27 misses the mark. See Defs’ Opp. at 9. Just like the Defendants in the present case,  
28 the Fairfax Covenant Church school board expressed a “concern for violating the  
Establishment Clause” and determined that religious organizations “should not be  
permitted to use the schools indefinitely.” 17 F.3d at 706. There was no indication

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

9 Under the precedents of the Supreme Court, the Ninth Circuit and other  
10 courts, the Defendants and the California Statute discriminate based on viewpoint  
11 by requiring the Good News Club to pay a fee that is waived for equivalent secular  
12 groups.<sup>6</sup>

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

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

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

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

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

21                  A state endorses religion when it “sends a message to nonadherents that they  
22                  are outsiders, \* \* \* and an accompanying message to adherents that they are  
23                  insiders[.]” Lynch v. Donnelly, 465 U.S. 668, 688 (1984). To evaluate a state’s  
24                  actions, courts ask “whether an objective observer, acquainted with the text, \* \* \*  
25                  history, and implementation of the [policy], would perceive it as a state  
26                  endorsement of” religion. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308,  
27                  120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000); see also Capitol Square Review &  
28                  Advisory Bd. v. Pinette, 515 U.S. 753, 780, 115 S. Ct. 2440, 132 L. Ed.2d 650

1 (1995) (“[T]he reasonable observer in the endorsement inquiry must be deemed  
2 aware of the history and context of the community and forum in which the  
3 religious [speech takes place].”) (O’Connor, J., concurring).

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

17 Defendants argue that the Policy and the California Statute on which it is  
18 based are permissible measures to advance the separation of church and state  
19 beyond that required by the Establishment Clause. Def. Opp. at 6-7. This  
20 argument is misplaced. “State constitutions can be more protective of individual  
21 rights than the federal Constitution. . . . However, states cannot abridge rights  
22 granted by federal law.” Garnett v. Renton Sch. Dist., 987 F.2d 641, 646 (9th Cir.  
23 1993) (citations omitted). See also Good News Club, 533 U.S. at 107 n.2; Church  
24 on the Rock v. City of Albuquerque, 84 F.3d 1273, 1280 (10th Cir. 1996). In  
25 Widmar v. Vincent, the Court reserved the question “whether, under the  
26 Supremacy Clause, a state interest, derived from its own constitution, could ever  
27 outweigh free speech interests protected by the First Amendment.” 454 U.S. 263,  
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1 275-76, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981) (footnote omitted). However,  
2 with regard to the Free Speech rights of a group seeking access to a forum and a  
3 state interest in greater separation of church and state than required by the  
4 Establishment Clause, the Court held that the latter must yield:

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

16 Id. at 277-78 (internal citation omitted). The same principle controls here.<sup>7</sup>

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

23 For the Defendants to suggest that it may charge religious groups for use of  
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25 <sup>7</sup>Defendants' invocation of Locke v. Davey, 540 U.S. 712, 124 S. Ct. 1307, 158  
26 L. Ed. 2d 1 (2004), is misplaced. Def. Opp. at 7. Locke held that there was no  
27 violation of the federal constitution in the case before it. It did not hold that a state's  
28 interest in the separation of church and state could justify a violation of an individual's  
federal constitutional rights.

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

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

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

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

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

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

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

2   Howard Jarvis Taxpayers Ass’n v. Whittier Union High Sch. Dist., 15 Cal. App.  
3 4th 730, 735, 19 Cal. Rptr. 2d 109, 113 (1993) (quoting Ellis v. Bd. of Educ. of  
4 San Francisco Unified Sch. Dist., 27 Cal. 2d 322, 329, 164 P.2d 1, 5 (1945)).

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

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

18 76 Ops. Cal. Att’y Gen. 52, 1993 WL 122644, at \*1 (1993) (“1993 Attorney  
19 General Opinion”) (quoting Danskin v. San Diego Unified Sch. Dist., 28 Cal.2d  
20 536, 547, 171 P.2d 885, 892 (1946)) (other citations omitted).<sup>8</sup>

21           Excluding the Plaintiffs from free access otherwise granted to secular  
22 organizations like the Boy Scouts whose speech concerns the same subject matter  
23 as the Plaintiffs is simply not reasonable in light of the Civic Center Act’s purpose  
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25           <sup>8</sup>The Civic Center Act was first enacted in 1913. See Danskin, 28 Cal.2d at  
26 555. The provisions concerning religious organizations in the California Statute were  
27 apparently added by a 1963 amendment to the Civic Center Act. See 43 Ops. Cal.  
28 Att’y Gen. 62, 62 (1964), discredited on other grounds by, 1993 Attorney General  
Opinion, at \*3.

1 of encouraging the exchange of ideas.

2       The fact that some other organizations may also be charged direct cost fees  
3 is immaterial so long as other organizations engaging in activities that are in  
4 substance like that of the Plaintiffs are granted free access. See Defs’ Opp. at 2  
5 (asserting that some secular groups are also charged a usage fee). In Rosenberger,  
6 the University’s policy also excluded certain categories, such as “political  
7 activities” and “philanthropic contributions and activities,” from the  
8 reimbursement program. 515 U.S. at 825. The Supreme Court nevertheless  
9 focused upon the fact that the religious student group was engaged in producing a  
10 public policy magazine, an activity otherwise fundable under the policy. See id. at  
11 846.

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

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**III. CONCLUSION**

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

**U.S. DEPARTMENT OF JUSTICE  
CIVIL RIGHTS DIVISION**

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