

No. 08-1847

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LONNY ROARK, et al,

Plaintiffs/Appellees

v.

SOUTH IRON R-1 SCHOOL DISTRICT, et al.

Defendants/Appellants.

On Appeal from the United States District Court for the Eastern District of Missouri, Civil No. 4:06CV392CDP, The Honorable Catherine D. Perry, Judge

OPENING BRIEF

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

This appeal arises from a lawsuit challenging the facial constitutionality of a school district's literature distribution policy that was never even acted upon. This appeal marks the second time this case has been before this Court. In the previous appeal, the issue presented was the propriety of a preliminary injunction against allowing distribution of Bibles to elementary school children on school property at any time during the school day.

The case initially arose over a prior distribution policy that had been employed to allow the distribution of Bibles by members of The Gideons International. For many years, the South Iron R-1 School District had allowed groups like the Gideons to distribute literature to students. After the Plaintiffs filed suit, the District adopted a written literature distribution policy, which policy was enjoined by the district court. The court placed great weight on the history of the written policy and comments made by some Board members.

After remand, the district court granted summary judgment against the new literature distribution policy, again holding the history of the Board's actions regarding the Gideons against the policy's facial constitutionality.

Appellants request 20 minutes of oral argument time per side because this case presents issues of first impression in this circuit concerning the application of *McCreary* and the constitutionality of a school's facially neutral literature distribution policy.

CORPORATE DISCLOSURE STATEMENT

Defendants-Appellants are governmental entities and officials of governmental entities. None of the Defendants-Appellants are non-governmental corporations nor are any of the Defendants-Appellants owned in any way by a publicly held corporation.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. §1331 as Plaintiffs alleged violations of the Establishment Clause of the First Amendment to the United States Constitution.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291 because the district court entered final judgment against Defendant-Appellants.

STATEMENT OF THE ISSUES

1. Whether the court erred in finding an illicit religious purpose in the passage of a facially neutral policy where the Board made no improper statements in passing the new policy and the policy on its face does not even mention religion.

Most Apposite Cases:

McCreary County v. ACLU, 545 U.S. 844 (2005).

Peck v. Upshur Cty. Bd. of Educ., 155 F.3d 274 (4th Cir. 1998).

Good News Club v. Milford Central Sch. Dist., 533 U.S. 98 (2001).

2. Whether the lower court erred in finding the new policy had the primary effect of conveying a message of endorsement of religion where it was facially neutral and does not even mention religion.

Most Apposite Cases:

Peck v. Upshur Cty. Bd. of Educ., 155 F.3d 274 (4th Cir. 1998).

Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools, 373 F.3d 589 (4th Cir. 2004).

3. Whether the lower court erred by entering an injunction that places a content-based restraint on expressive conduct.

Most Apposite Cases:

R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992).

United States v. American Library Ass'n, Inc., 539 U.S. 194, 216 (2003).

Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175, 183 (1968).

STATEMENT OF THE CASE

This case presents a facial challenge to a school's literature distribution policy. Plaintiffs include one mother of two children who once attended South Iron, but abruptly relocated outside the district some months ago.¹ Plaintiff John Doe has one child who currently attends South Iron schools, but he has already passed beyond the fifth grade. *See* JA 7. Plaintiff Lonny Roark has two children, ages 9 and 6, who have not been offered any literature under the new policy. (CITE).

Defendants are members of the school board and the superintendent and principal. Plaintiffs initially filed suit in February 2006 challenging the constitutionality of the District's allowing the distribution of Gideon Bibles to fifth grade students during the 2005-2006 school year. JA 25. Plaintiffs moved for and were granted a preliminary injunction, despite the District's having adopted a revised policy governing literature distribution. *See* JA 13. The District appealed, and this Court upheld the injunction, declining to consider the merits of the District's new policy. JA __.

¹ The District's motion to dismiss these Plaintiffs, Lesa Alcorn and her children, was denied. *See* JA 7. The failure to dismiss Plaintiffs Alcorn was also error, especially as it regards the District's new policy.

On remand, both parties moved for summary judgment. The lower court granted Plaintiffs' motion and denied the District's motion.² JA ___. On March 10, 2008, the district court entered final judgment and enjoined the "defendants, and any persons acting in concert with them, . . . from distributing or allowing distribution of Bibles to elementary school children on school property at any time during the school day." JA ___. The District timely appealed.

STATEMENT OF THE FACTS

South Iron R-1 School District is a public school district in Iron County, Missouri which operates elementary, junior high, and high schools in a single building with a shared entrance, cafeteria, library, and gymnasiums. JA __ (P.4 of decision).

On February 7, 2005, the South Iron R-1 School Board was approached by members of the Ministerial Alliance regarding a request by the Gideons International to distribute Bibles to the fifth grade class at the South Iron elementary school. JA

² Plaintiffs moved only for partial summary judgment, and their claims under state law were not decided at that time. Plaintiffs subsequently dismissed their state law claims. JA ___.

75.³ Representatives of the Gideons had approached Superintendent M. Homer Lewis to request permission to distribute Bibles and Mr. Lewis had decided not to allow the distribution. *Id.* The members of the Ministerial Alliance requested that the Board overrule Mr. Lewis' decision and allow the Gideon distribution to occur. *Id.* Superintendent Lewis advised the Board that if the Gideons came in to distribute Bibles, then the Board could not discriminate against other organizations who wanted to distribute literature. *Id.* The Board voted to allow the Gideons to distribute the Bibles. JA 76. After receiving a letter from the ACLU expressing concern over the distribution by the Gideons, the School Board considered the issue at the March 7, 2005, meeting and voted to delay the distribution by the Gideons until further investigation into the constitutionality of the distribution of Bibles in schools. JA 78.

A further exchange of letters occurred between the ACLU and the District's counsel which prompted the Board to consider the issue again at its April 4, 2005, meeting. JA 80. At the April meeting, the Board tabled the distribution by the

³ The lower court recognized the historical fact that the Gideons had for decades distributed Bibles to elementary age students in South Iron without incident or apparent constitutional injury prior to the relatively recent pronouncements of the courts on Establishment Clause jurisprudence. *See* Mem. and Opin. at 5 ("For as long as anyone can remember, representatives of Gideons International have distributed Bibles to fifth-grade students in the South Iron schools without, until recently, any objection.").

Gideons and voted not to allow the Gideons to distribute literature until further notice. *Id.* It also specifically noted that the Board again discussed “open or closed forum next year.” *Id.*

The issue was not raised again until a member of the Ministerial Alliance brought it to the Board’s attention at the September 6, 2005, Board meeting. JA 81-82. After much discussion, the Board reversed itself and agreed, by a vote of 4-3, to allow the Gideons access to the schools to distribute Bibles to the fifth grade students. *Id.*

During the October 3, 2005, Board meeting, the Board considered a letter from its counsel requesting it to reconsider its earlier decision concerning the Gideons. JA 86. Future Plaintiff Lesa Alcorn also addressed the Board on this occasion, stating that she was not opposed to the students receiving Gideons’ Bibles, but that their choice of methods “was illegal.” JA 87. The Board declined to take any action at the October 3, 2005 meeting. JA 86.

On October 4, 2005, representatives of the Gideons were permitted to pass out Bibles to the fifth graders without incident. JA 89, 92. At the November, 2005 Board meeting, members Paul Daggett and Jeff Rubles reported on their having attended the Missouri School Boards Association Conference. JA 90. Mr. Daggett distributed

some informational materials he had received, and stated that “[f]rom the information he had gathered, he felt the Board had done nothing illegal by allowing the Gideons to come in and distribute Bibles to the 5th graders.” *Id.*

On February 28, 2006, Plaintiffs filed the present lawsuit. The Board discussed the issue again at its March 6, 2006 meeting. JA 99-102. Apparently as a result of the lawsuit having been filed, the meeting was attended by numerous members of the public, many of whom addressed the Board. One individual stated, “The way I understand the issue now, is that it is not about Bibles in school. It’s about letting any group come in to distribute materials - Catholic, Jehovah Witness, Gay Rights, Atheists, etc. would now be allowed to distribute?” JA 99. Board member Paul Daggett, who had voted in favor of the Gideon distribution during the September 6, 2005 Board meeting, responded that the individual’s comments were correct. *Id.* Another individual commented that the District allows Hunter Safety, Water Patrol, and other such groups into the schools to distribute literature. *Id.*

The Board next discussed the issue of the Gideon distribution at its April 3, 2006, meeting. JA 103-106. During the discussion, “President Scaggs explained to the board at this point, we are an open forum and any group can request to enter our school and distribute materials - Atheists, Communists, Gay Rights, etc. The Board

acknowledged that this did establish an open forum.” JA 106. A motion to rescind the motion allowing the Gideons to distribute failed for lack of consensus. *Id.* Similarly, the Board declined to consider settling the lawsuit; “[t]he consensus was that the ACLU had no case.” *Id.*

A new school board was constituted at the June 19, 2006, Board meeting after a lengthy recount process to decide a tie between two candidates for the Board.⁴ The newly-constituted Board met on August 7, 2006, and passed a new, written literature distribution policy. JA 73-74. The new policy allows any outside group to come in and distribute literature to students only on specified terms and conditions. JA 74. All literature must be submitted to the Superintendent or his designee prior to distribution. *Id.* at ¶A.1. A request to distribute literature may only be denied for specified reasons. *See id.* at ¶¶A.3, B. The reasons for denying a request are neutral toward religion and do not take into account the content of the literature except in certain, limited situations. *Id.* The new policy makes it clear that literature may not be distributed in the classrooms and may only be distributed from two specified locations from tables in front of the administrative office or in a corner of the

⁴ *See* April 6, 2006 and June 19, 2006, Board Minutes, *available at* <http://schoolweb.missouri.edu/southiron.k12.mo.us/Board%20of%20Education/index.htm>.

cafeteria. *Id.* at ¶A.4. The policy also states that, “No student may be compelled or coerced to accept any materials being distributed by any person distributing such materials or by any school official. *Id.* at ¶A.6.

Following a hearing, the district court entered a preliminary injunction enjoining the District “from distributing or allowing distribution of Bibles to elementary school children on school property at any time during the school day.” JA 71. On appeal, this Court upheld the injunction, but declined to consider the constitutionality of the new policy adopted by the District. (CITE)

After remand, the parties filed cross-motions for summary judgment. JA 9-10. The lower court granted summary judgment for Plaintiffs as to their federal claims and denied the District’s motion. JA ___. In its opinion, the district court found that the District acted with the improper purpose of advancing religion. Addendum at ___. (Opin. at 26.) It found the Board’s actions to demonstrate a “hostile or defiant attitude,” (*id.* at 18), and that the Board could not be trusted to comply with the law in the future. *Id.* The court therefore found unconstitutional both the past practice of allowing the Gideons to come to the school and distribute Bibles to fifth grade students⁵, as well as the new policy, which, lacking an explicit statement of purpose

⁵ The court rejected the District’s argument that in light of the adoption of the new policy the issue of the old practice’s constitutionality had become moot.

or admission of wrongdoing in the past, could be assumed to have been adopted for the same improper religious purpose as led to the initial practice. Add. at __ (Opn. at 30).

The district court also opined that, “Bibles are different” from other forms of religious literature which have been found to be constitutional when distributed to elementary school children in numerous court cases. (Opin. at 36-37). The court held that because Bible is an “instrument of religion,” it could not be distributed to elementary school children under the new policy (or, apparently, under any circumstances). *Id.* The court went on to hold the new policy unconstitutional under the second prong of *Lemon v. Kurtzman* as well, namely that its primary effect was also the advancement of religion. (Opin at 40). The court therefore entered a permanent injunction prohibiting the District “from distributing or allowing distribution of Bibles to elementary school children on school property at any time during the school day.” Add. __.

This appeal followed.

SUMMARY OF THE ARGUMENT

The district court ruling improperly singles out one type of literature, Bibles, and strikes as unconstitutional a facially neutral policy simply because Bibles had been distributed in the past.

The district court erred in finding the new policy unconstitutional. The court improperly found the “taint” of the District’s prior actions in allowing the Gideons to continue a practice unbroken for some thirty (30) years somehow injected the act of adopting the new, facially neutral policy with an illicit religious purpose. In effect, the court stripped the District of any benefit of the doubt or deferential treatment, instead inferring the worst possible motives behind every ambiguous act and thereby dooming the policy to defeat before the District had an opportunity to defend it.

This rationale, if upheld, would establish a dangerous precedent of damning virtually subsequent action undertaken in good faith by a government body seeking to right a policy once found wrong. It also turns on its head the traditional deferential standard of review afforded a legislative body by the judiciary, and effectively erects a harsh and unforgiving standard for one area of the law only, an Establishment Clause challenge, and then apparently only when one religion is alleged to have been favored, namely Christianity. *Cf., e.g., American Family Ass’n, Inc. v. City and*

County of San Francisco, 277 F.3d 1114, 1121 (9th Cir. 2002) (applying extraordinarily lenient standard of review of purpose inquiry, because court “must be reluctant to attribute unconstitutional motives”, where City and County officially and publicly condemned plaintiffs’ religious views toward and proselytizing of homosexuals as “hateful rhetoric” which led to a “marked increase in anti-gay violence”).

Properly analyzed, the new policy passes constitutional muster. The actions of the Board were motivated by wholly proper purposes, and their efforts regarding the Gideons were at most accommodating, not preferential. Passage of the new policy was a sincere attempt to clarify and codify what the Board believed was an “open forum” policy all along. It was thus not a desperate effort to defeat this lawsuit, but a considered response to a situation that begged for action.

The new policy on its face is neutral as to religion, as even the lower court tacitly conceded. Any outside group seeking permission to distribute literature is allowed to distribute such literature without regard to the content or viewpoint of the literature, with certain narrow exceptions that are plainly spelled out in the policy. The policy does not grant any special treatment to religious groups nor does it place religious literature at a disadvantage. Bibles are treated the same as sports flyers,

underground newspapers, and any other manner of literature that an outside group may seek to distribute in the schools. The policy charts a course of neutrality regarding religion and is thus constitutional.

The policy is thus seen to satisfy all elements of the *Lemon* test; the lower court decision should therefore be reversed.

STANDARD OF REVIEW

The standard of review applicable in this case allows this Court to reverse the grant of a permanent injunction if the trial court abused its discretion or based its decision on an erroneous legal premise. *See Randolph v. Rodgers*, 170 F.3d 850, 856 (8th Cir. 1999). The review of summary judgment is de novo. *See Id.* In reviewing summary judgment, the Court should view the facts and inferences from the facts in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A court should only grant summary judgment if the moving party is entitled to judgment as a matter of law. *See Id.*

ARGUMENT

The court below found the policy unconstitutional under the analytical framework of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), because the District’s past actions in allowing the Gideons to distribute Bibles, coupled with the lack of a statement of purpose when adopting the new policy, raised “a very strong inference” that the purpose of the new policy was “to promote Christianity by providing a means for Christian Bibles to be distributed to elementary school students.” (Mem. and Opin. at 30). The court found the new policy to be “simply a continuation of the previous policy’s allowance of Bible distribution at school.” *Id.* at 31.

Although it noted that it was not necessary to consider the second or third prong of *Lemon*, the court nevertheless went on to find the policy unconstitutional under the “effects” prong as well. *Id.* at 34-35. Significantly, the lower court acknowledged that the new policy was neutral on its face, but held that “there is no incongruity in finding a facially neutral policy to have a religious purpose given the history and evolution of the policy.” *Id.* at 34 n.7. The court reasoned that because no reported case had held Bible distribution to elementary age students constitutional, that Bibles are “religious literature and many Christians believe that they contain the word of God,” and that the lack of safeguards to protect against a perception of

government endorsement of religion, “[t]he policy has the principle (sic) or primary effect of advancing religion by conveying a message of endorsement to elementary school children.” (*d.* at 35-39.)

I. THE NEW POLICY SATISFIES THE *LEMON* TEST.

The new policy passed by the District is constitutional on its face, as even the district court tacitly acknowledged. This case therefore raises the question to what extent a governmental entity must go in order to remove the “taint” from actions previously held unconstitutional. The lower court, relying heavily on *McCreary County v. ACLU*, 545 U.S. 844 (2005), and *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290 (2000), found the taint of the District’s prior actions potent enough to poison even the new policy. The District suggests the lower court erred in so finding.

A. The Policy was not Adopted for a Primarily Religious Purpose.

Under *Lemon*, the courts find a violation of the Establishment Clause of the First Amendment⁶ when the government acts with the predominant purpose of advancing religion. 403 U.S. at 612. The Supreme Court has cautioned that a finding

⁶ The First Amendment provides, in relevant part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;” U.S. CONST. amend. I. It is of course obvious that the District is not Congress.

of impermissible purpose should be rare and that the purpose test has a “straightforward nature,” that looks solely to “openly available data,” “readily discoverable fact,” or “traditional external signs” such as the “text, legislative history, and implementation of the statute or comparable act.” *McCreary*, 545 U.S. 844, 862-63. The “secular purpose inquiry has been seldom dispositive and standing alone it may be rarely determinative.” *ACLU of Kentucky v. Mercer County*, 432 F.3d 624, 630 (6th Cir. 2005)(internal marks omitted).

Although it is certainly true that “the secular purpose has to be genuine, not a sham, and not merely secondary to a religious objective,” *McCreary*, 545 U.S. at 864, neither should the inquiry be “rigged in practice to finding a religious purpose dominant every time a case is filed.” *Id.* at 863. The test must be conducted “without any judicial psychoanalysis of a drafter's heart of heart.” *Id.* at 862. This caution exists for good reason. In *Bd. of Edu. of Westside Community v. Mergens*, 496 U.S. 226, 246 (1990), the Supreme Court held that “what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enact the law.” (emphasis added). “There is a distinction . . . between the motives and purposes of the individual legislators and an institutional legislative purpose. Legislators may have the purest personal motives and produce unconstitutional legislation, and contrariwise individual legislators with wrongful motives may vote

for a bill and produce legislation which is both beneficent and constitutional.” *May v. Cooperstein*, 572 F. Supp. 1561, 1572 (D.N.J. 1983).

“[W]hile it is possible to discern the objective ‘purpose’ of a statute (i.e., the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth, . . . discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed finite.” *Edwards v. Aguillard*, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting).

1. The lower court employed a flawed analytical grid.

Here, the lower court placed undue emphasis on two key facts which resulted in the distortion of its analysis of the purpose prong. First, the court attributed the Board’s disagreement with Superintendent Lewis’ recommendation, made after his consultation with some attorneys⁷, that they no longer allow the Gideons to pass out Bibles to “a hostile and defiant attitude” on the part of the Board. JA __ (Mem. and

⁷ The disagreement of a majority of the Board with this second-hand legal advice does not necessarily suggest a willful disregard for the law. It may be that the Board simply disagreed with the advice. This area of the law is far from settled, as the palpable contrast between the positions advocated by the Board’s present counsel and those suggested by Mr. Lewis’ cohorts attest. Even the lower court observed that the Establishment Clause “lacks categorical absolutes.” JA __ (quoting *McCreary*, 545 U.S. at 860 n.10).

Opin. at 18-19). Second, the court assigned undue weight to the fact that it was *the Bible*, of all things, that was being distributed to fifth grade students, as if somehow that one book could never be held constitutionally sound for handling by elementary school students. *See, e.g.*, Mem. and Opin. at 36 (drawing stark distinction between mere flyers inviting students to a religious function and the Bible, which “many Christians believe to be the word of God”); *id.* (“[a] person need only read the Bible to be confronted with a religious viewpoint”).

The lower court’s analysis, beginning from these two axes, proceeded to graph all other “readily discoverable facts” on the grid of this improper purpose.⁸ Thus, the vote against Mr. Lewis’ recommendation could not have been motivated by a good faith belief that the District was already applying an unwritten open forum policy, but was instead an act of defiance; and when Board President Jim Scaggs said at the April 2006 Board meeting, “we are an open forum and any group can request to enter our

⁸ The court even seemed to hold the purposes of the Gideons themselves, obviously private actors, against the District. *See* Mem. and Opin. at 5-6 (noting that the purpose of the Gideons “is the promotion of the Gospel of Christ to all people, to the end that they might come to know the Lord Jesus Christ as their personal savior,” and that their purpose in distributing the Bibles “is to encourage the children to accept Christ as their personal savior”). After all, “there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” *Bd. of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990).

school and distribute materials - Atheists, Communists, Gay Rights, etc.,” it was not a sincere reflection of the Board’s true belief but an “after-the-fact attempt” only “created in response to litigation.” Mem. and Opin. at 23-24; *see also id.* at 24 (“The Board’s conclusion that it has been operating under an open forum policy all along is based on self-serving, after-the-fact justifications that are devoid of any reliable support.”). Similarly, when Board member Michael Ruble testified that he still thought “the way the Gideons did it in the past is fine,” and Paul Daggett said he thought there was nothing wrong with the way they had handled the literature distribution in the past “[a]s long as they treated everybody the same,” these were not statements of good faith to be taken at face value, but rather were indications of “a lack of willingness to comply with the law in the future.” *Id.* at 17-18.⁹

Again, on the grid of improper purpose, the new policy was not an attempt to make explicit what the District had implicitly (if inarticulately) believed before, but

⁹ Even the much ballyhooed vote to “pretend this meeting never happened,” after Mr. Lewis’ suggestion to revoke permission to the Gideons, may be subject to a reasonable interpretation. Given the strong feelings of Mr. Lewis on the matter (ultimately leading to his resignation), and the majority of the Board’s disagreement with him, the vote may well have been intended to smooth ruffled feathers on the personal level. It appears that the Board cared deeply for Mr. Lewis, as reflected by the fact that no one wanted to second the motion to accept his resignation. *See* JA 86. In addition, of course, the Board and the superintendent must work closely on myriad issues; hard feelings make for difficult working conditions.

“was passed simply in response to this litigation.” Mem. and Opin. at 16. Likewise, the adoption of the new policy ten days before the preliminary injunction hearing was not an act of good faith undertaken on advice of the District’s new counsel, who had only been retained at the eleventh hour, but was instead a “protestation[] of repentance and reform, . . . timed to anticipate suit.” *Id.* at 16-17 (quoting *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).¹⁰

The lower court’s grid had no means of recognizing good faith; the question was not *whether* the Board’s actions were in bad faith or not, but only *where* on the grid of improper purpose they lay. The district court’s analysis of purpose was thus not consistent with the teachings of *Lemon*, *McCreary*, and their progeny. The court, no doubt unintentionally, engaged in the very “judicial psychoanalysis” the *McCreary* Court warned against.

This inappropriate analytical framework is all the more readily seen when one considers that despite the (arguably improper) probing of the motives of the individual Board members, not a single “smoking gun” statement was uncovered. *Cf. McCreary*, 545 U.S. at 851 (Pulaski County judge executive quoted at time of

¹⁰ The District, it seems, could do no right by the lower court: on the one hand, the court chastised it both for *failing* to heed the advice of counsel and refusing to allow the Gideons back in the schools, and then for *heeding* advice of counsel by adopting the new policy.

erecting Ten Commandments display telling story of astronaut who became convinced “there must be a divine God” after viewing the Earth from the moon); *Wallace v. Jaffree*, 472 U.S. 38, 56-57 (1985) (lead sponsor of bill providing for oneminute period of silence “for meditation or voluntary prayer” at start of school day stated on record his purpose was “an effort to return voluntary prayer” to the public schools).

2. Properly analyzed, the new policy easily satisfies the purpose prong.

When properly considered within the careful and deferential analytical grid set forth in *McCreary*, the actions of the Board in adopting the new policy easily satisfy the low threshold of *Lemon*’s purpose prong.¹¹ First, the policy clarified and reduced to written form what had at best been imprecisely understood previously. To the extent the policy was intended to clarify and formalize the former understanding, it is only natural that the District did not repudiate and repent of its previous practice.¹²

¹¹ While the District does not concede its previous practice was unconstitutional, for purposes of this appeal it is not contesting that determination.

¹² There is undoubted irony in a court so bent on keeping religion out of the public realm insisting that the only way the District could overcome the taint of its alleged prior sins was by confessing them and promising to repent.

Second, insofar as the old practice had not been carefully thought out and rendered specific as to detail, the new policy filled what had become a great need for the District. For most of the Board members, they had simply assumed that this matter of the open forum had long ago been settled. As David Brewer testified: “To the best of my knowledge this school has been open, you know, ever since I can remember and there has never - nobody been denied access to the school, you know whichever group it is.” JA __ (dep. 19-20); *see also* JA _ (dep. Paul Daggett) (in response to the question when he first understood the District had an open forum policy, he said, “Back years ago when I was on the Board before [in the 1970's].”); JA __ (“Ever since I’ve been on the Board I’ve been under the impression we were an open forum.” (J. Ruble Dep. at 15). This uniformity of belief, however misguided under the current dictates of the courts, hardly comports with the suggestion that the Board members were engaged in some kind of conspiracy concocted just for this lawsuit. Rather, the evidence is entirely consistent with the conclusion that the District was under the good faith belief that their policy was and always had been an open forum in which any group could come into the school and distribute literature.

The filing of the lawsuit and the firestorm of controversy surrounding it provided ample evidence that the policy was not clear to all, and some additional work was needed. Hence the passage of the new policy.

Similarly, the Board’s decision in April 2006 not to rescind the vote allowing the Gideons to return to the school, occurring just after President Scaggs’ proclamation that the District policy was an open forum, was perfectly logical: Since the District had already adopted an open forum policy, there was every reason not to reverse itself on the Gideons’ vote. The Board believed (and continues to believe) that so long as it pursued a policy of neutrality on religion it is within the parameters of constitutional jurisprudence: “The touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.” *McCreary*, 545 U.S. at 860 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). The knee-jerk assumption that any action allowing a group such as the Gideons into the schools must be an unconstitutional advancement of religion itself suggests not neutrality, but hostility toward religion. *See, e.g., Mergens, supra*, 496 U.S. at 248 (“if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion”).¹³

¹³ The lower court held that the District did not in fact open its facilities to others, and that its claim is but a sham. However, the record is clear that other groups have availed themselves of the facilities, including the Girl Scouts, a group affiliated with the Railroad, Hunter Safety and Water Patrol personnel, and groups participating in the annual health fair. Mem. and Opin. at 6. That no other group distributed non-curriculum related literature in the classroom is certainly not dispositive of the issue; the record is clear that no group has been refused such permission. *See* JA (depo.

In the same vein, the lack of an official purpose statement issued on passage of the policy takes on a new meaning. First, it was not necessary for the Board to state that it was an open forum; they already had an open forum, in their understanding, at least. Second, and for the same reason, to repent of their past actions would have been insincere; if they already had an open forum policy, which was even-handed by definition, why should they repent of allegedly showing favoritism to the Gideons? This issue of the lack of a statement of purpose perhaps best underscores the impropriety of the lower court's analysis. Under a deferential standard of review, the burden of demonstrating wrongdoing is on the accusing party to show some concrete evidence supporting his claim. In a silent record, no such evidence can be found.¹⁴

If, on the other hand, the benefit of the deference is lifted, and the court assumes illicit motive even absent any hard evidence, then it is incumbent on the Board members to prove a negative, and somehow show that their silence was not intended to hide something. But where, as here, the officials testify, under oath, as to

David Brewer at 24) (“Like I said, nobody has ever been denied access.”).

¹⁴ Moreover, the taint of an alleged improper purpose in allowing the distribution of Bibles under an unwritten practice narrowly applied to the Gideons should not properly be applied to render unconstitutional a broad written policy applied to all groups and all kinds of literature. There is, as they say, no sense throwing the baby out with the bath water.

their understanding of the matter and attest to their good faith, the testimony is dismissed as having been adopted as a “litigation position.” In other words, government officials tainted with the tag of illicit religious purpose can almost never remove the stain, scrub as they might.

Applying the proper analytical framework, then, it is plain that the District had sound non-religious reasons for its actions. The new policy passes the purpose test.

B. The New Policy Passes the Primary Effect Prong.

The second prong of the *Lemon* test asks whether, in the eyes of an objective observer, the policy has the primary effect of conveying a message of endorsement of religion. The lower court found that the objective observer, knowing how the District had allowed the Gideons into the schools in the past, and that the new policy, although facially neutral, would also allow the Gideons to pass out Bibles to impressionable fifth graders, would naturally conclude that the policy was something of a Trojan horse whereby the District could continue its unconstitutional ways of furthering the cause of the Gideons. *See generally* Add. at __ (Opin at 35-40).

The lower court’s entire analysis was based upon the assumption that the new policy was implicitly if not explicitly all about the distribution of Bibles, despite the fact that the policy is facially neutral and not a word was mentioned at the time of

adoption of the policy about the Bible. In effect, the court analyzed a different policy than what the District actually adopted. This unprecedented narrowing of the plain language of the policy was improper, and quite naturally led to an erroneous conclusion.

1. A neutral literature distribution policy passes Constitutional muster.

When the focus is rightly adjusted to recognize that the new policy does not even mention the Bible but rather deals broadly with literature distribution of all kinds from an even-handed, neutral perspective, it is difficult to imagine the objective observer jumping to the conclusion that the policy has the *primary* effect of advancing religion.

The Defendants adopted a written policy that provides neutral access to all private speakers who wish to distribute outside literature in the public schools. (JA ___). All speakers, whether they wish to distribute religious speech or secular speech, must abide by the same requirements. No preference is given under the policy to religious speech in general or to any religious speech in particular. Bibles are treated the same as secular forms of literature and requests to distribute both must go through the same procedure. The restrictions on the distribution of literature under Section B of the policy do not in any way relate to whether literature is religious. The

Defendants in this case do not in any way review the content of the speech to determine whether it is religious to determine whether it should be allowed. Private religious speech in the limited public forum of the school cannot establish religion.

The policy, far from improperly advancing religion, embodies all that is best in our system of tolerance for a diversity of views. “The Supreme Court has, over the past decade, consistently sustained against Establishment Clause challenge neutral government policies that permit private religious speech on and within state educational and other properties on the same terms as private secular speech is permitted.” *Peck v. Upshur Cty. Bd. of Educ.*, 155 F.3d 274, 279 (4th Cir. 1998) (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Mergens*, *supra*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981)). “The Supreme Court has repeatedly held that such ‘an open forum policy, including non-discrimination against religious speech, [has] a secular purpose.’” *Peck*, 155 F.3d at 279 (citing *Widmar*, 454 U.S. at 271).

In *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, 373 F.3d 589 (4th Cir. 2004), the court ruled that a school district

must allow the Good News Club informational flyers to be distributed by teachers to students. The school district permitted many after-school organizations to give informational flyers to teachers for distribution to the students. However, the district refused to permit distribution of the Good News Club flyers, stating that the flyers were religious and contained a proselytizing message. The Fourth Circuit rejected this argument, finding it impermissible to discriminate against the religious viewpoint of the Good News Club. Thus, if the school permits informational flyers of secular organizations to be distributed to students, then the school must also allow the distribution of flyers by religious organizations. *Accord, Child Evangelism Fellowship of New Jersey Inc. v. Stafford Township School District*, 386 F.3d 514 (3d Cir. 2004) (holding that the district engaged in “viewpoint-based religious discrimination” by refusing to allow faculty to distribute flyers for Good News Clubs); *Hills v. Scottsdale Unified School District No. 48*, 329 F.3d 1044, 1052 (9th Cir. 2003) (“If an organization proposes to advertise an otherwise permissible type of extra-curricular event, it must be allowed to do so, even if the event is obviously cast from a particular religious viewpoint.”).

In a neutral policy allowing access to all speakers, then, it is not the inclusion of religious speakers that offends, but their exclusion. Government does not promote

or favor religion by simply giving it the same access to a public forum as all other secular speech. As the Supreme Court has written:

It will be a sad day when this Court casts piety in with pornography, and finds the First Amendment more hospitable to private explicatives than to private prayers. This would be merely bizarre were religious speech simply *as* protected by the Constitution as other forms of private speech; but it is outright perverse when one considers that private religious expression receives *preferential* treatment under the Free Exercise Clause. It is no answer to say that the Establishment Clause tempers religious speech. By its terms that Clause applies only to the words and acts of *government*. It was never meant, and has never been read by this Court to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum.

Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 766 (1995).

The new policy is constitutional under *Lemon*.

II. THE INJUNCTION IMPOSED BY THE LOWER COURT IS INAPPROPRIATE AND ITSELF CONSTITUTIONALLY SUSPECT.

Even assuming some relief is appropriate here, which the District suggests is not, the remedy imposed by the lower court is improper. The injunction issued was very specific: The District is enjoined “from distributing or allowing distribution of Bibles to elementary school children on school property at any time during the school day.” JA ___. It is not clear from the lower court’s opinion whether the new policy remains in effect as modified by the injunction. Because the court’s entire analysis focused only on the distribution of Bibles, which have now been enjoined, it is

arguable whether the policy may yet be implemented. After all, the injunction did not strike the policy in its entirety.¹⁵ If the policy does survive, which would seem to be the case, then it has the troubling effect of permitting the distribution of certain religious texts, such as the Koran or the I Ching, while censoring only one, the Bible. Such a result is hardly consistent with our constitutional scheme.

In addition, the injunction mandates that the District proscribe speech based solely on the basis of its content. It forces the District to discriminate against members of the public who wish to distribute only a single book from among the hundreds of thousands of titles available – the Bible.¹⁶

A. The Injunction is Content-Based.

As the lower court conceded, the policy is content-neutral, allowing anyone except a school official, staff member, or employee, to distribute literature outside of the classroom in specified areas. (CITE). The policy only excepts a reasonable,

¹⁵ Moreover, the lower court seemed to treat the policy as still in effect. *See* Add. at __ (opin at 12) (noting that as of March 2007, well after entry of the preliminary injunction, no requests to distribute literature had been made under the policy).

¹⁶ The District is similarly ham-strung whether the current policy survives or it adopts another literature distribution policy in the future; the injunction is permanent.

narrow set of literature from distribution.¹⁷ (CITE). The injunction, however, impermissibly mandates a content-based restriction on speech in the limited public forum created by the content-neutral policy. This effect visits harm upon third parties not before the Court who may wish to avail themselves of the literature distribution policy, and places the District in the uncomfortable position of enforcing a content-based regulation on speech.

“Content-based regulations are presumptively invalid.” *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992); *see also Interactive Digital Software Ass’n v. St. Louis County, Mo.*, 329 F.3d 954, 958 (8th Cir. 2003) (stating that “[a] content-based restriction on speech is presumptively invalid”). “The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed.” *R.A.V.*, 505 U.S. at 382. Indeed, “content discrimination ‘raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.’” *Id.* at 387 (quoting *Simon & Schuster, Inc. v. Members of New York State Crime Victim’s Bd.*, 502 U.S. 102, 116 (1991)). “If there is a bedrock principle underlying the First Amendment, it is that government

¹⁷ The policy does not allow the distribution of advertisements, copyright infringing literature, obscene literature, literature promoting illegal activity, and literature which would substantially interrupt or interfere with the operation of the school. (CITE).

may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Simon & Schuster*, 502 U.S. at 118 (citations omitted).

B. The Injunction Harms Third Parties not Before the Court.

While it is true that the prohibition on allowing distribution of the Bible is in the form of a court-awarded injunction rather than a legislatively-adopted regulation¹⁸, the effect upon third parties is the same: It is not the District that suffers so much in this case, but both those wishing to avail themselves of the otherwise benign literature distribution policy and the innocent students, who after all have the right to receive information from the widest variety of sources. *E.g.*, *United States v. American Library Ass’n, Inc.*, 539 U.S. 194, 216 (2003) (“the Constitution protects the right to receive information and ideas”) (Breyer, J., concurring) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)). The injunction imposed here thus operates like a large club employed to swat a single fly; it crushes the rights of those not before the Court as well as those that are.

The injunction draws a bulls eye on the District as a target in a future lawsuit by one whose rights have been infringed by this overly broad proscription. It is axiomatic that “First Amendment freedoms need breathing space, government could

¹⁸ This observation was made by this Court in the course of the first appeal. *See Doe v. South Iron R-1 Sch. Dist.*, 498 F.3d 878, 883 (8th Cir. 2007). However, the Court did not consider the effect of this restriction on third parties with whom the District deals.

regulate in the area only with narrow specificity.” *Keyishian v. Bd. of Regents of Univ. of State of New York*, 385 U.S. 589, 603 (1967). And just as the legislature must proceed with caution where First Amendment rights are implicated, so, too must the courts, for an “order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order.” *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175, 183 (1968).

Here, the District is being punished for nothing more than attempting to apply the teachings of the Supreme Court, which explained that where speech is involved and a wrong has been perpetrated, “the remedy to be applied is more speech, not enforced silence.” *Texas v. Johnson*, 491 U.S. 397, 419 (1968) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)). The District has adopted a content-neutral policy governing not only the elementary school, but also the middle and secondary schools. It may be employed by those of any ideology to distribute literature in an orderly and respectful fashion to students both young and old. What better vehicle by which to “prepare pupils for citizenship in the Republic [and] inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation”? *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting C. Beard & M. Beard, *New Basic History of the United States* 228 (1968)).

Even if avoiding an Establishment Clause violation were considered a compelling interest under the facts here, the injunction does not advance that interest in the least restrictive means available. The lower court enjoined the distribution of Bibles altogether, even where wholly initiated and occasioned by private actors. The District would be in violation of the injunction if, knowing the exchange of a Bible were occurring on campus, it did not act to censor the action. This result is absurd.

If the concern is that students will perceive an endorsement of religion by a private person distributing Bibles, a dubious proposition at best, then that concern could certainly be alleviated by requiring a disclaimer or a sign on the table stating that the school district is not sponsoring nor endorsing the distribution of the literature. The South Iron R-1 School District is a small district with an approximate enrollment of 425 students covering kindergarten through twelfth grade. (JA 79). It is reasonable to assume that a student in this small of a district would understand that an outside person is not a member of the school administration or faculty and, as such, the school is not endorsing religion by allowing them to be there distributing religious literature. Because the injunction entirely prohibits the distribution of Bibles, it does not advance whatever interest the district court identified in the least restrictive means.

The district court erred in enjoining the distribution of Bibles under the new policy. Because the new policy is constitutional and does not result in any endorsement of religion by the District, the district court should have allowed the new policy to remain in effect and to govern all future requests for distribution of literature. The injunction was legally erroneous and an abuse of discretion.

The district court's injunction in this case represents an unprecedented expansion of *McCreary*, distorts the purpose prong of the *Lemon* test, and ignores clear Supreme Court guidance on the specific factual circumstances of the case at bar. The injunction is thus a clear error of law and an abuse of discretion. It should be reversed.

CONCLUSION

Based on the foregoing, Appellants respectfully request that this Court reverse the district court's grant of a permanent injunction in this case.

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7), undersigned counsel certifies that the foregoing Initial Brief contains 9197 words. Word Perfect 12 software was used to count the words in the foregoing brief.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 24th day of June, 2008, by U.S. Mail, First Class Delivery, to the following:

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ADDENDUM

DISTRIBUTION OF MATERIALS AND LITERATURE TO STUDENTS

- A. Any group, organization, corporation, individual, club or association that wishes to distribute any printed material may do so subject to the following conditions:
1. All proposed printed material must be submitted to the Superintendent or designee 48 hours prior to the requested time of distribution.
 2. If the Superintendent does not respond to the request within 48 hours of receipt of the request, the request is deemed approved and material may be distributed.
 3. The Superintendent or designee shall state in writing the reason(s) under Section B of this Policy for denying a request to distribute printed materials to students.
 4. If a request is approved, the literature may be distributed to students either directly in front of the administrative offices of the District or at a table provided by the District in the Northwest corner of the cafeteria. Literature shall not be distributed from any other location.
 5. If a request is approved, literature may be distributed either before or after the school day, before or after classes or during lunch time.
 6. No student may in any way be compelled or coerced to accept any materials being distributed by any person distributing such materials or by any school official.
- B. All requests to distribute literature shall be approved unless the material:
1. Is libelous, invades the privacy of others, infringes on a copyright or is in any way prohibited by state or federal law.
 2. Is obscene, pornographic or lewd, vulgar or indecent.
 3. Primarily seeks to advertise for sale, the products or services of outside businesses.
 4. Endorses a particular candidate for public office, other than a candidate for student elective office.
 5. Promotes alcohol, tobacco, drugs or other illegal activity.
 6. Is likely to cause substantial disruption to or materially interfere with the proper and orderly operation of the school and its activities.
- C. This policy does not apply to students who may wish to distribute printed materials to fellow students.
- D. All appeals must be submitted in writing to the Board of Education. The Board shall hold a hearing regarding the matter on the next regularly scheduled Board Meeting. The Board shall issue a decision in writing within five working days following the hearing.