UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

CHILD EVANGELISM FELLOWSHIP OF RHODE ISLAND, INC.,	)	
Plaintiff,	)	
v.	)	No. 1:23-cv-00099-MSM-LDA
PROVIDENCE PUBLIC SCHOOL DISTRICT and DR. JAVIER MONTAÑEZ, in his official capacity as Superintendent of Providence Public School District,	)	
Defendants.	)	

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff, CHILD ENVANGELISM FELLOWSHIP OF RHODE ISLAND, INC. ("CEF Rhode Island"), pursuant to Rules 7 and 65, Fed. R. Civ. P., and Local Rule CV 7, moves for entry of a preliminary injunction restraining Defendants, PROVIDENCE PUBLIC SCHOOL DISTRICT and DR. JAVIER MONTAÑEZ, in his official capacity as Superintendent of Providence Public School District, from violating CEF Rhode Island's rights under the Speech Clause of the First Amendment to the United States Constitution, and the Equal Protection Clause of the Fourteenth Amendment, by denying CEF Rhode Island access to district facilities to host afterschool Good News Clubs on the basis of the clubs' Christian viewpoint, content, and identity, while discriminatorily allowing access to facilities for similarly situated, nonreligious afterschool programs.[1]

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[1] In its Verified Complaint, CEF Rhode Island challenges the District's discriminatory use policies as unconstitutional, facially and as-applied, under the Speech, Establishment, and Free Exercise Clauses of the First Amendment to the United States Constitution, and the Equal Protection Clause of the Fourteenth Amendment. For purposes of preliminary injunctive relief, however, CEF Rhode Island only presses its Speech and Equal Protection arguments here.

INTRODUCTION AND TIMELINE

For nearly two school years, the District has blocked CEF Rhode Island from hosting its elementary school Good News Clubs, which are Christian in viewpoint, content, and identity, in District facilities that are open to nonreligious afterschool clubs that similarly teach moral and character development. Since CEF Rhode Island requested approval for its Good News Clubs at D'Abate and Leviton Elementary Schools prior to the 2021–22 school year, officials have prolonged the District's review with endless delays and capricious conditions not imposed on the other, nonreligious clubs, and have never given CEF Rhode Island an answer. Through these delays and roadblocks, the District has effectively and unconstitutionally denied CEF Rhode Island equal access for most of two school years.

The facts supporting this motion are set forth in the Verified Complaint (Doc. 1, ¶¶ 1–57) and incorporated herein by this reference.[2] In summary:

- The District has written policies and procedures governing the use of school facilities by outside groups, including the use of school facilities under a simple Rental of School Facilities Application, and the use of facilities under a formal Community Partnership contract or memorandum of understanding (MOU) between the District and the outside group. (V. Compl., ¶¶ 16–25.) These written policies and procedures, together with the unwritten and undisclosed policies applied by the Superintendent and other District personnel to CEF Rhode Island, compose the District's "Use Policies" challenged in this action. (V. Compl. ¶ 16.)

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[2] Unless otherwise indicated, capitalized terms herein have the same meanings as in the Verified Complaint.

- The District allowed CEF Rhode Island to run a Good News Club at D'Abate Elementary School for the 2019–2020 school year under a simple Rental of School Facilities Application, before COVID caused the cancelation of all clubs in Spring 2020. (V. Compl., ¶¶ 26–27.)

- When CEF Rhode Island officer Baker requested to resume the D'Abate Good News Club and start a new club at Leviton Elementary for the 2021–22 school year, District officials Figueroa and Lopes pressed Baker about the Christian viewpoint of the clubs' programming and requested a written description and examples of the program content. (V. Compl., ¶ 28–29.) After nearly a month of silence from the District following Baker's submission of the requested materials, CEF Rhode Island officer Haley submitted new Rental of School Facilities Applications, to which Figueroa replied that the District deemed CEF Rhode Island's request for facilities use a "request for partnership" subject to "a process here that we must adhere to," and that CEF Rhode Island's ability to work with District students "has yet to be determined." (V. Compl., ¶¶ 30–33.)

- Over a month after Figueroa disclosed CEF Rhode Island's consignment to the "partnership" "process," D'Abate Principal Kermen—who wanted the Good News Club to return to his school—communicated to Baker that the District would additionally require CEF Rhode Island to "demonstrate academic/attendance outcomes" for Good News Club participants as new a condition of the District's review and consideration. (V. Compl. ¶ 35.) Baker replied, "I feel confident in saying that I have provided more information regarding the Good News Club than any after school club has been required to provide in all of the Providence schools," and that there was no new information to provide beyond the content materials previously provided to the District. (V. Compl. ¶¶ 30, 35.) Principal Kermen further

replied, "Wow! I am so sorry to hear this and am unsure of why there is an issue this year." (V. Compl. ¶ 35.)

- On January 13, 2022, Principal Kermen suggested language Baker could submit to the District to satisfy its new request for "attendance and academic goals" for Good News Clubs. (V. Compl., ¶ 39.) Kermen advised, "These attendance and academic goals, plus your program curriculum should be more than enough," and added, "I would prefer no fight, but I do not see [the District's] logic and feel this is a huge disservice to our students and families, so we fight." (V. Compl., ¶ 39.) The same day, Baker sent Kermen a letter containing the suggested language and describing other positive outcomes of Good News Clubs, and also offering a positive reference from the superintendent of another Rhode Island school district with Good News Clubs in its schools. (V. Compl., ¶ 40.)

- On March 8, 2022, Principal Kermen apologetically notified Baker that the District would require still more information as a condition for approving Good News Clubs, this time demanding "the attendance data, ELA growth, enhanced student learning experience, decreased behavioral problems (before and after joining the program), and the tools used to identify the change in the areas mentioned," for twenty prior participants in the 2019–2020 D'Abate Good News Club. (V. Compl., ¶ 43.) Principal Kermen lamented, "I am very upset about the continued roadblocks [the District] throws at us . . . ." (V. Compl., ¶ 43.)

- From 2019 to the present, the District has allowed numerous nonreligious groups to use school facilities for afterschool programs teaching morals and character development, including Boys & Girls Clubs, Boy Scouts (Cub Scouts), Girl Scouts, and Girls on the Run. (V. Compl., ¶¶ 50–56.)

- Like the other, nonreligious organizations the District allows to host their afterschool programs in District schools, Good News Clubs teach moral and character development, but Good News Clubs do so according to their Christian viewpoint, content, and identity. (V. Compl., ¶¶ 11–15, 57.)

- None of the District's written policies and procedures governing the use of school facilities expressly requires that an outside organization's request to conduct an afterschool program be consigned to a "partnership" "process," like CEF Rhode Island's requests have been since 2021, as opposed to the community use procedure and the simpler Rental of School Facilities Application that was sufficient for the D'Abate Good News Club in 2019. (V. Compl., ¶¶ 16–26, 33.)

- According to the District's records, none of the similarly situated nonreligious organizations had to submit to obtrusive District requests for historical student attendance, performance, and behavior data to justify its afterschool program, or otherwise submit to the unwritten and highly discretionary "partnership" "process" imposed on CEF Rhode Island. (V. Compl., ¶¶ 33, 35, 39, 42–45.)

- Between November 5, 2021 and January 4, 2023, counsel for CEF Rhode Island made four written demands for access to District facilities equal to the access given to the similarly situated afterschool programs run by nonreligious organizations. (V. Compl., ¶¶ 34, 37, 42, 48, Exs. O, R, V, Y.) In each demand, counsel notified the District that its disparate treatment of CEF Rhode Island is unconstitutionally discriminatory. The District has never denied or otherwise responded to any of counsel's written demands.

- Following the second of CEF Rhode Island's written demands for equal access, sent December 10, 2021, the District temporarily halted all afterschool programs. (V. Compl.,

¶¶ 37, 38.) From Spring 2022 to the present, however, at least some (if not all) of the similarly situated nonreligious programs have been allowed to resume while the Good News Clubs remain excluded. (V. Compl., ¶ 55 (Girls on the Run, Spring 2022), ¶ 56 (Girls on the Run, Spring 2023), Ex. Z at 5 (Girl Scouts, Spring 2022).)

STANDARDS OF DECISION

A. Preliminary Injunction

"When assessing a request for a preliminary injunction, a district court must consider '(1) the movant's likelihood of success on the merits; (2) the likelihood of the movant suffering irreparable harm; (3) the balance of equities; and (4) whether granting the injunction is in the public interest.'" *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 22 (1st Cir. 2020) (quoting *Shurtleff v. City of Bos.,* 928 F.3d 166, 171 (1st Cir. 2019)). "In the First Amendment context, the likelihood of success on the merits is the linchpin . . . . [I]rreparable injury is presumed upon a determination that the movants are likely to prevail . . . ." *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 10–11 (1st Cir. 2012).

B. Forum Doctrine

When the government excludes from its property speech protected by the First Amendment, Supreme Court precedents require a forum analysis for assessing the constitutionality of the speech restriction. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018). Under this forum doctrine, a court "must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). Then the court "must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard." *Id.*

The Supreme Court's forum doctrine generally recognizes traditional public forums, designated public forums, and nonpublic forums, each with its own "requisite standard" for regulating access:

> In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited. The same standards apply in designated public forums—spaces that have not traditionally been regarded as a public forum but which the government has intentionally opened up for that purpose. In a nonpublic forum, on the other hand—a space that is not by tradition or designation a forum for public communication—the government has much more flexibility to craft rules limiting speech. The government may reserve such a forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.

Minn. Voters All., 138 S. Ct. at 1885 (cleaned up).

Some Supreme Court cases call a nonpublic forum a "limited public forum." *Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 Sch. Dist.*, 640 F.3d 329, 334 (8th Cir. 2011); *see also, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) ("If the forum is a . . . public forum, the State's restrictions on speech are subject to stricter scrutiny than are restrictions in a limited public forum."). "But this change in nomenclature has not changed the governing standard." *Victory Through Jesus*, 640 F.3d at 334. Thus, whether called a nonpublic forum or limited public forum, a government restriction on speech "must not discriminate against speech on the basis of viewpoint, and the restriction must be reasonable in light of the purpose served by the forum." *Milford*, 533 U.S. at 106–107 (cleaned up).

C. Burden of Proof

"'[T]he burdens at the preliminary injunction stage track the burdens at trial,' and for First Amendment purposes they rest with the government." *Reilly v. City of Harrisburg*, 858 F.3d 173, 180 (3d Cir. 2017) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546

U.S. 418, 429 (2006)). "[I]n the First Amendment context, the moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, at which point the burden shifts to the government to justify the restriction." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011), *overruled on other grounds by Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195 (9th Cir. 2019); *see also Reilly*, 858 F.3d at 180 n.5 ("If the moving party meets the first burden, then the government must justify its restriction on speech under whatever level of scrutiny is appropriate . . . ."). Thus, for preliminary injunction purposes, CEF Rhode Island "must be deemed likely to prevail" if the District fails to prove the constitutionality of its denial of equal access. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

ARGUMENT

I. CEF RHODE ISLAND IS LIKELY TO SUCCEED ON THE MERITS OF ITS SPEECH AND EQUAL PROTECTION CLAIMS.

CEF Rhode Island is likely to succeed on the merits of its Speech and Equal Protection claims. The District has refused to give the distinctively Christian Good News Clubs access to District facilities equal to the access given to nonreligious clubs teaching similar principles. This disparate treatment based on CEF Rhode Island's religious viewpoint, speech content, and identity is unconstitutional discrimination under the Speech and Equal Protection Clauses.

A. The District's Use Policies Unconstitutionally Discriminate Against the Religious Viewpoint of CEF Rhode Island's Speech.

The forum doctrine supplies the standards under which the Court decides the constitutionality of the District's exclusion of Good News Clubs from access to school facilities, based on the nature of the afterschool program forum. *See Good News Club v. Milford*

Cent. Sch., 533 U.S. 98, 106 (2001). (*See also* Standards of Decision, *supra*, Pt. B.) According to the forum doctrine, whenever the government opens its property for private speech, it "may not exclude speech based on 'religious viewpoint'; doing so 'constitutes impermissible viewpoint discrimination.'" *Shurtleff v. City of Bos.*, 142 S. Ct. 1583, 1593 (2022) (quoting *Milford*, 533 U.S. at 112); *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("The principle that has emerged from our cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."). Thus, if there is viewpoint discrimination, identifying the type of forum is not necessary. *See Milford*, 533 U.S. at 106 ("we need not resolve the issue here"); *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 (4th Cir. 2006) ("The ban on viewpoint discrimination is a constant."). And discrimination against CEF Rhode Island's religious viewpoint is the only plausible reason for the District's effective exclusion of Good News Clubs from school facilities open to other similarly situated afterschool programs that are free to teach moral and character development from their nonreligious viewpoints.

In *Milford*, the local Good News Club challenged the school's exclusion of the club from access to school facilities based on the club's religious nature. 533 U.S at 102–03. The school's facility use policy had opened its facilities "to activities that serve a variety of purposes, including events 'pertaining to the welfare of the community,'" which left "no question that teaching morals and character development to children is a permissible purpose." *Id.* at 108. Thus, the Court explained, "this policy would allow someone to use Aesop's Fables to teach

children moral values. . . . [A]nd the Boy Scouts could meet 'to influence a boy's character, development and spiritual growth.'" *Id.* The Court reasoned that because, "[f]or example . . . the [Good News] Club instructs children to overcome feelings of jealousy, to treat others well regardless of how they treat the children, and to be obedient," *id.*, "it is clear that the Club teaches morals and character development to children." *Id.* The Court thus concluded it was "quite clear that [the district] engaged in viewpoint discrimination when it excluded the Club from the afterschool forum." *Id.* at 109. Reaffirming "that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint," the Court held that "[the district's] exclusion of the Club from use of the school, pursuant to its community use policy, constitutes impermissible viewpoint discrimination." *Id.* at 111–12.

Even more broadly than the school in *Milford*, the Providence Public School District is generally "committed to providing access to" its school buildings "by the community" because "[t]he Providence School Board believes the Providence School Buildings are an integral part of the local Community." (V. Compl. ¶¶ 17–18, Ex. A.) Similarly, regarding formal Community Partnerships, the District "believes that the support of partners and the entire Providence community is vital to our students' success," and thus enters into "collaborative relationship[s] between the PPSD and communities [sic] entities that [are] mutually beneficial and work[] towards shared goals and purpose." (V. Compl. ¶¶ 21–22, Ex. C.) And, like the *Milford* school, the Providence District allows school access to several nonreligious organizations teaching morals and character development in afterschool programs, including Boys & Girls Clubs, Boy Scouts (Cub Scouts), Girl Scouts, and Girls on the Run. (V. Compl., ¶¶ 50–56.) Thus, under *Milford*, because the teaching of those subjects

is already permitted in the District's afterschool forum, the District's exclusion of Good News Clubs for its Christian viewpoint on the same subjects is unconstitutional viewpoint discrimination under the First Amendment. *See Milford*, 533 U.S. at 111 ("What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the [Good News] Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons."); *accord Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1002 (8th Cir. 2012) ("In *Ladue* we held that the school district's exclusion . . . of a [Good News Club] from the . . . after-school program was impermissible viewpoint discrimination because the program remained open to the Boy Scouts and Girl Scouts."); *id.* at 1004 ("The record reflects that the organization, structure and activities of the various [Good News Club]s around the country have not changed since the programs were litigated in *Milford* . . . ."); *Good News/Good Sports Club v. Sch. Dist. of City of Ladue*, 28 F.3d 1501, 1506 (8th Cir. 1994) ("[T]he 'ideals of Scouting,' which Scout meetings seek to support, involve exactly the same category of speech for which the [Good News] Club seeks access: moral and character development.").

To be sure, the District has not *said* that the Good News Clubs' Christianity is the reason for their exclusion from District facilities, but the District certainly has not denied or tried to explain it—despite having received four legal demands from CEF Rhode Island's counsel explicitly making the claim. Moreover, what the District has *done* speaks loudly enough to remove any doubt. The District has never identified what policy, goal, or principle is served by subjecting Good News Clubs to paralyzing, uniquely intense scrutiny as compared to the similarly situated nonreligious afterschool programs. Indeed, after Figueroa communicated that CEF Rhode Island's request for access is being treated as a "request for partnership" and

is subject to an undisclosed "process here that we must adhere to," Figueroa never communicated directly with CEF Rhode Island again. (V. Compl. ¶¶ 33–49.) Rather, Figueroa communicated the District's new and increasingly onerous conditions for approval indirectly, through D'Abate Principal Kermen, who expressed bewilderment over the District's "continued roadblocks." (V. Compl. ¶¶ 35–43.) As an extracurricular, afterschool program, CEF Rhode Island could never have access to the school attendance, academic, and behavioral records of the student participants in its Good News Clubs, and the District's demand for this information from CEF Rhode Island—and not from any other, similarly situated afterschool program—is an obvious pretext for exclusion.

It is no argument that the District has not issued a formal denial to CEF Rhode Island (yet). Whether the District formally excludes the Good News Clubs or just treats them less favorably, the constitutional injury is the same. *See Child Evangelism Fellowship of Minn.*, 690 F.3d at 1002 ("[S]ubjecting a religious organization to disfavored treatment because of its religious viewpoint on an otherwise includible subject matter is impermissible viewpoint discrimination, as is excluding the organization from a speech forum altogether."). Nor can the District argue that its viewpoint discrimination is constitutional just because the District is not (officially) hostile or opposed to CEF Rhode Island's Christian viewpoint, even as the District has excluded it. *See Ladue*, 28 F.3d at 1507 ("The [Good News] Club need not establish that the School District opposed the Club's viewpoint; rather, the Club need only demonstrate that the Amended Use Policy allowed the Scouts to express their viewpoint on moral and character development but prohibited the Club's religious viewpoint.")

CEF Rhode Island has stated a more than colorable claim of unconstitutional viewpoint discrimination under the First Amendment. Accordingly, it is the District's burden to justify

its exclusion of the Good News Clubs from its afterschool programming, which is a burden the District cannot carry.

B. The District Cannot Justify Its Exclusion of the Good News Clubs Under Any First Amendment Standard.

The District's viewpoint discrimination ends the First Amendment inquiry, regardless of the nature of the District's afterschool program forum. *See, e.g.*, *Milford*, 533 U.S. at 107 ("Because the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum."). (*See also* Pt. I.A, *supra*.) Even if the District's viewpoint discrimination could be overlooked, however, the District cannot justify its exclusion of the Good News Clubs under the standards governing limited public forums or designated public forums.

1. The District's Exclusion of the Good News Clubs Is Not Reasonable in Light of Any Purpose Served by the Afterschool Program Forum.

The District's afterschool program is likely a limited public forum. *See, e.g.*, *Milford*, 533 U.S. at 106. Thus, in addition to not discriminating against speech on the basis of viewpoint, the District's speech restriction "must be reasonable in light of the purpose served by the forum." *Milford*, 533 U.S. at 107 (cleaned up). (*See* Standards of Decision, *supra*, Pt. B.) And the District cannot feign any reasonable basis for excluding the Good News Clubs in light of the broad purposes of the forum as found in the District's written policies and procedures.

As shown above (Pt. I.A, *supra*), the purposes of the District's community use and partnership policies are to provide community access to school buildings and to enter into mutually beneficial, collaborative relationships towards student success. If these purposes welcome the nonreligious moral and character teaching of the Boys and Girls Clubs, Boy and

Girl Scouts, and Girls on the Run, then they must also welcome the moral and character teaching of the Good News Clubs. The District's exclusion of the Good News Clubs cannot be reasonable in light of the purposes of its forum and is, therefore, unconstitutional.

2. The District's Exclusion of the Good News Clubs From the Afterschool Program Forum Cannot Satisfy Strict Scrutiny.

If, instead of a limited public forum, the District has opened a full, designated public forum for afterschool programs, then the District's exclusion of the Good News Clubs fares even worse. In a designated public forum, just like a traditional public forum, "restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited." *Minnesota Voters All.*, 138 S. Ct. at 1885. (*See* Standards of Decision*, supra*, Pt. B.) Thus, even overlooking the District's viewpoint discrimination (*see* Pt. I.A, *supra*), the District's exclusion of the Good News Clubs based on the content of their afterschool programming must satisfy strict scrutiny—which is harder than satisfying the reasonableness standard of a limited public forum. Under strict scrutiny, content-based restrictions on speech "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling government interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Strict scrutiny is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 US. 507, 534 (1997), which government restrictions rarely survive. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992). The District's exclusion of Good News Clubs is not the rare case that can survive strict scrutiny.

The District can have no compelling interest in excluding the afterschool programming of the Good News Clubs where a club was previously approved and successfully operated at a District school (V. Compl., ¶ 26), where the same school's principal wants the club back (V. Compl., ¶¶ 35–36, 39–41, 43), where Good News Clubs operate successfully in other Rhode

Island schools (V. Compl., ¶¶ 12, 40), and where the District allows similar moral and character development programming by other clubs (V. Compl., ¶¶ 50–57). And, while a school district may have a compelling interest generally in avoiding Establishment Clause violations, that interest is not implicated at all by the District's providing neutral access to the Good News Clubs' private religious speech. *See Milford*, 533 U.S. at 112–114 ("The Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups. Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, [the school] faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club."); *see also Rosenberger*, 515 U.S. at 842 ("It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities . . . ."); *cf. Shurtleff*, 142 S. Ct. at 1593 (rejecting city's Establishment Clause excuse for censoring private speech in public forum the city opened).

Moreover, the District's exclusion of Good News Clubs cannot be narrowly tailored to serve a *compelling* governmental interest of the District where the District has *no* governmental interest in the exclusion. But even if the District could articulate a compelling interest for excluding Good News Clubs, the exclusion still fails strict scrutiny for failing narrow tailoring. "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). A narrowly tailored regulation of speech is one that achieves the government's interest

"without unnecessarily interfering with First Amendment freedoms." *Sable Commc'ns*, 492 U.S. at 126. The District's exclusion of the Good News Clubs interferes with CEF Rhode Island's First Amendment freedoms without any justification and, therefore, does so unnecessarily.

C. The Use Policies Are an Unconstitutional Prior Restraint on CEF Rhode Island's Protected Speech.

The District's Use Policies—especially the undisclosed and shifting "partnership" "process"—set up an unconstitutional prior restraint on CEF Rhode Island's speech by vesting unbridled discretion in District officials and imposing no time limit for them to determine whether after school programs can be excluded despite meeting published criteria for access to the afterschool forum. "An ordinance which makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990) (cleaned up). "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (citing cases). The heavy presumption is justified because "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1975). Thus, while "[p]rior restraints are not per se unconstitutional," they "are highly disfavored and presumed invalid." *Weinberg v. City of Chicago*, 310 F.3d 1029, 1045 (7th Cir. 2002). There are two kinds of unconstitutional prior restraint: (1) "a procedure that places unbridled discretion in the hands of a government official and might result in censorship;" and (2) "a licensing procedure that

fails to place time limits within which a decision maker must issue the license." *Id.* (cleaned up). The District's Use Policies embody both.

"[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). "[E]ven if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not *condition* that speech on obtaining a license or permit from a government official in that official's boundless discretion." *Id.* at 764. "Unbridled" and "boundless" describe the discretion displayed by District official Figueroa in the "partnership" "process" where CEF Rhode Island is trapped. After meeting with CEF Rhode Island's representatives and receiving the requested Good News Club content materials, Figueroa continued to impose conditions on the Good News Clubs' approval without ever disclosing the criteria the clubs had to meet. (V. Compl., ¶¶ 28–49.) And there is nothing in the written community partnership policy (Board Policy 603) to guide applicants or cabin the discretion of District officials in deciding who can be a partner. The policy directs the Superintendent to "develop administrative regulations for Community Partnerships across District schools" addressing, *inter alia*, project proposals, signed contracts or MOUs, and use of school facilities (V. Compl., ¶ 22), but does not provide criteria for evaluating potential partners, and there are no published regulations from the Superintendent to cure the deficiency.

Nor do the written community use policy and regulations (Board Policy 912 and 912 Regulations) place any meaningful boundaries on District discretion in deciding which community members can use district facilities. While the 912 Regulations ostensibly limit the

sole reviewing official's "right to disapprove any application" to enumerated criteria, those criteria include a catchall: "or actions that do not conform to Providence School Department Policies." (V. Compl., ¶¶ 19–20.) In any event, District officials apparently have the discretion to divert facility use applicants like CEF Rhode Island to the undisclosed and undefined "partner" "process" that allows Figueroa to continually move the goal posts to keep approval out of reach. Secret and standard-less policies like the District's are precisely the reason for prior restraint prohibitions—"because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker," *City of Lakewood*, 486 U.S. at 763–64, and "*post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy." *Id.* at 758.

Compounding the District's failure to limit the discretion of its officials is the District's failure to impose any kind of time limit on their review of applicants for the afterschool program forum. "[A] prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." *FW/PBS, Inc.*, 493 U.S. at 226. The District has drawn out its review of CEF Rhode Island's request for school access for nearly two full school years, and there is no end in sight. Such a policy of "delay without limit" is unconstitutional because it "compels the speaker's silence." *Riley v. Nat. Fed'n of the Blind N.C., Inc.,* 487 U.S. 781, 802 (1988). "A law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (cleaned up). The District's Use Policies utterly fail the prior restraint test.

D. The Use Policies Violate CEF Rhode Island's Equal Protection Rights.

The Equal Protection Clause of the Fourteenth Amendment makes it unconstitutional for any state to "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "[T]he Equal Protection Clause has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the government action questioned or challenged." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Indeed, the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The District's discriminatory exclusion of the Good News Clubs for the Christian viewpoint and content of their program—i.e., for *being* Christian—violates CEF Rhode Island's equal protection rights. *See Burson*, 504 U.S. at 197 n.3 ("Content-based restrictions also have been held to raise Fourteenth Amendment equal protection concerns because, in the course of regulating speech, such restrictions differentiate between types of speech."); *see also Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) ("The conclusion is inescapable that the use of the park [for religious speech] was denied because of the City Council's dislike for or disagreement with the Witnesses or their views. The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body.").

II. THE DISTRICT'S EXCLUSION OF THE GOOD NEWS CLUBS IRREPARABLY HARMS CEF RHODE ISLAND.

The District's continuing exclusion of the Good News Clubs from the District's afterschool program forum violates CEF Rhode Island's First Amendment rights (*see* Pt. I, *supra*) and, therefore, irreparably harms CEF Rhode Island as a matter of law (*see* Standards of Decision, *supra*, Pt. A). "In the First Amendment context, the likelihood of success on the

merits is the linchpin . . . . [I]rreparable injury is presumed upon a determination that the movants are likely to prevail . . . ." *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 10–11 (1st Cir. 2012); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Maceria v. Pagan,* 649 F.2d 8, 18 (1st Cir. 1981) (same).

III. THE BALANCE OF EQUITIES FAVORS CEF RHODE ISLAND.

Remedying the violation of CEF Rhode Island's constitutional rights far outweighs any conceivable harm to the District. CEF Rhode Island already operated a Good News Club in the District's D'Abate Elementary School in the past (V. Compl., ¶ 26); the D'Abate Principal wants the Good News Club back (V. Compl., ¶¶ 35–36, 39–41, 43); Good News Clubs already operate in other Rhode Island Schools (V. Compl., ¶¶ 12, 40); and there are 4,800 Good News Clubs in public elementary and middle schools across the United States (V. Compl., ¶ 12). There is no plausible basis for the District to claim harm from a preliminary injunction reopening the D'Abate Good News Club and starting the Leviton Elementary School Good News Club, whereas the continuing exclusion of the clubs irreparably harms CEF Rhode Island as a matter of law. (*See* Pt. II, *supra*.)

IV. AN INJUNCTION WILL SERVE THE PUBLIC INTEREST.

The public interest will be served by an injunction protecting CEF Rhode Island's speech rights. *See, e.g.*, *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 15 (1st Cir. 2012) ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. To deprive plaintiffs of the right to speak will therefore have the concomitant effect of depriving the public of the right and privilege to determine for itself what speech and speakers are

worthy of consideration." (cleaned up)); *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 409 (D. Mass. 2020) ("The public interest would also be served by such an injunction as it would protect constitutional rights and remind elected officials of their responsibility to respect them."); *Comcast of Me./N.H., Inc. v. Mills*, 435 F. Supp. 3d 228, 250 (D. Me. 2019) ("The public interest is served by protecting First Amendment rights from likely unconstitutional infringement."), *aff'd,* 988 F.3d 607 (1st Cir. 2021); *Joelner v. Vill. of Wash. Park*, 378 F.3d 613 (7th Cir. 2004) ("We believe that the public interest is better served by protecting core First Amendment rights."); *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) ("Surely, upholding constitutional rights serves the public interest."); *Homans v. City of Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001) ("[W]e believe that the public interest is better served by following binding Supreme Court precedent and protecting the core First Amendment right of political expression."); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) ("[T]he public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties."); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.")

CONCLUSION

For the foregoing reasons, CEF Rhode Island respectfully requests entry of a preliminary injunction restraining Defendants, PROVIDENCE PUBLIC SCHOOL DISTRICT and DR. JAVIER MONTAÑEZ, in his official capacity as Superintendent of Providence Public School District, from violating CEF Rhode Island's rights under the Speech Clause of the First Amendment to the United States Constitution, and the Equal Protection Clause of the Fourteenth Amendment, and requiring Defendants to grant CEF Rhode Island's Good News

Clubs access to the District's afterschool program forum equal to the access given to similarly situated nonreligious organizations, such preliminary injunction to be binding on Defendants and their respective officers, agents, servants, employees, attorneys, and any other persons who are in active concert or participation with any of them.

REQUEST FOR HEARING

If the motion can be decided on the verified facts in the complaint, then CEF Rhode Island requests only oral argument on the motion, and estimates one hour will be required. If, however, Defendants raise disputed factual issues, then CEF Rhode Island also requests an evidentiary hearing, the length of which will depend on the number and materiality of disputed factual issues. If an evidentiary hearing is necessary, CEF Rhode Island requests that the Court conduct a preliminary status conference with the parties for the purpose of setting the evidentiary hearing.

/s/ Roger K. Gannam

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