

No.

IN THE SUPREME COURT OF THE
UNITED STATES

VICTORY THROUGH JESUS SPORTS
MINISTRY FOUNDATION,

Petitioner.

v.

LEE'S SUMMIT R-7 SCHOOL DISTRICT
and DAVID MCGEHEE, in his official
capacity as Superintendent of Schools,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth
Circuit

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QUESTIONS PRESENTED

A public school district's literature distribution procedure stated as follows:

Organizations Approved for "Backpack" Flyers to Students

Only flyers from the following groups/organizations will be approved for distribution: Lee's Summit Educational Foundation, PTA, Lee's Summit Chamber of Commerce, Lee's Summit Symphony Orchestra, Lee's Summit Parks and Recreation, Greenwood Sports Association, Lee's Summit Cares, Longview College for Kids, D.A.R.E., Jackson County, LS Girls' Softball Association, LS Baseball Association, LS Football Association, LS Soccer Association, LS Junior Basketball, Downtown Lee's Summit Main Street, each R-7 school, its Partners in Education* and its Booster Clubs. (Appx. 27a)

* * * * *

Exception for district wide backpack distribution: Community youth organizations such as Boy Scouts and Girl Scouts will be provided a onetime opportunity to distribute program flyers at the beginning of school on either the first

or second backpack distribution date.
(Appx. 27a).

No guidelines or definitions governed application of the procedure. Listed groups, together with various other organizations granted access to the forum by the district, were allowed unlimited distributions. After suit was filed, the exception clause was amended to allow community youth organizations to distribute their literature three times each year. (Appx. 31a).

1. Whether a flyer or literature distribution policy which grants outside groups access to the public school forum based in part upon the unbridled discretion to approve or disapprove applications on the basis of speaker identity “as determined appropriate,” “to be fair,” and which permits the decision-maker to prefer groups which have a “symbiotic relationship” with the district is subject to a facial challenge as a violation of the First Amendment.
2. Whether a flyer or literature distribution policy which grants multiple outside groups access to the public school forum is a nonpublic forum or a limited public forum for purposes of a First Amendment challenge.
3. Whether the First Amendment required that the specific forum to which the speaker

seeks access be narrowly defined to determine whether the restriction complies with the First Amendment.

PARTIES

Petitioner is Victory Through Jesus Sports Ministry Foundation (“Victory”).

Respondents are Lee’s Summit R-7 School District and David McGehee, in his official capacity as Superintendent of Schools for Lee’s Summit R-7 School District (collectively, “Respondents”).

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OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals (App., 3a) is reported at 640 F.3d 329. The opinion of the Court of Appeals denying rehearing and rehearing en banc is not reported, but is reprinted at App. 1a. The opinion of the district court denying claims for injunctive relief and damages is reported at 2010 WL 2291497 and is reprinted at App.,22a.

JURISDICTION

The judgment of the Court of Appeals was filed on May 20, 2011. The Court of Appeals denied rehearing en banc on June 29, 2011. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises issues involving the First Amendment to the United States Constitution, as applied to the states under Section 1 of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The Eighth Circuit determined that a school district may constitutionally relegate a Christian-based sports ministry to second class status by strictly limiting its access to a

literature distribution forum while at the same time granting unlimited access to preferred secular sports and other organizations hand-picked by the district. (Appx., 21a). Acknowledging but dismissing the conflict among the circuits created by its decision, the Eighth Circuit declined to entertain a facial challenge to the constitutionality of the program on grounds of unbridled discretion, holding that “[n]either the Supreme Court nor this court has ever applied a stringent, facial standard of judicial oversight to the discretionary decisions of school officials administering a nonpublic educational forum.” (Appx. 19a).

Victory is a non-profit religious organization that operates faith-based non-denominational summer soccer camps for elementary age children. (Appx. 25a-26a). The school district had opened a backpack flyer forum, by means of which the children were given flyers on subjects and events of interest to their families to take home once a week in their backpacks. (Appx. 25a). In 2008, Victory was denied permission to distribute its flyers even though the policy at that time provided that non-profit groups and community youth organizations were entitled to use the backpack forum:

Organizations approved for
“backpack” flyers

Due to the overwhelming number of requests the district receives to send information home with elementary students in their backpacks, the district limits distribution to not-for-profit organizations and approved events sponsored by civic groups that directly benefit R-7. Flyers that have been approved will be sent home with students and/or posted on the district's website...(Appx. 25a).

In 2009, the district had modified the rules governing the forum, relegating community youth organizations to a one-time distribution in the fall, while other, preferred non-profit organizations were granted unlimited opportunity to distribute their literature throughout the year:

Organizations Approved for
"Backpack" Flyers for Students

Flyers that have been approved will be sent home with students and/or posted on the district's website.

Only flyers from the following groups/organizations will be approved for distribution: Lee's Summit Educational Foundation, PTA, Lee's Summit Chamber of

Commerce, Lee's Summit Symphony Orchestra, Lee's Summit Parks and Recreation, Greenwood Sports Association, Lee's Summit Cares, Longview College for Kids, D.A.R.E., Jackson County, LS Girls' Softball Association, LS Baseball Association, LS Football Association, LS Soccer Association, LS Junior Basketball, Downtown Lee's Summit Main Street, each R-7 school, its Partners in Education* and its Booster Clubs.

Flyers must be submitted for approval by e-mailing a Microsoft Word, Excel document or .pdf file....

* Partners In Education is a district-sponsored program. Businesses that are formal business partners with a particular school, district program or the district as a whole, may seek approval for flyer distribution one per quarter....

Exception for district wide backpack distribution: Community youth organizations such as Boy Scouts and Girl Scouts will be provided a one-time opportunity to distribute program flyers at the

beginning of school on either the first or second backpack distribution date. These flyers must be approved at least 6 days prior to distribution. (Appx. 26a-28a).

A distribution nine months before the summer camps were to be held was of no benefit to Victory, and the district denied its request to distribute flyers in the spring. (Appx. 29a-30a).

On October 15, 2009, Victory filed suit seeking injunctive and declaratory relief and damages under 42 U.S.C. §1983 for violation of its free speech and equal protection rights. (Appx. 30a). While its motion for preliminary injunction was pending, the district again amended its policy, this time allowing community youth organizations three distributions each year, but still allowing preferred organizations unlimited distribution opportunities, and Victory included the newest version of the policy in its challenge. (Appx. 30a-31a). Following an evidentiary hearing on Victory's motion for preliminary injunction, the parties agreed to consolidate the hearing with trial on the merits under F. R. Civ. P. 65(a)(2) (Appx. 22a).

On June 3, 2010, the district court issued its decision denying Victory's claims. (Appx. 22a-47a). The court found that despite the number of groups allowed access to the forum

and the volume of documents sent home to the students' families, it was a non-public forum because the district did not intend to create a designated or limited public forum. (Appx., 43a). The court also found that the school district's procedures, under which administrators could grant unlimited access to the backpack flyer forum based upon such ad hoc criteria as having a "symbiotic" relationship with the district, or having had a prior superintendent on the board of directors, or being "fair," did not vest unbridled discretion in district officials in violation of the First Amendment. (Appx., 45a-46a).

The Eighth Circuit affirmed. It agreed that the forum was a non-public forum, because the district had not opened it to *general* access by the public, but only to *selective* access. (Appx., 11a). The court also found that Victory's description of the relevant forum as the backpack flyer distribution was a "flawed definition." and redefined the relevant forum as the district's website and flyer distribution forum "working in tandem" to provide information regarding community activities. (Appx., 14a).

The Eighth Circuit declined to entertain Victory's facial challenge to the unbridled discretion allowed district administrators overseeing the forum, stating that "[n]either the Supreme Court nor this court has ever

applied a stringent, facial standard of judicial oversight to the discretionary decisions of school officials administering a nonpublic educational forum.” (Appx. 19a). In a footnote, the Eighth Circuit acknowledged that its decision created a conflict with the Fourth Circuit, but simply said that it was declining to follow that decision. (Appx. 20a).

Testimony showed that district administrators had granted access to numerous organizations not listed in the procedure based upon such unwritten and undefined criteria as because the groups had a “symbiotic relationship” with the district, or because the administrators were told by superiors to grant the organization access. (Appx. 20a) Nevertheless, the court found that the district’s policy did not vest *unbridled* discretion in school administrators, but only *limited* discretion, which was permissible. (Appx., 20a-21a).

Finally, the court determined that the relevant forum was not the specific “backpack flyer” channel that Victory sought to use, but was instead a broadly defined activity information forum that included the district website. (Appx.,14a).

Victory sought rehearing or hearing en banc. (Appx., 1a). The Eighth Circuit denied the petition on June 29, 2011. (Appx. 1a-2a).

The Eighth Circuit's decision creates a conflict in the circuits, as the panel acknowledged, as well as a break with well-established precedent from this Court. Because of this conflict among the circuits and because this case raises issues yet undecided by this Court that touch on core First Amendment freedoms, the petition should be granted.

REASONS FOR GRANTING THE PETITION

I. THE PANEL'S DECISION THAT A FACIAL CHALLENGE ON GROUNDS OF UNBRIDLED DISCRETION DOES NOT LIE AGAINST A PUBLIC SCHOOL'S FORUM POLICY CREATES A CIRCUIT CONFLICT ON A CORE FIRST AMENDMENT ISSUE.

Policy KI-AP purports to provide an exclusive list of groups granted unlimited distribution in the "backpack flyers" forum (Appx. 27a). In truth, however, the District has granted numerous exceptions "as determined appropriate" by the administration. (Appx. 32a-34a). No written guidelines govern the determination of exceptions, and the district has used such whimsical criteria as having a "symbiotic relationship" with the district, because the Superintendent thought the flyers would be beneficial to the students and because

the organizations provide opportunities for students. (Appx. 32a-34a). Although the district indicated that its intent was to permit flyers for organizations with long-standing relationships and events which benefitted students, it also permitted the distribution of flyers for an organization that neither had a long-standing relationship with the school nor was sponsoring an event to benefit students. (Appx., 34a). Still, Victory, an organization providing an event that was beneficial to students, was not granted the same access. (Appx., 31a).

Despite these troubling facts, the Eighth Circuit panel determined that Victory could not bring a facial challenge to the administration of the forum on grounds of unbridled discretion, because neither it nor this Court has ever applied such “a stringent, facial standard of judicial oversight” to the discretionary decisions of school officials administering a nonpublic educational forum.” (Appx. 19a)

The panel decision creates an inter-circuit conflict regarding this issue. The Eighth Circuit acknowledged that its refusal to entertain a facial challenge under these circumstances conflicted with a prior decision of the Fourth Circuit. (Appx. 20a, (citing *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1068–69 (4th Cir.2006)).

In *CEF v. Anderson* the Fourth Circuit squarely addressed this issue, and reasoned that the unbridled discretion doctrine is a “corollary of the prohibition on viewpoint discrimination.” 470 F.3d at 1068. As such, the risks of unbridled discretion – the surreptitious suppressing of unfavorable viewpoints and self-censorship – “are just as present in other forums.” *Id.* (quoting *Child Evangelism Fellowship of MD, Inc. v. Montgomery County Pub. Sch.*, 457 F.3d 376, 386-87 (4th Cir. 2006)).

In *CEF v. Montgomery County*, the Fourth Circuit also noted that “there is broad agreement that, even in limited public and nonpublic forums, investing governmental officials with boundless discretion over access to the forum violates the First Amendment.” 457 F.3d at 386 (citing, *inter alia*, *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-74 (7th Cir.2001); *Sumnum v. Callaghan*, 130 F.3d 906, 919-20 (10th Cir.1997); and *Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298, 1306-07, 1310-11 (11th Cir.2003)).

The Seventh Circuit has similarly held that unbridled discretion inquiry is a component of viewpoint discrimination, which is applicable in all forums. *Southworth v. Bd. of Regents*, 307 F.3d 566, 575-80 (7th Cir.2002).

The Seventh Circuit relied upon this Court's long history of rejectiong licensing schemes and other restraints on expressive activity that vest unbridled discretion in government officials. *Id.* at 578-579.

The Supreme Court has made clear that when a decisionmaker has unbridled discretion there are two risks: First, the risk of self-censorship, where the plaintiff may edit his own viewpoint or the content of his speech to avoid governmental censorship; and second, the risk that the decisionmaker will use its unduly broad discretion to favor or disfavor speech based on its viewpoint or content, and that without standards to guide the official's decision an as-applied challenge will be ineffective to ferret out viewpoint discrimination. Both of these risks threaten viewpoint neutrality

Id. “Given that the risks which the Supreme Court sought to protect against in adopting the unbridled discretion standard are risks to the constitutional mandate of viewpoint neutrality, we conclude that the prohibition against unbridled discretion is a component of the

viewpoint-neutrality requirement.” *Id.* at 579. Based upon that conclusion, the Seventh Circuit found that the student plaintiffs had standing to bring a facial challenge to the mandatory fee system on the grounds that it granted unbridled discretion to the administration. *Id.* at 581.

By contrast, the Eighth Circuit’s conclusion that Victory did not have standing to bring a facial challenge to the district’s policy fails to follow this Court’s precedent as detailed in *Southworth*, as well as, as the panel acknowledged, the decisions in the Fourth Circuit similarly following this Court’s precedents in a school setting. The only authority cited by the Eighth Circuit, *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998), did not involve a public school setting and therefore is inapposite to the panel’s conclusion.

The Eighth Circuit’s decision is thus contrary to the rulings of this Court and of other circuits with respect to the propriety of a facial challenge to the discretion afforded a public school official administering a nonpublic forum for speech. The issue of unbridled discretion has frequently garnered much of this Court’s attention, as well as the attention of lower courts. *See, e.g., Gold v. Wilson County Sch. Bd. of Educ.*, 632 F. Supp. 2d 771, 793

(M.D. Tenn. 2009); *Jacobs v. Clark County Sch. Dist.*, 373 F. Supp. 2d 1162, 1184-85 (D. Nev. 2005) *aff'd*, 526 F.3d 419 (9th Cir. 2008); *Smith ex rel. Smith v. Mount Pleasant Pub. Sch.*, 285 F. Supp. 2d 987, 996 (E.D. Mich. 2003); *E. High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166, 1195 (D. Utah 1999); *Local Org. Comm., Denver Chapter, Million Man March v. Cook*, 922 F. Supp. 1494, 1497-98 (D. Colo. 1996); *Slotterback By & Through Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 298 (E.D. Pa. 1991). Therefore, the conflict posed by the panel's acknowledged conflict with existing precedent poses a significant problem for courts wrestling with First Amendment issues in public schools.

Consequently, this Court should grant the petition and resolve the split on this important issue.

II. THE PANEL'S DECISION THAT DEFENDANTS' POLICY DOES NOT VEST UNBRIDLED DISCRETION IN SCHOOL ADMINISTRATORS CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS AND FROM THIS COURT.

The panel's decision that the district's policy did not amount to unbridled discretion because the decision-maker needs "flexibility to properly serve the District's education and

community-service missions” (Appx. 20a), also conflicts with decisions from other circuits as well as from this Court.

According to the panel, district administrators’ arbitrary decisions which granted numerous exceptions to the facially exclusive forum policy evidenced a “rational basis for granting selective access” that is “far less than unbridled discretion.” (Appx., 20a). However, this Court and other Circuit courts have deemed such broad discretion to be an “unwarranted abridgement” of freedom of speech. *See, e.g., Cox v. Louisiana*, 379 U.S. 536, 558 (1965).

“Community youth organizations,” which were granted access three times per year, were not defined, and thus school administrators were free to define the term as they pleased, which is the very definition of unbridled discretion. (Appx., 32a-33a). The District utterly failed to establish the neutral criteria regarding speech which is required to insure that decision-makers have objective standards to guide them. *Thomas v. Chicago Park Dist.* 534 U.S. 316, 323 (2001).

A. The Eighth Circuit's Holding That Respondents' Policy Did Not Vest Unbridled Discretion In Administrators Creates An Inter-Circuit Conflict On A Core First Amendment Issue.

The panel's decision conflicts with decisions in the Third, Fourth and Eleventh Circuits with respect to what constitutes unbridled discretion. *See Child Evangelism Fellowship of N. J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514 (3d Cir. 2004); *Child Evangelism Fellowship of S. C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062 (4th Cir. 2006); *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Sch.*, 457 F.3d 376 (4th Cir. 2006); *Burk v. Augusta-Richmond County*, 365 F.3d 1247 (11th Cir. 2004).

In *CEF v. Anderson*, the Fourth Circuit struck down a school board policy that permitted "best interest" waivers to the district's policy requiring fees for access to school facilities. 470 F.3d at 1072. As the district did here, the Anderson district claimed that it did not exercise unbridled discretion because access was only granted to "longstanding users," but unlike here, the

Fourth Circuit flatly rejected that rationalization. *Id.* Similarly, in *Montgomery County*, the Fourth Circuit rejected a policy that, like KI-AP here, purported to limit flyers to those of “educational relevance,” but in reality permitted a wide variety of flyers to be distributed. *Montgomery Cnty.*, 457 F.3d at 389.

In *Stafford*, the Third Circuit rejected the purported criteria of excluding groups representing “special interests,” or that engage in “mundane recreational activities,” or whose views are “divisive” or “controversial,” or are “religious, commercial or secular” or “that proselytize.” Such rationalizations “are either incoherent or euphemisms for viewpoint-based religious discrimination.” *Stafford*, 386 F.3d at 527 (Alito, J.). In *Burk*, the Eleventh Circuit found that a provision that was administered with permissiveness and flexibility (the same description offered by the panel in this case) was a standardless requirement that left acceptance or rejection “to the whim of the administrator.” 365 F.3d at 1256.

The Eighth Circuit’s ruling that in the public school setting, “flexibility” in administering a forum for speech is commendable sets a dangerous and contrary precedent. The panel’s decision is contrary to the unbridled discretion jurisprudence of this

Court, and creates a conflict with decisions in the Third, Fourth and Eleventh Circuits.

This Court should therefore grant the petition.

B. The Eighth Circuit's Determination That A Policy Granting Administrators Flexibility In Selectively Granting Access To An Expressive Forum Conflicts With This Court's Precedents Prohibiting Policies That Grant Unbridled Discretion To Administrators.

The district must “establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered.” *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 760 (1988). Granting government officials absolute discretion over decisions involving expressive activity is problematic both because of the potential for viewpoint discrimination, and because of the tremendous burdens placed upon the individual speaker who might be inclined to self-censor as a result of the requirements established by the government.

[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, *even if the discretion and power are never actually abused.*

. . . .

Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy.

Id. at 757-58 (emphasis added). In *City of Lakewood*, the ordinance prohibited the private placement of any structure on public property. *Id.* at 753. Certain newspaper companies were prohibited from placing their news stands on the sidewalk, but the mayor had unbridled discretion to grant permits to certain other organizations. *Id.* The ordinance was found unconstitutional because it failed to establish neutral and objective criteria by which the government officials could make their decisions. *Id.* at 760.

The fundamental problem with permitting a public official to exercise unbridled discretion is that “it sanctions a device for the free communication of ideas.” *Saia v. N.Y.*, 334 U.S. 558, 562 (1948). In *Saia*, the ordinance at issue prohibited the use of sound amplification unless an exception was granted by the police chief. *Saia*, 334 U.S. at 558. The police chief was vested with unbridled discretion to determine whether to issue a permit. This Court found the statute unconstitutional because there were “no standards prescribed for the exercise of his discretion.” *Id.* at 560.

In *Cox v. Louisiana*, the statute prohibited all public assemblies and gatherings on public sidewalks. 379 U.S. at 555-56. While this appeared to be a law of general applicability, it was not being applied uniformly and some groups were permitted to have gatherings. *Id.* at 556. There were no standards by which the officials should consider when to grant exceptions, and the only measurement by which groups were permitted to have parades or gatherings was the unfettered discretion of city officials. *Id.* at 556-57. The selective enforcement of the statute by city officials was found to constitute an “unwarranted abridgment of the freedom of speech” *Id.* at 558.

A constitutional violation occurs the moment the official is vested with such discretion. “[T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decision-maker rests *not* on whether the administrator *has* exercised his discretion in a content-based manner, but whether there is anything in the ordinance *preventing* him from doing so.” *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992) (emphasis added).

Under the Policy here, district decision-makers used vague and shifting criteria such as whether it is “fair,” whether another administrator sits on a board, whether there is a “symbiotic relationship,” or some other reason concocted after the fact. To hold that there is a rational basis for such unbridled discretion conflicts with this Court’s precedent and with precedents from other circuits.

II. THE PANEL’S RE-DEFINITION AND EXPANSION OF THE RELEVANT FORUM CONFLICTS WITH PRECEDENTS FROM OTHER CIRCUITS AND FROM THIS COURT.

Departing from the district court (and from the district, which never contested the definition of the forum), the panel dismissed as “flawed” the definition of the relevant forum as

the “backpack fliers” forum and re-defined and expanded the forum. (Appx., 14a). That departure is itself is contrary to long-established precedents from other circuits and from this Court, which state that forum analysis must be based upon a narrow and specific definition of the forum. *See, e.g., Bloedorn v. Grube*, 631 F.3d 1218, 1232 (11th Cir. 2011) (“as the Supreme Court has instructed in *Cornelius [v. NAACP Legal Def. & Educ. Fund]*, 473 U.S. 788, 801 (1985)], the scope of the relevant forum is defined by ‘the access sought by the speaker,’ meaning that if a speaker seeks access only to a limited area of government property, we must tailor our approach to ‘the perimeters of a forum within the confines of the government property’”); *CEF of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1069 (4th Cir. 2006).

**A. The Eighth Circuit’s
Expansive Redefinition of
the Relevant Forum
Conflicts with this Court’s
Precedents Calling for
Narrowly Defined
Forums.**

This Court has consistently held that when a speaker is seeking access to a portion of public property for expressive activity, the relevant forum must be identified as the specific channel of communication sought.

Cornelius, 473 U.S. at 788 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). “[F]orum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum we have focused on the access sought by the speaker.” *Cornelius*, 473 U.S. at 801 (emphasis added). If a group is seeking broad access to government property in general, the government property is the relevant forum. *Id.* When the group is seeking a particular kind of access, the relevant definition of the forum must be specifically narrowed. *Id.*

In *Cornelius*, the NAACP was seeking access to a charitable solicitation forum provided to similar non-profit organizations. 473 U.S. at 790. The Court defined the forum by the access being sought and stated that the forum was limited to the charity drive alone, as opposed to the entire federal workplace, as the government had argued. *Id.* at 801. In *Perry*, a local union sought access to provide teachers in the district with information concerning their union. 460 U.S. at 39. The Court examined the specific access being sought and defined the forum as the internal mail system and teachers’ mailboxes. *Id.* at 45. Here, the access being sought by Victory is clearly the “backpack flyer” forum.

The panel misidentified the forum by stating that it was merely a general forum to inform students and their parents about upcoming activities. The panel's broad definition included the website, which enabled it to find that Victory was not denied access to the forum and that it had not suffered concrete harm, even though it was denied access to the backpack flyers forum – the forum which it specifically sought. The panel did not look at the *access* being requested, but at the purpose for distributing flyers. (Appx., 14a).

B. The Panel's Expansive Redefinition of the Relevant Forum Conflicts with Other Circuits Which Have Followed this Court's Precedents Calling for Narrow Forum Definitions.

The panel's decision also conflicts with other Circuits which have followed this Court's direction in *Cornelius* that a court must look at the access being requested to define the relevant forum. *See, e.g., Christ's Bride Ministries, Inc. v. S. E. Pennsylvania Transp. Auth.*, 148 F.3d 242 (3d Cir. 1998); *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Sch.*, 457 F.3d 376 (4th Cir. 2006); *Air Line Pilots Ass'n, Int'l v. Dep't of*

Aviation of City of Chicago, 45 F.3d 1144, 1151-52 (7th Cir. 1995).

Applying the reasoning of *Cornelius*, the Third Circuit looked at the access sought by the plaintiff to determine that the transit authority's advertising space, not the railway and subway stations as a whole, was the relevant forum. *Christ's Bride Ministries*, 148 F.3d at 248. "CBM did not seek to leaflet, demonstrate, or solicit in the rail and subway stations as a whole. Instead, it sought access only to the advertising space leased out by SEPTA." *Id.*

In *Anderson*, the Fourth Circuit held that the district's fee waiver system was the relevant forum, "because the forum is defined in terms of the *access sought by the speaker*." *Id.* (emphasis added). The court stated that the group had not been denied access to the school's facilities – which constituted one forum – but were denied access to the waiver "so the waiver constitutes the forum." *Id.*; *see also*, *Montgomery County*, 457 F.3d at 376 (defining the relevant forum as the "take home" flyer forum because that was the specific distribution channel to which the group wanted access).

In *Air Line Pilots Association*, the Seventh Circuit found that the relevant forum was a diorama display case at O'Hare Airport,

not, as district court claimed, the greater airport concourse. 45 F.3d at 1151. “The limited nature of the ALPA’s desired access renders the display case the relevant forum for the purpose of constitutional inquiry.” *Id.* at 1152.

The panel’s decision thus conflicts with the Third Circuit, Fourth Circuit, Seventh Circuit and this Court’s own precedent. The panel specifically stated in footnote five that it was declining to follow the Fourth Circuit’s precedent regarding unbridled discretion, but without expressly stating it, the panel has actually declined to follow the long-standing precedent in forum analysis as well.

This Court should therefore accept certiorari and resolve the conflict in the circuits.

**III. THE EIGHTH CIRCUIT’S
CONCLUSION THAT THE FORUM
OPENED FOR USE BY DOZENS OF
GROUPS WAS A NONPUBLIC
FORUM REFLECTS THE
CONFUSION AMONG THE
CIRCUITS REGARDING FORUM
ANALYSIS.**

The panel’s conclusion that the backpack flyer forum was a nonpublic forum conflicts with this Court’s decision in *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788

(1985), and with rulings in the First, Second, Fourth, Sixth, Seventh and Ninth Circuits and illustrates the chronic confusion among the circuits both with regard to forum analysis generally and how to define the various kinds of fora.

Ostensibly relying upon this Court's pronouncements in *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998), the Eighth Circuit concluded that the backpack flyer forum was a nonpublic forum because the district had opened the form to selective access as opposed to general access by the public. (Appx., 11a-12a). The Eighth Circuit reached its conclusion despite the fact that the "selective access" here was made available to numerous private groups resulting in thousands of pages of literature, and for the most part administrators made only ministerial judgments and routinely granted the preferred groups access to the forum. (Appx. 32a-34a). However, the difference between "general access" and "selective access," and its effect on forum definition is far from as obvious as the panel suggests. *See, e.g.,* Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299, 324 (2009) (analyzing cases).

In addition, although the Eighth Circuit did not afford any weight to the fact that

permission was not required as a condition of access to the backpack flyer forum here, other circuits have placed great weight on the need to obtain permission as a factor. *See, e.g., Perry v. McDonald*, 280 F.3d 159, 167-69 (2d Cir. 2001). In *Perry*, the Second Circuit found that Vermont's vanity license plate forum was a nonpublic forum. *Id.* A significant factor in that finding was the fact that the state required prior permission and had other stringent requirements in place which militated against creation of a public forum. *Id.* In *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 843-44 (6th Cir. 2000), the Sixth Circuit found that a city's Web site was a nonpublic forum. As was true in *Perry*, the Sixth Circuit determined that as significant factor in the determination was whether individual members of that class must obtain permission in order to access the property. *Id.*

Other circuits have struggled to determine the precise limits of what constitutes a designated public forum, or a limited public forum, or a nonpublic forum. The Fourth Circuit reached a contrary conclusion to that of the panel here where numerous groups were allowed access to the forum and the administrators exercised only ministerial judgments. *Goulart v. Meadows*, 345 F.3d 239, 250-51 (4th Cir. 2003). In *Goulart*, the court found that a community use policy was not a

nonpublic forum despite granting access to the public and allowing administrators to make only ministerial judgments. *Id.*

The Seventh Circuit noted the difficulty in assigning the appropriate terminology to a particular forum. *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 566-67 (7th Cir. 2001). Noting that forums have been designated as traditional, limited, designated and nonpublic, the *DeBoer* court found that it did not need to attempt to “reconcile this confusion” because the village’s restrictions were viewpoint based and therefore impermissible no matter how the forum was denominated. *Id.*

The Ninth Circuit illustrated the depth of the confusion in a divided panel decision in *Gentala v. City of Tucson*, 213 F.3d 1055 (9th Cir. 2000) *on reh'g en banc*, 244 F.3d 1065 (9th Cir. 2001) *cert. granted, judgment vacated*, 534 U.S. 946 (2001). In *Gentala*, the majority determined that the forum was a limited public forum, but the dissent found that it would have been more appropriately termed a nonpublic forum open for a limited purpose. *Id.* at 1075 n.4 (Pregerson, J., dissenting).

Other circuits have dealt with the confusion by declining to draw a conclusion when the analysis would yield the same result no matter which definition was adopted. *See e.g., Miller v. City of Cincinnati*, 622 F.3d 524,

535-36 (6th Cir. 2010) *cert. denied*, 131 S. Ct. 2875, 179 L. Ed. 2d 1188 (2011). In *Miller*, the Sixth Circuit said, “even if we were persuaded by the City's argument that the regulation, as revised, creates only a nonpublic forum, the result would be the same, because government limitations on speech in both a limited public forum and a nonpublic forum receive the same level of scrutiny”). *Id.* Similarly, the First Circuit bluntly concluded that “[w]e adopt the usage equating limited public forum with nonpublic forum and do not discuss the issue further.” *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 76 n.4 (1st Cir. 2004) The Fourth Circuit also held that a nonpublic forum and designated public forum were analytically indistinct. *Warren v. Fairfax County*, 196 F.3d 186, 194n. 8 (4th Cir.1999) (en banc).“Since designated public fora, in the absence of an affirmative governmental designation, would be treated as nonpublic fora, it would seem logical that the selection of the class would be subject only to the standards applicable to restrictions on speakers in a nonpublic forum.” *Id.* at 194.

As the Ninth Circuit has observed, “[t]his categorization admittedly leads to the strange semantic result that a limited public forum is not actually a public forum.” *Hopper v. City of Pasco, Wash.*, 241 F.3d 1067, 1075 n.8 (9th Cir. 2001); *see also* Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement*

Relationships: New Extensions of Government Speech, 31 HASTINGS CONST. L.Q. 71, 77 (2004) (agreeing with those courts that conclude “the ‘limited public forum’ is a subset of the ‘non-public’ forum”).

This state of confusion is an analytical minefield for circuit court and lower court judges. This Court should grant the petition to removed the landmines, resolve the conflicts and set forth clear guidelines for the application of the forum analysis.

CONCLUSION

The panel’s decision conflicts with precedents from this Court and with decisions from other circuits. In addition, this case highlights the need for further guidance in the area of forum analysis.

For these reasons, this Court should grant the petition and settle the issues.

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Respectfully Submitted,

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