IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

JOHN DOE and JANE DOE, as the Natural Parents and Next Friends of Their Minor Child, JAMES DOE, Plaintiffs, vs. THE WILSON COUNTY SCHOOL SYSTEM; JAMES M. DAVIS, Individually and as Director of Wilson County Schools; WENDELL MARLOWE, Principal of the Lakeview Elementary School; and JANET ADAMSON, Teacher at Lakeview Elementary School, Defendants, DOUG GOLD, CHRISTY GOLD, JAMES WALKER and JENNIFER WALKER, Intervenor-Defendants.	CIVIL ACTION NO. 3:06-cv-00924 DISTRICT JUDGE ROBERT ECHOLS MAGISTRATE JUDGE JOHN S. BRYANT

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

On September 27, 2006, plaintiffs John and Jane Doe, on behalf of their minor child James Doe (referred to collectively as "Does"), filed suit against various school officials affiliated with Lakeview elementary school (Lakeview) for purported Establishment Clause violations. With their Complaint, Does seek declaratory and injunctive relief that is aimed at keeping individual parents and students from expressing their religious beliefs on school grounds. Because of the prospect of this, on April 5, 2007, Doug Gold, Christy Gold, James Walker, and Jennifer Walker (collectively referred to as Intervenors) were allowed to intervene in this case.

Intervenors, who have children that currently attend Lakeview, organize and participate in many of the activities Does seek to prevent at Lakeview. If granted, Does' requested relief would

effectively silence constitutionally-protected religious expression of Intervenors and their children. In particular, Does pursue relief in this case regarding five separate activities: 1) "See You at the Pole," 2) "National Day of Prayer," 3) Praying Parents meetings and access, 4) references to prayer during Thanksgiving instruction, and 5) references to Christianity during Christmas Program. Pursuant to 42 U.S.C. §1983, Does ask for declaratory relief to denounce the Wilson County school board for permitting these events, injunctive relief to prohibit these events from occurring at Lakeview in the future, as well as damages. (Complaint "Request For Relief").

None of the matters that Does seek to eliminate actually violate the Establishment Clause. In fact, the forced prohibition of said activities – as sought by Does in this lawsuit – would violate the fundamental constitutional rights of Intervenors. Pursuant to Fed. R. Civ. P. 56, Intervenors seek judgment that Does cannot require Lakeview to 1) ban "See You At Pole," 2) ban "National Day of Prayer," 3) preclude "Praying Parents" activities on the grounds or their access to Lakeview, 4) modify Thanksgiving instruction to exclude mention of religion or prayer, or 5) conduct Christmas program that bars Christian references. Because there are no genuine issues of material fact concerning any of these claims, Intervenors are entitled to judgment as a matter of law.

FACTS

James and Jennifer Walker have two children that currently attend Lakeview. (Walker Aff., ¶ 2). Their family participated in the "See You at the Pole" (also referred to as SYP) and "National Day of Prayer" (also referred to as NDP) events. (Walker Aff., ¶¶ 6, 14). Mrs. Walker organized the SYP. (*Id.*). Also, Mrs. Walker presently leads the Praying Parents group at the school. (Walker Aff., ¶ 19). The Walkers desire to participate in and organize these activities in the future. (Walker Aff., ¶¶ 13, 18, 28). Doug and Christy Gold have two children who currently

attend Lakeview. (Gold Aff., ¶ 4). Mrs. Gold participates in "Praying Parents," and Mr. and Mrs. Gold and their children all attended the See You at the Pole event and the National Day of Prayer event at Lakeview. (Gold Aff., ¶¶ 8, 12, 16). Mrs. Gold led the NDP event in 2006. (Gold Aff., ¶ 13). Mr. and Mrs. Gold desire to continue such participation. (Gold Aff., ¶¶ 11, 15, 18).

Prayer at Flagpole

See You at the Pole is a national event in which students across the country gather around school flagpoles and pray for their classmates and teachers. (Walker Aff., ¶ 6). To coincide with this national event, Mrs. Walker organized the 2005 SYP event at Lakeview. (Walker Aff., ¶ 6). The event occurred before school, beginning at 6:40 a.m. and ending at 7:00 a.m., around the school flagpole on school grounds. (Walker Aff., ¶ 9; Gold Aff., ¶ 8). During this event, students and parents prayed and read bible verses. (Walker Aff., ¶ 11). The event was purely voluntary; no one threatened or intimidated others to participate. (*Id.*). Some school officials attended but did not formally lead or speak at the event. (*Id.*). Intervenors and their children participated in this event. (Walker Aff., ¶ 6; Gold Aff., ¶ 8). To inform others about this event, Mrs. Walker placed flyers in the school mailboxes of teachers so that teachers would distribute these flyers to the students about the event. (Walker Aff., ¶7). Other outside groups, like Cub Scouts, a bank, and a Tae Kwon-Do class, likewise distribute take-home flyers. (Walker Aff., ¶8; Girl Scouts take-home flyer, attached to Motion as Ex. "L"; Wilson Bank & Trust take-home flyer, attached to Motion as Ex. "M").

National Day of Prayer

National Day of Prayer is a day dedicated by United States Congress to encourage prayer. (Gold Aff., ¶ 14). To coincide with this national event, Mrs. Gold organized a time for students

and parents to pray before school in the school cafeteria from 6:40-7:00 a.m., on May 4, 2006. (Gold Aff., ¶¶ 12, 14). Some school officials attended this gathering, but no one affiliated with the school led the event. (Gold Aff., ¶14). The NDP event is organized and financed solely by parents; the school gives no money for this event. (Gold Aff., ¶13). Mrs. Walker placed information in the school newsletter regarding this event. (Walker Aff., ¶17). Other groups (like Tae Kwon-Do, Cub Scouts and West Wilson Community Arts Alliance) place similar information about their events in the school newsletter. (*Id.*) (Excerpts of PTO newsletters, attached to Motion as Exs. "G", "H" & "I"). Mrs. Walker also placed posters about this event in the hallway of Lakeview, just like other groups are allowed to place such posters. (Walker Aff., ¶¶ 29-30).

Praying Parents

"Praying Parents" is a small informal group of parents who meet at Lakeview, discuss concerns of the school, and pray for students and teachers. (Walker Aff., ¶ 19; Gold Aff., ¶ 16). Mrs. Walker organizes and attends these meetings. (Walker Aff., ¶ 19). The group typically meets the first Friday of each month from 7:15 to 8:15 a.m. in a partitioned off area of the school cafeteria when no children are present. (Walker Aff., ¶¶ 20-21). Mrs. Walker obtained permission to post information about this group on the school website. (Walker Aff., ¶22). Other groups can also obtain website access. (*Id.*). As a general rule, Praying Parents do not enter into classes or speak to students. (Walker Aff., ¶ 23).

References to Religion or Prayer in Teaching of Thanksgiving

The Gold family celebrates Thanksgiving. As Christians, they would be highly offended if Lakeview stripped this holiday of its religious history or its meaning of giving thanks to God. (Gold Aff., ¶¶ 19-20).

Christmas References in Christmas Program

Lakeview typically hosts a Christmas program in December for the kindergarten class. (Complaint ¶¶ 65-67.). In the program, students sing various songs and act out events. At this program, students recreated the story *T'was the Night Before Christmas* and also recreated a Nativity Scene. Students also sang various Christmas Carols including "Deck the Halls," "Silent Night," "Rudolph, The Red Nose Reindeer" and "We Wish You a Merry Christmas." The Golds would be highly offended if Christian songs and references were systematically eliminated from the Christmas program. (Gold Aff., ¶ 22).

ARGUMENT

Summary judgment is proper when the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Moore v. Philip Morris Companies, Inc.*, 8 F.3d 335, 339-40 (6th Cir. 1993). Initially, the burden is on the moving party to show a lack of evidence supporting the non-movant's case. *Id.* Then the burden shifts to the non-moving party to move beyond the pleadings and provide facts that warrant a trial. *Id*. But not all factual disputes will preclude summary judgment. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-48 (1986). A factual dispute must be material—that is "affect the outcome of the suit"---to preclude summary judgment. *Id*.

Regarding this case, no fair-minded finder of fact could return a verdict in favor of Does in respect to their claims for relief. In essence, Does do not object to school officials engaging in religious speech; the problem, according to the Does, is that school officials allow individual parents and children, like the Intervenors and their families, to speak on school grounds. (Complaint ¶ 99). To stop this private speech, Does must establish that the speakers have no right to speak or that some interest trumps that right to speak. As demonstrated herein, Does fall

short of this goal. Undisputed facts substantiate that Lakeview opens up its school to various groups, both religious and secular, and Intervenors have the same right as others to engage in speech. Under First Amendment jurisprudence, religious speech cannot be treated different from secular speech. And contrary to Does' assertions, the Establishment Clause cannot be used to excise all references to religion from public life: "[t]he Establishment Clause cannot require a complete separation between church and state because it is upon the very principles of the church that our nation was founded and continues to flourish." *Chaudhuri v. State of Tennessee*, 886 F.Supp. 1374, 1384 (M.D.Tenn. 1995).

I. Does Lack Standing to Challenge Praying Parents Meetings and National Day of Prayer Events

To demonstrate standing, a plaintiff must show 1) an injury in fact 2) which is traceable to the challenged conduct, and 3) redressable by judicial relief. *Allen v. Wright*, 468 U.S. 737, 751 (1984). At all times, the burden rests on the plaintiff to prove standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). And, at the summary judgment stage, mere allegations are insufficient; plaintiffs must supply "a factual showing of perceptible harm." *Id*. at 566. In this case, Praying Parents meetings and National Day of Prayer events do not inflict any injury on Does since they have never observed these events and no public money was ever spent on these events.

A. Does are not offended observers

In Establishment Clause cases, school children and their parents may challenge a religious practice in a school if they "were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 n.22 (1982). To satisfy this requirement, plaintiffs must actually be exposed to or witness the religious practice in question. *Washegesic v.*

Bloomingdale Pub. Schs., 33 F.3d 679, 683 (6th Cir. 1994); *See Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 497 (5th Cir. 2007) (en banc) ("The question is whether there is proof in the record that Doe or his sons were exposed to, and may thus claim to have been injured by, invocations given at any Tangipahoa Parish School Board meeting."). For example, in *Doe v. Duncanville Indep. Sch. Dist.*, a seventh grader and her parents sued the student's school for allowing private groups to distribute bibles to fifth graders. 70 F.3d 402, 408 (5th Cir. 1995). But, according to the Fifth Circuit, plaintiffs lacked standing because the student never saw nor would see the bible distribution:

> The Does also do not contend that Jane Doe has standing by virtue of her exposure to the Bible distribution, and we note that the record would not support such a claim. Indeed, the record strongly suggests that Jane Doe would never have even seen the Bibles, because the fifth grade is housed in a separate school facility than the seventh through twelfth grades.

Id. at 409 n.11 (citation omitted). *Duncanville*, thus, stands for the clear proposition that students or parents must be exposed to a religious practice in order to challenge that practice. *Accord Dobrich v. Walls*, 380 F.Supp.2d 366, 373-74 (D. Del. 2005).

This case is in line with *Duncanville*, as it concerns Does' claims about the Praying Parents and NDP. None of the Does have ever witnessed a Praying Parents' meeting or a NDP event. (Jane Doe Depo. at 45, 50; 78; 119; 122; John Doe Depo. at 101-02).[1] And there is no evidence to infer that Does will see these events in the future. Praying Parents meet in a partitioned-off section of the cafeteria from 7:15 a.m. to 8:15 a.m. (Walker Aff., ¶ 20). Students are not allowed in this area, and students cannot participate in these meetings. (Walker Aff., ¶ 21). Likewise, the NDP event occurrs in partitioned-off section of the cafeteria before school, and the doors to the cafeteria are shut. (Gold Aff., ¶ 14). There is no chance that James Doe will wander into these

[1] Nor is there any evidence that the Does were exposed to the Thanksgiving prayer detailed in ¶ 80 of the Complaint.

activities or ever see these activities. And Does are not required to take special precautions to avoid these events.

Because of the disconnect between Does and these challenged events, they have no basis to say they are "directly affected" by the events. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 224 n.9 (1963). If not for second-hand information, Does would not even know that these events took place. They are offended by the mere knowledge that these events have taken place, not exposure to them. (Jane Doe Depo. at 50-51; 120). Thus, the supposed "injury," is no different from the "psychological" injury declared insufficient in *Valley Forge*. 454 U.S. at 485-86.

B. Does do not have taxpayers standing

A municipal taxpayer might possess standing to litigate "a good-faith pocketbook action," if there is a "direct dollars-and-cents injury." *Doremus v. Bd. of Educ. of Borough of Hawthorne*, 342 U.S. 429, 434 (1952). To obtain taxpayer standing, a plaintiff must demonstrate payment of taxes to the relevant entity and the measureable expenditure of tax revenues on the disputed practice. *See ACLU-NJ v. Township of Wall*, 246 F.3d 258, 263-64 (3d. Cir. 2001); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 794 (9th Cir. 1999) (en banc); *Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 282 (5th Cir. 1999). Does must prove, therefore, that 1) funds actually support the disputed practices and 2) that expenditures rise above a de minimis level.

As to the first and foundational requirement, Does must establish that Lakeview spent money on the Praying Parents or the NDP. *See Gonzales v. North Township of Lake County*, 4 F.3d 1412, 1416 (7th Cir. 1993) (demanding "evidence of an expenditure of tax revenue solely on the challenged activity."). Yet, they are unable to clear this initial hurdle. The Praying Parents meetings, as well as the NDP events, are organized, put on, and entirely financed by private parties. (Walker Aff., ¶ 19; Gold Aff., ¶ 13). The Praying Parents and the NDP do not receive

any funds or any benefits from Lakeview. (*Id.*). And, if no public funds are used to support a disputed practice, then a taxpayer cannot possibly object to the misuse of taxpayer dollars. *See, e.g., Friedmann v. Sheldon Cmty. Sch. Dist.*, 995 F.2d 802, 803 (8th Cir. 1993) (plaintiffs lacked standing to challenge invocation at school graduation because "[t]hey have not shown any state money going to the invocation or benediction, which is what they contend violates the Establishment Clause. They have shown no more than that state money is spent for diplomas, which certainly is not objectionable under the Establishment Clause."); *ACLU of Ga. v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1106 n. 14 (11th Cir. 1983) (noting that the plaintiffs did not claim taxpayer standing, because "[n]o expenditures have been made by the State of Georgia in connection with the cross except for the costs incurred in maintaining the park itself.").

To the extent Does would rely on the use of Lakeview ground and facilities as financial benefits, those benefits are of de minimis value. Under *Doremus*, taxpayers have standing only when funds rise above a de minimis level. 342 U.S. at 433. *Accord Township of Wall*, 246 F.3d at 262 ("In short, the plaintiffs [in *Doremus*] failed to establish more than a potential de minimis drain on tax revenues due to the challenged reading."); *Madison Sch. Dist.*, 177 F.3d at 794 ("Under *Doremus*, then, the taxpayer must demonstrate that the government spends a *measurable* appropriation or disbursement of school-district funds occasioned solely by the activities complained of.") (emphasis added) (quotation and citation omitted).

At most, Praying Parents and NDP receive the benefit of using rooms at Lakeview. Any costs associated with the room (such as lighting or upkeep), are of a de minimis quality and do not create taxpayer standing. *See, e.g., Madison Sch. Dist.*, 177 F.3d at 794 (tax dollars spent on renting a hall, printing graduation programs, buying decorations, and hiring security guards do

not create standing to challenge invocation at high school graduation); *ACLU v. City of St. Charles*, 794 F.2d 265, 267 (7th Cir. 1986) (lighting for challenged cross did not create standing because electricity costs were "minuscule"); *Linnemeier v. Indiana University-Purdue University Fort Wayne*, 155 F.Supp.2d 1044, 1053 (N.D. Ind. 2001) (plaintiffs lacked standing to challenge play at university because costs for security, building, and lighting "would be but a de minimis drain on tax revenues and cannot, without more, provide the plaintiffs with taxpayer standing."). All these upkeep costs would be spent whether the Praying Parents or the NDP occurred or not. Such inevitable costs cannot create taxpayer standing. *See, e.g.*, *Madison Sch. Dist.*, 177 F.3d at 794 (expenditures for programs and decorations did not create standing to challenge prayer at high school graduation because "those are ordinary costs of graduation that the school would pay whether or not the ceremony included a prayer."); *Duncanville*, 70 F.3d at 408 (no standing to challenge private party's distribution of bibles at public school because "[t]here is no evidence that the school district bought the table especially for the Bible distribution or that the table has been set aside for this sole purpose."); *Gonzales*, 4 F.3d at 1416 ("And although Township funds are spent maintaining the Park areas surrounding the crucifix, this cost would be incurred with or without the presence of the crucifix."). And so, Does do not have standing to challenge the Praying Parents meetings or National Day of Prayer events.

II. Requested Relief would Violate Free Speech Rights of Intervenors

In attacking Lakeview's ability to permit religious speech, Does simultaneously attack Intervenors' right to speak. Does' requested relief would require viewpoint discrimination and content discrimination in a designated public forum. And there is no Establishment Clause interest that could justify the violation of these rights.

A. Viewpoint discrimination is unconstitutional

When the government excludes speech on an otherwise includible subject because of its perspective, it engages in viewpoint discrimination. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). Absent compelling justification, viewpoint discrimination is always unconstitutional, regardless of the forum in which it takes place. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828 (1995); *Kincaid v. Gibson*, 236 F.3d 342, 355 (6th Cir. 2001). Excluding a religious perspective on an otherwise permissible subject is an obvious form of viewpoint discrimination. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). This analysis does not change for religious expression in an elementary school context. Courts forbid elementary schools from singling out and silencing religious speech. *E.g. Child Evangelism Fellowship of MD., Inc. v. Montgomery County Pub. Schs.*, 373 F.3d 589 (4th Cir. 2004); *Child Evangelism Fellowship of N.J., Inc. v. Stafford Tp. Sch. Dist.*, 386 F.3d 514, 519-521 (3d Cir. 2004).

Lakeview, as a matter of policy and practice, permits outside civic groups related to students' interests to distribute material and meet on school grounds. *See* School Board Policy concerning distribution of materials, attached as Ex. "C"; School Board Policy concerning community use of school facilities, attached as Ex. "D." Accordingly, Lakeview cannot validly single out and ban community events espousing a particular Christian viewpoint while simultaneously allowing other community groups to express their viewpoint. Such would be blatant and impermissible viewpoint discrimination. *Stafford Tp. Sch. Dist.*, 386 F.3d at 528-29.

B. Content discrimination in designated public forum is unconstitutional

Neither can Lakeview silence religious speech after it has opened up a designated forum for speech.[2] A designated public forum "consists of public property that the State has opened for expressive activity by part or all of the public." *Jobe v. City of Catlettsburg*, 409 F.3d 261, 266 (6th Cir. 2005) (citation omitted). If a speaker falls within the permitted class, then the area is the equivalent of a traditional public forum for that speaker and any content based restrictions must survive strict scrutiny. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). To determine the existence of designated public forum, the Sixth Circuit analyzes the school's practices and policies, the nature of the property at issue, its compatibility with expressive activity, and the context of the forum. *Kincaid*, 236 F.3d at 349.

Schools, including elementary schools, are compatible with various forms of expression and can create public forums. The Supreme Court has commented on the "considerable force" of the argument that public schools can create designated public forums. *Lamb's Chapel*, 508 U.S. at 391. The Third Circuit has squarely found a limited forum when an elementary school allowed groups to distribute materials and post materials in school hallways:

> [I]t is evident that Stafford [school district] created limited public fora when it opened up the three fora at issue for speech by a broad array of community groups on matters related to the students and the schools. Stafford had no constitutional obligation to distribute or post any community group materials or to allow any such groups to staff tables at Back-to-School nights. But when it decided to open up these fora to a specified category of groups (i.e., non-profit, non-partisan community groups) for speech on particular topics (i.e., speech related to the students and the schools), it established a limited public fora.

Stafford Tp. Sch. Dist., 386 F.3d at 526. The Fourth Circuit echoes this conclusion. *See Child Evangelism Fellowship of MD, Inc. v. Montgomery County Pub. Schs.*, 457 F.3d 376, 383 (4th Cir. 2006) ("Thus, the take-home flyer forum would seem to be a limited public forum…").

[2] Different circuit courts define limited public forum and designated public forum differently. *See Bowman v. White*, 444 F.3d 967, 975-76 (8th Cir. 2006). For purposes of this discussion, the terms can be treated as synonyms.

Having created a forum open to other groups, Lakeview may not forbid religious groups. Such conduct would constitute blatant content discrimination in forum designated as desirable for speech. *See Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981).

C. Treating religious speech equally does not violate Establishment Clause

When private religious expression is treated on equal terms as other expression, the government does not violate the Establishment Clause. *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 770 (1995). *See also Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) ("[N]o reasonable observer would think a neutral program of private choice ... carries with it the imprimatur of government endorsement."). This analysis is not altered in the elementary school context. As long as an elementary school treats religious and non-religious speech equally, the school does not violate the Establishment Clause by allowing private religious speech. *See, e.g., Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418, 422 (6th Cir. 2004).

D. Requested relief would require Lakeview to engage in viewpoint discrimination and content discrimination in designated public fora

Plaintiffs object to a multitude of activities conducted by private individuals at Lakeview. In every single instance, the activities subject to attack are protected by the Free Speech Clause and are acceptable under the Establishment Clause.

1. See You at the Pole & National Day of Prayer events

Plaintiffs object to the SYP and NDP events. (Complaint ¶¶ 38, 53). At SYP, private parties from across the country gather once a year at the local school flag pole to pray and read bible verses. (Walker Aff., ¶ 6). In accordance with this event, parents and children at Lakeview have met together around the flag pole at Lakeview before school from at 6:40 a.m. to 7:00 a.m. for this purpose (Walker Aff., ¶ 9). Some school officials attend but do not formally lead or speak at the event. (Walker Aff., ¶ 11). No one has ever been pressured or intimidated to attend. (*Id.*).

Similarly, at the NDP event, taking place on the very day set aside by U.S. Congress, students and parents gather to pray and read bible verses in a partitioned off area of school cafeteria before school from 6:40-7:00 a.m. (Gold Aff., ¶ 14). The doors of the cafeteria are also shut to prevent anyone from wandering in the cafeteria. (*Id*.). Like SYP, some school officials attend the gathering, but no one affiliated with the school has ever led or participated in the event. (*Id*.). Thus, both the SYP and NDP pertain to private individuals using school facilities before or after school.

Lakeview cannot legitimately preclude these annual get-togethers of SYP and NDP because of their standing policy of allowing student-sponsored groups access on campus. (Ex. "D"). Lakeview routinely allows other groups, such as the Tae Kwon-Do group and the Cub Scouts, to use school facilities when school is not in session. (announcement from Principal of Lakeview, attached as Exhibit "E"; Cub Scouts announcement distributed at Lakeview, attached as Exhibit "F"; Walker Aff., ¶ 10). There is no meaningful distinction between these activities and Intervenors' events, except for viewpoint. Therefore, Lakeview cannot allow these secular groups to meet and ban the See You at the Pole or National Day of Prayer, without engaging in blatant viewpoint discrimination. *See Milford*, 533 U.S. at 112 (elementary school could not deny Good News club access to its facilities after giving access to other groups).

Moreover, by its policy and practice, Lakeview has created a designated forum for school affiliated and community groups to use their facilities after hours. All the factors needed for a designated forum have been satisfied. *See Kincaid*, 236 F.3d at 349. And Lakeview is not at liberty to open this forum (school facilities after hours) to secular groups and close the forum to religious groups. *See Prince v. Jacoby*, 303 F.3d 1074, 1091-92 (9th Cir. 2002).

The Establishment Clause does require such discrimination. Because these events are conducted by private citizens and because Lakeview allows other groups to use school facilities, Lakeview cannot possibly be seen as endorsing one particular religious group. *See Milford,* 533 U.S. at 114-19 (no Establishment Clause violation when elementary school opened up facilities on neutral basis); *Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F.Supp.2d 98, 117 (D. Mass. 2003) (no Establishment Clause violation when students prayed at flagpole before school). Lakeview has simply maintained a neutral policy for facility use for both religious and secular groups. Indeed, another court in this circuit has already upheld prayer at an elementary school flagpole. *Daugherty v. Vanguard Charter Sch. Academy*, 116 F.Supp.2d 897, 910 (W.D. Mich. 2000). *Daugherty* allowed the flagpole prayers because teachers did not participate in the prayer even though they attended the event. *Id*. This case is indistinguishable from *Daughtery* because teachers attended SYP and NDP but did not participate in these events.

Also, the NDP event, in particular, represents historic traditions honoring our religious history. *See Chaudhuri*, 886 F.Supp. at 1384 (historic recognition of National Day of Prayer reveals framers intent regarding Establishment Clause). There is no justifiable reason to allow other groups to use school facilities but ban the SYP and NDP.

2. Praying Parents Meeting

Praying Parents is a small informal group of parents who meet at Lakeview to pray for students and teachers. (Walker Aff., ¶ 19). The group meets in a partitioned off area of the school cafeteria from 7:15 to 8:15 a.m. (Walker Aff., ¶ 20). Of course, it is only prudent to allow parents to meet at school in an effort to foster parental involvement in the children's education. *Daugherty*, 116 F.Supp.2d at 907. Toward this end, Lakeview allows Praying Parents to meet on

school grounds, just as they do for other parental groups. Lakeview cannot allow other parental groups to meet, but ban Praying Parents, without engaging in impermissible discrimination.

The Praying Parents meeting does not violate the Establishment Clause. The meeting is conducted solely by parents. (Walker Aff., ¶ 21). Teachers and students do not participate and students have never been invited to attend. (*Id*.). And the meetings occur in a partitioned off area. (Walker Aff., ¶ 20). Therefore, there is no opportunity for students to ever see or wander into a meeting. For this reason, the Praying Parents meeting is indistinguishable from the meetings conducted by the "Moms' Prayer Group" upheld in *Daugherty*:

> What the student "audience" observes in this instance is simply the closed door of the parent room with knowledge that, during a ninety minute period each week, some students' mothers may be praying behind that door. No student is confronted with an invitation to join in the prayer or even to observe it. No student is forced to assume special burdens to avoid the prayer…. Under these circumstances, even elementary school children, who are concerned enough about what happens in the parent room to ask and learn the facts from their teachers or parents, can reasonably be expected to understand that Vanguard's tolerance of prayer in the parent room is not endorsement thereof.

116 F.Supp.2d at. 908-09.

3. Posters In Hallway

Intervenors have traditionally placed posters about the SYP, NDP, and Praying Parents in the hallways of Lakeview (Walker Aff., ¶ 29). In no way is any school official responsible for these posters. (*Id*.). Intervenors, as private citizens, are solely responsible for making and placing these posters. (*Id*.). Yet, Does object and seek to stop the practice. (Complaint ¶¶ 56-58).

Notwithstanding the Complaint, Lakeview must allow these posters because Lakeview allows secular groups—such as the Girl Scouts and Cub Scouts---to put posters in the hallways of the school. (Walker Aff., ¶ 30). Lakeview cannot isolate and ban religious posters without discriminating on the basis of viewpoint. *See Stafford Tp. Sch. Dist.*, 386 F.3d at 521, 526 (ruling

that elementary school engaged in viewpoint discrimination by allowing secular groups but preventing religious group from placing posters in hallway).

Indeed, Lakeview has a written policy allowing "[c]ommunity, educational, charitable, recreational and other similar civic groups" to "advertise events pertinent to students' interests or involvement." (Ex. "D"). This policy is confirmed by the actual practice of Lakeview since Lakeview has allowed various groups to put posters in the hallway. Thus, the explicit policy and practice of Lakeview confirm that Lakeview created a designated forum for community groups to place posters about interests. *See, e.g.*, *Stafford Tp. Sch. Dist.*, 386 F.3d at 521, 526 (ruling that elementary school created public forum for community groups to place posters in hallway). With this established forum, Lakeview cannot ban religious groups from using it.

And, again, the placement of these posters does not violate the Establishment Clause. Because the posters are private speech, not government speech, and because Lakeview treats groups equally, there is no danger of endorsing religion. Faced with this exact situation, other courts have allowed religious groups to place posters and information in the hallways of elementary schools. *See Stafford Tp. Sch. Dist.*, 386 F.3d at 530-35 (ruling that elementary school could allow religious groups to post material on school walls); *Sherman*, 8 F.3d at 1165-66 (ruling that Boy Scouts could place posters in school without violating Establishment Clause). *See also Prince*, 303 F.3d at 1092-94 (requiring that a school club be given equal access to bulletin boards).

4. Information in Newsletter and Website

Plaintiffs object to the ability of religious groups to display information in Lakeview's newsletter and school website. (Complaint ¶¶ 39-40, 42, 55). Intervenors have placed information in these mediums because these mediums are an essential way that groups

communicate information to parents and students. (Walker Aff., ¶¶ 17, 22). And Intervenors have a right to use this medium because many other community "events" have been advertised in these mediums. For example, the newsletter has contained information about a Tae Kwon-Do class, a food drive conducted by the Cub Scouts, information about the West Wilson Community Arts Alliance, a sock hop and skate night, and a closet consignment sale. (Copies of PTO newsletters, attached to Motion as Exs. "G", "H", "I", "J" & "K"). The website has contained information about groups and events related to the Lakeview community. (Walker Aff., ¶ 22). Thus almost any conceivable event affiliated with the school or with someone at the school has appeared in the newsletter and website. Lakeview cannot allow these various events and ban only religious groups without engaging in viewpoint discrimination.

And as with other venues in the school, by allowing all these groups to advertise in its newsletter and website, Lakeview has created a designated forum for speech. The practice is confirmed by the Lakeview's explicit policy regarding advertisements by groups (Ex. "C"). Having established the website and newsletters as forum to communicate community information, Lakeview may not prohibit intervenors from communicating information about religious events.

The display of such information in the website and newsletter cannot violate the Establishment Clause. Because such a wide variety of private groups use the website and newsletter, a reasonable observer could not conclude that Lakeview endorses all these events. Lakeview simply treats all groups equally and desires to communicate information relevant to the community. And this is only appropriate. The website and newsletter are just like modern versions of a bulletin boards and hallway space and placement of religious information in these

areas has already been upheld against an Establishment Clause attack. *See Prince*, 303 F.3d at 1092-94.

5. Take Home Flyers

Does further object to the distribution of take-home flyers. (Complaint ¶ 46). Lakeview allows various groupsto place information in folders that are then given to students to take home to their parents. For example, the Girl Scouts, a bank, and a Tae Kwon-Do class have all sent home flyers. (Walker Aff., ¶ 8). It would be blatant viewpoint discrimination for Lakeview to selectively prevent religious groups from doing the same thing. *Montgomery County*, 373 F.3d at 593-94 (finding viewpoint discrimination when elementary schools prohibited religious group from dispensing flyers to students in take home folders but allowed other groups to participate in program). Also, a public forum has been created with respect to the take home flyer program, and Lakeview may not exclude religious speech from this forum. *See Stafford Tp. School Dist.*, 386 F.3d at 519, 526; *Child Evangelism Fellowship of MD, Inc. v. Montgomery County Pub. Schs.*, 457 F.3d 376, 383 (4th Cir. 2006) ("Thus, the take-home flyer forum would seem to be a limited public forum…").

The Establishment Clause is no barrier to the use of these flyers. As private speech, the flyers do not threaten establishment. *See Rusk*, 379 F.3d at 419-20; *Montgomery County*, 373 F.3d at 594-602; *Hills*, 329 F.3d at 1047; *Sherman*, 8 F.3d at 1162-63; *Stafford Tp. Sch. Dist.*, 233 F.Supp.2d at 653; *Daugherty*, 116 F.Supp.2d at 911.

6. Stickers & Prayer Buddies

Does object to students wearing stickers saying "I prayed" and students calling themselves "prayer buddies." (Complaint ¶¶ 60-61). All these activities were conducted by students. (Gold Aff., ¶ 14). There is no evidence that teachers or administrators participated in these events. As

non-vulgar, private student speech about a social issue, this speech must be allowed unless it is substantially disruptive. *See Morse v. Frederick*, 127 S.Ct. 2618, 2637 (2007) (Alito, J., concurring) (explaining four distinct standards used to analyze student speech).[3] Nor is there any evidence that the stickers or prayer buddies slogan disrupted school activities. Therefore, these activities must be allowed.

The Establishment Clause is no trump to this right. Only private students conducted the speech in question. Thus, a reasonable observer could not possibly impute their private message to the state. Private religious speech conducted by individual students on stickers simply does not bear the imprimatur of the state.

7. Distribution of Notes and Cards

Finally, Does take issue with the ability of Praying Parents to enter into classes and distribute notes to students. (Complaint ¶¶ 43, 44). But the record does not bear this allegation out. Individuals affiliated with Praying Parents generally do not enter into classes or speak to students. (Walker Aff., ¶ 23). Praying Parents have never asked to enter into classrooms. (*Id.*). At most, Does can only pinpoint one incident where a praying parent allegedly entered into a classroom.[4] And in that incident, no students were in the classroom because the students had left for a mandatory school event in the gym. (Jane Doe Depo. at 46-48, 122-23). Supposedly, the praying parent asked Mrs. Doe to give one prayer card to Mrs. Adamson so Mrs. Adamson would give that card to a particular student. (*Id*). Of course, the student could have requested to receive that card. Mrs. Doe acknowledges that Praying Parents only gives out cards to those who request them. (*Id*. at 48). And Mrs. Adamson may have waited to distribute the card after class.

[3] Justice Alito's opinion is controlling because his and Justice Kennedy's votes were necessary to form the five-justice majority. Therefore it offers the narrowest grounds. *See Marks v. United States*, 430 U.S. 188, 193 (1977).
[4] Intervenors dispute that this incident ever occurred. (Walker Aff. ¶ 24). But even if Does' allegations are taken as true, there is still no Establishment Clause violation.

Teachers often distribute private notes to students from parents. (Walker Aff., ¶ 27; Gold Aff., ¶ 23). The Does can prove no incident (much less a pattern) where Praying Parents enter classes and distribute cards to students. At most, one member of Praying Parents distributed a card to a student who requested that card. Such private speech, unknown to others, cannot violate the Establishment Clause. In fact, there is no indication that school officials even knew about this incident.[5]

In contrast to Does' loose accusation, Intervenors only wish to distribute cards and notes to teachers by placing them in the teacher's boxes. (Walker Aff., ¶ 25). These boxes are located in the teachers' lounge where no students are allowed. (*Id*.). Intervenors wish to put general information in these teachers' boxes. (Walker Aff., ¶ 26). And this is not unusual. Other groups have been allowed to put information about their groups in teachers' boxes. (*Id*.). Lakeview cannot allow secular groups to distribute information to teachers and prohibit religious groups from distributing information. Such viewpoint discrimination is improper no matter where it occurs.

Intervenors also wish to distribute prayer cards in teacher's boxes when specific teachers request to receive those cards. (Walker Aff., ¶ 27). These cards simply inform the teacher that they have been prayed for. (*Id*.). But this action simply involves private communication between consenting adults. (*Id*.). *See Roberts*, 921 F.2d at 1056 (private, religious speech of teachers must be allowed unless others might reasonably perceive the activity to bear the imprimatur of the school). In no way can such private communication bear the imprimatur of the state because it is conducted between private individuals, out of the sight of students. Lakeview allows teachers

[5] This one time event was done by a private citizen, not by any Lakeview official. Thus, there is no state action. Moreover, Lakeview can only be found liable for an unconstitutional policy or custom. *Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658 (1978). Obviously, if Lakeview officials did not even know about this one time event, there can be no policy attributed to the government under which it can be held liable.

and other persons to use teachers' boxes to communicate private information. (Walker Aff., ¶ 27; Gold Aff., ¶ 23). Communicating religious information is no different. To be sure, restricting private religious speech, while allowing private secular speech, would constitute clear viewpoint discrimination. *See Wigg*, 382 F.3d at 815 ("In an effort to avoid an establishment of religion, SFSD unnecessarily limits the ability of its employees to engage in private religious speech on their own time.").

III. Requested Relief concerning Thanksgiving and Christmas Violates the Establishment Clause Rights of Intervenors

Intervenors have a fundamental right to avoid school hostility toward their religion. Depending on the context, the government can communicate a message of hostility toward religion and violate the Establishment Clause by eliminating religious materials and references. The Establishment Clause not only forbids government endorsement of religion but also forbids government hostility toward religion. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). The elimination of religious references in contexts where religious mention would be expected communicates a clear message of hostility, which also violates the Establishment Clause. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 598 (1992) ("A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution."); *Murray v. City of Austin*, 947 F.2d 147, 158 (5th Cir. 1991) ("requiring the City to remove all displays of the [religious] insignia, arguably evinces not neutrality, but instead hostility, to religion.").

This principle does not require the government to permit religious speech in all circumstances. But the intentional removal of religious content may very well communicate a message of hostility. For example, some musical programs inherently encompass religious content. Because religious content is very important in the historical development of some

music, the removal of religious references from this context would send a blatant message of hostility. While the government need not set aside space for religious content from the outset of a musical program, removal of religious content from a pre-existing program would undoubtedly send a message of hostility:

> Under normal circumstances the absence of religious displays is neutral and without First Amendment significance. However, in the context of the Christmas-Chanukah holidays, this absence might be less than neutral. As our nation becomes overwhelmed with the tangible evidences of the year-end holiday spirit, the studied absence or even limitation of consistent celebrations within the school might well be interpreted by a student as governmental hostility to the celebrating religions.

Clever v. Cherry Hill Township Bd. of Educ., 838 F. Supp 929, 940 (D.N.J. 1993).

For this reason, religious songs are permitted in public schools. *See, e.g., Florey v. Sioux Falls Sch. Dist. 49-5*, 619 F.2d 1311, 1317 n.5 (8th Cir. 1980) (noting that schools could perform Christmas carols such as Adeste Fideles, Hark the Herald Angels Sing, Joy to the World, and Silent Night). Consequently, a planned preclusion of religious references where it would otherwise be appropriate conveys a message of hostility toward that religion:

> Given the dominance of religious music in this field, DISD [the school district] can hardly be presumed to be advancing or endorsing religion by allowing its choirs to sing a religious theme song.… Within the world of choral music, such a restriction would require hostility, not neutrality, toward religion. A position of neutrality towards religion must allow choir directors to recognize the fact that most choral music is religious. Limiting the number of times a religious piece of music can be sung is tantamount to censorship and does not send students a message of neutrality. Where, as here, singing the theme song is not a religious exercise, we will not find an endorsement of religion exists merely because a religious song with widely recognized musical value is sung more often than other songs. Such animosity towards religion is not required or condoned by the Constitution.

Duncanville, 70 F.3d at 407-08. *Accord Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 553-56 (10th Cir. 1997).

These precedents apply forcefully to the Does' vision of Lakeview. Does ask this Court to eliminate Christian references in Lakeview's Christmas program and prevent the discussion of prayer or religion in connection to Thanksgiving. (Complaint ¶¶ 65, 80). The Christmas program as is, appropriately contains both secular and religious songs and symbols traditionally associated with Christmas. (Ex. 4). Religious songs and symbols in the context of the universal religious holiday of Christmas do not violate the Establishment Clause when they are accompanied by other secular symbols. *See Lynch*, 465 U.S. at 680-83; *Clever*, 838 F. Supp at 933.

The Does also seek to eradicate references to prayer in context of teachers explaining the events that occurred at the first Thanksgiving. Thanksgiving prayers, and dinner, though, are not religious events, since they reflect historical events. In such context, where religion is intimately connected to history, discussion of religion does not endorse religion. *See Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam) ("[T]he Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."); *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 406-08 (4th Cir. 2005) (mention of God permissible in classroom during patriotic not religious exercise). And, of course, Thanksgiving is not just a historical event, it is a national holiday on which day we are called to give thanks to God. *Chaudhuri*, 886 F.Supp at 1385.

In a Christmas program, Christian songs should only be expected since the holiday Christian origin and purpose. So too, religion plays a significant role with Thanksgiving, as history and the very purpose of the holiday reflects. In both of these contexts, religious content provides indispensable background for understanding the holiday. Therefore, Lakeview would be sending an anti-religious message by intuitively prohibiting religious mention in these fields.

Indeed, the notion of expunging all references to religion in school setting has no limit. Does might as well delete all references to religion in the Declaration of Independence or ignore the national motto. Such censorship serves only to impose a secularist meta-narrative upon elementary students by manipulating and rewriting the historical record. Such "editing" of what we are as a people evokes Orwellian visions, not the values of the Constitution. The Establishment Clause does not require such censorship. Far from it, the Establishment Clause forbids such anti-religious censorship, and Intervenors have a clear interest to avoid such hostility.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request this Court to enter an order granting summary judgment in their favor on all claims for relief sought by the Does.

Respectfully submitted,

JONATHAN SCRUGGS TN Bar # 025679 Alliance Defense Fund 699 Oakleaf Office Lane, Suite 107 Memphis, TN 38117 (901) 684-5485 telephone Attorney for Intervenor-Defendants	s/NATHAN W. KELLUM TN BAR #13482; MS BAR # 8813 Alliance Defense Fund 699 Oakleaf Office Lane, Suite 107 Memphis, TN 38117 (901) 684-5485 telephone Attorney for Intervenor-Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing was made upon Filing Users (all counsel of record) through the Electronic Filing System, this 1st day of October, 2007.

Edmund J. Schmidt, III, Esq. 1913 21st Avenue, S Nashville, TN 37212	Susan Laurie Kay, Esq. 131 21st Avenue, S Nashville, TN 37203
Winston N. Harless, Esq. 201 Fourth Avenue, N, Suite 1500 Nashville, TN 37219-8615	Larry L. Crain, Esq. 5214 Maryland Way, Suite 402 Brentwood, TN 37027
Michael R. Jennings, Esq. 326 N. Cumberland St. Lebanon, TN 37087	Tricia R. Herzfeld P.O. Box 120160 Nashville, TN 37212

s/Nathan W. Kellum