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JURISDICTIONAL STATEMENT

Basis for District Court's Subject Matter Jurisdiction

Jurisdiction is conferred on the U.S. District Court by 28 U.S.C. § 1343(3) and 1343(4), which provide for original jurisdiction in a district court of all suits brought pursuant to 42 U.S.C § 1983. 28 U.S.C. § 2201 and 2202 are the statutes authorizing declaratory judgment and permanent injunction. Jurisdiction is also conferred on the district court by 28 U.S.C. § 1331 because the cause of action arises under the Constitution and laws of the United States.

Plaintiffs seek declaratory and permanent injunctive relief under 42 U.S.C. § 1983 that the Defendants' policy and practices with respect to public community centers are violations of the Plaintiffs' civil rights under the United States Constitution. Plaintiffs further seek costs and attorneys' fees pursuant to 42 U.S.C. Section 1988.

Basis for the Court of Appeal's Jurisdiction

Jurisdiction is conferred on the Court of Appeals by 28 U.S.C. § 1291, which provides for appellate jurisdiction in Courts of Appeals of all final decisions of U.S. District Courts. Jurisdiction is also proper under 28 U.S.C. § 1294 because the Plaintiffs appeal from a final decision from the U.S. District Court for the District of Maryland, which the Court of Appeals for the Fourth Circuit embraces.

Filing Dates Establishing Timeliness of Appeal

- The final order of the district court was entered on August 20, 2002.
- Plaintiffs filed a notice of appeal in the district court on August 26, 2002, within 30 days of the order entry date pursuant to Fed. R. App. P. 4(a)(1)(A).

Finality of Order Below

This appeal is from a final order of the U.S. District Court that disposes of all parties' claims.

STATEMENT OF THE ISSUES

Calvert County refuses to allow homeschooling parents to teach classes in geography and fiber arts in a community center that is generally available to others for similar uses.

1. Is teaching of children protected speech for First Amendment purposes?
2. Has the County improperly excluded homeschoolers from this designated forum?
3. Does the disparate treatment of homeschoolers by the County violate the Equal Protection Clause?

STATEMENT OF THE CASE

When the Calvert County Community Center denied homeschoolers the right to rent the Center's facilities on the same basis as other people, Plaintiffs-Appellants Lydia Goulart and Kyle Travers filed a complaint in the United States District Court for the District of Maryland asking the Court to declare the unwritten policy a violation of the First Amendment guarantee of free speech and of the Fourteenth Amendment's guarantee of equal protection of the laws. After discovery and cross motions for summary judgment, the district court held that the Community Center had not violated the plaintiffs' rights. It reasoned that teaching the young is not speech protected by the First Amendment. It also held that the Community Center could legally exclude homeschoolers without violating equal protection, stating that the policy did not violate any fundamental right and applying a standard of "rational relationship to a legitimate goal of the government." The court's memorandum opinion and order were entered on August 20, 2002.¹ Plaintiffs thereafter filed a timely notice of appeal on August 26, 2002, appealing the lower Court's ruling on both First and Fourteenth Amendment grounds.

¹ 220 F.Supp.2d 494 (2002).

STATEMENT OF FACTS

Introduction

Plaintiffs-Appellants, two homeschooling mothers, independently applied to use Calvert County Community Centers for a geography club² and fiber arts class³ that they had organized. Both mothers planned to enroll their own children in their respective classes and to count their children's participation towards meeting state homeschooling requirements.⁴ Calvert County denied them the use of the community centers for these activities, claiming that the centers were available only for "recreational" uses and not "educational" uses,⁵ because their policy was that "the use of community center facilities for the purpose of home schooling would not be permitted."⁶ After unsuccessful attempts to reconcile the matter with Calvert County informally, the mothers filed this suit.⁷

² *Application – Chesapeake Home Educators*, J.A. 345.

³ *Application – Kyle Travers*, J.A. 197.

⁴ *Deposition of Goulart*, J.A. 174; *Deposition of Travers*, J.A. 193-194.

⁵ *Application – Goulart*, J.A. 345; *Application – Travers*, J.A. 197; *Letter from Calvert Co. Bd. of Comm'rs*, J.A. 214-215.

⁶ *Interoffice Correspondence to Board of County Commissioners from Paul D. Meadows*, J.A. 344.

⁷ *Letter from Calvert Co. Bd. of Comm'rs*, J.A. 214-215.

Appellants' Homeschools

Mrs. Goulart has been homeschooling since the 1995-1996 school year⁸ and Mrs. Travers since the 1992-1993 school year.⁹ They teach their children at home using a variety of resources, materials, textbooks, videos, the Internet, and pooled resources from other adults, such as art or physical education classes and activities.¹⁰ Although other adults may teach some individual classes, Appellants take personal responsibility for directing their children's overall education, deciding which activities to include in each child's complete educational program.

As part of their educational programs, Appellants enrolled their children in various activities at Calvert County Community Centers offered by the Parks and Recreation Department and private individuals, including art classes,¹¹ a research paper class,¹² a biology class,¹³ and physical education classes.¹⁴ They included these activities in their children's school portfolios,¹⁵ which they were required to keep for periodic review under Maryland's homeschooling law.¹⁶

⁸ *Goulart, J.A.* 296, 298.

⁹ *Travers, J.A.* 331, 333.

¹⁰ *Goulart, J.A.* 162; *Travers, J.A.* 190-191.

¹¹ *Goulart, J.A.* 164-166, 170-171.

¹² *Travers, J.A.* 187-188.

¹³ *Goulart, J.A.* 171-172.

¹⁴ *Goulart, J.A.* 164-166, 170-171.

¹⁵ *Goulart, J.A.* 164-166, 170-172; *Travers, J.A.* 187-188.

¹⁶ *Goulart, J.A.* 302-303.

Mrs. Goulart's Geography Club

In 1999, Mrs. Goulart decided to organize a geography club and applied to use the Northeast Community Center (which is operated by Defendants) as a meeting place for the club.¹⁷ She intended to enroll her own children in this club and incorporate their participation into their homeschool program and portfolios.¹⁸ The club's proposed meeting time was outside of traditional school hours from 2:30 p.m. to 4:30 p.m.¹⁹ Nothing in the record suggests that the geography club was restricted to homeschoolers as Defendant's counsel conceded at oral argument.²⁰ There is no evidence in the record to indicate that the parents of other homeschooling children participating in the club were required to include the club's activities into their own homeschool programs and portfolios. Nor would Maryland law have required them to do so.

The geography club held one session, but the Defendants revoked Mrs. Goulart's application and refused to let the geography club meet in the Northeast Community Center.²¹ Defendants claimed that the County's unwritten policy prohibited homeschoolers making "educational" use of the county's community

¹⁷ *Application – Goulart*, J.A. 182-183.

¹⁸ *Goulart*, J.A. 174.

¹⁹ *Goulart*, J.A. 175-176; *Application – Goulart*, J.A. 182-183.

²⁰ *Transcript of Motions Hearing*, J.A. 399.

²¹ *Goulart*, J.A. 312, 327.

centers.²² They claimed that because Mrs. Goulart intended to use the club for “educational” purposes, she could not use the community center, even though the club would use recreational means, such as activities and games, to educate the children in geography.²³

Mrs. Travers’ Fiber Arts Class

Mrs. Travers attempted to organize a fiber arts class in 1999.²⁴ Although the class targeted homeschooled participants, it was open to both adults and children of the general public.²⁵ It was to include instruction time in various fiber arts, such as knitting, crocheting, and basket-weaving, as well as practice sessions in these arts where participants would actually knit, crochet, or basket-weave.²⁶ Consistent with its overall use policy, Calvert County Community Centers had previously permitted the facilities to be used for basket making, sewing, knitting, and crocheting classes that were not organized by homeschoolers.²⁷

As with the geography club, there is no evidence in the record that homeschool parents were required to include their children’s participation in their

²² *Letter from Calvert Co. Bd. of Comm’rs*, J.A. 214-215.

²³ *Goulart*, J.A. 177-178; *Application – Goulart*, J.A. 182.

²⁴ *Application – Travers*, J.A. 197-198.

²⁵ *Travers*, J.A. 193; *Travers’ Answers to Interrogatories*, J.A. 200-201.

²⁶ *Application – Travers*, J.A. 197; *Travers*, J.A. 192-193.

²⁷ *Deposition of Meadows*, J.A. 29, 59-60.

portfolios. Non-homeschool children could also participate in the class for purely recreational purposes.²⁸ Adults could also participate in the class.²⁹

Mrs. Travers likewise applied to use the Northeast Community Center for the class but was denied for the same reason that the geography club was denied: the County's unwritten policy prohibited "educational" uses of the centers by homeschooling parents.³⁰

The County's Written Use Policy

When Appellants applied to use the Community Centers, the County's written policy provided:

The purposes of the community centers are:

- to provide a place for Park and Recreation programs;
- to provide a meeting place for community organizations;
- to provide a place for large community events;
- to provide a place for teens to gather;
- and to provide a place to pursue fitness activities.

USES

The community centers are available for:

- a. Recreational Uses – examples: birthday parties, baby showers, receptions.
- b. Meetings – community organizations
- c. Non-profit Fundraising Events – certification of non-profit status required

²⁸ *Travers, J.A. 193; Travers' Answers to Interrogatories, J.A. 200-201.*

²⁹ *Travers, J.A. 193; Travers' Answers to Interrogatories, J.A. 200-201.*

³⁰ *Travers' Answer to Interrogatories, J.A. 200-202; Letter from Calvert Co. Bd. of Comm'rs, J.A. 214-215.*

PROHIBITED USES

- a. Business or for profit activities – No person shall carry or conduct any business, trade, occupation or profession in any community center except in support of permitted uses.
- b. Any activity which is illegal, may incite riot or disturbance, or is in violation of the rules and regulations of the Calvert County Division of Parks and Recreation.
- c. Possession and consumption of alcoholic beverages is prohibited.³¹

The policy additionally restricted all users of the facilities to no more than two hours per week.³²

The County Allows Private Instruction, Teaching, and Classes at the Community Centers

The County's use policy permits Calvert County citizens to use the centers for recreational uses, meetings, and non-profit fundraising.³³ Under the permitted uses, the County has permitted private individuals unconnected to the County to teach courses and offer instruction and classes at the County Community Centers, including:

- classes teaching English to non-English speaking people³⁴
- course in magnets and ceramic technology³⁵
- Patuxent River Sail and Power Squadron instruction in vessel safety³⁶

³¹ *Community Center Use Policy*; J. A. 64

³² *Community Center Use Policy*, J.A. 64-68.

³³ J.A. 388.

³⁴ *Application – Lusby Prayer Group*, J.A. 96.

³⁵ *Application – Mary Posey*, J.A. 97; *Meadows*, J.A. 56.

³⁶ *Application – Kay Simkins*, J.A. 98.

- workshop on music teaching techniques sponsored by the Music Teachers Association of Southern Maryland³⁷
- skin care and nail care class³⁸
- class teaching baton twirling³⁹
- church-sponsored marriage and parenting enrichment seminar⁴⁰
- violin lessons⁴¹
- The Literacy Council teaches people to read at the Community Centers⁴²
- theater and drama instruction for youth ages 9-16⁴³
- CPR training and first aid training⁴⁴
- U.S. Census Bureau training for personnel to conduct the 2000 census⁴⁵
- Tutoring children who could not be taught at a public school or at home⁴⁶

The County does not object to homeschoolers attending these classes or counting them toward credit in satisfying state education requirements.⁴⁷

³⁷ *Application – Mary Stevens, J.A. 99; Meadows, J.A. 57.*

³⁸ *Application – Linda Gibbs, J.A. 100.*

³⁹ *Application – David Stanberg, J.A. 101; Meadows, J.A. 57-58.*

⁴⁰ *Application – Huntington Church of Christ, J.A. 102; Meadows, J.A. 55.*

⁴¹ *Application – Frank Narducci, J.A. 103.*

⁴² *Application – Calvert County Literacy Council, J.A. 104; Meadows, J.A. 43.*

⁴³ *Application – Chesapeake Youth Players, J.A. 105; Meadows, J.A. 49.*

⁴⁴ *Applications of Dunkin’s Supply and Concrete and Robert Huard, J.A. 106, 107.*

⁴⁵ *Application – U.S. Census Bureau, J.A. 108.*

⁴⁶ *Meadows, J.A. 41-42. This is conducted by the teachers from the Calvert County school district.*

⁴⁷ *Transcript of Motions Hearing, J.A. 403-404.*

The Parks and Recreation Department has Sponsored Many Classes Similar in Nature to the Classes Homeschoolers Wished to Conduct.

In addition to the wide variety of classes by outsider persons just listed, the County itself offers a myriad of courses on a wide variety of topics sponsored by the Parks and Recreation Department. The County has offered at the Community Centers classes on:

- sewing⁴⁸
- crochet⁴⁹
- knitting⁵⁰
- basket making⁵¹
- porcelain doll making⁵²
- sign language for the deaf⁵³
- drawing⁵⁴
- scratch board art⁵⁵
- pressed flower pictures⁵⁶

⁴⁸ *Excerpts of Calvert County Parks and Recreation Catalogues, J.A. 110, 118, 125, 129, 130, 133; Meadows, J.A. 59.*

⁴⁹ *Catalogues, J.A. 132; Meadows, J.A. 60.*

⁵⁰ *Catalogues, J.A. 132; Meadows, J.A. 60.*

⁵¹ *Catalogues, J.A. 111; Meadows, J.A. 60.*

⁵² *Catalogues, J.A. 118; Meadows, J.A. 59.*

⁵³ *Catalogues, J.A. 110, 120; Meadows, J.A. 59.*

⁵⁴ *Catalogues, J.A. 118, 122; Meadows, J.A. 59.*

⁵⁵ *Catalogues, J.A. 122; Meadows, J.A. 59.*

⁵⁶ *Catalogues, J.A. 122; Meadows, J.A. 59.*

- math tutoring⁵⁷
- Russian and other languages⁵⁸
- guitar⁵⁹
- cooking⁶⁰
- oil painting, and many other courses.⁶¹

The County Allows Community Groups To Engage In Expressive Activities At The Community Centers

The County has allowed a broad array of private community organizations and individuals, as well as other governmental entities, to use the facilities for a wide range of First Amendment activities.

- Boy Scouts, Girl Scouts, Cub Scouts and Brownies.⁶²
- partisan political meetings, such as meetings by the Democratic or Republican parties.⁶³
- church worship services and other religious seminars⁶⁴
- monthly meetings of the 4-H Calvert Caballeros Horse and Pony Club⁶⁵

⁵⁷ *Catalogues*, J.A. 113, 120; *Meadows*, J.A. 59.

⁵⁸ *Catalogues*, J.A. 127; *Meadows*, J.A. 60.

⁵⁹ *Catalogues*, J.A. 127; *Meadows*, J.A. 60.

⁶⁰ *Catalogues*, J.A. 123; *Meadows*, J.A. 60.

⁶¹ *Meadows*, J.A. 60.

⁶² *Meadows*, J.A. 50-51.

⁶³ *Meadows*, J.A. 46.

⁶⁴ *Applications of No Other Way Ministries, Shepherd of the Bay Lutheran Church, and Huntington Church of Christ*, J.A. 71-73; *Meadows*, J.A. 45-46.

⁶⁵ *Application – Sheryl Hause*, J.A. 74.

- computer workshop put on by Junior Cyberpals⁶⁶
- Irish step dancing practice⁶⁷
- Girls' club to discuss books and magazine articles⁶⁸
- meetings of the Amateur Radio Club⁶⁹
- rehearsals of the Shakespearean play, *Love's Labours Lost*⁷⁰
- fundraiser for the American Heart Association, sponsored by the

Tidewater School⁷¹

- Boys' Clubs and Girls' Clubs of Calvert County for "boys and girls activities"⁷²

- Bible studies⁷³

- crafts and water color program sponsored by Association of Retarded

Citizens of Southern Maryland⁷⁴

- Moms and Tots playgroup, where "preschool children meet to develop social skills, songs and games, some crafts"⁷⁵

⁶⁶ *Application* – Joyce Whitney, J.A. 75; Meadows, J.A. 51.

⁶⁷ *Application* – Marta Ceroni, J.A. 76; Meadows, J.A. 54.

⁶⁸ *Application* – Cathy Willcock, J.A. 77.

⁶⁹ *Application* – Wayne Rogers, J.A. 78; Meadows, J.A. 56.

⁷⁰ *Application* – Megan Meader, J.A. 79.

⁷¹ *Application* – The Tidewater School, J.A. 80.

⁷² *Application* – Chris Gregory, J.A. 81.

⁷³ *Application* – The Boxing Club, J.A. 82.

⁷⁴ Meadows, J.A. 52-53.

⁷⁵ *Application* – Charron Cothell, J.A. 83.

- T.H.U.G.S. computer programming workshop and drama group for teenagers⁷⁶
- modern dance workshop sponsored by the Maryland Modern Dance Collective⁷⁷
- play war fantasy game Warhammer 40K⁷⁸
- camp sponsored by the Performing Arts Youth Society⁷⁹
- group of approximately 20 friends getting together to work on family/friends photo album⁸⁰
- The County Library offers courses at the Community Centers where *students can learn how to weave* or participate in a gingerbread workshop.⁸¹ The County Library also sponsors large meetings at the Community Centers, such as puppet shows for children and other programs for larger groups.⁸² The County Library is a part of the Calvert County government.⁸³

⁷⁶ *Application – Joyce Whitney, J.A. 84.*

⁷⁷ *Applications of Southern Maryland Modern Dance Collective, J.A. 85.*

⁷⁸ *Application – Warhammer 40 K Club, J.A. 90.*

⁷⁹ *Application – Tonya Jackson, J.A. 91; Meadows, J.A. 56.*

⁸⁰ *Application – Karlee Rosasco, J.A. 92.*

⁸¹ *Applications of Twin Beaches Library, J.A. 93; Meadows, J.A. 48.*

⁸² *Meadows, J.A. 44.*

⁸³ *Meadows, J.A. 45.*

History of the Anti-Homeschool Policy

The County's anti-homeschooling policy traces its origins to a decision made in 1994 not to allow a private school to rent space at one of the centers for four hours per day, three days per week.⁸⁴ Defendant-Appellee Meadows, who was and is in charge of the community centers,⁸⁵ urged the Board of County Commissioners not to approve renting room to the private school for that amount of time.

In 1995, Meadows sent a memorandum to the Recreation Coordinators at each recreation center. The memorandum, entitled "Policy—Home Tutoring," stated that use of the recreation centers for "non-Board of Education affiliated/sponsored schools" was "unacceptable" to the Board of County Commissioners, no matter how much time was being requested.⁸⁶ While not uniformly enforced by all center coordinators,⁸⁷ and not included in the County's formal written use policy, this policy of Meadows and the Board of Commissioners intended to ban all uses of the facilities for private educational

⁸⁴ *Meadows*, J.A. 219-222.

⁸⁵ *Meadows*, J.A. 33.

⁸⁶ *Memo from Meadows to Laura Cranford, et al.*, J.A. 159-160.

⁸⁷ *Transcript of Motions Hearing*, J.A. 395-397; *Meadows*, J.A. 37.

purposes, especially by homeschooling parents.⁸⁸ According to Meadows, “space hasn’t been an issue in any of the refusals.”⁸⁹

In 1999, plaintiff-appellants sought to use the centers for their geography club and fiber arts class.⁹⁰ In response to a request by plaintiff-appellants’ counsel for clarification of the anti-homeschooling policy, the Board confirmed that the County’s unwritten policy banned all private educational use of the facilities.⁹¹ It attempted to justify the ban on the grounds that “allowing the Centers to be used for formal education associated with meeting State requirements for elementary or secondary education . . . would amount to a duplication of services.”⁹² After litigation was commenced in this case, and after appellants’ briefing on the motion for summary judgment was completed, the County reduced to writing the policy for use of the community centers to include the homeschooling ban it had been sporadically enforcing.⁹³ The County has conceded that the written ban codifies the previously unwritten policy.⁹⁴

The County’s written policy now states:

PRIVATE USES

⁸⁸ *Memo from Meadows to Laura Cranford, et al.*, J.A. 159.

⁸⁹ *Meadows*, J.A. 224.

⁹⁰ *Application – Goulart*, J.A. 182-183; *Application – Travers*, J.A. 197-198.

⁹¹ *Letter from Calvert Co. Bd. of Comm’rs*, J.A. 214-215.

⁹² *Letter from Calvert Co. Bd. of Comm’rs*, J.A. 214.

⁹³ *Community Center Use Policy, adopted 4/17/01*, J.A. 388-390.

⁹⁴ *Transcript of Motions Hearing*, J.A. 400-401.

The community centers are available to citizens of Calvert County and non-profit organizations having their principal offices in Calvert County for recreational uses (birthday parties, baby showers, receptions, etc.), meetings, and non-profit fund raising.

PROHIBITED USES:

- a. Business or for-profit activities are prohibited. No person or organization shall be permitted to carry or conduct any business, trade, occupation or profession in any community center except in support of permitted uses.
- b. Any activity that is illegal, may incite riot or disturbance, or is in violation of the rules and regulations of Calvert County Division of Parks and Recreation is prohibited.
- c. Possession and consumption of alcoholic beverages is prohibited.
- d. Instructional, educational and related enrichment activities of the type usually offered in the public schools to children of school age, including activities in English language arts (such as reading, writing, and spelling), mathematics, science, social studies, art, music, health and physical education are prohibited, it being intended that the community centers not be used for such activities associated with meeting the State requirements for elementary or secondary education. This prohibition does not apply to activities conducted by any agency of the Calvert County Government, the Calvert County Public Library or the Calvert County Board of Education.⁹⁵

In Meadow's opinion, allowing private education to operate in the Center conflicted with the recreational use of the facility, especially if the private school should grow and if the arrangement were to become permanent. He also expressed

⁹⁵ *Community Center Use Policy dated April 17, 2001, J.A. 388.*

concern that allowing the centers to be used for private educational purposes would “send the wrong message to the [County] Board of Education”⁹⁶ because it could be viewed as not supporting public education.

Maryland’s Homeschooling Law

Under Maryland law, homeschoolers have three options to conduct homeschooling: (1) under the supervision of a county superintendent of school,⁹⁷ (2) under the supervision of a church-operated educational program (“church umbrella” school),⁹⁸ and (3) under the supervision of a state-approved nonpublic school.⁹⁹ Each one of these options is affected by the Center’s ban on homeschoolers.

Homeschoolers under the supervision of a county superintendent must provide “regular, thorough instruction in the studies usually taught in the public schools to children of the same age,” including “English, math, science, social studies, art, music, health, and physical education.”¹⁰⁰ There is no requirement that this instruction must be completed at home or at any specific location. Many activities at the Community Center would qualify as school credit under Maryland

⁹⁶ *Memo from Paul D. Meadows to Bd. of County Comm’rs*, J.A. 157-158.

⁹⁷ Md. Regs. Code tit. 13A, § 10.01.01.

⁹⁸ Md. Regs. Code tit. 13A, § 10.01.05 A.

⁹⁹ Md. Regs. Code tit. 13A, § 10.01.05 B.

¹⁰⁰ Md. Regs. Code tit. 13A, § 10.01.01 C(2).

homeschool law as well, including classes sponsored by the Department of Parks and Recreation and other private parties that are allowed access to the community centers.

Homeschooling parents must maintain a portfolio including “relevant materials such as instructional materials, reading materials, and examples of the child’s writings, work sheets, workbooks, creative materials, and tests.”¹⁰¹ This portfolio is open to the inspection of the county superintendent.¹⁰² Again, material created in classes taken at the Community Center could be a part of this portfolio, which is designed to prove to the superintendent that regular and thorough instruction is taking place, such as art classes,¹⁰³ a research paper class,¹⁰⁴ a biology class,¹⁰⁵ and physical education classes.¹⁰⁶

Those homeschoolers who are under the jurisdiction and monitoring of a church umbrella are not required to prove to the state that they are providing instruction in all required subjects.¹⁰⁷ However, they are required to engage in periodic conferences with the church umbrella to ensure that they are conforming to the umbrella’s standards.¹⁰⁸

¹⁰¹ Md. Regs. Code tit. 13A, § 10.01.01 D(2).

¹⁰² Md. Regs. Code tit. 13A, § 10.01.01 D(3).

¹⁰³ *Goulart*, J.A. 164-166, 170-171.

¹⁰⁴ *Travers*, J.A. 187-188.

¹⁰⁵ *Goulart*, J.A. 171-172.

¹⁰⁶ *Goulart*, J.A. 164-166, 170-171.

¹⁰⁷ Md. Regs. Code tit. 13A, § 10.01.05.

Homeschoolers who are supervised by a state-approved nonpublic school are in similar circumstances. The nonpublic school is required to supervise and assist the homeschooling student by providing instructional material and assigning a teacher to assist the homeschooling parent.¹⁰⁹ This instruction does not have to take place at the nonpublic school, nor at the student's home. Thus, instruction which takes place at the Community Center and activities at the Center which homeschoolers count for school credit are legitimate ways to fulfill this option of homeschooling.

The County's Objection to Homeschoolers

The County does not object to homeschooled children participating in classes offered at the community centers but organized by non-homeschoolers.¹¹⁰ Nor does the County object to homeschooling parents counting their children's participation in classes offered by non-homeschoolers towards satisfaction of Maryland's compulsory attendance requirements.¹¹¹ The County's only objection is to homeschooling parents organizing the classes.¹¹²

¹⁰⁸ Md. Regs. Code tit. 13A, § 10.01.05 A(4).

¹⁰⁹ Md. Regs. Code 13A, § 10.01.05 B.

¹¹⁰ *Transcript of Motions Hearing*, J.A. 403-404.

¹¹¹ *Transcript of Motions Hearing*, J.A. 403-404.

¹¹² *Transcript of Motions Hearing*, J.A. 403-404.

SUMMARY OF ARGUMENT

The parents in this case were denied use of space in Calvert County's community centers for geography and fiber arts clubs. They intended personally to teach their children along with others through the spoken or written word. The district court in this case incorrectly held that educational instruction is not speech at all but is instead "expressive conduct." Applying the standard applicable to expressive conduct cases, the district court incorrectly held that Calvert County's policy of banning homeschoolers the use of its community centers for educational instruction purposes did not even implicate the First Amendment. The district court's holding is contrary to this Court's holding in *Edwards v. City of Goldsboro*, 178 F. 3d 231 (4th Cir. 1999), in which this Court held that speech in an instructional setting is speech protected by the First Amendment.

Because the district court incorrectly held that speech in an instructional setting is not protected by the First Amendment, it did not reach the issue of whether Calvert County had created a designated public forum and had unconstitutionally excluded homeschoolers from that forum. Even a cursory review of the uses Calvert County permitted under its use policy reveals that its community centers are wide-open fora. A vast array of people, groups and organizations were permitted under the County's use policy to conduct classes like the geography and fiber arts clubs Appellants wished to conduct. This exclusion

is contrary to this Court's controlling case *Warren v. Fairfax County*, 196 F.3d 186 (4th Cir. 1999). Because the County's use policy excludes "a speaker who falls within the class to which a designated [limited] public forum is made generally available, its action is subject to strict scrutiny" under this Court's "internal standard." *Id.* at 194. Calvert County has asserted no compelling interest to justify its exclusion of Appellants. Calvert County has created a designated public forum and has unconstitutionally denied homeschoolers access to the facilities under the First Amendment.

The County has denied Appellants equal protection of the law by prohibiting them access to its community centers. The right of parents to direct the education of their children by homeschooling them is a fundamental right that may not be infringed without a compelling justification. The district court incorrectly held that the right of parents to direct the education of their children is only "basic" rather than fundamental. It therefore incorrectly evaluated the County's use policy under minimum scrutiny. That holding is directly contrary to a long line of Supreme Court cases that hold that parents' rights are *fundamental* and subject to strict judicial scrutiny, most recently expressed in *Troxel v. Granville*, 530 U.S. 57 (2000). The County's policy has specifically classified parents based on the exercise of the right to homeschool and has denied them

access based on that classification. No interest advanced by the County is compelling; therefore its classification based on the exercise of a fundamental right is not justified.

ARGUMENT

I. STANDARD OF REVIEW

When reviewing a district court's determination that summary judgment is appropriate, this Court applies a de novo standard of review, *see Reyes v. City of Lynchburg*, 300 F.3d 449, 452 (4th Cir. 2002).

Additionally, in free speech cases, the reviewing court must make an independent review of the record where the district court has found that particular conduct is not expressive speech. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995).

II. DISCUSSION OF THE ISSUES

A. The district court erred by holding that instructing children is not protected speech.

The heart of this appeal involves the right of homeschooling parents to have the same access to public community centers to conduct classes that other residents of Calvert County are allowed. In other words, the central question is whether the county has created a designated public forum for First Amendment purposes, and whether the County's policy unconstitutionally excluded Appellants from the forum. The district court avoided this central issue by concluding that

teaching children geography and fiber arts is not speech protected by the First Amendment at all. *Goulart*, 220 F.Supp.2d 494, 501 (D.Md. 2002).

To say, as the district court has, that “communication of ideas to the young” (*Goulart*, 220 F.Supp.2d at 499) in a classroom is not speech defies logic and is contrary to the plain meaning of the word. More fundamentally, the district court’s conclusion is contrary to bedrock First Amendment principles.

1. Educational instruction is “speech” not “conduct.”

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” The district court began its First Amendment analysis with this breathtakingly muddled assertion:

The Court has found no authority holding that the enterprise of educational instruction, absent some expressive component, is expressive conduct within the meaning of the First Amendment.

First, it is difficult, if not impossible, to imagine educational instruction that does not include an expressive component. Educational instruction is inherently expressive.

Second, the act of instructing or teaching is not “expressive conduct” as that phrase is properly understood for First Amendment purposes, it is pure speech. The district court erred by analyzing this case under the “conduct” line of cases.

Appellant Lydia Goulart was the principal organizer of the geography club. She and the parents of other children intended personally to teach children

geography in a classroom setting by looking at maps, answering questions and by playing geography games.¹¹³ Likewise, appellant Kyle Travers intended to teach fiber arts in a classroom setting. Each of these activities involve the transmission of knowledge or ideas by way of the spoken or written word—speech.

Sometimes a proposition is so obvious that it is rarely litigated. That is the case in this appeal. The notion that communicating ideas to children in a classroom setting is speech is so obvious that it has rarely, if ever, been challenged.

For example in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), a school excluded from a limited public forum the local Good News Club, which wished to use a classroom to have “a fun time of singing songs, hearing a Bible lesson and memorizing scripture.” *Id.* at 103. The Supreme Court framed the issue as “whether Milford Central School violated the *free speech* rights of the Good News Club when it excluded the Club from meeting after hours at the school,” and concluded that it did violate the Club’s free speech rights. *Id.* at 102 (emphasis added).

Objectively, the only difference between the Good News Club’s use of the classroom and the homeschooler’s use of the community center in this case is the

¹¹³ *Goulart*, J.A. 177-178; *Application – Goulart*, J.A. 182.

topic of instruction. Indeed, the Supreme Court characterized the Good News Club's activities as "*teaching* morals and character development." *Id.* at 108, 109, 111 (emphasis added).

The Supreme Court did not evaluate the Good News Club case as one involving "expressive conduct;" it unreservedly treated the activity as speech. While the Supreme Court held that the exclusion of the Good News Club on the ground that the Club's speech was religious amounted to viewpoint discrimination, *id.* at 120, that holding is predicated on the unremarkable notion that the classroom instruction was unquestionably *speech*.

The Supreme Court has made it quite clear that before courts are to inquire into the communicative nature of *conduct* it must be ascertained that the act at issue was indeed *conduct* and not *speech*. For example, in *Spence v. Washington*, 418 U.S. 405 (1974) and in *Texas v. Johnson*, 491 U.S. 397 (1989) the issue was whether the conduct of burning an American flag in protest was protected by the First Amendment. Both cases demonstrate that a court need only assess the expressiveness of *conduct* in the absence of "the spoken or written word." *Johnson*, 491 U.S. at 404. In *Spence*, the Court said, "To be sure, appellant did not choose to articulate his views through printed or spoken words. It is *therefore*

necessary to determine whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First Amendment.” *Spence*, 418 U.S. at 409 (emphasis added).

Likewise, this Court has recognized that cases involving “pure speech” are to be evaluated differently from cases involving “expressive conduct,” because expressive conduct “enjoys less protection than does pure speech.” *Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 637 (4th Cir. 1999). This Court has held that “[t]his is so because restrictions on expressive conduct typically act not on the communicative component, but on the noncommunicative aspects of the conduct.” *Id.*

Because the district court analyzed spoken or written classroom instruction under the conduct cases it applied the wrong standard. For example, the district court said, “Plaintiffs have not demonstrated how, if at all, the *conduct* of geography or fiber arts classes is potentially ‘intertwined’ with the exercise of expressive rights.” *Goulart*, 220 F. Supp. 2d at 501. The district court concluded by citing to a case in which the question was whether the *conduct* of sleeping on a park bench was protected expression. “ ‘[I]t is the obligation of the person desiring to engage in assuredly expressive *conduct* to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all *conduct* is presumptively expressive.” *Id.* (quoting *Clark v. Community for*

Creative Non-Violence, 468 U.S. 288, 294 n.5 (1984) (emphasis added). Applying the expressive conduct standard to appellants’ spoken or written classroom instruction the district court held that the *conduct of speaking* is not *speech*. This Court must reject the district court’s approach and hold that teaching by means of the spoken or written word is speech.

2. *This Court has held that classroom instruction is protected speech.*

While this court has not directly addressed the issue of whether teaching children in the context of private education is protected speech, it has held that teaching a class to adults is speech protected by the First Amendment. In *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1998) the issue was whether a city violated a moonlighting police officer’s First Amendment rights when it suspended him for teaching a state-mandated class on concealed handgun safety during his off-duty hours. The officer’s superior denied the officer’s original request to teach the class in part because he believed that the state’s concealed weapons statute was “a bad law” and had personally lobbied against it. *Id.* at 239. This court held that suspending the officer for teaching the class violated the officer’s First Amendment rights.

The parallels between *Edwards* and this appeal are striking. The police officer in *Edwards* wished to teach a class to the public that was required by state law to obtain a concealed handgun permit. The speech the officer would be

engaging in was merely instructional about firearm safety, the firing of handguns and about the laws of North Carolina governing the carrying of a concealed firearm. *Id.* at 238. The class and the officer’s speech were intended to equip the students for obtaining a state permit and to safely handle firearms. For example, in his second amended complaint the officer simply alleged that he wished to conduct “instructional classes for civilians, including firearms training and the concealed carry course.” *Id.* at 241.

The district court in this case held that “instruction qua instruction,” *Goulart*, 220 F.Supp. 2d at 501, is not protected speech. According to the district court teaching the firearm safety class would have been “expressive conduct” and not be considered speech at all.

This Court in *Edwards* disagreed. After concluding that the content of the class was of “obvious concern to the public”—an element in a public employment case that is not present in this case, although educating the young is an area of paramount public concern—this court held that the context of the officer’s speech was also pivotal. “[T]he context of Sergeant Edwards’ *speech, an instructional setting* for members of the public, obviously weighs heavily in favor of concluding his *speech* is a matter of public concern.” *Id.* at 247. Contrary to the

district court, this Court in *Edwards* considered “instruction qua instruction” to be of particular relevance in deciding that teaching a class is speech protected by the First Amendment.

There is another way in which the facts of *Edwards* bear significantly on this appeal. The County’s policy does not forbid teaching geography or fiber arts at its community centers generally. Indeed the County Parks and Recreation Department itself has sponsored such classes and non-homeschooling residents of Calvert County are permitted to organize and conduct classes on a vast array of topics, which on the face of the policy would include these subjects. The County’s objection to Appellants’ use of the Community Centers is not to what takes place in the classroom, but to the fact that the organizers are homeschoolers who intend to use the classes to satisfy the state’s compulsory attendance laws. The district court considered this factor to weigh in favor of the County. *Goulart*, 220 F.Supp. 2d at 501.

This Court in *Edwards*, however, considered the fact that the firearm safety class was required by state law to be a significant factor in concluding that the officer’s free speech rights had been violated. “[W]e cannot discern any legitimate interest of the Defendants in preventing a police officer of the City from conducting a concealed handgun safety course for the public that is a creature of state law.” *Edwards*, 178 F.3d at 248. It is likewise difficult in this appeal to

understand how Calvert County has a legitimate interest in preventing a class that is otherwise acceptable for its Community Centers solely because the organizers are parents who may also use the class in partial satisfaction of state law. This Court did not accept the argument in *Edwards* that conducting an instructional class to satisfy state requirements is unprotected by the First Amendment. The principle in *Edwards* is controlling. This Court should reject the district court’s holding in this case that conducting private instructional classes to satisfy state educational requirements is not speech protected by the First Amendment.

3. *The advancement of science and the arts is quintessentially speech protected by the First Amendment.*

Additionally, the district court demonstrated a thoroughly flawed understanding of the interests at stake in this case. The district court in this case concluded that the “*neutral* speech involved in the administration of geography and fiber arts clubs” is not protected by the First Amendment because the Appellants did not trace a connection to a “more expansive expressive agenda.” *Goulart*, 220 F. Supp. 2d at 500 (emphasis added). In other words, the district court has held that merely instructional speech advancing the sciences and the arts— “instruction *qua* instruction”— *id.* at 501, is not protected unless it also advances a more expansive agenda.

The protections of the First Amendment are not limited to political, artistic or religious expression. *Universal Studios v. Corley*, 273 F.3d 429,446 (2nd Cir. 2001). “Even dry information, devoid of advocacy, political relevance, or artistic expression, has been accorded First Amendment protection.” *Id.* While the right to free speech is more often litigated in the context of political and religious speech, “[i]t is equally settled, however, though less commonly the subject of litigation, the First Amendment protects scientific expression and debate just as it protects political and artistic expression.” *Stanford University v. Sullivan*, 773 F. Supp. 472, 474 (D.D.C 1991).

Contrary to the district court’s holding, “[t]he Supreme Court has explained that ‘all ideas having even the slightest redeeming social importance,’ including those concerning ‘the advancement of truth, science, morality, and arts’ have the full protection of the First Amendment.” *Junger v. Daley*, 209 F.3d 481, 484 (9th Cir. 1999)(quoting *Roth v. United States*, 354 U.S. 476, 484 (1957) and 1 *Journals of the Continental Congress* 108 (1774)). In this case, the homeschooling parents wished to advance the science of geography and fiber arts to children in a classroom setting.

4. *Teaching children is protected speech of the highest order.*

It is really beyond debate that instructing children in the arts and sciences has considerably more than “slight” redeeming social importance. The Supreme Court has recognized that insuring that children are provided with an education is at the apex of society’s scale of importance. See *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972)(holding that religious parents were exempt from compulsory attendance laws). Teaching the young is not only a parental duty of the highest order, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), but it is necessary to insure that citizens in a free society are literate and self sufficient and fully able to participate in the civic life of a nation. *Yoder*, 406 U.S. at 221. To hold that parents who lawfully undertake to educate their own children have no “expansive expressive agenda” beggars belief and is contrary to centuries of common understanding and western tradition. It is difficult to imagine a more expansive expressive agenda than preparing the next generation for responsible life and civic participation.

Because the district court erroneously held that educational instruction is not speech it did not reach the issue of whether the County had created a designated public forum. An independent review of the record reveals that the County unquestionably created a designated public forum and unconstitutionally excluded Appellants.

B. The Homeschool Teaching Ban Violates the Free Speech Clause

In *Warren v. Fairfax County*, 196 F.3d 186 (4th Cir. 1999) (*en banc*), this Court clarified the rules that are relevant for evaluation of First Amendment claims concerning excluded speech in a public forum. The first inquiry requires a determination of the nature of the forum. There are three categories of public fora: traditional public forum, designated public forum, and nonpublic forum. For reasons we detail below, the Community Center is a designated public forum.

For claims arising in a designated public forum there is a second inquiry. The question is whether or not “the government [has] exclude[d] a speaker who falls within the class to which a designated [limited] public forum is made generally available?” *Warren*, 196 F.3d at 193. This Court has labeled this form of exclusion of speech an “internal exclusion.” Appellants will demonstrate that their teaching of academic classes regarding geography and fiber arts is without a doubt within the class to which this Community Center is usually available.

As this Court and the Supreme Court have made abundantly clear, an internal exclusion of speech within a designated public forum is treated under the same standard of strict judicial scrutiny as employed in cases involving traditional public fora. *Warren, id.*, see also *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 677 (1998); *Widmar v. Vincent*, 454 U.S. 263, 264 (1981),

and *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

Calvert County's policy of exclusion cannot withstand such analysis.

1. *The Community Center is a Designated Public Forum*

In the district court the County contended that the Community Center is a nonpublic forum. It is easily determined that the Community Center is a designated public forum by examining: (a) the written policy concerning who is generally allowed to use the facility and the permitted uses; and (b) the history of such uses.

To determine whether this is a nonpublic or designated forum, the critical factors are "general availability" and "selectivity."

So-called "designated public fora" (often called "limited public fora") are those properties which the government has opened for expressive activity to the public, or some segment of the public. *Ark. Educ.*, 523 U.S. at 677. A designated public forum can be opened only to a limited class of speakers or for limited topics. *Perry*, 460 U.S. at 46 n.7. Merely allowing some speech on property that is not a traditional public forum does not automatically create a designated public forum. The Supreme Court recently clarified the distinction. The government creates a designated public forum when it purposefully makes property "generally available" to a class of speakers. *See Ark. Educ.*, 523 U.S. at , 118 S. Ct. at 1642 (quoting *Widmar v. Vincent*, 454 U.S. 263, 264, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981)). By contrast, the government may retain nonpublic forum status by allowing selective, permission-only access to the forum. *See id.* The granting of such permission must be contingent upon non-ministerial judgments. *See id.*; *Cornelius*, 473 U.S. at 804.

Warren, 196 F.3d at 193.

The County will undoubtedly seize upon the phrase “the government may retain nonpublic forum status by allowing selective, permission-only access to the forum.” The county does require an application to be allowed to use the Community Center. However, the County will have to hope that the Court quits reading the paragraph at that point. The next sentence— “[t]he granting of such permission must be contingent upon *non-ministerial judgments*”—eliminates any hope that the County would have of claiming that this is a nonpublic forum.

The Community Center is available to “County residents and non-profit organizations having their principal offices in the County free of charge.”¹¹⁴ Permitted uses are “recreational uses (birthday parties, baby showers, receptions, etc.), meetings, and non-profit fund raising. *Id.* Persons wishing to use the Center must make an application which “shall be submitted to the Recreation Coordinator of the center as far in advance of the event as possible.” *Id.* But, the Recreation Coordinator makes merely a *ministerial* judgment. The Coordinator is allowed to deny an application only if it is “not in accordance with the provisions outlined herein.” *Id.*

The application process here is no different in substance from a requirement that a person wanting to hold a parade in a street normally has to obtain a parade permit. The issuance of the permit does not change the street into a nonpublic

¹¹⁴ *Community Center Use Policy dated April 17, 2001*, J.A. 388.

forum because of the permit requirement. Parade permits must be issued on a purely ministerial basis. The same is true here. If a proposed user falls within the confines of the Community Center Use Policy, the application *will* be granted on a purely ministerial basis.

Thus, it is easy to determine that Calvert County has made its community centers generally available to a class of users for specified purposes. This is a designated public forum.

There is no question that the Appellants fall within the class of persons entitled to use the Community Center. They are residents of the County. They are not operating a business or a for-profit activity. The question remains, however, whether their proposed use falls within the uses for which the designated forum is generally available. If the proposed use falls within this class of uses usually allowed then the exclusion is an “internal exclusion” requiring the application of strict judicial scrutiny.

The County has argued that the Appellants’ classes do not fall within the approved uses by arguing that it has always kept homeschools and private schools out of its facilities. The County appears to believe that as long as its exclusion is done on purpose, then this use falls outside the class of permitted users. The Fifth Circuit encountered a similar argument.

Government property, however, does not automatically cease to be a designated public forum because the government restricts some speech on the property. Otherwise, the restriction of speech on government property would be self-justifying. The restriction would disprove any intent to create a designated public forum, and the failure to create a public forum would justify the restriction of speech.

Hays County Guardian v. Supple, 969 F.2d 111, 117 (5th Cir. 1992).

The pertinent question is: But for the “homeschool exclusion” would the Appellants’ proposed use be allowed? Examination of the uses that have been permitted leave no doubt that a geography class would be permitted if not taught by a homeschooling group. The Center has allowed classes teaching English to non-English speaking people, a class teaching baton twirling, violin lessons, theater and drama instruction for youth ages 9-16, CPR training and first aid training, and tutoring children who could not be taught at a public school or at home. In addition, the Parks and Recreation Department has sponsored such classes as sewing, knitting, basket making, sign language for the deaf, math tutoring, and Russian. Indeed, the homeschooling exclusion itself leaves room for instruction of regular academic subjects unless “such activities [are] associated with meeting the State requirements for elementary and secondary education.” In light of both the language of the exclusion and the unbelievably broad variety of classes which have been permitted, the County cannot come before this Court and say, “We would exclude a geography club or a fiber arts club taught by persons not associated with homeschooling or private education.” Unless they make such

a claim, and provide some evidence from the record to demonstrate that it is true, it is beyond reasonable debate that the Appellants' classes fall within the uses for which this facility is generally available.

The legal standard is clear.

“If the government excludes a speaker who falls within the class to which a designated [limited] public forum is made generally available, its action is subject to strict scrutiny.” *Ark. Educ.*, 523 U.S. at ----, 118 S.Ct. at 1641. That is, as regards the class for which the forum has been designated, a limited public forum is treated as a traditional public forum. So, for instance, a University may not exclude certain student speakers from meeting *194 space or university funding otherwise available on a generalized basis to students and student groups. *See Widmar*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440. *Cf. Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (exclusion was viewpoint-based).

Warren, 196 F.3d at 193-194.

2. *The Anti-Homeschool Policy Equates With Viewpoint Discrimination*

Before we turn to an application of the strict scrutiny standard to the facts of this case, there are other relevant components of the law of speech and fora which should be considered. Numerous decisions refer to various kinds of exclusions of speech or speakers which invoke a variety of legal rules and varying degrees of judicial scrutiny. Government exclusions of speech have been held to be “viewpoint discrimination,” “content exclusion,” “subject matter exclusion,” or “speaker identity exclusions.”

Although the composite legal picture concerning each of these terms is far from clear, one rule is certain—viewpoint discrimination is never permitted in any type of forum. *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Commissioner of Virginia Department of Motor Vehicles*, 288 F.3d 610, 616 (4th Cir. 2002) (*rehearing en banc denied*).

The County may well attempt to argue that their anti-homeschooling policy is a permitted “speaker identity” or “subject matter” exclusion. There is no doubt that this is a “speaker identity” exclusion. But it is not correct to say that is an occasion where this is a *permitted* exclusion based on speaker identity. The Supreme Court has made it clear that “subject matter” and “speaker identity” exclusions are normally only valid in a nonpublic forum.

Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 49 (1983).

It is also clear, that at the time a designated forum is being created, the government can make choices about “subject matter” and “speaker identity” to set the limits for which the forum will be used. However the law is very different in its approach for after-the-fact exclusions that are attempted for those in a

designated forum. As this Court said in *Warren*, once the designated forum is created, “as regards the class for which the forum has been designated, a limited public forum is treated as a traditional public forum.” 196 F.3d at 193.

Without doubt, the courts have evaluated efforts to keep out a particular speaker or a particular kind of speaker in a traditional public forum as presumptively invalid. If the government tries to silence a particular topic that is otherwise included in the forum, it is no longer a permissible “subject matter” exclusion; rather, it is an impermissible “content exclusion.” “Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.” *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

If the government tries to silence a particular speaker or kind of speaker who is otherwise eligible to use the forum, it is no longer a permissible “speaker identity” exclusion, rather such efforts to silence a particular speaker are treated as impermissible—although the label applied to such efforts sometimes varies.

New York banned criminals from writing about their crimes and gaining from the royalties of the sale of their stories. This was the so-called Son of Sam law. The Supreme Court declared this law unconstitutional as a form of content

discrimination, although it may have been more accurate to consider it a form of “viewpoint” discrimination. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991):

The Son of Sam law is such a content-based statute. It singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content. Whether the First Amendment “speaker” is considered to be Henry Hill, whose income the statute places in escrow because of the story he has told, or Simon & Schuster, which can publish books about crime with the assistance of only those criminals willing to forgo remuneration for at least five years, the statute plainly imposes a financial disincentive only on speech of a particular content.

From a First Amendment perspective, there is no difference between the Son of Sam law and the anti-homeschooling rule. It was not the content of the story itself that was off limits in New York. Other people could write about these crimes; it was a particular speaker who could not write the story. Here, other people may teach children classes on geography, knitting, or weaving; only homeschoolers are prohibited from speaking in this manner.

Other cases have applied the term “viewpoint” discrimination to efforts to single out a particular kind of speaker:

But unlike the viewpoint discrimination concept, which is used to strike down government restrictions on speech by particular speakers, the content neutrality principle is invoked when the government has imposed restrictions on speech related to an entire subject area.

Perry Educ. Ass'n at 59 (Brennan, dissenting); see also *Giebel v. Sylvester*, 244 F.3d 1182, 1188 (9th Cir 2001):¹¹⁵

Content discrimination” occurs when the government “choos[es] the subjects” that may be discussed, while “viewpoint discrimination” occurs when the government prohibits “speech by particular speakers,” thereby suppressing a particular view about a subject.

Thus, it is apparent that there is no basis for considering the County’s policy as a permissible “subject matter” or “speaker identity” exclusion. This forum cannot be considered a nonpublic forum which is the only context in which such exclusions are permitted. Rather, there is substantial reason to conclude that, in reality what has happened here is simply a form of viewpoint discrimination that is indicated by the silencing of particular speakers on a matter that is otherwise permissible within the forum. Indeed, the very definition of “viewpoint discrimination” suggests this same result. The Supreme Court has defined

¹¹⁵ See also, *Association of Nat. Advertisers, Inc. v. Lungren*, 44 F.3d 726, 739-740 (9th Cir. 1994) (Noonan, dissenting):

Such a distinction between speakers, made by a legislature, has a name: viewpoint discrimination. Such a distinction has a constitutional destiny, to be held a violation of the First Amendment unless, strictly scrutinized, it is shown to be narrowly tailored to serve a compelling state interest. *R.A.V. v. City of St. Paul*, 505 U.S. 377, ----, 112 S.Ct. 2538, 2547, 120 L.Ed.2d 305 (1992). A legislature cannot privilege one set of speakers as the good guys, while restraining another set of speakers as the baddies. When the speakers use the same language, it’s not difference enough that one speaks for profit and the other for “nature.”

viewpoint discrimination to include more than an opposition to the opinions expressed in the speaker's message. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995):

Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific **motivating ideology** or the **opinion** or **perspective** of the speaker is the rationale for the restriction.

(Emphasis added.)

In assessing claimed justifications for such exclusions, the Tenth Circuit recently warned about placing too much value on *post hoc* rationalizations.

Sumnum v. City of Ogden, 297 F.3d 995, 1005 (10th Cir. 2002):

Any doubt regarding this conclusion is removed through consideration of the after-the- fact nature of the City of Ogden's effort to claim adoption of that speech. The Supreme Court has expressed considerable concern that post hoc rationalizations may obscure viewpoint discrimination. . . .[I]n *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 811-13, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985), the Court noted: "The existence of reasonable grounds for limiting access to a nonpublic forum ... will not save a regulation that is in reality a facade for viewpoint- based discrimination."

The record clearly demonstrates that the anti-homeschooling exclusion was created after the general policy was already in place. The general written policy was in place prior to the time that Benjamin Franklin Academy applied to use the facility in 1994. No exclusion for private schools or homeschools was in the written policy then or until late in this litigation. An unwritten exception was

created in 1994. Since this initial application in 1994, homeschoolers are the only known applicants who have been rejected under this unwritten policy. The written exclusion was created so late in this litigation that the plaintiffs first saw it when the County attached it to its reply brief in the district court.

There is little doubt that the County's objection to these classes is not that they would teach children about geography or knitting, but that those classes would be taught from the homeschooling perspective. It is the motivating ideology that is objectionable to the County. Simply because these Appellants are homeschoolers and teach from that perspective they are excluded. There is no other reason. Space in the facility is not an issue. The County admits this.¹¹⁶ Money is not an issue. The County agrees the costs are essentially zero.¹¹⁷ Subject matter is not a valid issue. The County has allowed so many classes on so many subjects it is not credible to claim that geography or fiber arts classes would be excluded if taught by others.

In fact, the viewpoint discrimination is more blatant than in cases like *Good News Club*, 533 U.S. 98 (2001), *Rosenburger*, 515 U.S. 819 (1995), or *Widmar*, 454 U.S. 263 (1981). In those cases, the government discriminated against speakers with a religious viewpoint. The government did not have any way to know the particular content of any excluded speech. Rather, the censorship of the

¹¹⁶ *Meadows*, J.A. 224.

speakers was based upon a desire by the government to appear to remain neutral concerning religion. Afraid of appearing to endorse one religion, the government censored all religious expression. The government actors had neither antipathy toward the particular views nor even any knowledge of the particular content that would be spoken.

Here, Calvert County does not desire merely to remain neutral on the subject of alternative forms of compulsory education. Rather, the County board wants to be sure that the Board of Education knows that it fully supports public schools. According to Meadows, allowing private education to operate in the Center might “send the wrong message to the [County] Board of Education.”¹¹⁸ There can be no doubt that this remains the motivation of the County now that the policy has finally been put in written form, for the exclusion itself makes it clear that the County wants to stop private education and wants to allow public education. The excluded classes are defined as “the type typically offered in the public schools.” The County says that this rule is “intended that the community centers not be used for such activities associated with meeting the State requirements for elementary and secondary education.” Then to make sure that the public schools are not adversely affected, the policy states “[t]his prohibition does not apply to ...the Calvert County Board of Education.”

¹¹⁷ *Meadows, J.A.* 62.

It is utterly illegitimate for one group of politicians—the County board—to violate the free speech rights of its citizens in order to avoid sending the wrong message to another group of politicians—the Board of Education. But there can be no doubt that this is all about the desire of the County Board to deliver the message, “We prefer public education.” Allowing homeschooling classes would send a message to the County Board of Education that the County Board of Supervisors wants to avoid sending.

To invoke strict scrutiny Appellants need not demonstrate that the County has engaged in viewpoint discrimination. It is enough to demonstrate that this exclusion is an internal exclusion within a designated forum. However, it is appropriate to look at this decision for what it is—an effort to make sure that the County is clear about its preference for public education. This is blatant viewpoint discrimination.

3. This Policy Cannot Survive Strict Judicial Scrutiny

There is no claim that these classes would impose too great a use on the Community Center. Nor is there a claim that these classes would impose any financial burden on the county at all, much less a significant burden. The only concern—and it would be a legitimate concern if true—is that a private school could move into a community center and operate full-time. Such a dominant use

¹¹⁸ *Memo from Paul D. Meadows to Bd. of County Comm’rs*, J.A. 157-158.

would indeed create a problem that would probably satisfy the compelling interest standard. However, the County's policy already eliminates that possibility with a very reasonable time of use restriction. No user may use the facility for more than two hours per week.¹¹⁹ No user—private school or otherwise—could dominate the Center at the rate of two hours per week.

The district court said (in the Equal Protection analysis) that the County's justification for the policy was to preserve the recreational character of the facility and to avoid the duplication of resources. *Goulart*, 220 F.Supp.2d at 503.

However, characterizing the use of the Center as *purely* recreational is inaccurate. The purposes of the Center certainly include recreation, but the policy allows two additional and independent categories. Meetings are permitted whether or not they are recreational in character. Non-profit fundraising is permitted. There is no requirement that the fundraising activity itself be of a recreational character. Nor is there any requirement that the non-profit organization operate for the purpose of recreation. Even the briefest consideration of the activities that have been allowed demonstrate that a great deal of instruction has been permitted that is no more recreational than a geography club or a fiber arts club. Classes in English as a second language, first aid, math tutoring, or Russian are no more recreational than geography or fiber arts.

¹¹⁹ *Community Center Use Policy*, J.A. 64-68.

This “preserving the recreational character” justification simply has no factual basis. Accordingly, there is no real need to demonstrate that such a justification would fail to satisfy the extremely high standards of the compelling interest test.

The second justification advanced by the district court was the desire to avoid duplication of resources. By this it is not claimed that allowing the courses would be too costly. There is no question as to what is meant by this idea: Calvert County already offers the public schools. Students should go to the public schools if they want to use county resources to learn geography or knitting. “Avoiding duplication of resources” means that children should be content with the public schools.

The Supreme Court rejected this as a valid government interest before the terminology of “compelling governmental interest” had been invented. The methodology may be different than that adopted by Oregon in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), but the motivation is exactly the same. In Oregon, private education was banned altogether. Here, homeschoolers and private schoolers are banned from the Community Center. The difference is only in degree not in kind. This governmental policy not only fails the compelling interest test, it contravenes deep principles of our nation.

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce, 268 U.S. at 535.

The real motivation for this policy is wanting to avoid sending the wrong message about homeschooling. The Ninth Circuit considered this exact claim in a case where a school district demoted a principal because he homeschooled his children. *Peterson v. Minidoka County School District*, 118 F.3d 1351 (1997). The school claimed having a principal who homeschooled sent the wrong message. We discuss this case in greater detail in the Equal Protection section below.

C. The County’s Policy Violates the 14th Amendment Guarantee of Equal Protection.

The Equal Protection Clause directs that “all persons similarly circumstanced shall be treated alike.” *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). Calvert County has violated this directive by enacting a policy that treats homeschooling parents different from other similarly situated residents of Calvert County.

1. The Court Should Apply Strict Scrutiny to the Policy.

Where similarly situated individuals are being treated differently, the court must decide what standard of scrutiny to use in examining the distinction. There

are two instances where the court must apply a strict standard of scrutiny: if the distinction is based on a suspect class, or if the distinction impinges on a fundamental right. *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). Appellants are not members of a suspect class. But while the suspect class analysis does not apply in this case, the Community Center’s policy does impinge on a fundamental right—the fundamental right of parents to direct the education of their children.

2. *Parents Have a Fundamental Right to Direct the Education of Their Children.*

The district court completely misunderstood the landmark case of *Troxel v. Granville*, 530 U.S. 57 (2000), when it held that there is only a “*basic* ‘right of parents to control the education of their own [children].’” *Goulart* at 502, (emphasis added) (quoting *Troxel*, 530 U.S. 57, 65 (2000)) The court quoted *Troxel*, the controlling case in this analysis, but it ignored the context of the quote and the substantive holding of the case. *Troxel* cannot be read to stand for the proposition that parents have only a “basic” right to direct the education of their children, because the case makes it glaringly obvious that this right is *fundamental*.

Only seven lines above the phrase the district court pulled from this landmark decision, the United States Supreme Court stated, “The liberty interest at issue in this case--the interest of parents in the care, custody, and control of their

children--is perhaps the oldest of the *fundamental liberty interests* recognized by this Court.” *Troxel*, 530 U.S. at 65. (Emphasis added.)

Justice Thomas in his concurring opinion in *Troxel* confirmed the Court’s holding as recognizing “a fundamental right of parents to direct the upbringing of their children...” *Troxel*, 530 U.S. at 80. He reiterated that *Pierce* held “that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them,” *id.*, and he stated that an infringement on this right should be evaluated under strict scrutiny. *Id.*

The Supreme Court listed a long line of cases standing for the proposition that parents have a fundamental right to direct the education and upbringing of their children. Thus, the Supreme Court of the United States has held that the right to direct the education of one’s children is a fundamental right, not simply a “basic” right as the district court erroneously held in *Goulart*.

In *Peterson v. Minidoka County School District*, 118 F.3d 1351 (1997), the Ninth Circuit explained the correct level of scrutiny that should be applied in a case involving a parent’s right to homeschool. Peterson was a public school principal who wanted to homeschool his children in accordance with his religious beliefs. When the school found out that he was considering this option, the School Board demoted him to a teaching position. He sued for damages, claiming that the Board had violated his constitutional right to homeschool.

The Ninth Circuit analyzed Peterson’s right to homeschool under two Constitutional guarantees: his First Amendment right to freedom of religion, and his Fourteenth Amendment parental right to homeschool his children. The Court applied the exact same standard in both instances: an analysis of strict scrutiny.

Using this analysis, the Ninth Circuit recognized that Peterson’s right to homeschool his children was fundamental, and could only be interfered with if the government could prove that there was a compelling state interest at stake. In *Peterson*, the government’s interest was merely a concern that Peterson might not be able to fulfill his job as a public school principal, and that he might send the wrong message to the community that he was not fully committed to the public school. The Court held that neither of these interests rose to a compelling level, and it ruled that the school district had violated Peterson’s fundamental right to homeschool his children. “Consequently, the question on this appeal must be whether the District’s two concerns about Frank Peterson’s work as principal outweighed the Petersons’ constitutional right to avail themselves of the Idaho statute [on homeschooling]. That question is resolved by the analysis already set out as to the free exercise of religion.” *Peterson*, 118 F.3d at 1358.

The record indicates that it does not matter to the Center if educational activity was going on in the community center, or even that credit was being granted. *Goulart*, 220 F.Supp.2d at 502. The only significant distinction involved

not what was happening but who was doing it. If it was a homeschooler leading the activity, the application was denied. In the case of Mrs. Travers' Fiber Arts Club, the Center only denied the application once it became obvious that the Club was for homeschoolers. It was not the activity involved, but the people involved, that were the problem.

Thus, it is obvious that the Center is discriminating against homeschoolers because of their exercise of a fundamental right, not based on what activity is actually occurring. A basket making class put on by the Parks and Recreation Department or any other private person not involved in home or private education is acceptable to the Community Center, but a basket making class put on by a homeschooler is considered "educational" and is forbidden. This is an absurd, as well as unconstitutional, result. Therefore, it is clear that the policy is discriminating based on the appellant's decision to exercise their fundamental right to direct the education of their children.

In addition, because the discrimination is based not on what actually takes place but on the parents' motivation for conducting the class, this policy discriminates against the only absolute right protected by the Constitution – the right to believe. The First Amendment to the United States Constitution guarantees individuals the absolute right to believe. "[T]he [First] Amendment embraces two concepts, – freedom to believe and freedom to act. The first is

absolute...” *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Policies touching on this right should be viewed with extreme care by the court to ensure that this basic right, the foundation of all other rights, is protected.

3. *The District Court was Wrong in its Analysis of Education Cases Because It Focused on Student Rights, Not Parents’ Rights.*

Rather than evaluating this case as a parental rights case, the district court incorrectly relied on cases about whether a child has a fundamental right to a public education. Just as a parent’s right to homeschool is a well-recognized right in the judicial system, so is the fact that children do not have a fundamental right to public education and its various accoutrements. The fundamental right violated by the community center’s policy is not a child’s right to education, but a parent’s right to direct education and upbringing of their child. None of the four cases cited by the district court in connection with its holding on equal protection is based on violation of a parent’s fundamental right.

In *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988), the Supreme Court examined legislation that allowed free bus transportation to students in some school districts, but not in others. Plaintiffs argued that their children had a fundamental right to public education and that because the government was not providing busing, their children’s rights were being violated. The court held that

children did not have a fundamental right to free transportation or education, so government interference did not trigger strict scrutiny.

The district court's reliance on *Papasan v. Allain*, 478 U.S. 265 (1986), *Plyler v. Doe*, 457 U.S. 202 (1982), and *San Antonio ISD v. Rodriguez*, 411 U.S. 1 (1973) was likewise misplaced. None of the cases dealt with the fundamental right of parents, but instead focused exclusively on the students' rights. These cases are all inapplicable to the issue at hand: whether the Center's policy impinged on the appellants' fundamental right to direct the education of their children. Calvert County has banned the class of homeschooling parents from the Community Centers *because* they have exercised a fundamental right. The district court was wrong to uphold this discriminatory practice.

4. *The Policy is Unconstitutional Because it Infringes on a Fundamental Right.*

The court below said, "The parents are in no sense being made to desist from homeschooling nor are they, at least insofar as the County Division of Parks and Recreation is concerned, being told which subjects may or may not be included in their curricula." *Goulart*, 220 F.Supp.2d at 502. While true, this has no bearing on whether their fundamental right is being burdened, which is the correct inquiry. The parents' right to direct the education of their children has not been stopped, but it has been impinged.

The Supreme Court has consistently held that the correct standard for determining whether a policy violates equal protection is whether it “burdens” or “impinges on” a fundamental right, not whether the fundamental right is completely prohibited. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Supreme Court examined a state’s prohibition of welfare benefits for residents of less than a year under strict scrutiny, because it was an infringement on interstate travel. The restriction did not forbid citizens from traveling or even put restrictions on where they could travel, but it did burden their right. The Court struck down the prohibition, saying, “in moving from State to State ... appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional...”*Shapiro*, 394 U.S. at 634. See also *Police Dept of Chicago v. Mosley*, 408 U.S. 92 (1972) (same); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (same); and *Kramer v. Union Free School District*, 395 U.S. 621 (1969) (same.)

All of these cases point to the same holding: infringement on a fundamental right demands strict scrutiny. Calvert County has infringed on the Appellants’ fundamental right to homeschool their children and their fundamental right to free speech. Therefore, the policy must be examined under strict scrutiny. And under this level of scrutiny, it unquestionably fails.

5. *The Policy Is Not Precisely Tailored to Serve a Compelling State Interest.*

Since the Community Center’s policy impinges on a parent’s fundamental right to direct the education of her children, a classification that the Supreme Court has called “presumptively invidious,” *Plyler v. Doe*, 457 U.S. at 216, “it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.” *Plyler*, 457 U.S. at 216. This the Community Center cannot do.

The Community Center, in its memo to the Board regarding the use of the Center, pointed out several reasons for denying homeschoolers the use of the Center for instructional purposes:

- 1) A private school in the Center would need a quiet environment, which *might* pose a conflict with other activities there;
- 2) If a private school grew and arranged to meet at the Center permanently, the Center’s ability to provide recreational space *might* be hindered;
- 3) Allowing a private school to operate in the Center might “send the wrong message to the [County] Board of Education.”

Goulart, 220 F.Supp.2d at 497 (emphasis added).

Based on these “reasons,” the Board of Commissioners has adopted a policy forbidding any private educational activity, including homeschoolers who would use the Community Center for instructional purposes. However, the reasons themselves show that the policy was not narrowly tailored.

“When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.” *Carey v. Brown*, 447 U.S. 455, 461-62 (1980). The justifications that the Community Center has put forward for this ban therefore must be carefully scrutinized, and they do not hold up under such scrutiny.

Reasons 1 and 2 are specifically aimed at the “problem” of having a private school dominate the Center in time and space. This problem is already adequately addressed by the reasonable time, place, and manner restriction limiting use to two hours per week. But the policy banning homeschoolers from the Center goes far beyond this reasonable restriction, and thus, it is clearly not narrowly tailored.

The county has no compelling interest in banning homeschoolers from using the Community Center. The court below held that the government’s interests were “maintaining the recreational character of the community centers” and “avoiding duplicative use of its resources.” *Goulart*, 220 F.Supp.2d at 503. Neither of these reasons is compelling, and therefore the policy is unconstitutional.

The “recreational character” of the Center cannot be adversely affected by allowing homeschoolers to conduct classes identical to those that the Parks and Recreation Department sponsors itself and allows other residents of Calvert

County to sponsor. If a County-sponsored knitting class does not affect the recreational character of the Centers, how can a homeschooling-parent-sponsored knitting class change the Center's character? If a Literacy Counsel reading class is acceptable under the use policy, how is a homeschool-parent-sponsored geography club unacceptable?

The Center's post-hoc argument that it wished to "avoid duplicative use of its resources" is somewhat confusing. From Meadows' deposition, it appears that this means that the Community Center wanted to avoid a conflict with the Board of Education regarding funding.¹²⁰ Logically, this does not mean that the funding of the Community Center was affected. Rather, it means that the Board of Education might demand more money for public schools if homeschoolers were allowed to use the Community Center. However, avoiding funding conflicts is not a compelling state interest. In this case, the claim is not even legitimate.

If the district court instead meant that the Center's interest was in avoiding education everywhere but in the public school, then this too fails the compelling interest test. This is simply not a legitimate interest of the county. Supporting education is a legitimate interest; for the County to favor one educational option over another just as legal option is not, especially when the choice of the option of homeschooling is a fundamental right. Additionally, there is no conceivable way

¹²⁰ *Meadows*, J.A. 39.

that the County would be duplicating resources by simply allowing homeschoolers to use the Community Center on the same basis as everyone else in the county. Homeschoolers are not asking for special privileges or extra funding, but simply for equal treatment.

Presumably, Calvert County has an emergency medical response team affiliated with its fire department. Would it be a “duplication of resources” for Calvert County to allow County residents to use its community centers to teach first aid and CPR certification classes? Apparently not, since first aid and CPR classes have been permitted.¹²¹ Also allowing CPR classes to be taught at the community centers apparently does not “send the wrong message” to the fire department either.

In addition, based on the activities sponsored by the Parks and Recreation Department, it is obvious that the County is already allowing “duplicative” education to go on at the Community Centers. Activities such as physical education, tutoring, and art classes can be taken either at the public school or at the Community Center – unless the person teaching the class is a homeschooler, in which case the Center bans the activity.

The *Peterson* case already cited sheds light on the government’s lack of a compelling interest. The Board claimed that their “compelling interest” in that

¹²¹ *Applications of Dunkin’s Supply and Concrete and Robert Huard*, J.A. 106,

case was that people would lose confidence in his leadership of a public school if he didn't even send his own children to that school. The court balanced this "interest" against Peterson's fundamental parental right to homeschool and rejected the Board's argument, stating, "As to the concern for loss of confidence in his leadership, the District was bound to take account of the fact that he was exercising a constitutional right and that accommodation of uninformed and prejudiced persons was not a compelling state interest outweighing that exercise." *Peterson*, 118 F.3d at 1357.

The Community Center in this case has expressed a similar interest. It does not want to present itself in the light of competing with the public schools or sending a "wrong message" to the Board of Education. However, the Court's reasoning in *Peterson* applies here. The fact is that the Center's policy infringes on the Appellants' exercise of a fundamental constitutional right due to the Center's desire not to offend the Board of Education.

Based on the reasoning in *Peterson*, avoiding "sending the wrong message" to the Board of Education is not even a legitimate governmental interest, much less a compelling one. The function of the Community Center is to provide services to the community at large without violating the fundamental rights of citizens, not to engage in political back-scratching with the Board of Education.

Because the Center’s policy is not narrowly tailored and is not in furtherance of a compelling state interest, the policy is unconstitutional. This Court should overturn the decision of the district court.

CONCLUSION

Calvert County has unconstitutionally forbidden homeschooling parents access to its community centers. The educational instruction of children in the arts and sciences is unquestionably protected speech deserving of the highest order of First Amendment protection. Calvert County has created a designated public forum and its exclusion of classes organized by homeschooling parents violates this Court’s “internal standard” for evaluating exclusions from designated public fora. Additionally, the County’s restriction based on the classification of “homeschooling parents” violates the parent’s guarantee of equal protection of the laws by infringing on their fundamental right to direct the education of their children. This Court should reverse the district court.

Dated: December 23, 2002

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REQUEST FOR ORAL ARGUMENT

Appellants Lydia Goulart and Kyle Travers respectfully request oral

argument.

