



July 8, 2013
VIA U.S. MAIL

Re: The ACLU's Letter Regarding Gideon Bible Distribution

Dear Superintendent:

The ACLU recently sent a letter to every superintendent in Kentucky threatening litigation against any school district that refuses to ban Gideon Bible distribution at public schools. We write to correct several misrepresentations made in the ACLU's letter and to inform you that allowing religious community groups, like the Gideons, to distribute literature at tables in the school hallways or by the entrances and exits on an equal basis with their secular counterparts fully complies with the Establishment Clause. Indeed, banning only religious community groups from distributing literature at public schools is clearly forbidden by the Free Speech and Free Exercise Clauses of the First Amendment. We hope to eliminate any confusion caused by the ACLU's letter and to offer you our assistance in formulating a literature-distribution policy that comports with the controlling caselaw of the United States Supreme Court and the United States Court of Appeals for the Sixth Circuit.

By way of introduction, Alliance Defending Freedom is an alliance-building legal organization that advocates for the right of citizens to freely live out their faith. We are committed to protecting citizens' right to exercise their religious liberties, including the right to distribute religious literature and engage in religious speech. One important way in which we further this mission is by educating the public and government entities about the freedom of religious expression. When necessary, we litigate these issues and in the past have defended—free of charge—school districts wrongly accused of violating the First Amendment.

Federal cases have consistently affirmed private citizens' right to share religious literature at public schools on equal terms with those promoting non-religious literature. *See, e.g., Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 535-36 (3d Cir. 2004); *Child Evangelism Fellowship of Md. v. Montgomery Cnty. Sch.*, 373 F.3d 589, 602 (4th Cir. 2004). When it comes to Gideon Bible distribution, one of the leading cases on this issue is the United States Court of Appeals for the Fourth Circuit's opinion in *Peck v. Upshur County Board of Education*, 155 F.3d 274 (4th Cir. 1998). *Peck* involved a literature-distribution forum that a school board created for private community groups. *See id.* at 276. As part of this program, the school district—at certain times—allowed the Gideons to place tables containing Bibles in its schools where students were free to pass by and pick one up if they wished. *See id.* at 276-77. The same opportunity was available to other groups who wished to offer free literature to students. *See id.* at 277.

In upholding this method of distributing Bibles, the Fourth Circuit noted that “[t]he Supreme Court ha[d] over the past decade, consistently sustained against Establishment Clause challenge neutral government policies that permit private religious speech on and within state educational and other properties on the same terms as private secular speech.” *Id.* at 279. The *Peck* Court recognized that opening such a forum did not advance religion but served the secular purpose of providing all community groups with an equal opportunity to communicate with students. *See id.* at 279-281; *see also id.* at 281 (explaining that the district’s policy “did nothing more than affirm ‘the right of religious speakers to use [Upshur County school] forums on equal terms with others,’ ... and [that] the Supreme Court has explicitly held that ‘prevent[ing] discrimination against religious and other types of speech’ in a school forum is an ‘undeniably secular’ purpose” (quoting *Widmar v. Vincent*, 454 U.S. 263 (1981) and *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990) (plurality opinion))).

Various safeguards put in place by the district ensured that no reasonable person would attribute the Gideons’ private religious speech to the school. *See id.* at 282. First, the district required “that disclaimers be placed on the [literature distribution] tables that explicitly state[d] that the schools [were] neither endorsing nor sponsoring the display.” *Id.* Second, the district instituted “strict guidelines which forbid any school teacher or employee from participating in any way in making the Bibles available” to students, while further ensuring that no “school employees [or] private citizens ... pressur[ed] or ... encourage[d] students to take [the Gideon] Bibles.” *Id.* Allowing for the private distribution of Bibles pursuant to this type of “neutral, open access policy [did] not confer any imprimatur of State approval on” the Gideons, in the Fourth Circuit’s view, “because the forum [was] available to a broad class of nonreligious as well as religious speakers.” *Id.* at 284-85 (quotation and alteration omitted).

The Fourth Circuit accordingly upheld the Gideons’ ability to distribute literature to secondary school students on equal terms with secular groups. *See id.* at 287-88. Although the *Peck* Court believed that Bible distribution at elementary schools in this manner also comported with the First Amendment, it struck down this practice because it thought that the Supreme Court would reach the opposite result. *See id.* at 287 n.* (citing the Supreme Court’s prior concern about the “impressionability of young elementary-age children”). But this forecast turned out to be incorrect, as the Supreme Court three years later in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), flatly refused to ban religious community groups from renting school facilities on equal terms with their non-religious counterparts based on “what the youngest members of the audience might misperceive.” *Id.* at 119.

Although the Sixth Circuit does not appear to have directly considered a case in which the distribution of Gideon Bibles was at issue, it adopted the *Peck* Court’s First Amendment analysis in *Rusk v. Crestview Local School District*, 379 F.3d 418, 424 (6th Cir. 2004). *Rusk* involved a school speech forum in which nonprofit community groups—including churches—were allowed to distribute flyers advertising their activities at an Ohio elementary school. *See id.* at 419. The Sixth Circuit held that “not even impressionable elementary school students [were] likely to misperceive [the school’s] practice of distributing flyers from a variety of community organizations as endorsing religion.” *Id.* at 422. Rather, if the school “were to refuse to distribute flyers advertising religious activities while continuing to distribute flyers advertising

other kinds of activities, students might conclude that the school [impermissibly] disapproves of religion.” *Id.* at 423.

The *Rusk* Court consequently agreed with the *Peck* Court’s conclusion that a “policy ... neutral toward religion” that “treat[ed] the Bible distributors the same as the 4-H Club or the Cub Scouts” passed muster under the Establishment Clause, particularly as the school district took several “steps ...to guard against students mistaking the distribution of Bibles as the school’s endorsement of religion.” *Rusk*, 379 F.3d at 424. But the Sixth Circuit did not stop there. It went one step further, stating: “*Peck*’s conclusions regarding the permissibility of exposing older students [to religious speech may be] properly appl[ied] to elementary school students as well.” *Id.*; *see also id.* (“While we generally agree with the *Peck* court’s reasoning, we disagree with that court’s ... conclusion that the reasoning does not apply to elementary school students.”). In the Sixth Circuit’s view, this conclusion was mandated by the Supreme Court’s holding in *Good News Club*, which came down several years after the Fourth Circuit decided *Peck*. *See id.* (explaining that *Peck* pre-dated *Good News Club*’s “rejection of the age and impressionability of elementary schools students as grounds for ruling that allowing a religious club to meet in [elementary] school classrooms would violate the Establishment Clause”).

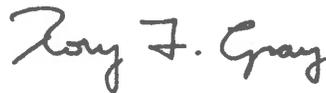
Sixth Circuit precedent thus explicitly approves Gideon Bible distribution under the circumstances described in *Peck*. *See id.* In so doing, the *Rusk* Court rejected the ACLU’s erroneous allegation that “distribut[ing] religious literature ... to ... students during school hours” violates the First Amendment and explained that this practice does not represent an impermissible “governmental endorsement” of religion. ACLU Letter at 1-2; *see also Peck*, 155 F.3d at 283 (“[S]chools do not endorse everything they fail to censure ...” (quoting *Mergens*, 496 U.S. at 250 (plurality opinion))). “[N]ot even impressionable elementary school students are likely to misperceive [a] practice of distributing [literature] from a variety of community organizations as endorsing religion.” *Rusk*, 379 F.3d at 422. And, even if they were, “elementary school students’ possible misperceptions of endorsement are an insufficient basis for finding an Establishment Clause violation.” *Id.* at 421. The Establishment Clause does not constitute “a modified heckler’s veto” that the ACLU and others hostile to religion may use to “proscribe[]” a community “group’s religious activity ... on the basis of what the youngest members of the audience might misperceive.” *Id.* (quoting *Good News Club*, 533 U.S. at 119).

The caselaw cited in the ACLU’s letter is not to the contrary. Most of the decisions cited in the ACLU’s letter are no longer good law as they were issued before the Supreme Court decided *Good News Club* in 2001. *See, e.g.*, ACLU Letter at 2 (citing Gideon Bible distribution cases ranging from 1977 to 1997 that were decided at least four years prior to *Good News Club*). Only one recent decision cited in the ACLU’s letter questions Gideon Bible distribution in public schools based on the fact that it occurred in the classroom with teacher or administrator supervision and approval. *See Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556, 559 (8th Cir. 2009). But the United States Court of Appeals for the Eighth Circuit specifically noted that this unlawful practice did “not forever preclude the district from allowing distribution of Bibles at [the elementary school] under all circumstances.” *Id.* at 561 n.3. If the school district had permitted Bible distribution pursuant to a neutral speech forum created for community groups, as outlined above, no constitutional violation would have occurred. *See id.* at 561 (“The injunction

does not address, and therefore does not categorically prohibit, other ways in which the District might, in a neutral manner, facilitate Bible distribution by private parties”).

Accordingly, we urge you to reject the ACLU’s baseless assertions and adopt a neutral literature-distribution policy that complies with both *Rusk* and *Peck*. We note that this advice comports fully with that offered by the Kentucky School Board Association (“KSBA”). See KSBA Guide for Distribution of Religious Materials Following ACLU Inquiry of All Districts, available at <http://www.ksba.org/protected/ArticleView.aspx?iid=6GI2PY2&dasi=3UBI> (last visited July 5, 2013). Controlling Supreme Court and Sixth Circuit precedent permits school districts to allow community groups, like the Gideons, to make Bibles and other religious materials available to students on tables in the hallways or school lobby pursuant to a neutral forum established for private speech. Indeed, excluding religious community groups from such a forum would clearly violate the First Amendment. See *Rusk*, 379 F.3d at 423 (“[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.” (quoting *Mergens*, 496 U.S. at 248 (plurality opinion))). We would be happy to discuss this matter further with you or your counsel, including the possibility of Alliance Defending Freedom representing your school district free of charge should the ACLU challenge a neutral policy of equal access for religious groups. Please call us at 480-444-0020.

Sincerely,



Rory T. Gray
Jeremy D. Tedesco
J. Matthew Sharp
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260

Leslie C. Bates
Law Office of Leslie C. Bates, PLLC
P.O. Box 22005
Louisville, KY 40252

John F. Billings
Law Office of John F. Billings
201 S. Main Street
Nicholasville, KY 40356

A.C. Donahue
Donahue Law Group, PSC
P.O. Box 659
Somerset, KY 42502

Jeffery L. Eastham
Attorney at Law
201 W. Columbia Avenue
P.O. Box 127
Greensburg, KY 42743

Clinton J. Elliott
Attorney and Counsel at Law
P.O. Box 52
Crestwood, KY 40014

Michael A. Hamilton
Hamilton & Associates, PSC
118 N. Main Street
Nicholasville, KY 40356

Vince F. Heuser
Heuser Law Office
3600 Goldsmith Lane
Louisville, KY 40220

John A. Majors
Morgan & Pottinger, PSC
601 W. Main Street
Louisville, KY 40202