SAN FRANCISCO BAY AREA

FEDERAL EXECUTIVE BOARD

211 Main Street, Room 1700
San Francisco, California 94105

September 27, 1982

The Honorable Donald J. Devine
Director
U.S. Office of Personnel Management
1900 E. Street, N.W.
Washington, DC 20415

Dear Dr. Devine:

We held our Combined Federal Campaign Kickoff celebration September 22, 1982, but have been postponing distribution of Campaign literature hoping for a reply to our letter of September 10, 1982. We sincerely regret not having received a reply from you.

Without benefit of additional information, we find it impossible to escape the contradiction between the "presence" requirement and those organizations we denied but whose appeal you favorably received. The best example of this contradiction is the Pacific Legal Foundation. They do not even allege "presence" in the Bay Area.

Because time constriction dictates that the Campaign proceed or jeopardize the result, the Policy Committee has voted, and we are proceeding with the Campaign without the participation of any previously denied organization.

We want to reemphasize that our primary objective is a successful Campaign that is both fair and legal. We continue to look forward to your reply and stand ready to adjust our Campaign if necessary.

Sincerely yours,

Paul D. Ising
Chair Elect

United States of America
Office of Personnel Management

Office of the General Counsel
Washington, D.C. 20415

In Reply Refer To:

Your Reference:

September 30, 1982

Dear Mr. Ising:

Director Devine has asked me to reply to your letter of September 27, 1982. I trust that, by now, you have received my letter of September 15, 1982.

Pursuant to the Executive Order and the regulations that govern the Combined Federal Campaign (CFC), the Director's determinations of appeals are final. We expect the local Federal Coordinating Committee for the San Francisco Bay Area CFC to act faithfully to give full force and effect to the Director's decisions.

I must counsel you that litigation surely would be expected if a local Federal Coordinating Committee persisted in excluding a voluntary agency from a campaign to which, on appeal, it had been admitted by the Director. In such an eventuality, the persons responsible for the exclusion may well be exposed to a personal liability claim. Were such responsible persons to have failed to comply with the decision of the Director on point, Government counsel may not be available for their representation.

Needless to say, we expect no such problems to arise, in view of the anticipated compliance of the local Federal Coordinating Committee with the Director's decisions.

There are many features of the rules presently governing the CFC that merit review. I assure you that intensive examination of the campaign's groundrules is underway. Meanwhile, of course, public servants are obliged to enforce the law as it exists rather than as they would wish it to exist. Please do not hesitate to call on me if I may render any assistance to your committee in its discharge of its duties.

Sincerely yours,

Joseph A. Morris
General Counsel

Mr. Paul D. Ising
Chair Elect
Federal Executive Board
211 Main Street, Room 1700
San Francisco, California 94105

SAN FRANCISCO BAY AREA

FEDERAL EXECUTIVE BOARD

211 Main Street, Room 1700
San Francisco, California 94105

101502

September 13, 1982

Honorable Edwin Meese, III
Counsellor to the President
The White House
Washington, DC 20500

Dear Mr. Meese:

The San Francisco Federal Executive Board Policy Commitee, in action on September 8, 1982, unanimously agreed to appeal the Office of Personnel Management's decision to reverse our denial of the National Right to Work Legal Defense Foundation, Inc., the Conservative Legal Defense and Education Funds, and the National Right to Life Educational Foundation applicants for the 1982 Combined Federal Campaign. A copy of that letter is enclosed.

The President has stated that he encourages local decision making. One of the responsibilities of the Local Combined Federal Campaign Coordinating Committee is indeed that: To determine local eligibility for national agencies. This Committee conscientiously reviewed all applications using the criteria stipulated by the Regulations and determined that the aforementioned agencies did not meet the criteria.

We respectfully ask that you lend your support to the San Francisco Federal Executive Board's request to reverse Dr. Devine's decision regarding the eligibility of these three agencies.

Sincerely,

Paul D. Ising
Chair Elect

Enclosure

SAN FRANCISCO BAY AREA

FEDERAL EXECUTIVE BOARD

211 Main Street, Room 1700
San Francisco, California 94105

September 10, 1982

The Honorable Donald J. Devine
Director, U.S. Office of Personnel Management
1900 E. Street, N.W.
Washington, D.C. 20415

Dear Dr. Devine:

Your letter of August 31, 1982, informed this Board, the Local Federal Coordinating Committee for the 1982 Combined Federal Campaign for the San Francisco Bay Area, that three of its campaign eligibility decisions had been appealed and that you granted the appeals. The agencies involved are the National Right to Work Legal Defense Foundation, Inc., the Conservative Legal Defense and Education Funds, and the National Right to Life Educational Foundation.

On September 8, 1982, the Policy Committee of the San Francisco Federal Executive Board instructed me to request that you reconsider and reverse your decision regarding the eligibility of these agencies. The Board believes that your decision presents substantial legal risks because it allowed some applicants to augment their applications after the filing deadline, allows an unfair advantage to those whose appeal was granted, and will adversely affect our campaign because of the negative reaction of some CFC supporters.

The regulations you promulgated require that an applicant agency demonstrate to the Local Federal Coordinating Committee, through documentation, that the agency's services are known to, and accessible to Federal employees in the local community. The San Francisco Federal Executive Board required that in the absence of physical presence, the applicant agency document and demonstrate, as a bare minimum, local presence by having a local or 800 telephone number in its name which is obtainable via the telephone directory or the local operator. The minimum criteria were applied uniformly to all 1982 applicants. The three aforementioned agencies did not meet the criteria.

Honorable Donald Devine

Your letters state that you considered local presence information contained in the appeals which was not contained in the original application provided us and which was obviously submitted after the filing deadline. This action patently favors those agencies which appealed and provided additional documentation and appears to violate the regulation. Other organizations which applied and were denied for the same reason may very well have been able to provide additional information to augment their application had they been treated similarly.

Moreover, your direction to the Board that it print a supplement to the campaign brochure listing the aforementioned organizations violates a fundamental tenet of the campaign, namely that the campaign literature not give undue publicity to a particular volunteer agency. Compliance on our part would discriminate against and adversely affect those agencies who initially made application in accordance with the campaign regulations in a timely manner and are listed en masse in the campaign brochure in the position determined by a lottery.

The Policy Committee has further determined that, in the event you do not reverse your decision prior to the September 20 commencement of our local Campaign, we have no option but to seek legal advice to avoid liability. If this becomes necessary, it is incumbent on you to provide your rationale in overturning our original denial.

This Federal Executive Board and its committees have expended considerable effort and concern in determining eligibility by applying the criteria in a fair and equitable manner. Your decision focuses questions upon our actions. Our Combined Federal Campaign has been both successful and prosperous and benefits many who are in need of social services. We intend that our 1982 campaign be equally successful, and to that end we reiterate our request that you reverse your decision regarding the eligibility of these three agencies.

Paul D. Ising

PAUL D. ISING
Chair

September 15, 1982

Dear Mr. Ising:

Director Devine has asked me to reply to your letter of September 10, 1982.

Nothing appears in your letter upon which we can properly predicate the reconsideration of any decision taken with respect to the 1982 Combined Federal Campaign for the San Francisco Bay Area.

Your letter suggests that your Local Federal Coordinating Committee may request legal guidance in connection with its duties. As the principal attorney for the Combined Federal Campaign, I shall be happy to address any such questions that you may have.

Sincerely yours,

Joseph A. Morris
General Counsel

Mr. Paul D. Ising
Chair
San Francisco Bay Area
Federal Executive Board
211 Main Street
Room 1700
San Francisco, California 94105

OGC:JMorris:cl 9-15-82

PACIFIC LEGAL FOUNDATION

September 2, 1982

Office of the Director
United States Office of
Personnel Management
Washington, DC 20415

Dear Sir:

Pacific Legal Foundation hereby appeals the denial of its application for inclusion in the 1982 San Francisco Bay area Combined Federal Campaign (CFC). The denial is based on a finding of noncompliance with 5 C.F.R. § 950.405(a)(6), which requires a direct and substantial presence in the local campaign community.

Pacific Legal Foundation believes it meets this requirement. For example, four members of the Foundation's Board of Trustees, Alan C. Furth, Robert F. Kane, Brooks Walker, Jr., and Robert W. Walker are from the bay area.

Much of the Foundation's litigation occurs in and directly affects the bay area. For example, in City and County of San Francisco v. Farrell, the Foundation represented San Francisco Controller John C. Farrell in opposing the imposition of increased taxes by San Francisco. In Citizens Against Rent Control v. City of Berkeley and Valparaiso Associates v. City of Cotati, the Foundation opposed unreasonable rent control ordinances. In Gonzales v. Costle the Foundation opposed illegal use of Clean Water Act funds by the Association of Bay Area Governments (ABAG); in Groch v. City of Berkeley we opposed arbitrary government action in a neighborhood preservation ordinance; in Marin Coalition v. Freeman we opposed inappropriate government disposition of Hamilton Air Force Base; in State of California v. Marina County Water District we opposed unreasonable wastewater regulations; and in United Public Employees v. City of Fremont we supported the government spending limitations in Proposition 4. All of this litigation in and concerning the bay area demonstrates the Foundation's substantial local presence.

455 Capitol Mall, Suite 600 · Sacramento, California 95814 · (916) 444-0154

Washington, D.C. Office 1990 M Street, N.W., Suite 550 · Washington, D.C. 20036 · (202) 466-2686
Seattle Liaison Office 215 Columbia Street · Seattle, WA 98104 · (206) 447-7264
Alaska Liaison Office, 444 W. 7th Avenue · Anchorage, AK 99501 · (907) 278-1731

It may be that the finding of ineligibility was in part based on the ground that Pacific Legal Foundation does not have a local or "800" telephone number listed in current area directories. Rather than use an "800" number, we are authorizing the listing of our Sacramento number to be called collect. That number is: Sacramento (916) 444-0154. As a nonprofit charitable organization, we found this to be more economical than an "800" number, while providing equivalent accessibility.

Based on the above information, Pacific Legal Foundation appeals the finding of ineligibility.

Very truly yours,

Ronald A Zumbrun

RONALD A. ZUMBRUN
President and Legal
Director

PACIFIC LEGAL FOUNDATION

September 2, 1982

Captain Richard L. Slater
Chairman
Combined Federal Campaign
410 Bush Street
San Francisco, CA 94108

Dear Captain Slater:

Pacific Legal Foundation requests a reconsideration of the denial of its application for inclusion in the 1982 San Francisco Bay area Combined Federal Campaign (CFC). The denial is based on a finding of noncompliance with 5 C.F.R. § 950.405(a)(6), which requires a direct and substantial presence in the local campaign community.

Pacific Legal Foundation believes it meets this requirement. For example, four members of the Foundation's Board of Trustees, Alan C. Furth, Robert F. Kane, Brooks Walker, Jr., and Robert W. Walker are from the bay area.

Much of the Foundation's litigation occurs in and directly affects the bay area. For example, in City and County of San Francisco v. Farrell, the Foundation represented San Francisco Controller John C. Farrell in opposing the imposition of increased taxes by San Francisco. In Citizens Against Rent Control v. City of Berkeley and Valparaiso Associates v. City of Cotati, the Foundation opposed unreasonable rent control ordinances. In Gonzales v. Costle the Foundation opposed illegal use of Clean Water Act funds by the Association of Bay Area Governments (ABAG); in Groch v. City of Berkeley we opposed arbitrary government action in a neighborhood preservation ordinance; in Marin Coalition v. Freeman we opposed inappropriate government disposition of Hamilton Air Force Base; in State of California v. Marina County Water District we opposed unreasonable wastewater regulations; and in United Public Employees v. City of Fremont we supported the government spending limitations in Proposition 4. All of this litigation in and concerning the bay area demonstrates the Foundation's substantial local presence.

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Based on the above information, Pacific Legal Foundation earnestly requests reconsideration of the finding of ineligibility.

Very truly yours,

Ronald A. Zumbrun

RONALD A. ZUMBRUN
President and Legal
Director

410 Bush Street
San Francisco, CA 94108
(415) 772-4308

August 24, 1982

Mr. Ronald A. Zumbrun
President and Legal Director
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, CA 95814

Dear Mr. Zumbrun:

The Combined Federal Campaign of the San Francisco Bay Area has considered your application for the 1982 Campaign. The application was reviewed by the Admission Committee, the CFC Committee and the Federal Executive Board, each composed of volunteers from the military and civilian sectors of the Federal Government.

I am sorry to state we have found the Pacific Legal Foundation for the 1982 Campaign to be ineligible for CFC local approval because we have found no substantial local presence in our campaign area.

If you believe this decision contrary to the OPM Regulations, you may appeal this decision in writing to the Director of the Office of Personnel Management in Washington, D.C.

While I am sorry to give you bad news in these difficult times, our CFC Committee has applied the regulation criteria equitably and fairly to all.

Sincerely,

Richard L. Slater

Captain Richard L. Slater
CFC Chairman

RLS:cs
0676B

ROUTING AND TRANSMITTAL SLIP

Date 3/11/83

TO: (Name, office symbol, room number, building, Agency/Post)	Initials	Date
1. H. P. GOLDFIELD		
2. The White House		
3.		
4.		
5.		

	Action		File		Note and Return
	Approval		For Clearance		Per Conversation
	As Requested		For Correction		Prepare Reply
	Circulate	X	For Your Information		See Me
	Comment		Investigate		Signature
	Coordination		Justify		

REMARKS

Re: CFC.

Support!

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

FROM: (Name, org. symbol, Agency/Post)	Room No.—Bldg.
MORRIS	OPM
	Phone No. 632-4632

5041-102

OPTIONAL FORM 41 (Rev. 7-76)
Prescribed by GSA
FPMR (41 CFR) 101-11.206

☆ GPO : 1981 O - 361-529 (148)

Cohen, supra, at 546. In *Cohen* itself, the District Court denied the defendant's motion to require the plaintiff to post a bond on the ground that the statute requiring the bond did not apply. That order "conclusively determined" the question whether a bond was required because no conceivable change of circumstances could affect the basis of the District Court's decision. In this case, any number of plausible events might have convinced the District Court that a necessary basis of its decision—that the state court would proceed promptly and fairly to adjudicate the issue of the existence of an agreement to arbitrate—no longer applied.

Furthermore, I am not as certain as is the Court that by staying this case the District Court resolved "an important issue." An issue should not be deemed "important" for these purposes simply because the court of appeals or this Court thinks the appellant should prevail. The issue here was whether the factual question whether there was an agreement to arbitrate should be adjudicated in a state or federal court. Unless there is some reason to believe that the state court will resolve this factual question wrongly, which the Court quite rightly disclaims, *ante*, at 22, I do not see how this issue is more important than any other interlocutory order that may place a litigant at a procedural disadvantage.

For these reasons, I do not believe the District Court's order was appealable. Interlocutory orders are committed by statute to the judgment of the District Courts, and this Court ill-serves the judges of those courts and the overwhelming majority of litigants by devising exceptions to the statute when it believes a particular litigant has been wronged.

Given my view of appealability, I do not find it necessary to decide whether the District Court's order was proper in this case. I am disturbed, however, that the Court has sanctioned an extraordinary departure from the usual and accepted course of judicial proceedings by affirming the Court of Appeals decision on an issue that was not decided in the District Court.

The Court of Appeals ordered the District Court to enter an order compelling arbitration, even though that issue was not considered by the District Court. This Court has maintained the difference between appellate jurisdiction and original jurisdiction at least since *Marbury* v. *Madison*, 1 Cranch 137, 174–176 (1803) ("It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a case already instituted."). I do not understand how the Court can say that the Court of Appeals had discretion to perform a non-appellate act.

The Court relies on 28 U. S. C. § 2106, which provides that a court of appeals:

> "may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the case and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

This statute does not grant the courts of appeals authority to constitute themselves as trial courts. Section 4 of the Arbitration Act gives the Hospital a right to a jury trial. See *ante*, at 19, n. 27. By deciding that there were no disputed issues of fact, the Court of Appeals seems to have decided a motion for summary judgment that was not before it. This is the kind of issue that district judges decide every day in the ordinary course of business. It is not the kind of issue that Courts of Appeals determine. The Court of Appeals did have before it the memoranda filed in the District Court but, contrary to the Court's intimation, *ante*, at 26, this issue was not argued in the Court of Appeals. See 656 F. 2d 933, 948, n. 1 (Hall, J., dissenting) ("No one argued that this court should decide that issue.").

There was no reason to believe that the District Court would not have acted promptly to resolve the dispute on the merits after being reversed on the stay. That judges of a court of appeals believe they know how a case should be decided is no reason for them to substitute their own judgment for that of a district judge without regard to the normal course of appellate procedure.

The judgment below should be vacated and the case remanded to the Court of Appeals with directions to dismiss the appeal for want of jurisdiction. Failing that, even if the Court is correct that the stay order was an error, the judgment should be reversed, insofar as it decides the question of arbitrability, and remanded to the district court for further proceedings under the Arbitration Act.

JACK W. FLOYD, Greensboro, N.C. (SMITH, MOORE, SMITH, SCHELL & HUNTER, STEPHEN P. MILLIKIN, and DOUGLAS W. EY, JR., with him on the brief) for petitioner; A. H. GAEDE, JR., Birmingham, Ala. (BRADLEY, ARANT, ROSE & WHITE, STANLEY D. BYNUM, JOSEPH B. MAYS, JR., CHARLES NICHOLS, LINDSAY R. DAVIS, NICHOLS, CAFFREY, HILL, EVANS & MURRELLE, and FRANK H. McFADDEN, with him on the brief) for respondent.

No. 81-896

PERRY EDUCATION ASSN., APPELLANT *v.* PERRY LOCAL EDUCATORS' ASSN., ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Syllabus

No. 81-896. Argued October 13, 1982—Decided February 23, 1983

Under a collective-bargaining agreement between the Board of Education of Perry Township, Ind., and appellant as the exclusive bargaining representative for the school district's teachers, appellant was granted access to the interschool mail system and teacher mailboxes in the Perry Township schools. The bargaining agreement also provided that access rights to the mail facilities were not available to any rival union, such as appellee Perry Local Educators' Association (PLEA). PLEA and two of its members filed suit in Federal District Court against appellant and individual members of the School Board, contending that appellant's preferential access to the internal mail system violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The court entered summary judgment for the defendants, but the Court of Appeals reversed.

Held:

1. The appeal is not proper under 28 U. S. C. § 1254(2), which grants this Court appellate jurisdiction over federal court of appeals' decisions holding a state statute repugnant to the Federal Constitution. Here, only certain provisions of the collective-bargaining agreement, not the Indiana statute authorizing such agreements, were held to be constitutionally invalid, and the bargaining agreement cannot be considered to be in essence a legislative act. However, regarding the jurisdictional statement as a petition for a writ of certiorari, certiorari is granted because the constitutional issues presented are important and the decision below conflicts with the judgments of other federal and state courts.

2. The First Amendment is not violated by the preferential access to the interschool mail system granted to appellant.

(a) With respect to public property that is not by tradition or government designation a forum for public communication, a State may reserve the use of the property for its intended purposes, communicative or otherwise, as long as a regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. The school mail facilities were not a "limited public forum" merely because the system had been opened for periodic use by civic and church organizations, or because PLEA was allowed to use the school mail facilities on an equal footing with appellant prior to appellant's certification as the teachers' exclusive bargaining representative.

(b) The differential access provided appellant and PLEA is reason-

able because it is wholly consistent with the school district's legitimate interest in preserving the property for the use to which it was lawfully dedicated. Use of school mail facilities enables appellant to perform effectively its statutory obligations as exclusive representative of *all* Perry Township teachers. Conversely, PLEA does not have any official responsibility in connection with the school district and need not be entitled to the same rights of access to school mailboxes. The reasonableness of the limitations on PLEA's access to the school mail system is also supported by the substantial alternative channels that remain open for union-teacher communication to take place. Moreover, under Indiana law, PLEA is assured of equal access to all modes of communication while a representation election is in progress.

3. The differential access provided the rival unions does not constitute impermissible content discrimination in violation of the Equal Protection Clause. Since the grant of exclusive access to appellant does not burden a fundamental right of PLEA, the school district's policy need only rationally further a legitimate state purpose. That purpose is clearly found in the special responsibilities of an exclusive bargaining representative. *Police Department of Chicago* v. *Mosely*, 408 U. S. 92, and *Carey* v. *Brown*, 447 U. S. 455, distinguished.

652 F. 2d 1286, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, POWELL, and STEVENS, JJ., joined.

JUSTICE WHITE delivered the opinion of the Court.

Perry Education Association is the duly elected exclusive bargaining representative for the teachers of the Metropolitan School District of Perry Township, Indiana. A collective bargaining agreement with the Board of Education provided that Perry Education Association, but no other union, would have access to the interschool mail system and teacher mailboxes in the Perry Township schools.[1] The issue in this case is whether the denial of similar access to the Perry Local Educators' Association, a rival teacher group, violates the First and Fourteenth Amendments.

I

The Metropolitan School District of Perry Township, Indiana, operates a public school system of thirteen separate schools. Each school building contains a set of mailboxes for the teachers. Interschool delivery by school employees permits messages to be delivered rapidly to teachers in the district.[1] The primary function of this internal mail system is to transmit official messages among the teachers and between the teachers and the school administration. In addition, teachers use the system to send personal messages and individual school building principals have allowed delivery of messages from various private organizations.[2]

Prior to 1977, both the Perry Education Association (PEA) and the Perry Local Educators' Association (PLEA) represented teachers in the school district and apparently had equal access to the interschool mail system. In 1977, PLEA challenged PEA's status as *de facto* bargaining representative for the Perry Township teachers by filing an election petition with the Indiana Education Employment Relations Board (Board). PEA won the election and was certified as the exclusive representative, as provided by Indiana law. Ind. Code Ann. § 20-7.5-1.2(1).

The Board permits a school district to provide access to communication facilities to the union selected for the discharge of the exclusive representative duties of representing the bargaining unit and its individual members without having to provide equal access to rival unions.[3] Following the election, PEA and the school district negotiated a labor contract in which the school board gave PEA "access to teachers' mailboxes in which to insert material" and the right to use the interschool mail delivery system to the extent that the school district incurred no extra expense by such use. The labor agreement noted that these access rights were being accorded to PEA "acting as the representative of the teachers" and went on to stipulate that these access rights shall not be granted to any other "school employee organization"—a term of art defined by Indiana law to mean "any organization which has school employees as members and one of whose primary purposes is representing school employees in dealing with their employer."[4] The PEA contract with these provisions was renewed in 1980 and is presently in force.

The exclusive access policy applies only to use of the mailboxes and school mail system. PLEA is not prevented from using other school facilities to communicate with teachers. PLEA may post notices on school bulletin boards; may hold meetings on school property after school hours; and may, with approval of the building principals, make announcements on the public address system. Of course, PLEA also may communicate with teachers by word of mouth, telephone, or the United States mail. Moreover, under Indiana law, the preferential access of the bargaining agent may continue only while its status as exclusive representative is insulated from challenge. Ind. Code Ann. § 20-7.5-1.10(c)(4). While a representation contest is in progress, unions must be afforded equal access to such communication facilities.

PLEA and two of its members filed this action under 42 U. S. C § 1983 (1976) against PEA and individual members of the Perry Township School Board. Plaintiffs contended that PEA's preferential access to the internal mail system violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. They sought injunctive and declaratory relief and damages. Upon cross-motions for summary judgment, the district court entered judgment for the defendants. *Perry Local Educators' Ass'n* v. *Hohlt*, IP 79-189-C, (S.D. Ind. 1980).

The Court of Appeals for the Seventh Circuit reversed. 652 F. 2d 1286 (1981). The court held that once the school district "opens its internal mail system to PEA but denies it to PLEA, it violates both the Equal Protection Clause and the First Amendment." *Id.* at 1290. It acknowledged that PEA had "legal duties to the teachers that PLEA does not have" but reasoned that "without an independent reason why

[1] The United States Postal Service, in a submission as amicus curiae, suggests that the interschool delivery of material to teachers at various schools in the district violates the Private Express statutes, 18 U. S. C. §§ 1693-1699 (1976) and 39 U. S. C. §§ 601-606 (1976), which generally prohibit the carriage of letters over postal routes without payment of postage. We agree with the Postal Service that this question does not directly bear on the issues before the Court in this case. Accordingly, we express no opinion on whether the mail delivery practices involved here comply with the Private Express statute or other Postal Service regulations.

[2] Local parochial schools, church groups, YMCAs, and Cub Scout units have used the system. The record does not indicate whether any requests for use have been denied, nor does it reveal whether permission must separately be sought for every message that a group wishes delivered to the teachers.

[3] See *Perry Local Educators' Ass'n* v. *Hohlt*, 652 F. 2d 1286, 1291 & n. 13 (CA7 1981). It is an unfair labor practice under state law for a school employer to "dominate, interfere or assist in the formation or administration of any school employer organization or contribute financial or other support to it." Ind. Code § 20-7.5-1-7.(a)(2). The Indiana Education Employment Relations Board has held that a school employer may exclude a minority union from organizational activities which take place on school property and may deny the rival union "nearly all organizational conveniences." *Pike* v. *Independent Professional Educators*, No. U-76-16-5350 (May 20, 1977) (holding that denying rival union use of a school building for meetings was not unfair labor practice, but that denying the union use of school bulletin boards was unfair labor practice).

[4] Ind. Code Ann. § 20-7.5-1-2.(k).

equal access for other labor groups and individual teachers is undesirable, the special duties of the incumbent do not justify opening the system to the incumbent alone." *Id.* at 1300.

The PEA now seeks review of this judgment by way of appeal. We postponed consideration of our jurisdiction to the hearing of the case on the merits. 454 U. S. 1140 (1981).

II

We initally address the issue of our appellate jurisdiction over this case. PEA submits that its appeal is proper under 28 U. S. C. § 1254(2) (1976), which grants us appellate jurisdiction over cases in the federal courts of appeals in which a state statute has been held repugnant to the Constitution, treaties, or laws of the United States. We disagree. No state statute or other legislative action has been invalidated by the Court of Appeals. The Court of Appeals has held only that certain sections of the collective bargaining agreement entered into by the school district and PEA are constitutionally invalid; the Indiana statute authorizing such agreements is left untouched.

PEA suggests, however, that because a collective bargaining contract has "continuing force and [is] intended to be observed and applied in the future," it is in essence a legislative act, and, therefore a state statute within the meaning of § 1254(2). *King Manufacturing Co.* v. *City Council of Augusta*, 277 U. S. 100, 104 (1928). In support of its position, PEA points to our decisions treating local ordinances and school board orders as state statutes for § 1254(2) purposes, *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 927 n. 2 (1975); *Illinois ex rel. McCollum* v. *Bd. of Education*, 333 U. S. 203 (1948); *Hamilton* v. *Regents of Univ. of Cal.*, 293 U. S. 245, 257–258 (1934). In these cases, however, legislative action was involved—the unilateral promulgation of a rule with continuing legal effect. Unlike a local ordinance or even a school board rule, a collective bargaining agreement is not unilaterally adopted by a lawmaking body; it emerges from negotiation and requires the approval of both parties to the agreement. Not every government action which has the effect of law is legislative action. We have previously emphasized that statutes authorizing appeals are to be strictly construed, *Fornaris* v. *Ridge Tool Co.*, 400 U. S. 41, 42 n. 1 (1970), and in light of that policy, we do not find that § 1254(2) extends to cover this case.[5] We therefore dismiss the appeal for want of jurisdiction. See, *e. g. Lockwood* v. *Jefferson Area Teachers Ass'n*, (No. 81–2236, October 4, 1982) —— U. S. ——, (appeal dismissed for want of jurisdiction and certiorari denied).

Nevertheless, the decision below is subject to our review by writ of certiorari. 28 U. S. C. § 2103 (1976); *Palmore* v. *United States*, 411 U. S. 389, 396 (1973). The constitutional issues presented are important and the decision below conflicts with the judgment of other federal and state courts.[6] Therefore, regarding PEA's jurisdictional statement as a petition for a writ of certiorari, we grant certiorari.

III

The primary question presented is whether the First Amendment, applicable to the states by virtue of the Fourteenth Amendment, is violated when a union that has been elected by public school teachers as their exclusive bargaining representative is granted access to certain means of communication, while such access is denied to a rival union. There is no question that constitutional interests are implicated by denying PLEA use of the interschool mail system. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* v. *Des Moines School District*, 393 U. S. 503, 506 (1969); *Healy* v. *James*, 408 U. S. 169 (1972). The First Amendment's guarantee of free speech applies to teacher's mailboxes as surely as it does elsewhere within the school, *Tinker* v. *Des Moines School District*, *supra*, and on sidewalks outside, *Police Department of Chicago* v. *Mosely*, 408 U. S. 92 (1972). But this is not to say that the First Amendment requires equivalent access to all parts of a school building in which some form of communicative activity occurs. "Nowhere [have we] suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes." *Grayned* v. *City of Rockford*, 408 U. S. 104, 117–118 (1972). The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.

A

In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *CIO*, 307 U. S. 496, 515 (1939). In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Carey* v. *Brown*, 447 U. S. 455, 461 (1980). The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *United States Postal Service* v. *Council of Greenburgh*, 453 U. S. 114, 132 (1981); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530, 535–536 (1980); *Grayned* v. *City of Rockford*, *supra*, at 115; *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Schneider* v. *State of New Jersey*, 308 U. S. 147 (1939).

A second category consists of public property which the state has opened for use by the public as a place for expressive activity. The Constitution forbids a state to enforce

[5] Appellants' reliance upon *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977) is misplaced. In *Abood*, appellate jurisdiction under 28 U. S. C. § 1257(2) (1976) was proper because the constitutionality of the state statute authorizing the negotiation of agency shop agreements was at issue. See Jurisdictional Statement in *Abood*, No. 75–1153, at 5.

[6] Constitutional objections to similar access policies have been rejected by all but one other federal or state court to consider the issue. See *Connecticut State Federation of Teachers* v. *Board of Ed. Members*, 538 F. 2d 471 (CA2 1976); *Memphis American Federation of Teachers Local 2032* v. *Board of Ed.*, 534 F. 2d 699 (CA6 1976); *Teachers Local 3724* v. *North St. Francis County School District*, 103 L.R.R.M. 2865 (E.D. Mo. 1979); *Haukedahl* v. *School District No. 108*, No. 75–C–3641 (N.D. Ill. May 14, 1976); *Federation of Delaware Teachers* v. *De La Warr Board of Ed.*, 335 F. Supp. 385 (D. Del. 1971); *Local 858, American Federation of Teachers* v. *School District No. 1*, 314 F. Supp. 1069 (D. Colo. 1970); *Maryvale Educators Ass'n* v. *Newman*, 70 A.D. 2d 758, 416 N.Y.S. 2d 876, appeal denied, 48 N.Y. 2d 605, 424 N.Y.S. 2d 1025 (App. Dis. 1979); *Geiger* v. *Duval County School Board*, 357 So. 2d 442 (Fla. App. 1978); *Clark Classroom Teachers Assoc.* v. *Clark County School District*, 91 Nev. 143, 532 P. 2d 1032 (1975) (*per curiam*). The only case holding unconstitutional a school district's refusal to grant a minority union access to teacher's mailboxes or other facilities while granting such privileges to a majority union is *Teachers Local 399* v. *Michigan City Area Schools*, No. 72–S–94 (N.D. Ind. Jan. 24, 1973), vacated on other grounds, 499 F. 2d 115 (CA7 1974).

certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. *Widmar* v. *Vincent*, 454 U. S. 263 (1981) (university meeting facilities); *City of Madison Joint School District* v. *Wisconsin Public Employment Relations Comm'n*, 429 U. S. 167 (1976) (school board meeting); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975) (municipal theater).[1] Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. *Widmar* v. *Vincent*, *supra*, at 269–270.

Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service* v. *Greenburgh Civic Ass'n*, *supra*, at 129. In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. *Id.* at 131, n. 7. As we have stated on several occasions, "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.*, at 129; *Greer* v. *Spock*, 424 U. S. 828, 836 (1976); *Adderley* v. *Florida*, 385 U. S. 39, 48 (1966).

The school mail facilities at issue here fall within this third category. The Court of Appeals recognized that Perry School District's interschool mail system is not a traditional public forum: "We do not hold that a school's internal mail system is a public forum in the sense that a school board may not close it to all but official business if it chooses." 652 F. 2d at ——. On this point the parties agree.[2] Nor do the parties dispute that, as the District Court observed, the "normal and intended function [of the school mail facilities] is to facilitate internal communication of school related matters to teachers." *Perry Local Educators' Ass'n* v. *Hohlt*, IP 79–189–C (1980), at ——. The internal mail system, at least by policy, is not held open to the general public. It is instead PLEA's position that the school mail facilities have become a "limited public forum" from which it may not be excluded because of the periodic use of the system by private non-school connected groups, and PLEA's own unrestricted access to the system prior to PEA's certification as exclusive representative.

Neither of these arguments is persuasive. The use of the internal school mail by groups not affiliated with the schools is no doubt a relevant consideration. If by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public, then PLEA could justifiably argue a public forum has been created. This, however, is not the case. As the case comes before us, there is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public. Permission to use the system to communicate with teachers must be secured from the individual building principal. There is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material. We can only conclude that the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. This type of selective access does not transform government property into a public forum. In *Greer* v. *Spock*, *supra*, at 838 n. 10, the fact that other civilian speaker and entertainers had sometimes been invited to appear at Fort Dix did not convert the military base into a public forum. And in *Lehman* v. *Shaker Heights*, 418 U. S. 298 (1974) (Opinion of BLACKMUN, J.), a plurality of the Court concluded that a city transit system's rental of space in its vehicles for commercial advertising did not require it to accept partisan political advertising.

Moreover, even if we assume that by granting access to the Cub Scouts, YMCAs, and parochial schools, the school district has created a "limited" public forum, the constitutional right of access would in any event extend only to other entities of similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as PLEA, which is concerned with the terms and conditions of teacher employment.

PLEA also points to its ability to use the school mailboxes and delivery system on an equal footing with PEA prior to the collective bargaining agreement signed in 1978. Its argument appears to be that the access policy in effect at that time converted the school mail facilities into a limited public forum generally open for use by employee organizations, and that once this occurred, exclusions of employee organizations thereafter must be judged by the constitutional standard applicable to public forums. The fallacy in the argument is that it is not the forum, but PLEA itself, which has changed. Prior to 1977, there was no exclusive representative for the Perry school district teachers. PEA and PLEA each represented its own members. Therefore the school district's policy of allowing both organizations to use the school mail facilities simply reflected the fact that both unions represented the teachers and had legitimate reasons for use of the system. PLEA's previous access was consistent with the school district's preservation of the facilities for school-related business, and did not constitute creation of a public forum in any broader sense.

Because the school mail system is not a public forum, the School District had no "constitutional obligation per se to let any organization use the school mail boxes." *Connecticut St. Federation of Teachers* v. *Bd. of Education Members*, 538 F. 2d 471, 481 (CA2 1976). In the Court of Appeals' view, however, the access policy adopted by the Perry schools favors a particular viewpoint, that of the PEA, on labor relations, and consequently must be strictly scrutinized regardless of whether a public forum is involved. There is, however, no indication that the school board intended to discourage one viewpoint and advance another. We believe it is more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views. 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

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[1] A public forum may be created for a limited purpose such as use by certain groups, *e. g.*, *Widmar* v. *Vincent*, 454 U. S. 263 (1981) (student groups), or for the discussion of certain subjects, *e. g.*, *City of Madison Joint School District* v. *Wisconsin Public Employment Relations Comm'n*, 429 U. S. 167 (1976) (school board business).

[2] See Brief of Appellees at 9 and Tr. of Oral Arg. at 41.

light of the purpose which the forum at issue serves.[9]

B

The differential access provided PEA and PLEA is reasonable because it is wholly consistent with the district's legitimate interest in "preserv[ing] the property . . . for the use to which it is lawfully dedicated." *Postal Service*, *supra*, at 129–130. Use of school mail facilities enables PEA to perform effectively its obligations as exclusive representative of *all* Perry Township teachers.[10] Conversely, PLEA does not have any official responsibility in connection with the school district and need not be entitled to the same rights of access to school mailboxes. We observe that providing exclusive access to recognized bargaining representatives is a permissible labor practice in the public sector.[11] We have previously noted that the "designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 221 (1977). Moreover, exclusion of the rival union may reasonably be considered a means of insuring labor-peace within the schools. The policy "serves to prevent the District's schools from becoming a battlefield for inter-union squabbles."[12]

The Court of Appeals accorded little or no weight to PEA's special responsibilities. In its view these responsibilities, while justifying PEA's access, did not justify denying equal access to PLEA. The Court of Appeals would have been correct if a public forum were involved here. But the internal mail system is not a public forum. As we have already stressed, when government property is not dedicated to open communication the government may—without further justification—restrict use to those who participate in the forum's official business.[13]

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[9] JUSTICE BRENNAN minimizes the importance of public forum analysis and all but rejects *Greer* v. *Spock*, 424 U. S. 828, (1976); *Lehman* v. *Shaker Heights*, 418 U. S. 298 (1974); and *Jones* v. *North Carolina Prisoners' Union*, 433 U. S. 119 (1977), in each of which, of course, he was in dissent. It will not do, however, to put aside the Court's decisions holding that not all public property is a public forum, or to dismiss *Greer*, *Lehman*, and *Jones* as decisions of limited scope involving "unusual forums." In *U. S. Postal Service* v. *Greenburgh Civic Assns.*, 453 U. S. 114, 129 (1981), the Court rejected this argument stating that "[i]t is difficult to conceive of any reason why this Court should treat a letterbox differently for First Amendment purposes than it has in the past treated the military base in *Greer* . . . the jail or prison in *Adderley* v. *Florida*, 385 U. S. 39 (1966) and *Jones* . . . or the advertising space made available in city rapid transit cars in *Lehman*." The Court went on to say that the mere fact that an instrumentality is used for the communication of ideas does not make a public forum, and to reaffirm JUSTICE BLACKMUN's observation in *Lehman* that: "Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities, would immediately become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." *U. S. Postal Service* v. *Greenburgh Civic Assns.*, *supra*, at 130 n. 6, quoting 418 U. S. at 304.

JUSTICE BRENNAN also insists that the Perry access policy is a forbidden exercise of viewpoint discrimination. As noted in text, we disagree with this conclusion. The access policy applies not only to PLEA but to all unions other than the recognized bargaining representative, and there is no indication in the record that the policy was motivated by a desire to suppress the PLEA's views. Moreover, under JUSTICE BRENNAN's analysis, if PLEA and PEA were given access to the mailboxes, it would be equally imperative that any other citizen's group or community organization with a message for school personnel—the chamber of commerce, right-to-work groups, or any other labor union—also be permitted access to the mail system. JUSTICE BRENNAN's attempt to build a public forum with his own hands is untenable; it would invite schools to close their mail systems to all but school personnel. Although his viewpoint-discrimination thesis might indicate otherwise, JUSTICE BRENNAN apparently would not forbid the school district from closing the mail system to all outsiders for the purpose of discussing labor matters while permitting such discussion by administrators and teachers. We agree that the mail service could be restricted to those with teaching and operational responsibility in the schools. But, by the same token—and upon the same principle—the system was properly opened to PEA, when it, pursuant to law, was designated the collective bargaining agent for all teachers in the Perry schools. PEA thereby assumed an official position in the operational structure of the District's schools, and obtained a status that carried with it rights and obligations that no other labor organization could share. Excluding PLEA from the use of the mail service is therefore not viewpoint discrimination barred by the First Amendment.

Accordingly, the cases relied upon by JUSTICE BRENNAN are fully consistent with our approach to and resolution of this case. *Neimotko* v. *Maryland*, 340 U. S. 268 (1951), *Police Dept of Chicago* v. *Mosely*, 408 U. S. 92 (1972), *City of Madison Joint School District* v. *Wisconsin Employment Relations Commission*, 429 U. S. 167 (1976), *Carey* v. *Brown*, 447 U. S. 455 (1980), and *Widmar* v. *Vincent*, 454 U. S. 263 (1981) are cases involving restricted access to public forums. *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969), did not involve the validity of an unequal access policy but instead an unequivocal attempt to prevent students from expressing their viewpoint on a political issue. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), and *Consolidated Edison Company* v. *Public Service Commission*, 447 U. S. 530 (1980) do not concern access to government property and are, for that reason, inapposite. Indeed, in *Consolidated Edison*, which concerned a utility's right to use its own billing envelopes for speech purposes, the Court expressly distinguished our public forum cases, stating that "the special interests of a government in overseeing the use of its property" were not implicated. 447 U. S. at 539–540.

[10] The Court of Appeals refused to consider PEA's access justified as "official business" because the School District did not "endorse" the content of its communications. We do not see the necessity of such a requirement. PEA has official duties as representative of Perry township teachers. In its role of communicating information to teachers concerning, for example, the collective bargaining agreement and the outcome of grievance procedures, PEA neither seeks nor requires the endorsement of school administrators. The very concept of the labor-management relationship requires that the representative union be free to express its independent view on matters within the scope of their representational duties. The lack of an employer endorsement does not mean that the communications do not pertain to the "official business" of the organization.

[11] See, *e. g. Broward County School Board*, 6 FPER § 11088 (Fla. PERC, 1980); *Union County Board of Education*, 2 NJPER 50 (N.J. PERC, 1976). Differentiation in access is also permitted in federal employment, and, indeed, it may be an unfair labor practice under 5 U. S. C. § 7116(a)(3) (1976) to grant access to internal communication facilities to unions other than the exclusive representative. That provision states that it shall be an unfair labor practice for an agency to "sponsor, control or otherwise assist any labor organization" aside from routine services provided other unions of "equivalent status." A number of administrative decisions construing this language as it earlier appeared in Executive Order 11491, § 19(a)(3), have taken this view. See, *e. g.*, Dept. of the Army, Asst. Sec. Labor/Management Reports (A/SLMR) No. 654 (U. S. Dept. of Labor, 1976); Commissary, Fort Meade, Dept. of the Army, A/SLMR No. 793; U. S. Dept. of Labor of Labor (1977); Dept of the Air Force, Grissom Air Force Base, A/SLMR No. 852 (U. S. Dept of Labor, 1977); Dept of Transportation, Federal Aviation Administration, 2 FLRA No. 48 (1979).

Exclusive access provisions in the private sector have not been directly challenged, and thus have yet to be expressly approved, but the Board and the courts have invalidated only those restrictions that prohibit individual employees from soliciting and distributing union literature during nonworking hours in nonworking areas. *NLRB* v. *Magnavox Co.*, 415 U. S. 322 (1974); *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793 (1945); *NLRB* v. *Arrow Molded Plastics, Inc.*, 653 F. 2d 280, 283–284 (CA6 1981); *General Motors Corp.*, 212 NLRB 133, 134 (1974). The Court of Appeals' view that *NLRB* v. *Magnavox Co.*, *supra*, held that an exclusive access provision such as this would be impermissible under the National Labor Relations Act, 29 U. S. C. §§ 151–169 (1976), is a clear misreading of our decision.

[12] *Haukvedahl* v. *School District No. 108*, No. 75C–3641 (N.D. Ill. 1976). This factor was discounted by the Court of Appeals because there is no showing in the record of past disturbances stemming from PLEA's past access to the internal mail system or evidence that future disturbance would be likely. We have not required that such proof be present to justify the denial of access to a non-public forum on grounds that the proposed use may disrupt the property's intended function. See, *e. g.*, *Greer* v. *Spock*, 424 U. S. 828 (1976).

[13] The Court of Appeals was also mistaken in finding that the exclusive access policy was not closely tailored to the official responsibilities of PEA. The Court of Appeals thought the policy overinclusive—because the collec-

Finally, the reasonableness of the limitations on PLEA's access to the school mail system is also supported by the substantial alternative channels that remain open for union-teacher communication to take place. These means range from bulletin boards to meeting facilities to the United State mail. During election periods, PLEA is assured of equal access to all modes of communication. There is no showing here that PLEA's ability to communicate with teachers is seriously impinged by the restricted access to the internal mail system. The variety and type of alternative modes of access present here compare favorably with those in other non-public forum cases where we have upheld restrictions on access. See, *e. g. Greer* v. *Spock*, 424 U. S. at 839 (servicemen free to attend political rallies off-base); *Pell* v. *Procunier*, 417 U. S. 817, 827–828 (1974) (prison inmates may communicate with media by mail and through visitors).

IV

The Court of Appeals also held that the differential access provided the rival unions constituted impermissible content discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. We have rejected this contention when cast as a First Amendment argument, and it fares no better in equal protection garb. As we have explained above, PLEA did not have a First Amendment or other right of access to the interschool mail system. The grant of such access to PEA, therefore, does not burden a fundamental right of the PLEA. Thus, the decision to grant such privileges to the PEA need not be tested by the strict scrutiny applied when government action impinges upon a fundamental right protected by the Constitution. See *San Antonio School District* v. *Rodriguez*, 411 U. S. 1, 17 (1973). The school district's policy need only rationally further a legitimate state purpose. That purpose is clearly found in the special responsibilities of an exclusive bargaining representative. See *supra*, at 13–15.

The Seventh Circuit and PLEA rely on *Police Department of Chicago* v. *Mosely*, 408 U. S. 92 (1972) and *Carey* v. *Brown*, 447 U. S. 455 (1980). In *Mosely* and *Carey*, we struck down prohibitions on peaceful picketing in a public forum. In *Mosely*, the City of Chicago permitted peaceful picketing on the subject of a school's labor-management dispute, but prohibited other picketing in the immediate vicinity of the school. In *Carey*, the challenged state statute barred all picketing of residences and dwellings except the peaceful picketing of a place of employment involved in a labor dispute. In both cases, we found the distinction between classes of speech violative of the Equal Protection Clause. The key to those decisions, however, was the presence of a public forum.[14] In a public forum, by definition, all parties have a constitutional right of access and the state must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject.

When speakers and subjects are similarly situated, the state may not pick and choose. Conversely on government property that has not been made a public forum, not all speech is equally situated, and the state may draw distinctions which relate to the special purpose for which the property is used. As we have explained above, for a school mail facility, the difference in status between the exclusive bargaining representative and its rival is such a distinction.

V

The Court of Appeals invalidated the limited privileges PEA negotiated as the bargaining voice of the Perry Township teachers by misapplying our cases that have dealt with the rights of free expression on streets, parks and other fora generally open for assembly and debate. Virtually every other court to consider this type of exclusive access policy has upheld it as constitutional, see n. 6, *supra*, and today, so do we. The judgment of the Court of Appeals is

Reversed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE POWELL, and JUSTICE STEVENS join, dissenting.

The Court today holds that an incumbent teachers' union may negotiate a collective bargaining agreement with a school board that grants the incumbent access to teachers' mailboxes and to the interschool mail system and denies such access to a rival union. Because the exclusive access provision in the collective bargaining agreement amounts to viewpoint discrimination that infringes the respondents' First Amendment rights and fails to advance any substantial state interest, I dissent.[1]

I

The Court properly acknowledges that teachers have protected First Amendment rights within the school context. See *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503, 506 (1969). In particular, we have held that teachers may not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work. . . ." *Pickering* v. *Board of Education*, 391 U. S. 563, 568 (1968). See also *Mount Healthy City Board of Education* v. *Doyle*, 429 U. S. 274, 284 (1977). We also have recognized in the school context the First Amendment right of "individuals to associate to further their personal beliefs," *Healy* v. *James*, 408 U. S. 169, 181 (1972), and have acknowledged the First Amendment rights of dissident teachers in matters involving labor relations. *City of Madison Joint School District* v. *Wisconsin Employment Relations Commission*, 429 U. S. 167, 176, n. 10 (1976). Against this background it is clear that the exclusive access policy in this case implicated the respondents' First Amendment rights by restricting their freedom of expression on issues important to the operation of the school system. As the Court of Appeals suggested, this speech is "if not at the very apex of any hierarchy of pro-

tive bargaining agreement does not limit PEA's use of the mail system to messages related to its special legal duties. The record, however, does not establish that PEA enjoyed or claimed unlimited access by usage or otherwise; indeed, the collective bargaining agreement indicates that the right of access was accorded to PEA "acting as the representative of the teachers . . ." In these circumstances, we do not find it necessary to decide the reasonableness of a grant of access for unlimited purposes.

The Court of Appeals also indicated that the access policy was underinclusive because the school district permits outside organizations with no special duties to teachers to use the system. As we have already noted in text, see p. 10, *supra*, there was no district policy of open access for private groups and, in any event, the provision of access to these private groups does not undermine the reasons for not allowing similar access by a rival labor union. See *Greer* v. *Spock*, 424 U. S. 828, 838 n. 10 (1976) ("The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix . . . surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever.")

[14] The Court emphasized the point in both cases. *Mosely*, *supra*, at 96 ("Selective exclusions from a public forum may not be based on content alone,"); *Carey*, *supra*, at 461 ("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").

[1] I agree with the Court's conclusion that the appeal should be dismissed for want of appellate jurisdiction. See *ante*, at ——.

tected speech, at least not far below it." *Perry Local Educators' Association* v. *Hohlt*, 652 F. 2d 1286, 1299 (CA7 1981).

From this point of departure the Court veers sharply off course. Based on a finding that the interschool mail system is not a "public forum," *ante*, at ——, the Court states that the respondents have no right of access to the system, *id.*, and that the school board is free "to make distinctions in access on the basis of subject matter and speaker identity," *id.*, if the distinctions are "reasonable in light of the purpose which the forum at issue serves." *Ibid.* (footnote omitted). According to the Court, the petitioner's status as the exclusive bargaining representative provides a reasonable basis for the exclusive access policy.

The Court fundamentally misperceives the essence of the respondents' claims and misunderstands the thrust of the Court of Appeals' well-reasoned opinion. This case does not involve an "absolute access" claim. It involves an "equal access" claim. As such it does not turn on whether the internal school mail system is a "public forum." In focusing on the public forum issue, the Court disregards the First Amendment's central proscription against censorship, in the form of viewpoint discrimination, in any forum, public or nonpublic.

A

The First Amendment's prohibition against government discrimination among viewpoints on particular issues falling within the realm of protected speech has been noted extensively in the opinions of this Court. In *Niemotko* v. *Maryland*, 340 U. S. 268 (1951), two Jehovah's Witnesses were denied access to a public park to give Bible talks. Members of other religious organizations had been granted access to the park for purposes related to religion. The Court found that the denial of access was based on public officials' disagreement with the Jehovah's Witnesses' views, *id.*, at 272, and held it invalid. During the course of its opinion, the Court stated: "The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body." *Ibid.* In a concurring opinion, Justice Frankfurter stated that "to allow expression of religious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment." *Id.*, at 273, 284 (Frankfurter, J., concurring in result). See also *Fowler* v. *Rhode Island*, 345 U. S. 67, 69 (1953).

In *Tinker* v. *Des Moines Independent Community School District*, *supra*, we held unconstitutional a decision by school officials to suspend students for wearing black armbands in protest of the war in Vietnam. The record disclosed that school officials had permitted students to wear other symbols relating to politically significant issues. *Id.*, at 510. The black armbands, however, as symbols of opposition to the Vietnam War, had been singled out for prohibition. We stated: "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Id.*, at 511.

City of Madison Joint School District v. *Wisconsin Employment Relations Commission*, *supra*, considered the question of whether a state may constitutionally require a board of education to prohibit teachers other than union representatives from speaking at public meetings about matters relating to pending collective bargaining negotiations. The board had been found guilty of a prohibited labor practice for permitting a teacher to speak who opposed one of the proposals advanced by the union in contract negotiations. The board was ordered to cease and desist from permitting employees, other than union representatives, to appear and to speak at board meetings on matters subject to collective bargaining. We held this order invalid. During the course of our opinion we stated: "Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech. See *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972)." 429 U. S., at 176 (footnote omitted).[2]

There is another line of cases, closely related to those implicating the prohibition against viewpoint discrimination, that have addressed the First Amendment principle of subject matter, or content, neutrality. Generally, the concept of content neutrality prohibits the government from choosing the subjects that are appropriate for public discussion. The content neutrality cases frequently refer to the prohibition against viewpoint discrimination and both concepts have their roots in the First Amendment's bar against censorship. 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. The content neutrality principle can be seen as an outgrowth of the core First Amendment prohibition against viewpoint discrimination. See generally, Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81 (1978).

We have invoked the prohibition against content discrimination to invalidate government restrictions on access to public forums. See, *e. g.*, *Carey* v. *Brown*, 447 U. S. 455 (1980); *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972); *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972). We also have relied on this prohibition to strike down restrictions on access to a limited public forum. See, *e. g.*, *Widmar* v. *Vincent*, 454 U. S. 263 (1981). Finally, we have applied the doctrine of content neutrality to government regulation of protected speech in cases in which no restriction of access to public property was involved. See, *e. g.*, *Consolidated Edison Company* v. *Public Service Commission*, 447 U. S. 530 (1980); *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205 (1975). See also *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490, 513, 515, 516 (1981) (plurality opinion).

Admittedly, this Court has not always required content neutrality in restrictions on access to government property. We upheld content-based exclusions in *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974), in *Greer* v. *Spock*, 424

[2] See also *Widmar* v. *Vincent*, 454 U. S. 263, 280 (1981) (STEVENS, J., concurring in judgment) ("[T]he university . . . may not allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted. If a state university is to deny recognition to a student organization—or is to give it a lesser right to use school facilities than other student groups—it must have a valid reason for doing so"); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 784–786 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. . . . Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended" (citation omitted) (footnote omitted)); *Healy* v. *James*, 408 U. S. 169, 187–188 (1972) ("the state "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent").

U. S. 828 (1976), and in *Jones* v. *North Carolina Prisoners' Union*, 433 U. S. 119 (1977). All three cases involved an unusual forum, which was found to be nonpublic, and the speech was determined for a variety of reasons to be incompatible with the forum. These cases provide some support for the notion that the government is permitted to exclude certain subjects from discussion in nonpublic forums.[3] They provide no support, however, for the notion that government, once it has opened up government property for discussion of specific subjects, may discriminate among viewpoints on those topics. Although *Greer*, *Lehman*, and *Jones* permitted content-based restrictions, none of the cases involved viewpoint discrimination. All of the restrictions were viewpoint-neutral. We expressly noted in *Greer* that the exclusion was "objectively and evenhandedly applied. . . ." 424 U. S., at 839.[4]

Once the government permits discussion of certain subject matter, it may not impose restrictions that discriminate among viewpoints on those subjects whether a nonpublic forum is involved or not.[5] This prohibition is implicit in the *Mosley* line of cases, in *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969), and in those cases in which we have approved content-based restrictions on access to government property that is not a public forum. We have never held that government may allow discussion of a subject and then discriminate among viewpoints on that particular topic, even if the government for certain reasons may entirely exclude discussion of the subject from the forum. In this context, the greater power does not include the lesser because for First Amendment purposes exercise of the lesser power is more threatening to core values. Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of "free speech."

B

Against this background, it is clear that the Court's approach to this case is flawed. By focusing on whether the interschool mail system is a public forum, the Court disregards the independent First Amendment protection afforded by the prohibition against viewpoint discrimination.[6] This case does not involve a claim of an absolute right of access to the forum to discuss any subject whatever. If it did, public forum analysis might be relevant. This case involves a claim of equal access to discuss a subject that the board has approved for discussion in the forum. In essence, the respondents are not asserting a right of access at all; they are asserting a right to be free from discrimination. The critical inquiry, therefore, is whether the board's grant of exclusive access to the petitioner amounts to prohibited viewpoint discrimination.

II

The Court addresses only briefly the respondents' claim that the exclusive access provision amounts to viewpoint discrimination. In rejecting this claim, the Court starts from the premise that the school mail system is not a public forum[7] and that, as a result, the board has no obligation to grant access to the respondents. The Court then suggests that there is no indication that the board intended to discourage one viewpoint and to advance another. In the Court's view, the exclusive access policy is based on the status of the respective parties rather than on their views. The Court then states that "implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis

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[3] There are several factors suggesting that these decisions are narrow and of limited importance. First, the forums involved were unusual. A military base was involved in *Greer* v. *Spock*, 424 U. S. 828 (1976), advertising space on a city transit system in *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974), and a prison in *Jones* v. *North Carolina Prisoners' Union*, 433 U. S. 119 (1977). Moreover, the speech involved was arguably incompatible with each forum, especially in *Greer*, which involved speeches and demonstrations of a partisan political nature on a military base, and in *Jones*, which involved labor union organizational activities in a prison. Finally, we have noted the limited scope of *Greer* and *Lehman* in subsequent opinions. See, *e. g.*, *Consolidated Edison Company* v. *Public Service Commission*, 447 U. S. 530, 539–540 (1980); *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490, 514, n. 19 (1981) (plurality opinion); *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 209 (1975).

[4] In his concurring opinion in *Greer* v. *Spock*, *supra*, JUSTICE POWELL noted the absence of any viewpoint discrimination in the regulations and stated that the military authorities would be barred from discriminating among viewpoints on political issues. 424 U. S. at 848, n. 3.

In other cases in which we have upheld restrictions on access to government property, the restrictions have been both content and viewpoint-neutral. See, *e. g.*, *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U. S. 114 (1981); *Adderley* v. *Florida*, 385 U. S. 39 (1966).

[5] This is not to suggest that a government may not close a nonpublic forum altogether or limit access to the forum to those involved in the "official business" of the agency. Restrictions of this type are consistent with the government's right "to preserve the property under its control for the use to which it is lawfully dedicated." *Ante*, at —— (quoting *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U. S. 114, 129 (1981)). Limiting access to a nonpublic government forum to those involved in the "official business" of the agency also protects the government's interest, *qua* government, in speaking clearly and definitively.

[6] Lower courts have recognized that the prohibition against viewpoint discrimination affords speakers protection independent of the public forum doctrine. See, *e. g.*, *National Black United Fund, Inc.* v. *Devine*, 215 U. S. App. D.C. 130, 136, 667 F. 2d 173, 179 (1981); *Jaffe* v. *Alexis*, 659 F. 2d 1018, 1020–1021, n. 2 (CA9 1981); *Bonner-Lyons* v. *School Committee of the City of Boston*, 480 F. 2d 442, 444 (CA1 1973). In *Jaffe*, the Ninth Circuit stated: "When the content of the speaker's message forms the basis for its selective regulation, public forum analysis is no longer crucial; the government must still justify the restriction and the justification 'must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove of the speaker's views.'" *Jaffe* v. *Alexis*, *supra*, at 1020–1021, n. 2 (citations omitted). See also *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 454 U. S. 114, 136, 140 (1981) (BRENNAN, J., concurring in the judgment).

In *Greer* v. *Spock*, *supra*, I suggested that an undue focus on public forum issues can blind the Court to proper regard for First Amendment interests. After noting that "the notion of 'public forum' has never been the touchstone of public expression . . . ," *id.*, at 859 (BRENNAN, J., dissenting), I stated:

"Those cases permitting public expression without characterizing the locale involved as a public forum, together with those cases recognizing the existence of a public forum, albeit qualifiedly, evidence the desirability of a flexible approach to determining whether public expression should be protected. Realizing that the permissibility of a certain form of public expression at a given locale may differ depending on whether it is asked if the locale is a public forum or if the form of expression is compatible with the activities occurring at the locale, it becomes apparent that there is a need for a flexible approach. Otherwise, with the rigid characterization of a given locale as not a public forum, there is the danger that certain forms of public speech at the locale may be suppressed, even though they are basically compatible with the activities otherwise occurring at the locale." *Id.*, at 859–860.

[7] It is arguable that the school mail system could qualify for treatment as a public forum of some description if one focuses on whether "'the manner of expression is incompatible with the normal activity of a particular place at a particular time.' *Grayned* v. *City of Rockford*, *supra*, 408 U. S. at 116." *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U. S. 114, 136 (1981) (BRENNAN, J., concurring in the judgment). It is difficult to see how granting the respondents access to the mailboxes would be incompatible with the normal activities of the school especially in view of the fact that the petitioner and outside groups enjoy such access. The petitioner's messages, and certainly those of the outside groups, do not appear to be any more compatible with the normal activity of the school than the respondents' messages would be. It is not necessary to reach this issue, however, in view of the existence of impermissible viewpoint discrimination.

of subject matter and speaker identity." *Ante*, at ——. According to the Court, "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." *Ibid.*

As noted, whether the school mail system is a public forum or not the board is prohibited from discriminating among viewpoints on particular subjects. Moreover, whatever the right of public authorities to impose content-based restrictions on access to government property that is a nonpublic forum,[8] once access is granted to one speaker to discuss a certain subject access may not be denied to another speaker based on his viewpoint. Regardless of the nature of the forum, the critical inquiry is whether the board has engaged in prohibited viewpoint discrimination.

The Court responds to the allegation of viewpoint discrimination by suggesting that there is no indication that the board intended to discriminate and that the exclusive access policy is based on the parties' status rather than on their views. In this case, for the reasons discussed below, see *infra*, at ——, the intent to discriminate can be inferred from the effect of the policy, which is to deny an effective channel of communication to the respondents, and from other facts in the case. In addition, the petitioner's status has nothing to do with whether viewpoint discrimination in fact has occurred. If anything, the petitioner's status is relevant to the question of whether the exclusive access policy can be justified, not to whether the board has discriminated among viewpoints. See *infra*, at ——.

Addressing the question of viewpoint discrimination directly, free of the Court's irrelevant public forum analysis, it is clear that the exclusive access policy discriminates on the basis of viewpoint. The Court of Appeals found that "the access policy adopted by the Perry schools, in form a speaker restriction, favors a particular viewpoint on labor relations in the Perry schools . . . : the teachers inevitably will receive from [the petitioner] self-laudatory descriptions of its activities on their behalf and will be denied the critical perspective offered by [the respondents]." *Perry Local Educators' Association* v. *Hohlt*, 652 F. 2d 1286, 1296 (CA7 1981). This assessment of the effect of the policy is eminently reasonable. Moreover, certain other factors strongly suggest that the policy discriminates among viewpoints.

On a practical level, the only reason for the petitioner to seek an exclusive access policy is to deny its rivals access to an effective channel of communication. No other group is explicitly denied access to the mail system. In fact, as the Court points out, *ante*, at ——, many other groups have been granted access to the system. Apparently, access is denied to the respondents because of the likelihood of their expressing points of view different from the petitioner's on a range of subjects. The very argument the petitioner advances in support of the policy, the need to preserve labor peace, also indicates that the access policy is not viewpoint-neutral.

In short, the exclusive access policy discriminates against the respondents based on their viewpoint. The board has agreed to amplify the speech of the petitioner, while repressing the speech of the respondents based on the respondents' point of view. This sort of discrimination amounts to censorship and infringes the First Amendment rights of the respondents. In this light, the policy can survive only if the petitioner can justify it.

III

In assessing the validity of the exclusive access policy, the Court of Appeals subjected it to rigorous scrutiny. *Perry Local Educators' Association* v. *Hohlt*, *supra*, at 1296. The court pursued this course after a careful review of our cases and a determination that "no case has applied any but the most exacting scrutiny to a content or speaker restriction that substantially tended to favor the advocacy of one point of view on a given issue." *Id.*, at 1296. The Court of Appeals' analysis is persuasive. In light of the fact that viewpoint discrimination implicates core First Amendment values, the exclusive access policy can be sustained "only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Company* v. *Public Service Commission*, 447 U. S. 530, 540 (1980). Cf. *Carey* v. *Brown*, 447 U. S. 455, 461–62 (1980) (to be valid legislation must be "finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized"); *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 98–99 (1972) (discriminations "must be tailored to serve a substantial governmental interest").

A

The petitioner attempts to justify the exclusive access provision based on its status as the exclusive bargaining representative for the teachers and on the state's interest in efficient communication between collective bargaining representatives and the members of the unit. The petitioner's status and the state's interest in efficient communication are important considerations. They are not sufficient, however, to sustain the exclusive access policy.

As the Court of Appeals pointed out, the exclusive access policy is both "overinclusive and underinclusive" as a means of serving the state's interest in the efficient discharge of the petitioner's legal duties to the teachers. *Perry Local Educators' Association* v. *Hohlt*, *supra*, at 1300. The policy is overinclusive because it does not strictly limit the petitioner's use of the mail system to performance of its special legal duties and underinclusive because the board permits outside organizations with no special duties to the teachers, or to the students, to use the system. *Ibid.* The Court of Appeals also suggested that even if the board had attempted to tailor the policy more carefully by denying outside groups access to the system and by expressly limiting the petitioner's use of the system to messages relating to its official duties, "the fit would still be questionable, for it might be difficult—both in practice and in principle—effectively to separate 'necessary' communications from propaganda." *Ibid.* The Court of Appeals was justly concerned with this problem, because the scope of the petitioner's "legal duties" might be difficult, if not impossible, to define with precision. In this regard, we alluded to the potential scope of collective bargaining responsibilities in *City of Madison Joint School District* v. *Wisconsin Employment Relations Commission*, 429 U. S. 167 (1976), when we stated: "[T]here is virtually no subject concerning the operation of the school system that could not also be characterized as a potential subject of collective bargaining." *Id.*, at 177.[9]

[8] The Court's reference to the government's right to make distinctions in access based on "speaker identity" might be construed as a reference to the government's interest in restricting access to a nonpublic forum to those involved in the "official business" of the particular agency. See note 5, *supra*. The "speaker identity" distinction in this case, however, cannot be justified on this basis. See note 10, *infra*.

[9] The Court rejects the Court of Appeals' finding that the exclusive access policy was overinclusive on the ground that "the record . . . does not establish that [the petitioner] enjoyed or claimed unlimited access by usage or otherwise; indeed, the collective bargaining agreement indicates that the right of access was accorded to [the petitioner] 'acting as the representative of the teachers . . . .'" *Ante*, at ——, n. 13. Under these circum-

Putting aside the difficulties with the fit between this policy and the asserted interests, the Court of Appeals properly pointed out that the policy is invalid "because it furthers no discernible state interest." *Perry Local Educators' Association* v. *Hohlt*, *supra*, at 1300. While the board may have a legitimate interest in granting the petitioner access to the system, it has no legitimate interest in making that access exclusive by denying access to the respondents. As the Court of Appeals stated: "Without an independent reason why equal access for other labor groups and individual teachers is undesirable, the special duties of the incumbent do not justify opening the system to the incumbent alone." *Ibid.* In this case, for the reasons discussed below, there is no independent reason for denying access to the respondents.[10]

B

The petitioner also argues, and the Court agrees, *ante*, at ——, that the exclusive access policy is justified by the state's interest in preserving labor peace. As the Court of Appeals found, there is no evidence on this record that granting access to the respondents would result in labor instability. *Id.*, at 1301.[11] In addition, there is no reason to assume that the respondents' messages would be any more likely to cause labor discord when received by members of the majority union than the petitioner's messages would when received by the respondents. Moreover, it is noteworthy that both the petitioner and the respondents had access to the mail system for some time prior to the representation election. See *ante*, at ——. There is no indication that this policy resulted in disruption of the school environment.[12]

Although the state's interest in preserving labor peace in the schools in order to prevent disruption is unquestionably substantial, merely articulating the interest is not enough to sustain the exclusive access policy in this case. There must be some showing that the asserted interest is advanced by the policy. In the absence of such a showing, the exclusive access policy must fall.[13]

C

Because the grant to the petitioner of exclusive access to the internal school mail system amounts to viewpoint discrimination that infringes the respondents' First Amendment rights and because the petitioner has failed to show that the

stances, the Court suggests that it is unnecessary "to decide the reasonableness of a grant of access for unlimited purposes." *Ibid.* This argument is flawed in three ways. First, the Court of Appeals found that "the collective bargaining agreement [did] not limit [the petitioner's] use of the mail system to messages related to its special legal duties . . . ," *Perry Local Educators Association* v. *Hohlt*, 652 F. 2d 1286, 1300 (CA7 1981), and there is nothing in the record to indicate that the petitioner did *not* enjoy unlimited access. Second, we noted above the nearly limitless scope of collective bargaining responsibilities. See *supra*, at ——. With no apparent monitoring of the petitioner's messages by the board, *Perry Local Educators' Association* v. *Hohlt*, *supra*, at 1293, n. 29, it is clear that there is no real limit to the petitioner's "special legal duties." Finally, even assuming that the board had a narrowly tailored policy that expressly limited the petitioner's access to official messages and included school monitoring of the messages, it still would be difficult, as the Court of Appeals pointed out, "to separate 'necessary' communications from propaganda." *Id.*, at 1300.

The Court rejects the Court of Appeals' determination that the policy was underinclusive on the ground that there was no district policy of "open access for private groups and, in any event, the provision of access to these private groups does not undermine the reasons for not allowing similar access by a rival labor union." *Ante*, at ——, n. 13 (citing *Greer* v. *Spock*, 424 U. S. 828, 838, n. 10 (1976)). Even though there was no apparent policy of open access, the provision of access to outside groups certainly undermines the petitioner's asserted justification for the policy and establishes that the policy is overinclusive with respect to that justification. Moreover, if *all* unions were denied access to the mail system, there might be some force to the Court's reliance on *Greer* for the notion that granting access to some groups does not undermine the reasons for denying it to others. But in a case where the government grants access to one labor group, and denies it to another, *Greer* is irrelevant because even read broadly *Greer* does not support a right on the part of the government to discriminate among viewpoints on subjects approved for discussion in the forum. See *supra*, at ——.

[10] A variant of the "special legal duties" justification for the exclusive access policy is the "official business" justification. As noted, see note 5, *supra*, the government has a legitimate interest in limiting access to a nonpublic forum to those involved in the "official business" of the agency. This interest may justify restrictions based on speaker identity, as for example, when a school board denies access to a classroom to persons other than teachers. Such a speaker identity restriction may have a viewpoint discriminatory effect, but it is justified by the government's interest in clear, definitive classroom instruction.

In this case, an "official business" argument is inadequate to justify the exclusive access policy for many of the same reasons that the "special legal duties" rationale is inadequate. As with its relation to the "special legal duties" argument, the exclusive access policy is both overinclusive and underinclusive with respect to an "official business" justification. First, as the Court of Appeals pointed out, the school board neither monitors nor endorses the petitioner's messages. *Perry Local Educators' Association* v. *Hohlt*, *supra*, at 1293, n. 29. In this light, it is difficult to consider the petitioner an agent of the board. Moreover, in light of the virtually unlimited scope of a union's collective bargaining duties, it expands the definition of "official business" beyond any clear meaning to suggest that the petitioner's messages are always related to the school system's "official business."

More importantly, however, the only board policy discernible from this record involves a denial of access to one group: the respondents. The board has made no explicit effort to restrict access to those involved in the "official business" of the schools. In fact, access has been granted to outside groups such as parochial schools, church groups, YMCAs, and Cub Scout units. See *ante*, at ——. It is difficult to discern how these groups are involved in the "official business" of the school. The provision of access to these groups strongly suggests that the denial of access to the respondents was not based on any desire to limit access to the forum to those involved in the "official business" of the schools; instead, it suggests that it was based on hostility to the point of view likely to be expressed by the respondents. The board simply has agreed to shut out one voice on a subject approved for discussion in the forum. This is impermissible.

[11] The Court suggests that proof of disruption is not necessary "to justify the denial of access to a non-public forum on grounds that the proposed use may disrupt the property's intended function," *ante*, at ——, n. 12, and again cites *Greer* v. *Spock*, *supra*. In *Tinker* v. *Des Moines Community School District*, 393 U. S. 503 (1969), which is discussed *supra*, at ——, we noted that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.*, at 508. Later, we stated that "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." *Id.*, at 509 (citation omitted). Finally, we stated that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Id.*, at 511. It is noteworthy that *Tinker* involved what the Court would be likely to describe as a nonpublic forum. See also *City of Madison Joint School District* v. *Wisconsin Employment Relations Commission*, 429 U. S. 167, 173–174 (1976); *Healy* v. *James*, 408 U. S. 169, 190–191 (1972). These cases establish that the state must offer evidence to support an allegation of potential disruption in order to sustain a restriction on protected speech.

[12] It appears, therefore, that the exclusive access provision was included solely at the demand of the majority union in collective bargaining negotiations. We note that, in this case, the school board did not even seek review of the Court of Appeals' holding that the mailboxes and the interschool mail system must be open to both unions.

[13] The Court also cites the availability of alternative channels of communication in support of the "reasonableness" of the exclusive access policy. *Ante*, at ——. In a detailed discussion, the Court of Appeals properly concluded that the other channels of communication available to the respondents were "not nearly as effective as the internal mail system." *Perry Local Educators' Association* v. *Hohlt*, *supra*, at 1299. See also *id.*, at 1299–1300. In addition, the Court apparently disregards the principle that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U. S. 147, 163 (1939). In this case, the existence of inferior alternative channels of communication does not affect the conclusion that the petitioner has failed to justify the viewpoint-discriminatory exclusive access policy.

policy furthers any substantial state interest, the policy must be invalidated as violative of the First Amendment.

IV

In order to secure the First Amendment's guarantee of freedom of speech and to prevent distortions of "the marketplace of ideas," see *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting), governments generally are prohibited from discriminating among viewpoints on issues within the realm of protected speech. In this case the board has infringed the respondents' First Amendment rights by granting exclusive access to an effective channel of communication to the petitioner and denying such access to the respondents. In view of the petitioner's failure to establish even a substantial state interest that is advanced by the exclusive access policy, the policy must be held to be constitutionally infirm. The decision of the Court of Appeals should be affirmed.

ROBERT H. CHANIN, Washington, D.C. (MICHAEL H. GOTTESMAN, ROBERT M. WEINBERG, BREDHOFF & KAISER, RICHARD J. DARKO, BAYH, TABBERT & CAPEHART, with him on the brief) for appellant; RICHARD L. ZWEIG, Indianapolis, Ind. (LAWRENCE M. REUBEN and ATLAS, HYATT & REUBEN, with him on the brief) for appellees.

No. 81–927

CONNECTICUT, PETITIONER *v.* LINDSAY B. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

Syllabus

No. 81–927. Argued October 13, 1982—Decided February 23, 1983

Upon a jury trial in a Connecticut state court, respondent was convicted of all the charges under a multicount information, including charges of attempted murder and robbery. The trial court's general instructions to the jury included an instruction that "a person's intention may be inferred from his conduct and every person is conclusively presumed to intend the natural and necessary consequences of his act." In specific instructions on the elements of each crime, the charge as to attempted murder again referred to a conclusive presumption of intent, but the instructions on robbery did not contain any further discussion of intent. While respondent's appeal was pending, this Court decided *Sandstrom* v. *Montana*, 442 U. S. 510, which held that the Due Process Clause of the Fourteenth Amendment was violated by a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts," because a reasonable juror might have viewed it as creating a conclusive persumption of intent or as shifting the burden of proof as to intent. *Sandstrom* left open the question whether, if a jury is so instructed, the error can ever be harmless. Thereafter, the Connecticut Supreme Court, while affirming respondent's convictions on other counts in the information, reversed his convictions for attempted murder and robbery. Without discussing the State's argument that the *Sandstrom* violation was harmless, the court concluded that the unconstitutional "conclusive presumption" language in the general instructions was not cured by the specific instructions on attempted murder and robbery.

Held: The judgment is affirmed.

185 Conn. ——, 440 A. 2d 858, affirmed.

JUSTICE BLACKMUN, joined by JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL, concluded that the instructional error deprived respondent of "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," *Chapman* v. *California*, 386 U. S. 18, 23. No matter how strong the prosecution's evidence, a reviewing court cannot find beyond a reasonable doubt that a *Sandstrom* error did not contribute to the jury's verdict. A trial judge may not direct a jury to return a guilty verdict regardless of how overwhelmingly the evidence may point in that direction, and a conclusive presumption on the issue of intent is the functional equivalent of a directed verdict on that issue. Respondent's jurors reasonably could have interpreted the instructions as requiring a conclusive presumption on the issue of intent, an element of the crimes charged, leading them to ignore the evidence—including evidence relating to respondent's apparent defense that he intended to borrow rather than steal the victim's car and that he did not intend to kill the victim—in finding that the State had proved respondent guilty beyond a reasonable doubt. If so, a reviewing court cannot hold that the error did not contribute to the verdict, since the fact that the reviewing court may view the evidence of intent as overwhelming is irrelevant. While there may be rare situtations in which the reviewing court can be confident that a *Sandstrom* error did not play any role in the jury's verdict—such as where, by raising a particular defense or by his other actions, the defendant himself has taken the issue of intent from the jury—such an exception, regardless of its boundaries, does not apply here.

JUSTICE STEVENS concluded that no federal question was raised by the Connecticut Supreme Court's refusal to consider whether the *Sandstrom* error here was harmless and that therefore the writ of certiorari should simply be dismissed. However, because a fifth vote was necessary to authorize the entry of a Court judgment, he joined the disposition allowing the Connecticut Supreme Court's judgment to stand.

BLACKMUN, J., announced the judgment of the Court, and delivered an opinion, in which BRENNAN, WHITE, and MARSHALL, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment. BURGER, C. J., filed a dissenting opinion. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined.

JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion in which JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL joined.

In *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), this Court held that the Due Process Clause of the Fourteenth Amendment was violated by a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.*, at 512. We expressly left open in that case the question whether, if a jury is so instructed, the error can ever be harmless. *Id.*, at 526–527. Since *Sandstrom*, courts have taken different approaches to the harmless error problem.[1] We therefore granted certiorari in this litigation to resolve the conflict. 455 U. S. 937 (1982).

I

A

Respondent Lindsay B. Johnson was accused in a four-count information of attempted murder, kidnaping in the second degree, robbery in the first degree, and sexual assault in the first degree. His jury trial in Connecticut Superior Court concluded with a verdict of guilty on all counts.

The evidence at trial revealed the following sequence of events: At approximately 11:00 p.m. on December 20, 1975, respondent and three male companions were in an automobile

[1] Several state and federal courts have assumed or held that *Sandstrom* errors may well be harmless, and have then gone on to decide whether the evidence of guilt was overwhelming. See, *e. g.*, *Lamb* v. *Jernigan*, 683 F. 2d 1332, 1342–1343 (CA11 1982); *Jacks* v. *Duckworth*, 651 F. 2d 480, 487 (CA7 1981), cert. denied, 454 U. S. 1147 (1982); *People* v. *Wright*, 408 Mich. 1, 30–32, 289 N.W. 2d 1, 10–12 (1980); *State* v. *McKenzie*, —— Mont. ——, ——, 608 P. 2d 428, 458–459, cert. denied, 449 U. S. 1050 (1980). Other courts have taken a narrower view, holding that whether an unconstitutional presumption is harmless depends on whether intent was a disputed issue in the case. See, *e. g.*, *United States* v. *Winter*, 663 F. 2d 1120, 1144–1145 (CA1 1981), cert. pending, No. 81–1392; *McGuinn* v. *Crist*, 657 F. 2d 1107, 1108–1109 (CA9 1981), cert. denied, 455 U. S. 990 (1982); *Washington* v. *Harris*, 650 F. 2d 447, 453–454 (CA2 1981) (dictum), cert. denied, 455 U. S. 951 (1982); see also *People* v. *Thomas*, 50 N.Y. 2d 467, 477, 407 N.E. 2d 430, 436 (1980) (concurring opinion). Still other courts have suggested that *Sandstrom* errors can never be harmless. See, *e. g.*, *Hammontree* v. *Phelps*, 605 F. 2d 1371, 1380 (CA5 1979); *State* v. *Truppi*, 182 Conn. 449, 466, 438 A. 2d 712, 721 (1980), cert. denied, 451 U. S. 941 (1981). See also *Dietz* v. *Solem*, 640 F. 2d 126, 131 (CA8 1981).

OFFICE OF PERSONNEL MANAGEMENT
OFFICE OF THE GENERAL COUNSEL

Dear "H.P.",

Joe is out of town this weekend. He asked me to drop this off at your office. The regs were sent to Fed Reg. on Friday, July 2. Call him Tuesday if you have any questions.

Jorge Velez

GC 60 3/79

Publication date: JUL 6 1982
6325-01

OPM

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 950

Solicitation of Federal Civilian and Uniformed Services Personnel for Contributions to Private Voluntary Organizations

AGENCY: Office of Personnel Management.

ACTION: Final rule

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing regulations governing solicitation of Federal civilian and uniformed services personnel for contributions to private voluntary organizations under the authority of Executive Order No. 12353, Charitable Fund-Raising, of March 23, 1982. These regulations provide a system for administering the annual solicitation campaigns and establish requirements for organization participation.

EFFECTIVE DATE: (On Publication.)

FOR FURTHER INFORMATION CONTACT: Joseph S. Patti, Special Assistant for Regional Operations, (202) 632-5544.

more -------->>

SUPPLEMENTARY INFORMATION: On Monday, May 11, 1982, the U.S. Office of Personnel Management (OPM) published proposed regulations to govern the Combined Federal Campaign (CFC) (47 FR 20268-20283, May 11, 1982). The proposed regulations were issued to implement Executive Order 12353, March 23, 1982, and to replace, in its entirety, the Manual on Fund-Raising Within the Federal Service for Voluntary Health and Welfare Organizations.

They were developed to provide precise criteria for participation in and the operation of the CFC. Major changes were made in an attempt to meet objections raised in past years by various parties associated with the CFC and to balance judiciously the many considerations which must be taken into account in order to create the most equitable system for all parties concerned: Federal employees and members of the Armed Forces, the charities, the recipients of the charities' services, and the general public.

The proposed regulations provided for:

1. More precise and objective criteria for eligibility of organizations to participate in the CFC.

2. The selection of local community federated fund-raising organizations to serve as Principal Combined Fund Organizations (PCFOs) to manage local CFCs under the direction and control of local Federal Coordinating committees and the Director of OPM.

3. The encouragement of contributors to designate their contributions to specific charities or to be advised, with clear notification, that contributions not specifically designated to a particular charity would be deemed designated to the PCFO.

4. The return to the original, and still valid, form of fund-raising at places of Federal employment by national organizations and federations of local agencies by the elimination after one year of the participation of local unaffiliated agencies couped with the encouragement for them to join existing federations, or form new ones, in order to participate.

time. While the number of responses is very large, the number of issues raised is not. OPM believes that there has been sufficient time to analyze and consider all comments received, and that it would take just as long to run the fall 1982 CFC under the current procedures at this time as it would under the new regulations.

Most of the general objections centered on contentions that 1) the identification of a local Principal Combined Fund Organization would result in the United Way exerting undue control over the management of the CFC since local United Ways will likely, in most cases, be selected as Principal Combined Fund Organizations; 2) all CFC participants other than United Ways would be precluded from receiving any shares of undesignated contributions since the PCFOs would be responsible for deciding how the undesignated contributions would be distributed within local CFC areas; 3) charitable organizations that serve minorities and women would be prohibited from particpation in the CFC because the eligibility criteria require an organizational structure encompassing all or most of the United States and because of the provision that they provide direct and substantial service throughout the country and in specific CFC locations; and 4) local charities, not affiliated with local federated fund-raising organizations, would be eliminated from participation in the CFC after the fall 1982 campaign.

In response to the first general objection concerning the concept of the Principal Combined Fund Organization, OPM believes that this arrangement will strengthen the administration of local CFCs because of the expertise of these already-existing federated fund-raising organizations, and that substantial administrative cost to the government will thereby be reduced. Specific changes to the proposed regulations resulted from comments on this issue, however, and are discussed in more detail below. They involve strengthening

Comments on the proposed regulations were invited. More than 6,500 were received--from national and local voluntary agencies and groups, local Federal CFC organizations, Federal Executive Boards, Federal employees, Federal agencies, unions, and private citizens. In addition, the Director of OPM invited representatives from national voluntary agency groups and agencies to meet personally to discuss the proposed regulations. He met with individuals representing all of the national voluntary groups and 15 charitable agencies, in some cases more than once.

Most of the commenters (70%) were supportive of the proposed regulations; another 7% supported them but had specific suggestions. Of the remaining 23% of the commenters, most suggested that the proposed regulations were being considered too late in the year to run efffective CFCs in the fall of 1982 or that more time was needed for thorough study of the proposed regulations and that, therefore, the current regulations should remain in effect for the fall 1982 CFC. Others of these comments had general and/or specific suggestions and objections.

In many cases both support and objections came from members or affiliates of the same groups and agencies. Some member agencies of national voluntary groups (United Way, National Health Agencies, National Service Agencies, International Service Agencies and the American Red Cross) commented in favor of proposed regulations; other members of the same groups had objections to various provisions. Affiliates of some national voluntary agencies did the same. Organizations representing minorities and women were also on both sides of many issues.

In response to the timing of the proposed regulations, OPM believes that the changes are important enough to require implementation at this

the direction and control over PCFOs by the local Federal Coordinating Committees and the Director and insuring that other major CFC participants have a voice in campaign arrangements. Some commenters were under the mistaken impression that PCFOs would take over all aspects of the local campaign operations, including even solicitation of employees. This is definitely not the intent--the CFC remains a fund-raising program in which Federal employees solicit Federal employees for the benefit of worthy charitable organizations that meet important human needs.

In reponse to the second general objection, concerning the distribution of undesignated funds, OPM never intended that the distribution of undesignated contributions be restricted to organizations that serve local organizations only. International service and other agencies were intended to be eligible to receive undesignated funds, although the decison on the distribution of these funds remains with the PCFOs. The regulations have been revised, however, to clarify this provision.

The distribution of undesignated contributions has been one of the major sources of controversy with the CFC since its inception. Over the years, various methods and formulas have been used in attempts to insure their equitable distribution. None have stilled the controversy over the methods or forestalled legal action to overturn them. OPM is convinced that, to resolve the controversy, the employee-contributor must distribute all funds; either by being strongly encouraged to make a rational choice of a specific beneficiary or beneficaries of his or her contribution, or to be clearly warned that a decision not to do so is a rational choice to have the contributions allocated by the PCFO--an organization made up of representatives of his or her local community, experienced in evaluating needs and allocating scarce charitable contributions.

In response to the third general objection regarding eligibility of legal defense, minority, and women's organizations, OPM is persuaded that some

of the earlier criteria were overly restrictive and has modified both the general eligibility requirements and the direct and substantial presence criterion to meet most of the germane objections.

In response to the fourth major objection, regarding the elimination of local unaffiliated charities, OPM believes that fund-raising activities must comply with the requirement in section 1 of Executive Order No. 12353 that the CFC be limited to national voluntary agencies. The regulations do permit local unaffiliated organizations one year of grace to participate in the CFC before they must join other national federated fund-raising organizations to be eligible for participation in the future. The regulations, in addition, provide the means for the eventual participation of these local non-federated agencies as part of national federations.

Comments were received on a number of specific areas. In response to those that advanced the clarity of the proposed regulations or that pointed out technical problems, we incorporated the suggestions in the final regulations. Others that we did not believe did so were not incorporated.

Most of the specific comments centered on four areas. A summary of those and OPM's responses follows:

Eligibility Requirements

As mentioned above in the discussion of the general comments, there were many comments on specific national agency eligibility requirements, particularly the requirements in section 950.430(a) and (c) regarding national scope and in 405(a)(2)(ii) regarding the 50% and 20% support requirements. Some commenters desired more restrictive criteria, most did not. OPM changed the requirement that at least 50% of an organization's revenue be from government sources to a requirement that not more than 50% of an organization's

revenue be from Federal government agencies. OPM also more specifically defined "recently founded" organizations and provided for a one-year grace period for other organizations to meet this requirement.

A few commenters suggested that OPM require CFC participants to meet applicable charitable solicitation, nondiscrimination, and other laws of the State and local governments in which CFCs exist. OPM believes that these are concerns that are more appropriately left in the hands of the charitable organizations and the governments concerned. The Federal Government does not generally enforce compliance with laws not of its making.

Principal Combined Fund Organization

In response to the general suggestions described earlier, OPM has made specific changes. The first requires that an organization serving as a PCFO not be identified by its organizational or corporate title in any CFC material other than specific places on the pledge card and the campaign brochure (see sections 950.101(c), 950.521(e)(2)(iii) and Appendix A to Subpart E). Second, changes were made in section 950.509(j) to provide that all campaign arrangements and material be approved by local Federal Coordinating Committees after other individuals and organizations are permitted to comment on them.

A number of commenters were of the opinion that there may be a conflict of interest in having PCFOs act as central receipt and accounting points for CFCs. OPM believes that there is not sufficient reason to change the regulations in light of the reporting and audit requirements in Subpart E and the fact that in the fall 1981 campaign, the local representatives of the national voluntary groups selected group representatives to serve that function in over 27% of the CFCs.

Distribution of Funds

Many of the commenters who voiced objections had specific objections and suggestions about the identification of agencies in the contributor's leaflet and about the method of distributing undesignated funds.

In the first area, commenters complained that specific agencies would lose their group identities if they were listed in alphabetical order and thus the groups would not receive an appropriate share of designations; and that by not having agencies listing under a group title, contributors would be led to believe that groups include all related charities when, in fact, agencies of the same general type can be found in different groups. Others commented that, by encouraging designations and permitting designation to groups, smaller, less-recognized agencies would be at a disadvantage.

To be as fair as possible, in section 950.521(e)(2)(ii) OPM adopted the suggestion that agencies be listed according to categories of service, each identified by its group affiliation, with federated groups enumerated separetely at the end of the listing.

In the second area, commenters complained that section 950.513(a) restricted the distribution of undesignated fund to only organizations in the local CFC community, suggested that there should be a formula or method prescribed for the distribution, and noted that there exists a potential conflict of interest in having the organizations at least at this time most likely to be selected as PCFO's, local United Ways, decide on the distribution.

In response, OPM has removed the restriction in section 950.513(a) that undesignated funds be allocated "to meet the needs of that community" to permit them to be distributed to any participant in the local CFC.

Almost all of the commenters suggesting the use of formulas proposed formulas or variations of formulas or methods that have been used or were proposed for use in the past, none of which have ever been considered to be acceptable to all CFC participants or local Federal officials. OPM believes that the fairest way, after encouraging designations for the first time in the history of CFC, is to have the decisions made, as stated earlier, by local organizations, representative of the communities, experienced in making such decisions. In response to several requests, OPM has eliminated the local Volunteer Evaluation and Allocation Committee as duplicative of the function of the PCFOs.

OPM appreciates the concern and effort shown by those commenters who, as a result of close analysis of the proposed rules, provided detailed comments and suggestions aimed at helping OPM develop rules which would be as fair as possible to all parties and be able to be efficiently administered by the Federal Government.

admittance to the campaign is extended until 10 days after publication of the final rules.

E.O. 12291, FEDERAL REGULATION

OPM has determined that this is not a major rule for the purposes of E.O. 12291, Federal Regulation.

REGULATORY FLEXIBILITY ACT

I certify that this regulation will not have a significant economic impact on a substantial number of small entities. The nominal costs to voluntary agencies, which are primarily associated with developing the initial application, are essentially the same as under current procedures.

LIST OF SUBJECTS IN 5 CFR PART 950

Government employees, Charitable contributions.

U.S. OFFICE OF PERSONNEL MANAGEMENT

Donald J. Devine
Director

Accordingly, the Office of Personnel Managment amends 5 CFR by adding new Part 950 to read as follows:

Signed 7.2.82 and sent to the Federal Register at 11^00 a.m. bmjones

PART 950--SOLICITATION OF FEDERAL CIVILIAN AND UNIFORMED SERVICE PERSONNEL FOR CONTRIBUTIONS TO PRIVATE VOLUNTARY ORGANIZATIONS.

Subpart A--Administration and General Provisions

Sec.

Subpart B--Organization and Functional Responsibilities

Subpart C--Campaign Arrangements for Voluntary Agencies

Authority: E.O. 12353

SUBPART A

ADMINISTRATION AND GENERAL PROVISIONS

§950.101 DEFINITIONS.

For purposes of this Part:

(a) The term "national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate" means national entities that:

(1) Meet all eligibility requirements established in this Part, except as limited hereinafter;

(2) Are not "action" organizations within the meaning of 26 CFR §1.501 (c) (3)-1(c) (3) and are eligible to receive tax deductible contributions under 26 U.S.C. §170; and

(3) Provide or substantially support one or more of the following services:

(i) Relief of needy, poor or indigent children and of orphans, including adoption services;

(ii) Relief of needy, poor or indigent adults; and of the elderly;

(iii) Delivery of health care to the needy, poor, indigent, ill or infirm;

(iv) Education and training of personnel for the delivery of health care to the needy, poor and indigent;

(v) Health research;

(vi) Education, training, care and relief of physically and mentally handicapped persons;

(vii) Delivery of legal services to the poor and indigent, and defense of human and civil rights secured by law;

(viii) Relief of victims of crime, war, casualty, famine, natural disasters,

and other catastrophes;

(ix) Treatment, care, rehabilitation, and counseling of juvenile delinquents, criminals, released convicts, persons who abuse drugs or alcohol, persons who are otherwise in need of social adjustment and rehabilitation, and the families of such persons;

(x) Assistance, consistent with the mission of the Department of Defense, to members of the armed forces and their families;

(xi) Protection of families in short or long-term need of family and child care services, child and marriage counseling, foster care, and management and maintenance of the home;

(xii) Neighborhood and community-wide services which assist the needy as part of the whole community, including provision of emergency relief and shelter, recreation, safety, transportation, and the preparation or delivery of meals;

(xiii) Information and counseling with respect to the obtaining of any of the foregoing services; or

(xiv) Lessening the burdens of government with respect to the provision of any of the foregoing services.

(b) Campaign terms:

"Director" shall mean the Director of the United States Office of Personnel Management, or his delegate;

"Employee" shall mean any person employed by the Government of the United States or any branch, unit, or instrumentality thereof, including persons in the civil service and in the uniformed services;

"Combined Federal Campaign" or "Campaign" or "CFC" shall mean the fund-raising program established and administered by the Director pursuant to

Executive Order 12353, and any subsidiary units of such program;

"Community" shall mean a community that is defined either by generally recognized geographic bounds or by its relationship to an isolated government installation;

"Direct Contributions" shall mean gifts, in cash or in donated in kind material, given by individuals and/or other non-governmental sources directly to the spending health and welfare organization.

"Indirect Contributions" shall mean gifts, in cash or in donated in kind material, given to the spending health and welfare organizations by another health and welfare organization, but not transfers, dues or other funds from affiliated organizations or government, which are not to be considered as public "contributions."

(c) The term "Principal Combined Fund Organization" (or Organization) means the organization in a local Combined Federal Campaign that has been selected and so prescribed in section 950.509 of this Part to manage and administer the local Combined Federal Campaign, subject to the direction and control of the local Federal Coordinating Committee and the Director. All of its Campaign duties shall be conducted under the title "Principal Combined Fund Organization for _____(local CFC)" and not under the corporate title of the qualifying federation.

§950.103 SUMMARY DESCRIPTION OF THE PROGRAM.

(a) Eligibility of National Voluntary Agencies. National voluntary agencies apply to the Director each year for on-the-job solicitation privileges in the Federal Government. Early each calendar year, the Director issues a list of agencies that have met the prescribed standards as to program objective, eligibility, administrative integrity, and financial responsibility.

(b) Assigned Campaign Periods. In the United States, Combined Federal Campaigns are held when set by the Director, usually in the fall; the DOD Overseas Combined Federal Campaign is also usually held during the fall. The solicitation period for a Combined Federal Campaign is normally limited to six weeks, but may be extended for good cause by the local Federal Coordinating Committee.

(c) Combined Federal Campaign. At locations where there are 200 or more Federal personnel, all campaigns must be consolidated into a single, annual drive, known as the Combined Federal Campaign. The campaign is managed by the organization designated as the Principal Combined Fund Organization, in accord with section 950.509 of this Part, under the supervision of the local Federal Coordinating Committee and the Director. Such campaigns are conducted under administrative arrangements that provide for individual voluntary agency recognition, description of each voluntary agency's services, and allocation of contributions in accordance with specific designations by donors.

(d) Decentralized Operations. The federalism principle shall guide Campaign organization. Following designation of a Principal Combined Fund Organization, local representatives of that Organization initiate campaigns in their local community by direct contact with the heads of Federal offices and installations. Each Federal agency conducts its own solicitation among its employees, using campaign materials, supplies, and speakers furnished by or through the Principal Combined Fund Organization, under the direction of the local Federal Coordinating Committee and the Director.

(e) Solicitation Methods. Employee solicitations are conducted during duty hours using methods that permit true voluntary giving and reserve to the individual the option of disclosing any gift or keeping it confidential.

(f) Off-the-Job Solicitation. Many worthy voluntary agencies do not participate in the on-the-job program because they do not wish to join in its coordinated arrangements or because they cannot meet the requirements for eligibility. Such voluntary agencies may solicit Federal employees at their homes as they do other citizens of the community, or appeal to them through union, veteran, civic, professional, political, legal defense, or other private organizations. In addition, limited arrangements may be made for off-the-job solicitations on military installations and at entrances to Federal buildings.

(g) Prohibited Discrimination. The Campaign is a means for promoting true voluntary charity among members of the Federal community. Because of the participation of the Government in organizing and carrying out the Campaign, all kinds of discrimination prohibited by law to the Government must be proscribed in the Campaign. Accordingly, discrimination for or against any individual or group on account of race, color, religion, sex, national origin of citizens, age, handicap, or political affiliation is prohibited in all aspects of management and execution of the Campaign. Nothing herein denies eligibility to any voluntary agency, which is otherwise eligible under this Part to participate in the Campaign, merely because such voluntary agency is organized by, on behalf of, or to serve persons of a particular race, color, religion, sex, national origin, age, or handicap.

§950.105 FEDERAL POLICY ON CIVIC ACTIVITY.

Federal personnel are encouraged to participate actively in the work

of voluntary agencies--as members of policy boards or committees, heads of local campaign units, or volunteer workers--to the extent consistent with Federal agency policy and prudent use of official time. They are encouraged also to devote private time to such volunteer work.

§950.107 PREVENTING COERCIVE ACTIVITY.

True voluntary giving is basic to Federal fund-raising activities. Actions that do not allow free choices or even create the appearance that employees do not have a free choice to give or not to give, or to publicize their gifts or to keep them confidential, are contrary to Federal fund-raising policy. The following activities are not in accord with the intent of Federal fund-raising policy and, in the interest of preventing coercive activities in Federal fund-raising, are not permitted in Federal fund-raising campaigns:

(a) Supervisory solicitation of employees supervised;

(b) Setting 100% participation goals;

(c) Providing and using contributor lists for purposes other than the routine collection and forwarding of contributions and installment pledges;

(d) Establishing personal dollar goals and quotas; and

(e) Developing and using lists of noncontributors.

SUBPART B

ORGANIZATION AND FUNCTIONAL RESPONSIBILITIES

§950.201 DEVELOPMENT OF POLICY AND PROCEDURES.

(a) Director, U.S. Office of Personnel Management. Under Executive Order 12353, Charitable Fund-Raising, the Director is responsible for establishing fund-raising policies and procedures in the Executive Branch. With the advice of appropriate interested persons and organizations and of the executive departments and agencies concerned, he makes all basic policy, procedural, and eligibility decisions for the program. The Director may authorize the conduct of demonstration projects in one or more CFC locations to test alternative arrangements from those specified in this Part for the conduct of fund raising activities in Federal agencies.

(b) Eligibility Committees. A National Eligibility Committee shall consist of a chairman and such other members selected by the Director as he deems necessary, who shall serve at the pleasure of the Director. Local eligibility shall be determined by the local Federal Coordinating Committees. The National Eligibility Committee is responsible for recommending to the Director:

(1) Eligibility determinations on national federations and national voluntary agencies;

(2) Modification of eligibility standards and requirements as needed; and

(3) Any other matters as requested by the Director.

§950.203 PROGRAM ADMINISTRATION.

(a) Federal Agency Heads. The head of each Federal executive department and agency is responsible for:

(1) Seeing that voluntary fund-raising within the Federal department or agency is conducted in accordance with the policies and procedures prescribed by this Part;

(2) Designating a top-level representative as Fund-Raising Program Coordinator to work with the Director as necessary in the administration of the fund-raising program within the Federal agency;

(3) Assuring full participation and cooperation in local fund-raising campaigns by all installations of the Federal agency;

(4) Assuring that the policy of voluntary giving and clear employee choice is upheld during the fund-raising campaign; and

(5) Providing a mechanism to look into employee complaints of undue pressure and coercion in Federal fund-raising. Federal agencies shall provide procedures and assign responsibility for the investigation of such complaints. Personnel offices shall be responsible for informing employees of the proper organization channels for pursuing such complaints.

(b) Fund-Raising Program Coordinators. The responsibilities of Federal agency Fund-Raising Program Coordinators are to:

(1) Cooperate with the Director, the local Federal Coordinating Committee, and the Principal Combined Fund Organization in the development and operation of the program;

(2) Maintain direct liaison with the Office of the Director in the administration of the program;

(3) Publicize program requirements throughout the Federal department or

agency;

(4) Answer inquiries about the program from officials and employees and from external sources; and

(5) Investigate and arrange for any necessary corrective action on complaints that allege violation of fund-raising program requirements within the Federal agency.

§950.205 PROGRAM COORDINATION.

The Director coordinates the Federal agencies' administration of the fund-raising program and maintains liaison with voluntary agencies.

§950.207 LOCAL VOLUNTARY AGENCY REPRESENTATIVES.

Federated and national voluntary agencies provide their State and local representatives with policy and procedural guidance on the Federal program. The local representatives are responsible for furnishing educational materials, speakers, and campaign supplies as may be required and appropriate to the Federal program.

§950.209 LOCAL FEDERAL AGENCY HEADS.

The head of the Federal department or agency provides the heads of the local Federal offices and installations with copies of the Federal fund-raising regulations. The local Federal agency heads are responsible for:

(a) Cooperating with representatives of the local Federal Coordinating Committee, the Principal Combined Fund Organization, and local Federal officials in organizing local Federal campaigns;

(b) Undertaking official campaigns within their offices or installations and providing active and vigorous support with equal emphasis for each authorized campaign;

(c) Assuring that personal solicitations on the job are organized

and conducted in accordance with the procedures set in these regulations;

(d) Assuring that authorized campaigns are kept within reasonable administrative limits of official time and expense.

§950.211 LOCAL FEDERAL COORDINATING COMMITTEES.

(a) When there are a number of Federal agency offices and installations in the same local area, some interagency coordination is necessary in order to achieve effective community-wide campaigns and to improve general understanding and compliance with the fund-raising program. The Director assigns the responsibility for local coordination to existing organizations of Federal agency heads whenever possible and to special committees where needed. The local Federal Coordinating Committee is authorized to make all decisions within the provisions and policies established in this Part on all aspects of the local campaign, including eligibility and the supervision of the local community campaign and the Principal Combined Fund Organization. Such decisions may be appealed, however, to the Director.

(b) Authorized Local Federal Coordinating Committee. Coordinating responsibility is assigned by the Director to one of the following organizations:

(1) Federal Executive Boards. The boards exist in principal cities of the United States for the purpose of improving interagency coordination. They are composed of local Federal agency heads who have been designated as Board members by the heads of their departments and agencies under Presidential authority.

(2) Federal Executive Associations and Federal Business Associations, selforganized associations of local Federal officials, and the Department of Defense National Policy Coordinating Committee.

(3) Fund-Raising Program Coordinating Committees. These committees are established in communities where there is no Federal Coordinating Committee in existence. Leadership in organizing such a committee is the responsibility of the head of the local Federal installation that has the largest number of civilian and uniformed services personnel. Local Federal agency heads or their designated representatives serve on the committee and determine all organizational arrangements.

(c) Employee union representation. In order to ensure employee participation in the planning and conduct of the CFC, employee representatives from the principal employee unions of local Federal installations should be invited to serve in whatever organization exercises local coordinating responsibilities.

(d) Fund-raising responsibilities. Within the limits of the policies, procedures, and arrangements made nationally, the fund-raising responsibilities of local Federal Coordinating Committees are to:

(1) Facilitate local campaign arrangements. The Federal Coordinating Committee (i) names a high-level chairman for the authorized Federal campaigns, (ii) provides lists of Federal activities and their personnel strength, (iii) cooperates on interagency briefing sessions and kick-off meetings, and (iv) supports appropriate publicity measures needed to assure campaign success.

(2) Administer program requirements. The Coordinating Committee is responsible for organizing the local Combined Federal Campaign, supervising the activities of the Principal Combined Fund Organization, and acting upon any problems relating to a voluntary agency's noncompliance with the policies and procedures of the Federal fund-raising program.

(3) Develop understanding of campaign program policies and procedures and voluntary agency programs. The local Federal Coordinating Committee serves as the central medium for communicating program, policies and procedures of the Campaign and for understanding the organizations employees are being asked to support and how employees can obtain services they may need from these organizations.

(e) Principal Combined Fund Organization. The local Federal Coordinating Committee will supervise a local Principal Combined Fund Organization. The Principal Combined Fund Organization will raise money from Federal employees and administer the local campaign, under the direction of the local Federal Coordinating Committee.

(f) Communication and Resolution Procedures Through the Director, Office of Personnel Management. Each local Federal agency head will receive fund-raising directions through his Federal agency channels and will raise questions that pertain to fund-raising activities within his Federal agency by the same means. However, the local Federal Coordinating Committee refers unresolved local fund-raising questions or problems that are common to several Federal agencies directly to the Director. The Director communicates directly with the chairman of the local Federal Coordinating Committee for information about the local fund-raising situation.

§950.213 AVOIDANCE OF CONFLICTS OF INTEREST.

Any Federal employee who serves on the Eligibility Committee, a local Federal Coordinating Committee, or as a Federal agency fund-raising program coordinator must not participate in any decision situations where, because of membership on the board or other affiliation with a voluntary agency, there could be or appear to be a conflict of interest.