No. 09-315

In the Supreme Court of the United States

DONNA KAY BUSCH,
PETITIONER

v.

MARPLE NEWTOWN SCHOOL DISTRICT, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

In the educational environment, the First Amendment must be considered in light of the special characteristics of public schools. Culbertson Elementary School officials prohibited a parent from reading Bible verses to an audience of kindergarten students during a curricular, teacher-supervised, classroom activity. Was the school officials' reasonable viewpoint-based restriction consistent with the First Amendment?

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STATEMENT OF THE CASE

A. Factual Background

1. During the 2004-2005 academic year, Jamie Reilly taught a class of kindergarten students at Culbertson Elementary School, a division of the Marple Newtown School District. (R. at 7, 51.) As part of the social studies curriculum, Reilly included a unit of study called "All About Me." (R. at 7, 51.) The "All About Me" unit was designed as a "socialization" program in which students would identify individual interests, learn about others, and develop conflict resolution skills. (R. at 52.)

Reilly implemented the "All About Me" program by featuring a different child each week. (R. at 7, 51.) The "All About Me" curriculum called for student participation in three ways. (R. at 7.) First, students were directed to create a poster displaying information about their families, hobbies, and interests. (R. at 7, 52.) Second, students were allowed to bring in a toy or stuffed animal, as well as a snack to share with the class. (R. at 7, 52.) Finally, Reilly permitted parents to participate by coming to class to "share a talent, short game, small craft, or story." (R. at 7, 52.)

2. On October 15, 2004, Petitioner Donna Busch was scheduled to visit Reilly's classroom as a contributor to her son's "All About Me" week. (R. at 7, 53.) Her son Wesley, a five-year-old student in Reilly's class, had already been allotted time to present his "All About Me" poster. (R. at 6-7, 52-53.) Both Petitioner and her son identify themselves as Evangelical Christians. (R. at 7, 52.) During trial, Petitioner testified that an Evangelical Christian is "someone who believes . . . the Bible is the

literal word of God." (R. at 53.) Petitioner's husband similarly described an Evangelical Christian as "one who brings God's word to the world." (R. at 6, 53.)

In preparing for the presentation, Petitioner told Wesley that the teacher indicated that she could come in and read his favorite book. (R. at 53.) When asked what he would like her to read, Wesley responded, "the Bible." (R. at 7.) The night before her visit to the class, Petitioner, alone, without Wesley, decided which selections from the Bible she would read. (R. at 8, 53.) She selected verses 1 through 4 and verse 14 of Psalm 118 from the King James Bible:

> 1 Give thanks unto the Lord, for he is good; because his mercy endures forever.
> 2 Let Israel now say, his mercy endures forever.
> 3 Let the house of Aaron now say, that his mercy endures forever.
> 4 Let them now that fear the Lord say, that his mercy endures forever.
> * * *
> 14 The Lord is my strength and my song, and is become my salvation.

(R. at 9, 54.)

At trial, there was disagreement over Petitioner's motivation for selecting these particular Psalms. Petitioner testified that she chose verses from Psalms because: (1) she and Wesley frequently read from the Book of Psalms; (2) she thought that the children in Reilly's classroom would like Psalms because they are similar to poetry; and (3) she wanted a reading that did not make any reference to Jesus, which she feared might upset some people. (R. at 54.) Expert witness Brian Ortele, however, described Psalm 118 as an especially "powerful tool for proselytizing by the Christian community." (R. at 54 n.4.) Ortele opined that Evangelical Christians believe that the reading of Psalm 118 "conveys a blessing upon the one who comes

in the name of the Lord," which makes "the reading of Psalm 118 a religious exercise for an Evangelical Christian." (R. at 54 n.4.) Petitioner did not respond to Ortele's explanation of Psalm 118. (R. at 54 n.4.)

3. On the morning of the scheduled presentation, Petitioner entered Reilly's classroom and informed Reilly that she was prepared to read to the class from Psalm 118. (R. at 10, 54.) Reilly said she would have to check with the school's principal, Thomas Cook, to see if the Bible reading was permitted. (R. at 55.) Reilly then spoke to Principal Cook in the hallway. (R. at 55.) When Reilly returned, she told Petitioner that Principal Cook wanted to speak with Petitioner in the hallway. (R. at 55.) Once alone, Principal Cook told Petitioner that she would not be permitted to read Bible verses to Reilly's class. (R. at 10, 54.)

Principal Cook expressed his opinion that permitting a parent to read Bible passages to a classroom of captive kindergarten students would be viewed as "promoting religion" and "proselytizing" for a "specific religious point of view." (R. at 10, 55.) Petitioner objected, informing Principal Cook that her other son, age six, had recently read a book called *Gershon's Moster: A Story for the Jewish New Year* that had been taken from the school library. (R. at 56.) Petitioner said that it was "the same thing that [she] was going to read." (R. at 56.) Principal Cook responded that unlike the school library, the children in Reilly's classroom would not be "choosing to hear from the Bible . . . ." (R. at 11.) Following this conversation, Reilly and Petitioner discussed other books to read, and they settled on a book about counting. (R. at 11.)

4. Marple Newtown School District policy provides guidelines for principals regarding what is considered appropriate holiday observance in schools. (R. at 55.) The first guideline states: "Public schools should not be a forum . . . for expressing individual/personal religious preference/doctrine." (R. at 59.) Although the guidelines do permit "religious symbols" and "cultural themes," they must be part of an "established curriculum." (R. at 59.)

In line with this policy, Reilly had taught her students about various holidays, as part of the winter and spring holiday curriculum. (R. at 12, 57.) For example, Reilly maintained a library of books from which she read to her students. (R. at 11, 57.) Among these books were several about holidays, including *Bear Stays Up for Christmas*, *The Magic Dreidals*, *The Wild Christmas Reindeer*, *Easter Bunny's On His Way*, and *The Hanukkah Mice*. (R. at 11, 57.) In addition, Reilly permitted one parent, Linda Lipski, to visit the classroom and give presentations on Hanukkah and Passover. (R. at 57.) Several weeks before the first of these presentations, Reilly discussed the district's guidelines with Lipski. (R. at 57.)

Robert Mesaros, the Superintendent of the Marple Newtown School District, stated that Principal Cook's response to Petitioner was proper under the relevant school district policies. (R. at 55.) Superintendent Mesaros emphasized that the students in Reilly's classroom "are there because they must be there by state law," and were thus a "captive audience" that "would have no choice but to listen to Mrs. Busch." (R. at 56.) Under these circumstances, Superintendent Mesaros opined that it would be "assumed that the school district and the school w[ere] advocating or

supporting the – whatever was going to be read by, in this case, Mrs. Busch." (R. at 56.)

B. Procedural Background

1. On May 3, 2005, Petitioner filed this lawsuit, alleging that the Culbertson Elementary School officials' actions had violated her First Amendment rights. (R. at 59.) On May 31, 2007, the United States District Court for the Eastern District of Pennsylvania granted summary judgment against Petitioner and in favor of the school officials. (R. at 51.)

The district court held that the school officials were permitted to impose reasonable viewpoint-based restrictions under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). Although the court recognized that viewpoint-based restrictions are generally prohibited, it found that "there are circumstances in which it may be allowed." (R. at 66.) Applying *Hazelwood*, the court initially found that children and parents could reasonably perceive Petitioner's Bible reading during the "All About Me" curricular exercise as school-endorsed. (R. at 74.) The court found that reading Bible verses to students is "significantly different" than discussing one's personal religious observance, and noted that the Petitioner could have instead discussed the importance of religion in her family life or described her family's religious activities. (R. at 73-74.) Recognizing Principal Cook's concern that the Petitioner's speech could "easily" be interpreted as endorsed by the school, the court concluded that "[t]he school had a valid educational purpose in preventing [Petitioner]'s reading of the Bible to a captive audience of kindergarten students."

(R. at 72, 74.) Thus, because the viewpoint-based restriction was "reasonably related to legitimate pedagogical concerns," the court held that the school's action was proper under *Hazelwood*. (R. at 74.)

2. Petitioner appealed the district court's opinion. On June 1, 2009, the Third Circuit, in an opinion by Chief Judge Scirica, affirmed the district court's summary judgment decision in favor of the school officials. (R. at 6.)

The Third Circuit held that educators are permitted to restrict invited speakers from using the classroom to promote specific messages. (R. at 19-20.) The court recognized that in fulfilling their educational mission, school officials face the "sensitive task" of exposing children to diverse cultural experiences while remaining "mindful of the expectations and rights of children and their parents." (R. at 23.) The court found that in fulfilling this task, educators should be free to seek appropriate ways to involve parents in the school's curriculum. (R. at 20.) The court recognized that if invited parents were allowed to "express any message of their choosing so long as it related in some way to their child," educators would be placed in the unacceptable position of "either foregoing valuable curricular activities or foregoing the ability to control the pedagogical direction of their classrooms." (R. at 20.) Thus, the court concluded that by allowing parent participation in specific curricular activites, "educators do not cede control over the message and content of the subject matter presented in the classroom." (R. at 19.)

Considering the curricular nature of the "All About Me" activity, the court concluded that Principal Cook's actions were consistent with the First Amendment.

(R. at 25-26.) The court observed that the parents of kindergarten students may "reasonably expect [that] their children will not become captive audiences to an adult's reading of religious texts." (R. at 25.) Although recognizing that in other contexts a Bible reading may be appropriate, the court held that in light of the "involuntary and very young" audience of children in Reilly's classroom, the restrictions were reasonably related to preserving the school's educational goals. (R. at 25-26.) Thus, the court concluded that the school's actions did not violate Petitioner's First Amendment rights. (R. at 25-26.)

Although Judge Barry joined in "Chief Judge Scirica's excellent [o]pinion," he wrote separately to articulate his view that pre-K and kindergarten classrooms should not be subject to First Amendment scrutiny. (R. at 29-30.) Recognizing the "crucial importance of age in determining the extent of the First Amendment's protections," Judge Barry concluded that kindergarten classrooms should be exempt from First Amendment review. (R. at 29-30.)

SUMMARY OF ARGUMENT

I. In the public school environment, individual rights must be balanced by the special needs of educators and administrators. In order to fulfill the school's obligation to instill values and prepare students for later professional training, public school officials must inevitably curtail the First Amendment rights of individual speakers. While educators and administrators do not have unlimited discretion in limiting expression, it is well-established that school officials may restrict speech that conflicts with the school's "basic educational mission."

Hazelwood, 484 U.S. at 266 (1988) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)). Because Respondents' reasonable viewpoint-based restriction on curricular speech was in line with this bedrock First Amendment principle, the well-reasoned decision of the Third Circuit should be affirmed.

A. Essential to the school's educational mission is the ability to control the educational curriculum. In contrast to public fora, the curricular environment is a highly controlled atmosphere in which material is presented in a manner designed to emphasize certain values and ideas. Hence, educators are entitled to greater control over speech that takes place as part of a curricular, teacher-supervised, classroom activity. This greater level of discretion necessarily permits educators to further the legitimate educational goals of a curricular activity by imposing reasonable viewpoint-based restrictions on invited speech. Thus, in light of the special characteristics of the curricular environment, the school officials' actions were consistent with the First Amendment.

B. In balancing First Amendment rights with the special characteristics of the school environment, this Court has recognized distinct standards of review for different categories of restricted speech. Restrictions on speech that takes place as part of a curricular activity such as the "All About Me" unit of study are subject to the reasonableness standard of *Hazelwood*. As the text and reasoning of *Hazelwood* demonstrate, this standard necessarily extends to both content-based and viewpoint-based restrictions.

First, *Hazelwood's* public forum analysis permits educators and administrator to impose reasonable viewpoint-based restrictions on curricular speech. The *Hazelwood* Court, departing from traditional public forum analysis, declined to apply a viewpoint-neutrality standard to the highly controlled context of curricular activities. In doing so, the Court implied that viewpoint-based restrictions are permitted as long as they are "reasonably related to legitimate pedagogical goals." *Hazelwood*, 484 U.S. at 273.

Second, *Hazelwood's* discussion of the proper standard of review resolves any remaining doubt over the legitimacy of reasonable viewpoint-based restrictions. In explaining the reasonableness standard, the *Hazelwood* Court anticipated the need for educators and administrators to engage in viewpoint-based restrictions on curricular speech. Reinforcing the necessity for such restrictions, *Hazelwood* employed model examples of viewpoint-based restrictions to illustrate the reach of the reasonableness standard. Thus, under the principles outlined in *Hazelwood*, the Culbertson Elementary School officials' actions were consistent with the First Amendment.

C. For at least four reasons, applying the *Hazelwood* reasonableness standard to invited curricular speech strikes the proper balance between individual First Amendment rights and the necessary discretion of school officials. *First*, schools have a paramount interest in preserving a sound educational environment. Although schools cannot restrict speech solely because they disagree with a speaker's viewpoint, the recognized interest in furthering the school's educational

mission justifies reasonable viewpoint-based restrictions. *Second*, Petitioner is seeking to use the State's compulsory educational process to promote a specific viewpoint to a captive audience of kindergarten students. Because this is a right that is neither recognized nor guaranteed by our Constitution, school officials should not be forced to show a "compelling interest" to justify prohibiting Petitioner's speech. *Third*, a reasonableness standard preserves the necessary discretion of school officials while ensuring that schools do not become "enclaves of totalitarianism." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969). Consistent with the deference that this Court has always given to school officials in educating the Nation's youth, a reasonableness standard would allow educators to make the commonsense, practical decisions that parents entrust them to make. *Fourth*, educators have powerful reasons to involve parents in curricular activities. In line with the need to determine First Amendment rights in light of the special characteristics of public schools, a reasonableness standard would allow educators to further this critical pedagogical goal.

For all of these reasons, a reasonableness standard is both appropriate and consistent with the First Amendment. Because the school officials' actions were proper under this standard, the decision by the Third Circuit should be affirmed.

II. The unique characteristics of the elementary school environment provides especially strong reasons for allowing school officials to impose reasonable viewpoint-based restrictions on invited curricular speech. *First*, the decisions of this Court have long recognized that age and maturity are essential in determining the

proper allocation of constitutional rights. *Second*, the age and maturity of elementary school children compels a lower standard of review over viewpoint-based restrictions. Elementary school children lack the capacity to engage in abstract reasoning and to differentiate between a parent speaking and a teacher speaking. Hence, children of this age cannot differentiate between the viewpoint of their teachers, and the viewpoint of an invited adult. In order to ensure that the school is not associated with a viewpoint that is contrary to the school's educational mission, elementary school educators and administrators must be able to impose reasonable viewpoint-based restrictions on curricular speech. For this additional reason, the elementary school officials' actions were consistent with the First Amendment.

ARGUMENT

I. THE CULBERTSON ELEMENTARY SCHOOL OFFICIALS' REASONABLE VIEWPOINT-BASED RESTRICTION WAS CONSISTENT WITH THE FIRST AMENDMENT.

This Court has long recognized public schools as the "primary vehicle for transmitting 'the values on which our society rests.'" *Plyer v. Doe*, 457 U.S. 202, 221 (1982) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76 (1979)). To ensure that public schools fulfill their fundamental obligations to awaken children to cultural values and prepare them for later professional training, *Brown v. Bd. of Educ.*, 374 U.S. 483, 493 (1954), educators and administrators must inevitably curtail individual conduct. *New Jersey v. TLO*, 469 U.S. 325, 339 (1985). For this reason, while individuals "do not 'shed their constitutional rights . . . at the schoolhouse gate,' the nature of those rights is what is appropriate for children in school." *Veronia Sch. Dist. v. Acton 47J*, 515 U.S. 646, 656 (1995) (quoting *Tinker*, 393 U.S. at 506).

Accordingly, First Amendment rights must be considered "in light of the special characteristics of the school environment." *Tinker*, 393 U.S. at 506. Hence, the "necessarily broad" authority of public school educators and administrators must be carefully balanced against the "limited constitutional restriction" imposed by the First Amendment. *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 879 (1982) (Blackmun, J., concurring). In guiding this inquiry, the Supreme Court has recognized that the First Amendment allows school officials to prohibit speech that is "inconsistent" with the school's "'basic educational mission' . . . ." *Hazelwood*, 484 U.S. at 266 (quoting *Fraser*, 478 U.S. at 685). Because this bedrock First Amendment principle requires that public school officials have the discretion to impose reasonable viewpoint-based restrictions on speech solicited as part of a curricular, teacher-supervised, classroom activity, the decision below should be affirmed.

A. Public School Officials Are Entitled to Greater Control over Curricular Speech.

Essential to the school's educational mission is the ability to control the educational curriculum. In contrast to independent student speech that "happens to occur on the school premises," *Hazelwood*, 484 U.S. at 271, "the purpose of a curricular program is by definition pedagogical . . . ." *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998) (quoting *Searcey v. Harris*, 888 F.2d 1314, 1319 (11th Cir. 1989)); *see also Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004) ("Few activities bear a school's imprimatur and involve pedagogical interests more significantly than speech that occurs within a classroom setting as

part of a school's curriculum.") (internal quotation marks and citations deleted). Thus, in carrying out their paramount responsibility to educate, teachers and administrators necessarily have "wide discretion over the way the course material is communicated to students." *Ambach*, 441 U.S. at 78.

Educators' wide discretion, which derives from the "custodial and tutelary" nature of the school environment, entitles them to greater control in restricting individual speech in the curricular environment. *Veronia*, 515 U.S. at 655; *see also Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152, 156 (6th Cir. 1995) ("Learning is more vital in the classroom than free speech."). In contrast to "streets and parks and other public 'forums,'" the classroom is a context in which "speech is highly controlled" and "the curriculum itself prescribe[s] which ideas are to be studied and discussed." Kathleen M. Sullivan & Gerald Gunther, *First Amendment Law* 284-85 (1st ed. 1999). Hence, educators must make value judgments in determining what information is presented as part of the curricula. *See Pico*, 457 U.S. at 864 (1982) (plurality) ("[L]ocal school boards must be permitted to establish and apply their curriculum in such a way as to transmit community values . . . ."). In making these decisions, teachers and administrators have a primary duty to ensure that the appropriate educational lessons are learned. *Hazelwood*, 484 U.S. at 271.

In order to carry out the cardinal obligation to educate, public school officials must have the discretion to impose reasonable viewpoint-based restrictions on invited curricular speech. As this Court has recognized, "a public school prescribing its curriculum . . . by its nature will facilitate the expression of some viewpoints

instead of others." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998). Applying a reasonableness standard to viewpoint-based restrictions on invited speech taking place within a supervised classroom activity allows educators to meet the pedagogical goals of the curricular exercise. *See Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993) ("[I]t is well-settled that public schools may limit classroom speech to promote educational goals."). Without such discretion, teachers and administrators would be left in the untenable position of implementing a viewpoint-based curriculum in a viewpoint-neutral manner. Alexis Zouhary, Note, *The Elephant in the Classroom: A Proposed Framework for Applying Viewpoint Neutrality to Student Speech in the Secondary School Setting*, 83 Notre Dame L. Rev. 2227, 2255 (2008). Thus, while normally the state "may not discriminate based on the viewpoint of private persons whose speech it facilities," curricular speech is "controlled by different principles." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 844 (1995) (citing *Hazelwood*, 484 U.S. at 270-72); *see also Chiras v. Miller*, No. 3:03-CV-2561-M, 2004 WL 1660388, at *11 (N.D. Tex. July 23, 2004) (opining that *Rosenberger* demonstrates the legitimacy of viewpoint-based restrictions on curricular speech), *aff'd on other grounds*, 432 F.3d 606 (5th Cir. 2005).

As base, the First Amendment must be applied in a manner that comports with the unique characteristics of the curricular environment. Because a compelling interest standard of review is inconsistent with the need to ensure educators' control over the curricular environment, it cannot be reconciled with this

fundamental principle. Thus, this Court should affirm the decision of the Third Circuit, and find that reasonable viewpoint-based restrictions on invited speech associated with a curricular activity are consistent with the First Amendment.

B. The School Official's Reasonable Viewpoint-Based Restriction on Speech Solicited as Part of a Curricular Activity Was Permitted Under *Hazelwood*.

In clarifying the scope of permissible speech restrictions in the public school environment, this Court has recognized three distinct categories of expression. First, independent student speech is governed by the "substantial and material disruption" test presented in *Tinker*. *See Tinker*, 393 U.S. at 514. Under this standard, speech may only be prohibited if school officials reasonably forecast that the speech "would substantially interfere with the work of the school or impinge on the rights of other students." *Id.* at 509. Second, "sexually explicit, indecent, or lewd" speech may be more freely restricted. *Fraser*, 478 U.S. at 684. This greater level of discretion is partially justified by the concern to protect children, "especially in a captive audience," from exposure to such content. *Id.* at 684. Finally, speech that occurs as part of a school-sponsored activity is governed by the reasonableness standard of *Hazelwood*. *Hazelwood*, 484 U.S. at 272-73. In this context, school officials are entitled to "greater control," and can restrict speech as long as such restrictions "are reasonably related to legitimate pedagogical concerns." *Id.* at 272.

The principles outlined by the Court in *Hazelwood* are the beginning and the end of this case. Consistent with the recognition that First Amendment rights must be considered within the special context of the school environment, the Court in

Hazelwood recognized that educators must be afforded greater discretion to restrict speech that is solicited as part of a curricular exercise. As both the text and reasoning of *Hazelwood* demonstrate, this discretion necessarily extends to reasonable viewpoint-based restrictions.

1. *Hazelwood*'s Public Forum Analysis Allows Viewpoint-Based Restrictions on Curricular Speech.

In *Hazelwood*, the Court upheld a public school's suppression of two pages of articles in *Spectrum*, the school newspaper. *Hazelwood*, 484 U.S. at 276. The Court initially determined that the newspaper was not a public forum. *Id* at 267-68. While recognizing that students were "permitted to exercise some authority over the contents" of *Spectrum*, the Court opined that this "hardly implies a decision to relinquish school control over that activity." *Id.* at 270. Noting the curricular nature of the newspaper, the Court concluded that *Spectrum* was a "supervised learning experience" which was not subject to the independent student speech standard of *Tinker*. *Id.* at 270. Instead, the Court found that "school officials were entitled to regulate the contents of Spectrum in any reasonable manner." *Id.*

Hazelwood's public forum analysis did not require viewpoint-neutrality in the context of school-sponsored activities. *See id.* at 270. Although the Court cited to prior decisions that had applied a viewpoint-neutrality requirement, it did not extend this requirement to curricular speech. *See id.* Primarily, the Court relied on *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), which applied a viewpoint-neutral requirement to restrictions on the use of an interschool mailing system. *See Hazelwood*, 484 U.S. at 267 (citing *Perry*, 460 U.S. at 47); *see*

also id. (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985) (applying a viewpoint-neutrality requirement to an annual charity drive)). *Hazelwood*, however, held only that the school's restrictions needed to be reasonable, without imposing a separate viewpoint-neutrality constraint on the authority of public school officials. *See id.* at 270; *see also* R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. Ill U. L.J. 175, 182-83 (2007) (observing that the *Hazelwood* Court declined to apply a viewpoint-neutral requirement in both the initial public forum analysis and the repetition of the non-public forum finding).

By applying every element of traditional public forum analysis *except* the viewpoint-neutrality requirement, the Court implied that viewpoint-based restrictions are appropriate in limited circumstances. As the First Circuit recognized in *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993), under the *Hazelwood* rationale, the faculty mailing system at issue in *Perry* "significantly differs from a school-sponsored curriculum being taught to a captive audience of youngsters." *Id.* at 454. Indeed, *Hazelwood* emphasized that unlike the forums at issue in *Perry* and *Cornelius*, the school newspaper was a curricular activity that had been reserved for a specified, educational purpose. *See Hazelwood*, 484 U.S. at 270. Because the school's educational purpose was the very basis for the reasonableness standard of review, *see id.*, it "would make no sense" to read a viewpoint-neutrality requirement into the *Hazelwood* decision. *Fleming v. Jefferson County School District R-1*, 298 F.3d 918 (10th Cir. 2002).

By declining to apply a viewpoint-neutral requirement to the unique context of curricular activities, the Court allowed reasonable viewpoint-based restrictions in the context of school-sponsored speech. At the very least, by omitting the traditional requirement of viewpoint-neutrality from the public forum analysis, the *Hazelwood* Court left the viewpoint-neutrality issue an open question.

2. *Hazelwood's* Reasonableness Standard Necessarily Extends to Viewpoint-Based Restrictions.

Any doubt regarding the validity of reasonable viewpoint-based restrictions is resolved by the remainder of the *Hazelwood* opinion. In discussing the proper standard of review to determine the constitutionality of restrictions on "school-sponsored" speech, the Court extended the reasonableness standard to both content-based and viewpoint-based restrictions.

The *Hazelwood* Court began by recognizing the fundamental difference between speech that "happens to occur on the school premises" and speech that takes place as part of an activity that is "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Hazelwood*, 484 U.S. at 271. The Court observed that this latter category of "school-sponsored" speech takes place as part of activities that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271.

The Court held that educators "are entitled to exercise greater control" over these activities in order to preserve educational value, to ensure that students are "not exposed to material that may be inappropriate for their level of maturity," and

to guarantee "that the views of the individual speaker are not erroneously attributed to the school." *Id.* Thus, instead of the more stringent standard of *Tinker*, the *Hazelwood* Court held that educators may restrict curricular speech "so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.

The Court next provided examples of restrictions that would be proper under the reasonableness standard. *Id.* at 272. Explaining the necessity of maintaining a positive learning environment, the Court observed that restrictions "might range from the existence of Santa Clause in an elementary school setting to the particulars of teenage sexual activity in a high school setting." *Id.* at 272. More generally, the Court found that public school officials must "retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct inconsistent with 'the shared values of a civilized order,' or to associate the school with any position other than neutrality on matters of political controversy." *Id.* at 272 (quoting *Fraser*, 478 U.S. at 683) (internal citations omitted).

Hazelwood's reasoning permits, and even anticipates, the need for public school officials to make reasonable viewpoint-based restrictions on curricular speech. Mark W. Cordes, *Making Sense of High School Speech After* Morse v. Frederick, 17 Wm. & Mary Bill Rts. J. 657, 689 (2009); *see also Hazelwood*, 484 U.S. at 286-88 (Brennan, J., dissenting) (characterizing the majority opinion as permitting viewpoint-based restrictions). This conclusion is supported by both the general

discussion of the reasonableness standard, and the specific examples utilized by the Court.

First, the general level of discretion afforded public school officials under *Hazelwood* extends to viewpoint-based restrictions. Educators and administrators have difficult jobs that requires them to make "on the spot" decisions. *Morse v. Frederick*, 551 U.S. 393, 410 (2007); *see also Hazelwood*, 484 U.S. at 275 (observing that the school official had to make an immediate decision). Under *Hazelwood*, the discretion afforded public school officials is based on the unique characteristics of the curricular environment. *See Hazelwood*, 484 U.S. at 271. The curricular environment may be imperiled by either the content or the viewpoint that an individual promotes. *See Curry ex rel. Curry v. Hensiner*, 513 F.3d 570, 579 (6th Cir. 2008) ("*Hazelwood* does not require us to balance the gravity of the school's educational purpose against [the individual's] First Amendment right to free speech, only that the educational purpose behind the speech suppression be valid."). Thus, by basing the proper standard of review on the effect that speech has on the curricular environment, *Hazelwood* "entrusts to educators these decisions that require judgments based on viewpoint." *Fleming*, 298 F.3d at 928; *see also Chiras*, 2004 WL 1660388, at *11 ("The Supreme Court's reasoning in Hazelwood suggests that the Supreme Court intended that educators have the discretion to make viewpoint-based determinations.").

Second, the examples used by the *Hazelwood* Court to illustrate the intended reach of the reasonableness standard demonstrate the legitimacy of reasonable

viewpoint-based restrictions. Although difficult to discern in some cases, viewpoint discrimination is generally defined as "[c]ontent-based discrimination in which the government targets not a particular subject, but instead certain views that speakers might express on the subject." *Black's Law Dictionary* 534 (9th ed. 2009); *see Perry*, 460 U.S. at 49 (defining viewpoint-based restrictions as "intended to discourage one viewpoint and advance another"). Recognizing that a school could allow a story about Santa Clause, while prohibiting 'Santa Clause does not exist' speech, is a model example of viewpoint-based restrictions. *See* Samuel P. Jordan, Comment, *Viewpoint Restrictions and School-Sponsored Student Speech: Avenues for Heightened Protection*, 70 U. Chi. L. Rev. 1555, 1566-67 (2003); *see also Chiras*, 2004 WL 1660388, at *11 (observing that the examples of proper restrictions under *Hazelwood* "exemplify viewpoint-based discrimination"). This restriction would prohibit only a certain viewpoint one has *about* Santa Clause, and not the subject of Santa Clause generally.

Likewise, in discussing the general range of permitted restrictions, the *Hazelwood* Court left "[n]o doubt [that] the school could promote student speech advocating against drug use, without being obligated to sponsor speech with the opposing viewpoint." *Fleming*, 298 F.3d at 928. Other courts have similarly observed that in light of *Hazelwood*'s emphasis on the curricular environment, school officials are permitted to impose viewpoint-based restrictions on speech. *C.H. v. Oliva* 195 F.3d 167, 172 (3d Cir.) ("A rule foreclosing classroom speech that promotes the use of alcohol or that advocates a position on a controversial political

issue is recognized by *Hazelwood* to be permissible even though it is not viewpoint neutral."), *vacated and reh'g en banc granted*, 197 F.3d 63 (3d Cir. 1999), *aff'd by an equally divided court on reh'g en banc*, 226 F.3d 198 (3d Cir. 2000); *see also Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1116, 1185 (9th Cir. 2006) (opining that "public schools may permit, and even encourage, discussions of tolerance, equality and democracy without being required to provide equal time for student or other speech espousing intolerance, bigotry, or hatred."), *vacated as moot*, 127 S. Ct. 1434 (2007). Like the Santa Clause example, these restrictions would allow the subject of illegal drugs to be discussed, but only from a particular viewpoint.

Thus, any ambiguity regarding the legitimacy of reasonable viewpoint-based restrictions left open by *Hazelwood*'s public forum analysis is firmly resolved by the Court's discussion of the proper standard of review. Because the Culbertson Elementary School officials' actions were permitted under *Hazelwood*, the judgment of the court of appeals below should be affirmed.

3. Contrary Interpretations of *Hazelwood* Are Unpersuasive.

Despite the plain import of *Hazelwood*, the Second, Sixth, Ninth, and Eleventh Circuits have indicated that viewpoint-neutrality is required in the context of curricular speech. For several reasons, these decisions are unpersuasive.

Primarily, these cases fail to consider or address *Hazelwood*'s reasoning. In contrast to the lengthy analysis of *Fleming* and *Oliva*, which upheld viewpoint-based restrictions, the decisions of the Sixth and Eleventh Court of Appeals give scant attention to the actual language of *Hazelwood*. The Sixth Circuit, in a short-

lived decision, noted in dicta that *Hazelwood* did not extend to non-viewpoint based restrictions on student speech. *Kincaid v. Gibson*, 191 F.3d 719, 727 (6th Cir. 1999), *rev'd en banc*, 236 F.3d 342 (6th Cir. 2001). The *Kincaid* court added this viewpoint-neutrality requirement without addressing *Hazelwood's* discussion of the reasonableness standard, or considering the First Circuit's earlier contrary holding in *Ward v. Hickey*. *See id.* Consequently, the *Kincaid* decision offers no reason for imposing a viewpoint-neutrality requirement in the curricular context. *See* Janna J. Annest, Note, *Only the News That's Fit to Print: The Effect of Hazelwood on the First Amendment Viewpoint-Neutrality Requirement in Public School-Sponsored Forums*, 77 Wash. L. Rev. 1227, 1251 (2002) (observing that the Kincaid court "offer[ed] no explanation" for the viewpoint-neutrality requirement).

The Eleventh Circuit's application of *Hazelwood* to a high school's career day event was similarly flawed. *See Searcey*, 888 F.2d at 1325. Citing *Hazelwood* only once in the entire section of the decision addressing viewpoint-based restrictions, the *Searcy* court concluded: "[W]e do not believe [*Hazelwood*] offers any justification for allowing educators to discriminate based on viewpoint." *Id.* at 1324-25. Because the *Searcy* court failed to seriously consider the reasoning of *Hazelwood*, the court's refusal to permit reasonable viewpoint-based restrictions "[w]ithout more explicit direction" is unpersuasive. *Id.* at 1325.

Even those cases that do consider *Hazelwood* in greater depth fail to reconcile the special characteristics of curricular speech with a viewpoint-neutrality requirement. The Ninth Circuit failed to reconcile the imposition of a viewpoint-

neutrality requirement with its observation that *Hazelwood* "constrained" the public forum analysis "by requiring that courts focus on unique attributes of the school environment and recognize broadly articulated purposes for which high school facilities may properly be reserved." *Planned Parenthood of S. Nev., Inc. v. Clark Cnty. Sch. Dist.*, 941 F.2d 817, 825 (9th Cir. 1990) (en banc) (citing *Hazelwood*, 484 U.S. at 270-73). Instead, the court imposed a viewpoint-neutrality requirement without explanation or analysis. *Bannon v. Sch. Dist. of Palm Beach Cnty.*, 387 F.3d 1208, 1219 (11th Cir. 2004) (Black, J., specially concurring) (observing that the *Planned Parenthood* court "never explained why *Hazelwood* proscribed viewpoint-based discrimination").

In a subsequent decision, a Ninth Circuit panel strongly criticized the *Planned Parenthood* decision, observing that "[d]espite the absence of express 'viewpoint neutrality' discussion anywhere in *Hazelwood*, the *Planned Parenthood* court incorporated 'viewpoint neutrality' analysis into nonpublic forum, school-sponsored speech cases in our Circuit." *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1010 (9th Cir. 2002); *see also Fleming*, 298 F.3d at 927 (noting the criticism by the *Downs* court and rejecting the *Planned Parenthood* court's viewpoint-neutrality holding). Other courts have similarly recognized the lack of analysis in the *Planned Parenthood* court's application of a viewpoint-neutrality requirement. *Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 632 n.9 (2d Cir. 2005) (noting that the *Planned Parenthood* court "appli[ed], without discussion, *Cornelius* viewpoint neutrality standard to a nonpublic school forum").

Similarly, the Second Circuit, although recognizing that the *Hazelwood* decision provides support for reasonable viewpoint-based restrictions, nonetheless expressed reluctance to permit viewpoint-based restrictions in the limited context of school-sponsored speech. *Peck*, 426 F.3d at 633. In *Peck*, the court observed that "much of *Hazelwood*'s discussion of the proper role of school officials in making curricular judgments seems to suggest that viewpoint-based judgments would be permissible, and perhaps even desirable, at least under some circumstances." *Id.* The court, however, refused to allow viewpoint-based restrictions "without clear direction . . . ." *Id.*

A viewpoint-neutrality requirement is inconsistent with *Hazelwood*. None of the decisions to the contrary addresses the principles underlying the reasonableness standard, or the viewpoint-based examples employed in *Hazelwood*. Whether a form of expression is protected by the First Amendment is a context-specific inquiry. *New York v. Ferber*, 458 U.S. 747, 778 (1982) (Stevens, J., concurring). In the highly controlled context of a curricular activity, the *Hazelwood* Court recognized that speech may be restricted in order to ensure that appropriate lessons are communicated, students are shielded from inappropriate material, and personal views are not erroneously attributed to the school. *Hazelwood*, 484 U.S. at 271; *Ward*, 996 F.2d at 454.

As the well-reasoned decisions of the First, Third, and Tenth Circuits recognize, this principle extends to both content-based and viewpoint-based restrictions. Fundamentally, educators are entitled to restrict curricular speech as long as the

restrictions are "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. As the reasoning of *Hazelwood* demonstrates, whether these concerns arise due to the content of the speech or the viewpoint being expressed, the level of discretion that must be afforded public school officials remains the same. *See Curry*, 513 F.3d at 579. In the present case, both the district court and the Third Circuit concluded that the school officials' actions were reasonably related to valid educational concerns. *See* (R. at 26, 75.) Thus, under *Hazelwood*, the school officials' actions were consistent with the First Amendment.

C. The *Hazelwood* Reasonableness Standard Strikes the Proper Balance Between Invited Speakers' Rights and the Necessary Discretion of Public School Officials.

First Amendment rights must be balanced by the interest in furthering the educational mission of schools. For several reasons, the reasonableness standard outlined in *Hazelwood* strikes the proper balance between the rights of outside speakers and the necessary discretion school officials have over teacher-supervised, curricular activities.

1. While school officials may not restrict speech solely because they disagree with the speaker's viewpoint, *Tinker*, 393 U.S. at 509, they may restrict speech that is inconsistent with the school's educational mission. *Hazelwood*, 484 U.S. at 266; *see also LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 988 (9th Cir. 2001) (recognizing the need for educators and administrators to preserve the educational process). As the Supreme Court has recognized, the discretion afforded under this standard extends to viewpoint-based restrictions.

In *Morse*, the Court held that in light of the special characteristics of the school environment, school officials may "restrict student expression that they reasonably regard as promoting illegal drug use." *Morse*, 551 U.S. at 408; *see also id.* at 439 (Stevens, J., dissenting) ("[I]t might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting."). Under this rationale, the Court would have permitted the school to proscribe a pro-drug viewpoint while *allowing* speech from an anti-drug viewpoint. *Id.* at 410 (majority). While *Morse* involved the narrow issue of speech reasonably perceived as promoting illegal drug use, the Court's rationale underscores the need for reasonable viewpoint-based restrictions in the curricular environment.

The challenged speech in *Morse* occurred at an off-campus school event, which lacked the close supervision and control of the curricular environment. *See id.* at 405 (declining to apply *Hazelwood* because no one would reasonably believe the speech at issue "bore the school's imprimatur"). Nonetheless, the Court held that in the context of the school event, the school was "reasonable" in concluding that the challenged speech "promoted illegal drug use" and that "failing to act would send a powerful message to the students . . . about how serious the school was about the dangers of illegal drug use." *See Id.* at 410. In language echoing *Hazelwood*, the Court concluded that "[t]he First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers." *Id.*

The need for reasonable viewpoint-based restrictions is even more pronounced in the curricular environment. In the present case, Principal Cook restricted

Petitioner's speech not because he disagreed with Petitioner's religious viewpoint, but because that viewpoint was inappropriate in the context of a kindergarten curricular activity. *See* (R. at 55-56). Although the restriction was not related to illegal drug use, as in *Morse*, the school officials exercised the discretion with which the parents of Culbertson Elementary entrusted them. *See Edwards v. Aguillard*, 482 U.S. 578, 584-85 (1987) ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposefully be used to advance religious views that may conflict with the private beliefs of the student and his or her family."). Because the First Amendment allows school officials to uphold this basic responsibility, a reasonableness standard is appropriate. *See Morse*, 551 U.S. at 397.

2. Outside speakers have diminished First Amendment rights when addressing a captive audience of students. While the First Amendment provides certain rights of expression, it does not guarantee the attention of a captive audience. *Hill v. Colorado*, 530 U.S. 703, 736-37 (2000) (Souter, J., concurring); *cf. Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."). In light of the special characteristics of the school environment, the standard of review applied to school officials' restrictions of speech must ensure that classrooms are not used by outside speakers to force their views on a young, impressionable captive audience. *See Pub. Utils. Comm'n v. Pollack*, 343 U.S. 451, 469 (1952) (Douglas, J., dissenting) (opining that when the state "force[s] people to listen to another's ideas, [it] give[s] the

propagandist a powerful weapon); *McCullom v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) (finding that allowing sectarian groups to teach religious classes during school hours gave the groups an "invaluable aid" by "provid[ing] pupils for their religious classes through the use of the Sate's compulsory public school machinery").

Students do not have a choice in attending curricular activities. *Edwards*, 482 U.S. at 584 ("Students in [public schools] are impressionable and their attendance is involuntary."); *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1049 (2d Cir. 1979) (describing classroom as a "captive audience of children"). This choice is critical to the First Amendment analysis. In *Pico*, this Court, in a divided opinion, found that removing books from school libraries based on "narrow partisan or political motives" was inconsistent with the First Amendment. *Pico*, 457 U.S. at 869 (plurality). Chief Justice Burger, in a strong dissent, articulated his fear that schools would become a "slavish courier of the material of third parties." *Id.* at 888 (Burger, J., dissenting). Although that concern failed to carry the day in determining the "narrow" issue of removing library books, it applies with full force to compulsory activities taught within the classroom environment. *See Id.* at 861-62 (plurality) (comparing the "free choice" in checking out a library book to the "compulsory" classroom environment) (quoting *Right to Read Def. Comm. v. Sch. Comm.*, 454 F. Supp. 703, 715 (Mass. 1978)). In the compulsory classroom context, the right that Petitioner seeks is not the right to express a particular idea to a voluntary audience of peers, but to "read the Bible to a captive audience of kindergarten students." (R. at 74); *see Berger v. Rennselaer Cent. Sch. Corp.*, 982

F.2d 1160, 1166-67 (7th Cir. 1993) (finding that a sectarian group seeking to present a religious presentation to elementary school classrooms was "seek[ing] access to children and not facilities"). Because this is not a right recognized or guaranteed by our Constitution, the school officials should not have been forced to show a "compelling interest" to justify prohibiting Petitioner's speech.

3. A reasonableness standard is consistent with the general discretion afforded public school officials. This Court's First Amendment jurisprudence has long recognized the need for reasonable restrictions on speech in the school environment. *See Tinker*, 393 U.S. at 513 (holding that the First Amendment permits "reasonable regulation of speech-related activities in carefully restricted circumstances"); *Hazelwood*, 484 U.S. at 273 (applying reasonableness standard to curricular speech). Applying this familiar standard to viewpoint-based restrictions on curricular speech will ensure the proper balance between individual First Amendment rights and the necessary discretion afforded to public school officials.

First Amendment jurisprudence has been guided by the well-established principle that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges." *Hazelwood*, 484 U.S. at 273; *see also Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (opining that federal courts should not ordinarily "intervene in the resolution of conflicts which arise in the daily operation of school systems"). Requiring school officials to show a "compelling interest" in restricting curricular speech will have a drastic chilling effect on the teachers' ability to educate, and

embroil the courts in issues best left to educators and administrators. Due to the difficulty of discerning exactly what a "compelling state interest" is, educators will instead opt to not invite speech in the first instance. *See Widmar v. Vincent*, 454 U.S. 263, 278-79 (1981) (Stevens, J., dissenting) (characterizing the phrase "compelling state interest" as "ambiguous"); *Ill. Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring) ("I have never been able fully to appreciate just what a 'compelling state interest' is."). This chilling effect will be amplified by the additional uncertainty regarding how to distinguish content from viewpoint, a difference that this Court has recognized "is not a precise one." *Rosenberger*, 515 U.S. at 831; *Make the Road by Walking v. Turner*, 378 F.3d 133, 150 (2d Cir. 2004) (characterizing the distinction as "imprecise"). Thus, under a "compelling interest" standard, the result would be less speech, not more. *See Hazelwood*, 484 U.S. at 275 (predicting that a higher standard of review would have "far more deleterious consequences" because many schools would simply decide to eliminate school-sponsored activities).

By contrast, a reasonableness standard would allow school officials to restrict speech based on the realities of the school environment. In determining the proper standard for establishing students' Fourth Amendment rights, the Supreme Court indicated that the school setting "requires some modification" of the normal requirements. *New Jersey v. TLO*, 469 U.S. at 341. The Court concluded that a "reasonableness" standard was appropriate because it allowed teachers and administrators to determine their actions based on "reason and common sense." *Id.*

at 342. At the same time, the Court recognized that this standard would avoid "unrestrained intrusions" by ensuring that "the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." *Id.*

The same logic applies in the realm of curricular speech restrictions. Far from turning schools into "enclaves of totalitarianism," *Tinker*, 393 U.S. at 511, the reasonableness standard would allow educators and administrators to make commonsense, practical decisions in determining allowable curricular speech. *See Walz ex rel. Walz v. Egg Harbor Twp.*, 342 F.3d 271, 275-76 (3d Cir. 2003) ("School officials who exercise expertise and authority should be afforded leeway in making choices designed to foster an appropriate leaning environment and further the educational process."). In addition, the reasonableness standard is consistent with the general disfavor of viewpoint-based restrictions, *see, e.g.*, *Perry*, 460 U.S. at 54-55, because it will be difficult show how any individual viewpoint-based restriction reasonably furthers the school's educational mission. Jordan, *supra*, at 1573. As Judge Black of the Eleventh Circuit opined, "when a school discriminates against expression on the basis of its viewpoint, it runs a greater risk of having its policy struck down for its failure to be reasonably related to legitimate pedagogical concerns." *Bannon*, 387 F.3d at 1219 n.1 (Black, J., specially concurring); *see also* Annest, *supra*, at 1252-53 (observing that the conclusions in *Kincaid*, *Planned Parenthood*, and *Searcy* could have been reached under a reasonableness test, without imposing a viewpoint-neutrality requirement). Thus, a reasonableness

standard both ensures that public school officials are able to make practical decision and that individual speakers remain free from unrestrained restrictions on their speech.

The chilling effect of a "compelling interest" standard cannot be squared with the unifying principle that the First Amendment must be considered in light of the special characteristics of the curricular environment. By contrast, the familiar reasonableness standard balances individual rights with the practical realities of the school environment. Because a reasonableness standard strikes the proper balance between speakers' rights and the discretion of public school officials, the decision below should be affirmed.

4. Educators, particularly at the elementary school level, have powerful reasons to involve parents in their children's education. Over thirty years of research has shown that parent involvement in their children's learning is a "critical link to achieving a high-quality education and a safe, disciplined learning environment for every student." U.S. Dep't of Educ., *Strong Families, Strong Schools: Building Community Partnerships for Learning* 6 (1994); *see also* Nicholas V. Longo, *Connecting Education with Civic Life* 102 (2007) (noting that "[t]he impact that parental involvement has on school performance and student achievement" has been "well documented" and "cannot be overstated"). Consistent with these findings, a major strategy in facilitating parent involvement has been to solicit parent participation in school activities like field trips and career awareness days. Robert W. Roeser et. al., *A Longitudinal Study of Parent Involvement in School Across the*

Elementary Years: Teacher and Parent Reports 4 (1995) (citing Joyce L. Epstein, *What Principles Should Know About Parent Involvement*, 66 Principal 6 (1987)).

Educators and administrators must maintain considerable control over these activities in order to ensure that the educational environment benefits from the presence of parents and other outside speakers. As the Third Circuit recognized, when outside speakers are permitted to speak to a captive audience of students as part of an educational activity, educators and administrators must be able to limit their speech accordingly. (R. at 19.) Judge Hardiman's dissenting assertion that a school opens a "Pandora's box" by permitting parents to participate in curricular activities is inconsistent with the realities of the school environment. *See* (R. at 39.) A school does "not lose its character as a nonpublic forum merely because outsiders are occasionally invited to speak." *May v. Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105, 1114 (7th Cir. 1986); *see Perry*, 460 U.S. 37, 47 (1983) ("[S]elective access does not transform government property into a public forum."). Thus, by allowing limited parent participation in the "All About Me" curricular activity, Reilly did not transform her classroom into a public forum or invite unlimited discourse. *See May*, 787 F.2d at 1114 ("A college classroom (and *a fortiori* an elementary school classroom) does not become a public forum because a guest lecturer from the outside is invited to talk to the class.").

Schools cannot be forced into a Hobson's Choice between forgoing valuable curricular exercises and ceding control over the school environment. (R. at 19.) A reasonableness standard affords educators and administrators a level of deference

that allows them to achieve the critical pedagogical goal of better involving parents in their children's education. Balancing the First Amendment with the needs of the schools requires that this goal be accommodated. Thus, in light of the recognized need to ensure that teachers are able to fulfill their fundamental obligation to educate our Nation's youth, a reasonableness standard should be applied to viewpoint-based restrictions on speech solicited as part of a curricular, teacher-supervised, classroom activity.

For all of these reasons, a reasonableness standard is both appropriate and consistent with the First Amendment. Because the school officials' actions were proper under this standard, the decision by the Third Circuit should be affirmed.

II. THE CULBERTSON SCHOOL OFFICIALS' REASONABLE VIEWPOINT-BASED RESTRICTION WAS PARTICULARLY WARRANTED IN LIGHT OF THE SPECIAL CHARACTERISTICS OF THE ELEMENTARY SCHOOL ENVIRONMENT.

The discretion to impose reasonable viewpoint-based restrictions on curricular speech is especially important in the elementary school environment. Although this Court has never reached the issue of which speech restrictions are appropriate in the elementary school setting, it has consistently recognized the need to consider constitutional rights in light of the age and maturity of children who may be affected. Because a "compelling interest" standard would be inefficient and irresponsible due to the age and maturity of elementary school children, this Court should apply the more appropriate reasonableness standard to viewpoint-based restrictions on curricular speech. Thus, for this additional reason, the decision of the Third Circuit should be affirmed.

A. Age and Maturity Are Crucial in Determining the Extent of First Amendment Protections.

In determining the applicability of constitutional rights to "[t]he world of children," the "factor of immaturity, and perhaps other considerations, impose different rules." *Ginsberg v. New York*, 390 U.S. 629, 638 n.6 (1968) (quoting Thomas I. Emerson, *Toward A General Theory of the First Amendment*, 72 Yale L.J. 877, 938-39 (1963)) (internal quotation marks omitted). Hence, the decisions of this Court have "indicated that youth-blindness . . . is not a goal in the allocation of constitutional rights." *Ramos v. Town of Vernon*, 353 F.3d 171, 179-80 (2d Cir. 2003). This is because "even with regard to fundamental rights, failing to take children's particular attributes into account in many contexts . . . would be irresponsible." *Id.*; *see also May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring) ("Children have a very special place in life which law should reflect.").

There are particularly "heightened concerns" regarding the responsible allocation of constitutional rights within the elementary school environment. *Lee v. Weisman*, 505 U.S. 577, 591 (1992). Because curricular material is designed to meet the developmental level of students, educators must be able to consider the "age and maturity" of the student audience when determining proper restrictions on curricular speech. *Hazelwood*, 484 U.S. at 272; *see Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 416-17 (3d Cir. 2003) (observing that "age is a crucial factor" in determining First Amendment rights in the public school environment). Since the age and maturity of young students "demands a far greater level of guidance," these

factors make it particularly important that elementary school officials are afforded greater latitude in controlling the curricular environment. *Walker*, 325 F.3d at 416.

B. The Age and Maturity of Elementary School Students Requires the Discretion to Impose Reasonable Viewpoint-Based Restrictions on Curricular Speech.

Children, especially young children, are "more vulnerable or susceptive to negative influences and outside pressures" and "their characters are 'not as well formed.'" *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010) (quoting *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005));*see also Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 288 n.* (4th Cir. 1998) (noting the "impressionability of young elementary-age children."). As the Third Circuit recognized, these characteristics make the elementary school setting "a unique forum for purposes of considering competing First Amendment and pedagogical interests." (R. 14.)

In the elementary school context, "the age of students bears an important inverse relationship to the degree and kind of control a school may exercise: as a general matter, the younger the students, the more control a school may exercise." *Walz*, 342 F.3d at 276; *see also Sch. Dist. v. Schempp*, 374 U.S. 203, 290-91 n.69 (1963) (Brennan, J., concurring) (observing that the "susceptibility of school children . . . within the school environment varies inversely with the age, grade level, and consequent degree of sophistication of the child"). Thus, "[i]f the schoolchildren are very young . . . the school has a pretty free hand." *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 673 (7th Cir. 2008).

The elementary school curriculum reflects the developmental stage of young children. In contrast to higher levels of education, "[g]rammer schools are more about learning, including to sit still and be polite, than about robust debate." *Muller ex rel. Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1538 (7th Cir. 1996). In light of these pedagogical goals, "it follows that a public elementary school can shield its five through thirteen-year-olds from topics and viewpoints that could harm their emotional, moral, social, and intellectual development." *Id.* at 1538; *see also Walz*, 342 F.3d at 276 ("[A] 'show and tell' exercise may be restricted to age-appropriate items to prevent unsuitable discussions in a kindergarten classroom.").

Thus, educators and administrators should be able to impose viewpoint-based restrictions on curricular speech in the elementary school environment. In a case factually similar to the present case, the Second Circuit prohibited a school from allowing a sectarian group to distribute Bibles in elementary school classrooms. *Berger*, 982 F.2d at 1166. There, the court observed that "[a] ten- or eleven-year-old fifth grader cannot be expected to make subtle distinctions between speakers or instructors invited by the [school] and those whose invitations are self-initiated . . . ." *Id.* at 1166.

The same logic applies with even greater force to the present case. Culbertson Elementary School officials had a legitimate fear that the four- and five-year-old children in Reilly's classroom would interpret Petitioner's Bible reading as endorsed by the school. *See* (R. at 10, 55); *see also Walz*, 342 F.3d at 277 ("[I]n an elementary school classroom, the line between school-endorsed speech and merely allowable

speech is blurred . . . ."). Instead of talking about religion in the context of her son or her family's religious observance, the Petitioner attempted to read religious scripture to a captive audience of impressionable kindergarten students. (R. at 55-56.) Because the Bible passages would be presented without a pedagogical context, the school had a valid educational reason to "avoid having its curricular event offend other children or their parents, and to avoid subjecting young children to an unsolicited promotional message that might conflict with what they are taught at home . . . ." *Curry*, 513 F.3d at 579.

In order to preserve the educational process, the Culbertson Elementary School officials had to make an immediate decision. As educators, they were in a far better position to make that judgment than a federal judge would be. *See Hazelwood*, 484 U.S. at 273. They had the knowledge and expertise to determine what is appropriate in light of the unique concerns raised by the age and maturity of the young student audience. As the decisions of the Supreme Court demonstrate, the First Amendment provides educators with the leeway to make such determinations. *See id.* at 271-72; *cf. Walker*, 325 F.3d at 416 (opining that the analysis in student speech cases "necessarily take[s] into account the age and maturity of the student"). The special circumstances presented in the elementary school context necessitate preserving the discretion of school officials to make reasonable viewpoint-based decisions when necessary. Thus, for this additional reason, the decision by the Third Circuit should be affirmed

CONCLUSION

The judgment of the court of appeals should be affirmed.

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