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 PETITIONER

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QUESTION PRESENTED

Whether a public school must, consistent with the First Amendment, present a compelling interest to censor invited speech on the basis of viewpoint, or whether it may present only a reasonable justification.

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I. Factual Background

In October 2004, Wesley Busch—son of Petitioner Donna Busch—was in Jaime Reilly's kindergarten class at Culbertson Elementary School, a division of Marple Newtown School District ("Respondent"). (R. at 51.) At that time, Ms. Reilly began a unit for her social studies curriculum called "All About Me." (R. at 51.) The gist of the assignment was simple: each week a single student would share information about himself or herself by bringing in a "poster with pictures, drawings or magazine cut outs of [their] family, hobbies, or interests." The children would also bring in items such as stuffed animals or toys, and could share a snack with the other students. The final component was an invitation for parents to come to the school and "share a talent, short game, small craft, or story" with the class. (R. at 52.) The unit was designed as a "socialization" program, and the purpose was for students to "identify individual interests and learn about others" as well as to "identify sources of conflict with others and ways that conflicts can be resolved." (R. at 51.)

For the poster assignment, Donna Busch helped Wesley put images of his choosing on the poster. (R. at 52.) This included pictures of family, a pet, his best friend, and a church under which Wesley requested for Donna to write something similar to "I love to go to the House of the Lord." (R. 52–53.) Donna also participated in the project by coming to Wesley's class to read a story, just as she was invited to do. When Donna asked what book Wesley would like her to read to

the class, he asked her to read from the Bible. As it happened, the Busch's were regular churchgoers and Evangelical Christians, and Wesley and Donna read the Bible together twice per day. Wesley often carried a Bible with him as well. (R. at 53.)

Wesley having left the choice of which part of the Bible to read to Donna, she chose Psalm 118, verses 1 through 4 and 14. (R. at 53.) Donna chose these because she knew that Wesley liked them, they are similar to poetry, do not make specific reference to Jesus. Her stated goal was to avoid upsetting others, presumably by choosing to read something that would be more explicitly denominational (R. at 54–55.) The verses translate as follows:

> 1 Gives 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 54.) Donna intended to read the verses without elaborating upon them or explaining them, and if asked questions she intended to simply say that they were "ancient psalms and ancient poetry and one of Wesley's favorite things to hear . . . ." (R. at 54–55.)

When she arrived at school on October 15, 2004, Donna informed Ms. Reilly of Wesley's request that she read from the Bible and informed her which passage she had chosen. Ms. Reilly responded that she would have to check with Principal Thomas Cook, who subsequently requested that Donna speak with him in the

hallway. Principal Cook informed Donna that he would not allow her to read the passage because it would be "against the law . . . of separation of church and state" and because it would be "proselytizing for promoting a specific religious point of view." (R. at 55.) Donna reluctantly agreed to read from a different book, and rejected Ms. Reilly's suggestion that she read from a book about Halloween. Donna and Ms. Reilly settled on a book on counting. (R. at 56.)

Other parents participated in the "All About Me" unit, reading at least ten other books about Christmas, Easter, and Hanukkah. On two other occasions, another parent made presentations on Hanukkah and Passover. During Hanukkah, the parent brought in a menorah and a dreidel and read a Hanukkah-related story. (R. at 57.) On Passover, the parent read a book called *The Matzah Ball Fairy* and offered the children matzah ball soup. (R. at 58.) Donna's encounter with Ms. Reilly and Principal Cook appears to have been the only occasion during the relevant timeframe in which a specific religious point of view was singled out for different treatment.

II. Legal Background

On May 3, 2005, Donna Busch filed a lawsuit against Respondents, alleging, inter alia,[1] that by banning her from reading the short passage from the Bible that Wesley chose for the class, the school violated her right to free speech as guaranteed

[1] Donna Busch also alleged violations of the Pennsylvania Constitution, the Establishment Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Establishment Clause of the First Amendment. (R. at 59.) These claims were disposed of in various parts of the litigation and are immaterial to the certified question.

by the Free Exercise Clause of the First Amendment to the U.S. Constitution. (R. at 59.) Donna Busch and Respondents filed cross motions for summary judgment on February 23, 2006. (R. at 60.)

The District Court granted Respondents' motion for summary judgment on the Free Speech question. (R. at 77.) The court first held that Ms. Reilly's classroom became a limited public forum in this context, which meant that the school's restriction was required to be reasonable and viewpoint neutral. (R. 63–64.) Agreeing with Donna Busch that the school's actions constituted viewpoint discrimination (R. at 65–66), the court nonetheless held that the censorship was constitutional. Relying on the Supreme Court's holding in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), the court held that viewpoint discrimination *is* lawful where a school can present a compelling justification for a restriction on speech. (R. at 66–74.) Because the court believed that Respondents had presented a compelling justification in their desire to avoid violating the Establishment Clause, summary judgment was granted for the Respondents on this question. (R. 75–77.)

The Third Circuit affirmed, but was silent on the question whether, as Respondents argued, *Hazelwood* stood for the proposition that viewpoint discrimination can be justified where a school presents a compelling interest. The Third Circuit ultimately held that Respondents' censorship of Donna Busch was unot unreasonable (R. at 25.) In a partial dissent and partial concurrence, Judge Hardiman explained that *Hazelwood* was not applicable to the case before the court

because it was "limited to situations in which the speech may be interpreted as coming from the school itself." (R. at 41.) Citing a previous Third Circuit dissent, Judge Hardiman further noted that *Hazelwood* did not allow schools to restrict student speech on the basis of viewpoint. (R. at 43.)

This point is at the crux of this litigation, and is the subject of disagreement by federal Courts of Appeal. Some courts have held that *Hazelwood* effectively holds that schools may censor speech on the basis of viewpoint, and only need present a reasonable justification for doing so. *See Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 926–29 (10th Cir. 2002); *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993); *see also C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 172–73 (3d Cir.1999), *vacated for en banc review*, *C.H. ex rel. Z.H. v. Oliva*, 197 F.3d 63 (3d Cir.1999) (en banc). Other circuit courts have adhered to a long line of precedent holding that viewpoint discrimination is unconstitutional. *See Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 626, 629–30 (2d Cir. 2005); *Planned Parenthood of S. Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991); *Searcey v. Harris*, 888 F.2d 1314, 1320 (11th Cir. 1989); *see also Oliva*, 226 F.3d at 211 (Alito, J., dissenting).

The Supreme Court granted certiorari to resolve this question.

SUMMARY OF THE ARGUMENT

Respondents do not dispute that they censored Donna Busch's reading of a short religious text on the basis of her religious viewpoint. To sustain this action, Respondents ask this Court to reverse course on a long line of precedent that stamps out the odious, undemocratic consequences of government censorship of particular viewpoints. To do so would not only turn back this long line of precedent, but would undermine important principles underlying the First Amendment. Respondents argument must be rejected, and the Third Circuit's decision must be reversed.

This Court has long held that government may not censor speech on the basis of viewpoint. This rule is a manifestation of important First Amendment principles. The Court has noted the evils of allowing government to choose among viewpoints which are fit for citizens to hear and which are merely fit for censorship. Our republic, the Court has held, succeeds on the principle that citizens ought to be able to choose from among a variety of views; government may not choose for them. The Court has never deviated from this rule, and has consistently held viewpoint discrimination to be per se unconstitutional.

Government entities may, however, exercise some control over speech that takes place on its property. In "traditional public forums" and "limited public forums," for example, government entities may exercise control over the *content* of speech, provided that they have a compelling justification and do not engage in viewpoint discrimination. In nonpublic forums, government entities need only

present a reasonable justification to regulate the content of speech. What all forums have in common is that government may not discriminate on the basis of viewpoint. Again, the Court has consistently held this type of restriction on speech to be per se unconstitutional.

Assuming that government entities could engage in viewpoint discrimination on the basis of a compelling justification, Respondent has not provided one here. Rather, until this point Respondents' only justification for the censorship has been that they wished to avoid a potential violation of the Establishment Clause. The Court has never held that this is a sufficient justification for violating an individual's right to free speech. Even if this can be a sufficient justification, as it has been held to be in other contexts, Respondent has not provided a sufficient Establishment Clause claim here. Allowing Donna Busch to speak would have been in the exercise of a secular purpose, would not have advanced or promoted any particular religion, and would not have resulted in excessive entanglement with religion. Further, there would be no danger that any person, including the students, would mistake Donna Busch's speech for the school's point of view. Plainly, Respondents do not have a viable Establishment Clause defense, let alone a compelling justification for censorship.

Likewise, Respondent cannot establish a defense under cases giving discretion to school authorities to regulate the classroom setting. Respondents have not demonstrated that allowing Donna Busch to speak would cause a significant disruption, would constitute lewd or offensive behavior, or promote illegal drug use.

These are the only justifications the Court has held to validate restrictions on the content of student speech.

Respondents' effectively argue that none of this matters; they argue that the Supreme Court held in *Hazelwood* that schools have *carte blanche* to regulate speech in schools and only need a reasonable justification to do so. This argument is grievously misguided. First, *Hazelwood* only applies to cases in which speech might bear the imprimatur of the school. This is not the case here, where Donna Busch's speech is wholly separate from the school. Second, even if *Hazelwood* applied, it does not hold that schools may engage in viewpoint discrimination. *Hazelwood* did not explicitly hold that schools may censor speech on the basis of viewpoint, and the case itself did not involve censorship on the basis of viewpoint. To hold that the Court undermined every previous holding on viewpoint discrimination *without explicitly saying so* and *in a case in which viewpoint discrimination was not at issue* is to hold that viewpoint discrimination was never worth prohibiting in the first place.

This cannot be the case. Students, no less than adults, must be exposed to ideas and viewpoints as a part of learning the responsibilities of citizenship in a free republic. This Court has noted as much, and this, in fact, was part of the point of the Ms. Reilly's assignment in the first place. Allowing public schools to make the determination of what speech is deserving of censorship in almost all cases—which is what Respondents would have this Court do—would ask students to believe that the principles of the First Amendment are only important *sometimes*. The First

Amendment cannot be so easily overcome. Respondents' argument must be rejected, and Petitioners respectfully ask this Court to reverse the Third Circuit and remand for further proceedings to determine whether Donna Busch is entitled to damages as a result of Respondents' constitutional violation.

ARGUMENT

I. In Censoring Donna Busch, Respondents Unconstitutionally Infringed Upon Her Freedom of Speech

The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. Constitutional limitations on government restriction of this freedom, of course, apply to states. *See Gitlow v. New York*, 268 U.S. 652 (U.S. 1925) (incorporating the First Amendment as against states). As such, public school administrations and teachers, as government actors, are bound to respect the freedom of speech, and the Supreme Court has plainly held that the freedom extends to students. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."). By banning Donna Busch from reading a short religious text despite having invited her to share information about Wesley, Respondents have failed to fulfill their constitutional obligations to respect Donna and Wesley Busch's freedom of speech.

a. It Is Settled Law That Viewpoint Discrimination is Unconstitutional

Government suppression of certain viewpoints is anathema to the First Amendment, and the Supreme Court's line of cases rejecting this type of limitation on speech and expression is well traveled. Specifically, the Court has long held that "[o]ur Constitution does not permit the official suppression of *ideas*." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871 (1982)

(emphasis in original); *see also Speiser v. Randall*, 357 U.S. 513 (1958) (holding that government violates the freedom of speech when it imposes limitations "frankly aimed at the suppression of dangerous ideas") (internal citations omitted). The problem with governmental censorship of particular viewpoints is one of democratic principle:

> At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.

Turner Broad. Sys. v. FCC, 512 U.S. 622, 641 (1994). Where government determines which ideas ought to be heard and which ought to be silenced, this ideal has been undermined, if not destroyed In its place, the government has obtained authority to "drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

The application of this animating principle, of course, is not without cost. Politically unpopular speech—even speech that many would find repugnant—is as well-protected as speech that many would embrace. *See, e.g.*, *Tex. v. Johnson*, 491 U.S. 397 (1989) (holding unconstitutional a statute making it unlawful to burn the American flag); *United States v. Eichman*, 496 U.S. 310 (1990) (same); *R. A. V. v. St. Paul*, 505 U.S. 377 (1992) (holding unconstitutional a statute banning cross burning on the basis of race, color, creed, religion or gender). But the Supreme Court has consistently upheld this principle "'in the belief that no other approach would comport with the premise of individual dignity and choice upon which our

political system rests.'" *Leathers v. Medlock*, 499 U.S. 439, 449 (1991) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)). It is on this view that Donna Busch's speech must be considered.

b. Viewpoint Discrimination is Unconstitutional Regardless of the Category of Forum the Government Has Created

The Supreme Court has held that government entities can regulate speech in limited circumstances, including those circumstances in which a government entity owns or controls the property upon which the disputed speech would take place. Specifically, a government entity has the ability "to preserve the property under its control for the use to which it is lawfully dedicated." *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2984 (2010) (quoting *Cornelius v. NAACP Legal Defense and Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985)). The level of control a government entity can exert, however, depends on the nature of the "forum" in which speech is to take place. Specifically, government entities have the authority to regulate the *content* of speech in certain circumstances. For preliminary purposes, a vivid example of the distinction between content-based discrimination and viewpoint-based discrimination can be found in *Lehman v. City of Shaker Heights*, where the Court held that a ban on all political advertisements on city buses was constitutional. 418 U.S. 298, 304 (1974). It would be inconceivable for the Court to have held the policy constitutional if the ban only extended to political advertisements by certain political parties. The fundamental difference between content-based and viewpoint-based discrimination, then, is the degree to which government seeks to disparage certain ideas.

In this respect, not all forums are created equal. When it comes to traditional public forums such as "streets and parks[,]" a government entity can enforce content-based regulations if it can "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). By contrast, government creates a "limited public forum" where it has opened a forum for expression even absent a requirement to do so. *Id.* at 45–46. While government can restrict the content of a limited public forum by presenting a compelling state interest—as with traditional public forums—a government entity retains the ability to define the length to which a facility must retain its "open character[.]" *Cornelius v. NAACP Legal Defense and Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985) (quoting *Perry Educ. Ass'n*, 460 U.S. at 46). Finally, there exist "nonpublic forums"—settings in which the Court has held that government entities retain still greater control:

> 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. . . . The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

Id. at 49.

Despite the differences between the levels of scrutiny to be applied to different categories of forums, all forums have in common that certain *types* of regulations demand a higher level of scrutiny regardless which category is applied. Specifically, this Court has consistently held that viewpoint discrimination is unconstitutional, even in a nonpublic forum. *Perry Educ. Ass'n*, 460 U.S. at 46; *see*

also Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."). Contrary to Respondents' argument and the holding of the Third Circuit, the Court has time and again held that public schools are held to this standard.

c. The Court Has Consistently Held That Discrimination on the Basis of Religious Speech Constitutes Viewpoint Discrimination

Though Respondent apparently does not dispute that it censored Donna Busch's speech on the basis of religion, it is important to note that the Court has held special solicitude for religious speech when analyzing viewpoint discrimination. In *Lamb's Chapel v. Center Moriches Union Free School District*, for example, the Supreme Court considered whether a school district violated a local evangelical congregation's right to free speech by denying it access to school facilities to show a film with a religious theme. 508 U.S. 384, 387–89 (1993). It was undisputed that access to the facilities was denied solely because of the religious content of the film. *Id.* at 393–94. The Court held that it was irrelevant that all religious viewpoints would be treated the same way under the policy. *Id.* at 393. Discriminating *generally* against religious viewpoints violated the First Amendment. *Id.*

The Court expanded on this concept in *Rosenberger v. Rector & Visitors of the University of Virginia*, where it considered whether the University of Virginia

violated the First Amendment by denying funding to a student newspaper for the sole reason that it "promoted or manifested a particular belief in or about a deity or an ultimate reality." 515 U.S. at 827. Holding first that the student group funding system was a limited public forum under the framework previously discussed, the Court ultimately held that the denial of funding was viewpoint discrimination. *Id.* at 829–31. Rejecting the dissent's claim that there was no viewpoint discrimination because the school's policy eliminated support for all religious viewpoints, the Court characterized the dissent's conception as reflecting "an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech." *Id.* at 831. More to the point, the Court explained that "[t]he dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways." *Id.* at 831–32. Thus, the Court held, the school's actions contravened the First Amendment. *Id.* at 846. Whether a government entity discriminates against a single viewpoint or against many does not matter. Discrimination against the viewpoint of a religious viewpoint *in general* violates the Constitution.

Finally, in *Good News Club v. Milford Central School*, the Court again held that eliminating religious viewpoints from participation in debate where it justifiably belongs is unconstitutional. 533 U.S. 98 (2001). There, a school district prevented a local Christian organization from using school facilities to host weekly meetings in which students would sing religious songs, hear a bible lesson, and memorize scripture. *Id.* at 103. The school had denied the Good News Club's

request to use the facilities on the grounds that the activities proposed "were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself." *Id.* at 104. Assuming that the school district was operating a limited public forum in allowing outside groups to use its facilities, the Court first addressed whether its conduct toward the Good News Club constituted viewpoint discrimination. *Id.* at 106–07. Citing *Lamb's Chapel* and *Rosenberger*, the Court held that the Club sought to teach a subject otherwise permitted under the school's policy, only through a religious perspective. *Id.* at 109. That the perspective was religious, though, did not disqualify it from being a legitimate means of teaching development of character and morals, as the school itself stated was its goal. *Id.* at 111. Thus, the exclusion of the Good News Club's activities from school facilities constituted viewpoint discrimination and violated the First Amendment.

While there is no dispute in this case that Respondents engaged in viewpoint discrimination, *Lamb's Chapel*, *Rosenberger*, and *Good News Club* stand plainly for the proposition that viewpoint discrimination of religious perspectives, even by a public school exercising its authority to control its property, is unconstitutional. Respondents seek to undermine this clear holding, and therefore the Third Circuit must be reversed.

d. Respondent Has Not Asserted a Compelling State Interest in Banning the Speech

The Supreme Court has never held that viewpoint discrimination requires the application of a certain level of scrutiny to be deemed constitutional. Rather, the Court has always found viewpoint discrimination to be per se unconstitutional where a party has successfully established that it has taken place. From its earliest admonitions against viewpoint discrimination, the Court has held in no uncertain terms that it is plainly unconstitutional:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. *If there are any circumstances which permit an exception, they do not now occur to us*.

W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (emphasis added); *see also Hague v. CIO*, 307 U.S. 496, 516 (1939) (holding unconstitutional a local ordinance allowing state officials to deny permits for assemblage and speech on an arbitrary basis); *Niemotko v. State of Md.*, 340 U.S. 268, 284 (1951) (holding unconstitutional a municipality's denial of a permit for public speech by Jehovah's Witnesses despite allowing other religious groups the same privilege); *R. A. V. v. St. Paul*, 505 U.S. 377 (1992) (holding unconstitutional a statute banning cross burning on the basis of race, color, creed, religion or gender). As noted above, viewpoint-based restrictions on speech by schools have also been held to be a per se violation of the First Amendment. *See Lamb's Chapel*, 508 U.S. 384 (1993); *Rosenberger*, 515 U.S. 819 (1995); *Good News Club*, 533 U.S. 98 (2001).

Of course, the Court has constrained the question in this case to whether a school-based restriction need be based on a compelling or reasonable justification, and has thus foreclosed the argument that viewpoint discrimination in this context can be per se unconstitutional. The great weight of authority demonstrates, however, that a government engaging in viewpoint discrimination must *at least* present a compelling justification for doing so. Respondents have no such justification.

i. The Court Has Never Held That Avoiding a Violation of the Establishment Clause Justifies Viewpoint Discrimination

The Court has held that avoiding violations of the First Amendment's Establishment Clause[2] may be a compelling interest justifying content-based restrictions of speech in a limited public forum. In *Widmar v. Vincent*, the University of Missouri at Kansas City denied a student organization the ability to use the University's facilities for meetings. 454 U.S. 263, 265 (1981). The University argued that it had a compelling interest—required because the meeting facilities constituted a limited public forum—in avoiding a First Amendment violation. *Id.* at 269–70. The Court acknowledged that "the interest of the University in complying with its constitutional obligations may be characterized as compelling." *Id.* at 271. Notably, though, the Court has not held that an Establishment Clause defense—even if compelling for the purposes of analyzing content-based restrictions on speech—can justify viewpoint discrimination, and has

[2] "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I.

acknowledged as much. *Good News Club*, 533 U.S. at 113 ("[I]t is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination.").

Respondent would ask this Court to turn its back on a previously articulated distinction between content-based and viewpoint-based discrimination, which it expressly declined to do in *Good News Club. Id.* To do so would reject the premise that viewpoint discrimination is an evil at which the First Amendment is aimed, and it would do so in the most emphatic of terms. Viewpoint discrimination, which has always been per se unconstitutional, would come under the same scrutiny as content-based discrimination, which is permissible in some settings upon a showing of reasonableness *and viewpoint neutrality*. Functionally, there would cease to be a distinction between the two.

The Court has never held this to be so. Respondents' argument must fail, and the Third Circuit's holding below must be reversed.

ii. Even if Avoiding a Potential Establishment Clause Violation is Compelling for the Purposes of Permitting Viewpoint Discrimination, Respondents Do Not Have A Viable Establishment Clause Claim Here

Thus far, Respondents' only asserted justification for censoring Donna and Wesley Busch's speech has been their wish to avoid a potential violation of the Establishment Clause. (R. at 55–56.) This justification must fail under the Court's prior treatment of the defense.

One such consideration of the defense arose in *Widmar*. There, the Court applied the three-part test found in *Lemon v. Kurtzman* to determine whether

allowing religious groups to have equal access to government property would violate the Establishment Clause:

> First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy] must not foster "an excessive government entanglement with religion."

Widmar, 454 U.S. at 271 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)). The Court found the argument lacking because an open-forum policy would have a secular purpose of allowing student groups to flourish, would not foster excessive entanglement with religion, and would not advance religion because any benefits to religious groups would be incidental. *Id.* at 271–75. Though the Court has not consistently applied *Lemon* in all Establishment Clause cases,[3] it has used the test in cases where a school has used an Establishment Clause defense. In *Lamb's Chapel*, for example, the Court declined to uphold the school's defense, holding that allowing a religious group to show a film series on school property would not have created an Establishment Clause violation under *Lemon* and would not create "a realistic danger that the community would think that the District was endorsing religion or any particular creed . . . ." 508 U.S. at 395.

Respondents' argument must fail under either formulation of the test. Under *Lemon*, the school's stated purpose behind the "All About Me" program would clearly be secular. Ms. Reilly taught the unit for the purpose of "socialization"; to "identify individual interests and learn about others"; and to "identify sources of

[3] *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 677–78 (2005) (declining to use the *Lemon* test and instead looking to the nature of a religious monument on public property and "the Nation's history").

conflict with others and ways that conflict can be resolved." (R. at 51). Parents were invited to read stories requested by their child in as a part of this mission. (R. at 52). Clearly, exposure to Wesley's religious background is subsumed within the secular purpose of the activity. If students are to "learn about others" or "identify conflict with others[,]" briefly and cursorily exposing students to Wesley's religious faith is part and parcel of that mission, to say nothing of the invitation for students to learn "All About Me." (R. at 51). The school would retain the secular purpose of the unit if it were to allow Donna Busch to speak to Wesley's religious beliefs precisely because the assignment demanded a broad range of responses. The reading became, in other words, "a reference for the teaching of secular subjects." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 224 (1963); *see also id.* at 225 ("Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment."). Respondents' apparent fears of the imminent evils of reading short, nondescript Bible passages to children have no basis in the nature of the assignment itself.

Second, reading selected lines from Psalm 118 (R. at 53–54) would not have the primary effect of advancing religion. *Lemon*, 403 U.S. at 612. To the extent that mere exposure to brief, opaque lines from the Bible could promote a particular sect among young children, the advancement would be incidental. *See Widmar*, 454 U.S. at 276. It is nonsense to suggest that the mere reading of these lines would assist Donna Busch in converting the children's young souls to her religion, even if

Respondents could show that to have been a goal of hers (which they cannot). Common sense suggests that the strongest reaction of the children would be to ask questions, a response that is perfectly within the scope of the assignment and troubling to no reasonable person. Allowing the speech would not commit the school to religious goals, and the same privilege of speaking would be broadly available to any other parent who wished to read a brief story from a text analogous to what the Bible meant for Wesley. *Id.* at 277. Any claims of advancement of religion defy the most sane and rational understanding of the activity.

Third, allowing Donna Busch to read selected lines from the Bible would not "foster an excessive entanglement with religion." *Lemon*, 403 U.S. at 613. As in *Lamb's Chapel*, the school district would not be interfering with religious practice or otherwise involving itself with the Busch's religious beliefs. 508 U.S. at 395.

Beyond the factors articulated in *Lemon*, here there would be "no realistic danger" that the students or community would think that the school "was endorsing religion or any particular creed." *Lamb's Chapel*, 508 U.S. at 395. The District Court held that the danger was in students believing that a parent speaking in a classroom carries the same authority as a teacher, and thus the children would be inclined to believe that the school endorsed the speech. (R. at 69). This argument ignores the context in which the speech is taking place. Other parents have been allowed to express religious and cultural beliefs and present on Easter, Passover, and Hanukkah with no apparent threat of endorsement. (R. at 57–58). Moreover, the context of the assignment was such that students were exposed to other parents

presenting stories or other items for their children. (R. at 57). To assume that the children would be unable to distinguish between the school's endorsement of these presentations—presentations in which their own parents appear to have participated in—and parental participation is to call into question whether they would understand the unit at all. The Court has previously refused to operate "under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding . . . religious activity." *Good News Club*, 533 U.S. at 119. The risk of infringing upon Donna and Wesley Busch's freedom of speech counsels against doing so here.

iii. Respondent Does Not Have a Compelling State Interest Under *Tinker*

While Respondent has not previously asserted a defense for its censorship of Donna and Wesley Busch's speech other than avoiding an Establishment Clause violation, it is important to determine whether other defenses exist. Specifically, the Supreme Court has given schools some leeway in restricting the speech of students in the school setting. "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker*, 393 U.S. at 507. This authority, however, is limited.

In *Tinker*, the Court considered whether a school district violated the First Amendment rights of students by banning them from wearing black armbands at school in protest of hostilities in Vietnam. *Id.* at 504–05. Acknowledging the rights

of schools to control classrooms to some degree, the Court held that in order to justify censorship, a school "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. The school must show that "the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school[.]" *Id.* (internal citations and quotations omitted). The Court has elaborated on this standard in two ways. First, the Court has held school officials act constitutionally in banning offensive or lewd speech. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). Second, the Court has held that school officials may limit speech "reasonably viewed as promoting illegal drug use." *Morse v. Frederick*, 551 U.S. 393, 409 (2007).

Allowing Donna Busch to read short passages from the Bible would clearly not be an act of condoning offensive or lewd speech, nor would it promote illegal drug use. To call it the sort of speech that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school[]" would also be gravely mistaken. *Tinker*, 393 U.S. 509. The students had already heard presentations on Passover, Easter, and Hanukkah, and appear to have been no worse for the wear. (R. at 57–58.) One can imagine that inquisitive students might ask questions about the speech, but nowhere in the Court's jurisprudence is it suggested that the classroom is an inappropriate place for student questions.

Because *Tinker* and its descendants do not provide protection for schools against harmless speech, Respondents cannot successfully claim that they had a compelling interest in preventing Donna Busch from speaking.

II. *Hazelwood* Does Not Allow Schools to Engage in Viewpoint Discrimination

Respondents' primary argument is that the standard the Court set forth in *Tinker* has been altered irrevocably to allow schools to censor speech as long as it is reasonable. The reason this is so, Respondent argues, is that the Court abrogated *Tinker* in *Hazelwood School District v. Kuhlmeier* to allow schools to discriminate on the basis of viewpoint with only the requirement that the restriction be reasonable. 484 U.S. 260 (1988). Not only does *Hazelwood* not apply here, but Respondents encourage an egregious misreading of the case.

a. *Hazelwood* Only Applies to Those Cases in Which Speech Bears the Imprimatur of the School

In *Hazelwood*, students participated in a journalism class that periodically published a student newspaper that was distributed to students, faculty, and the outside community. 484 U.S. at 262. A faculty member oversaw publication, and the principal of the school was given the paper to review before publication. *Id.* at 263. One such publication included two articles to which the principal objected: one discussed teen pregnancy at the school and the other discussed divorce, and both included interviews with affected students. *Id.* The principal, believing that the articles were inappropriate, withheld from publication two pages of the paper including those articles. *Id.* at 264.

Beginning by acknowledging *Tinker* and its holding that students retain broad rights to free speech, the Court first held that the newspaper was a limited public forum, and that "school officials were entitled to regulate the contents of [the paper] in any reasonable manner." *Id.* at 267–70, 271. Notably, the Court distinguished the facts before it from those in *Tinker*:

> [*Tinker*] addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. [The instant] question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

Id. at 271. Thus, the Court held, a school would not run afoul of the First Amendment by "exercising editorial control over the *style and content* of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273 (emphasis added).

Setting aside the fact that Respondents have not asserted a single pedagogical concern for the speech limited here, Donna Busch's speech does not "bear the imprimatur of the school" in the manner regulated by *Hazelwood*. *Id.* at 271; *see also Morse*, 551 U.S. at 405. While the school would be *allowing* Donna Busch to speak and thus providing resources for her to do so, it would have taken place in a context in which students could readily distinguish between parental speech and school speech. "All About Me" week, after all, is presented from a student's point of view; if the school dictated the content of each student's assignment to any great degree, the exercise would be nonsensical. Further, and

despite the lower courts' skepticism toward the cognitive abilities of young children (R. at 69), it defies common sense to assume that children are unable to tell the difference between their parents and their teachers. Elementary school would be quite a confusing experience if the opposite were true. Where *Hazelwood* involved a student paper that literally bore the school's seal of approval, allowing Donna Busch to speak would bear only her own seal of approval. And of course, a teacher could readily clear up any misunderstanding if Donna were to somehow indicate otherwise.

Simply put, *Hazelwood* does not apply to this case because the school does not have a legitimate concern that its point of view could be confused with that of Donna Busch.

b. Even if *Hazelwood* Applied Here, It Does Not Hold That Schools May Engage in Viewpoint Discrimination

Respondents' argument relies mostly on the proposition that *Hazelwood* altered the Court's First Amendment jurisprudence such that schools can now engage in almost unfettered viewpoint discrimination. This argument ignores the Court's longstanding position on viewpoint discrimination, the fact that *Hazelwood* did not involve viewpoint discrimination in any way, and the dangers associated with allowing public officials to choose which viewpoints deserve to be heard and which deserve to be censored. Respondents position is untenable, unconstitutional, and must be rejected.

i. The Court Has Never Deviated from the Position That Viewpoint Discrimination is Unconstitutional, and Did Not Do So in *Hazelwood*

As discussed above, the Court has long held that viewpoint discrimination is unconstitutional, and in fact has never held that governments may traffic in viewpoint discrimination by presenting a compelling interest for doing so. *See, e.g.*, *Christian Legal Soc.*, 130 S. Ct. at 2988. ("The constitutional constraints on the boundaries the State may set bear repetition here: 'The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, . . . nor may it discriminate against speech on the basis of . . . viewpoint.'") (internal citations omitted). The Court has certainly never held that a government entity can engage in viewpoint discrimination with only a showing that its purpose is reasonable. The grant of authority to schools in *Hazelwood*, while broad in some ways, does nothing to alter this calculus.

Hazelwood plainly dealt with an instance of content-based discrimination. The student paper that the principal edited did not promote a viewpoint, such as an editorial expounding on school policy or local politics. In fact, the school board's policy concerning the paper specifically disavowed any intent to discriminate on the basis of viewpoint. 484 U.S. at 269. Rather, the Court specifically held that school officials were entitled to "exercising editorial control over the style and *content*" of the paper. *Id.* at 261 (emphasis added).

Respondents' argument boils down to claiming that the Supreme Court undermined *all* of its previous jurisprudence regarding viewpoint discrimination (1)

without explicitly saying so, and (2) in a case in which viewpoint discrimination was not at issue. This argument defies not only the plain holding of *Hazelwood*, but also the important principles underlying the Constitution's prohibition on viewpoint discrimination.

ii. Allowing School Officials to Censor Viewpoints With Only a Showing of Reasonableness Would Offend the Principles Upon Which the First Amendment is Based

There is a world of difference between the holding of *Hazelwood* and the proposition that schools may censor viewpoints on only a reasonable basis. *Hazelwood* and its kin cases allow schools to protect students from specific harms that may arise from lewd or offensive speech, speech that promotes drug use, or other harms that may arise in the special school environment. *See Fraser*, 478 U.S. 675; *Morse v. Frederick*, 551 U.S. 393; *see also New Jersey v. T.L.O.*, 469 U.S. 325, 347–48 (1985) (holding that students can be subject of searches by school officials "depend[ing] simply on the reasonableness, under all the circumstances, of the search"); *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009) (same). Respondents' suggested holding would give school officials broad discretion to prevent students from articulating an unpopular viewpoint. *Hazelwood* allows a teacher to prevent a student from speaking on hostilities in Iraq where he or she is asked a question about mathematics. Respondents' suggested holding would allow something more; if a student wore a black armband to school in protest of the war in Iraq, school officials would now have the authority remove it while the student answered a question about mathematics, simply for the reason that it would be

unrelated to the presentation. *See Tinker*, 393 U.S. 503. Where *Hazelwood* allows a principal to edit a student newspaper to remove content that might humiliate other students, Respondents' suggested holding would allow the principal to remove an editorial about town policies with which the principal agreed. This proposition is an affront to the First Amendment principle that government should not be in the business of choosing which viewpoints may be heard and which viewpoints must be silenced.

The Court has repeatedly recognized the unique position of public schools with respect to the First Amendment. Their special function is not merely to act in loco parentis. "That [public schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). Public schools are more than information dumps, robotically instructing students on mathematical equations, important dates in history, and the basic rules of grammar. Rather, public education is "the 'inculcation of fundamental values necessary to the maintenance of a democratic political system.'" *Fraser*, 478 U.S. at 681 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)). Public schools provide constant exposure to the ideas and beliefs of others, and at their best they instill democratic values of tolerance and rational debate.

It is clear that Respondents understood this. "All About Me" week was, in Respondents' words, "designed to be a 'socialization' program in which students would 'identify individual interests and learn about others' and 'identify sources of conflict with others and ways that conflicts can be resolved.'" (R. at 51). To any observer, this appears to be a perfectly valid means of instilling "the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys.*, 512 U.S. at 641. And it is noteworthy that Respondents have not, to date, given a pedagogical reason for censoring Donna Busch's speech.

Respondents would create a public school system in which "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" would provide cause for censoring speech that takes place inside its walls. *Tinker*, 393 U.S. at 509. This proposal comports neither with the Supreme Court's precedent on school speech nor with the principles underlying the First Amendment. Rather, it comports only with a vision of the schoolhouse as a sort of "democracy-free zone"; a place in which students learn from textbooks the most important principles to our republic, but learn from public school officials that those principles are negotiable as long as limiting them is "reasonable." The First Amendment demands more of our public schools and expects more from citizens, even in their formative stages. Respondents' argument to the contrary must fail, and the Third Circuit's holding below must be reversed.

CONCLUSION

The First Amendment to the Constitution requires that public schools must at least provide a compelling justification for censoring speech on the basis of the speaker's viewpoint. Respondents censored Donna Busch solely on the basis of viewpoint, and have failed to provide a compelling justification for doing so. Petitioners respectfully ask Court to reverse the Third Circuit and remand for further proceedings to determine whether Donna Busch is to be entitled to damages as a result of Respondents' constitutional violations.

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Respectfully Submitted,

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