No. 07-2967

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DONNA K. BUSCH,

Plaintiff-Appellant,

v.

MARPLE NEWTOWN SCHOOL DISTRICT, *et al.,*

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE ON BEHALF OF DEFENDANTS-APPELLEES, IN SUPPORT OF AFFIRMANCE

Ayesha N. Khan
Alex J. Luchenitser
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
518 C. Street, N.E.
Washington, D.C. 20002
(202) 466-3234

Charles B. Wayne
Edward B. Schwartz
DLA PIPER US LLP
500 8th Street, N.W.
Washington, D.C. 20004
(202) 799-4000

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Americans United is a national, nonsectarian public-interest organization based in Washington, D.C. that is committed to preserving the constitutional principles of religious freedom and separation of church and state. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in many of the leading church-state cases decided by the United States Supreme Court and the Courts of Appeals. Americans United has more than 75,000 members nationwide, including many within the jurisdiction of this Court. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Plaintiff-appellant Donna Kay Busch ("Busch") argues that the defendant-appellees (collectively "the School") violated her First Amendment rights by prohibiting her from reading Bible verses to her son's kindergarten class. But the School would have violated the Establishment Clause of the First Amendment had the School allowed the proposed Bible reading. Permitting Busch to read to kindergartners the Biblical Psalm she chose — one that is indisputably used for proselytizing — would have transformed a classroom social studies program into a religious exercise, forcing the very young schoolchildren present to participate in Busch's religious observance and to be subjected to the promotion of a particular religion, something the Establishment Clause prohibits. Allowing Busch to read

from the Bible would also have violated the Establishment Clause by communicating a message of governmental endorsement of Busch's chosen religion.

Even if permitting Busch to read her Bible to her son's class would not have actually violated the Establishment Clause, the School's on-the-spot decision to disallow the Bible reading did not violate Busch's First Amendment right to free speech. The law is clear that in the context of a classroom program — particularly one conducted for kindergarten-age children who may lack the ability to readily distinguish between private and school-sponsored speech — a school has wide discretion to control the content of classroom presentations to ensure that they are consistent with the school's legitimate pedagogical goals. A decision to bar a parent from reading the Bible to a kindergarten class falls well within the bounds of such discretion. Accordingly, the District Court was correct in entering judgment against Busch.

ARGUMENT

I. ALLOWING BUSCH TO READ BIBLE VERSES TO PUBLIC-SCHOOL ELEMENTARY SCHOOL STUDENTS WOULD VIOLATE THE ESTABLISHMENT CLAUSE.

Government action touching on religion violates the First Amendment's Establishment Clause if it has the purpose or the effect of advancing religion. *E.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002); *ACLU of N.J. v. Black*

Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1483 (3d Cir. 1996) (en banc). Government conduct can have the improper effect of advancing religion in a number of ways, including when the government places coercive pressure on people to participate in or attend religious activity, and when the government communicates a message of governmental endorsement of religion. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302, 305, 308, 312 (2000); *Black Horse Pike*, 84 F.3d at 1480, 1485-86. Permitting Busch to read from the Bible to her son's kindergarten class as part of the "All About Me" study unit would constitute coercion and endorsement of religion.

A. Reading Bible Verses to Kindergartners During Class Coerces Participation in Religious Activity.

"It is beyond dispute that, at a minimum, the Constitution guarantees that the government may not coerce anyone to support or participate in religion or its exercise." *Santa Fe*, 530 U.S. at 302 (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992)). Had the School allowed Busch to read from the Bible to her son's kindergarten class, this fundamental prohibition of coercion would have been violated because (1) the proposed conduct was an inherently religious undertaking; and (2) the audience for Busch's presentation was captive, so participation in the exercise would have been mandatory. Moreover, Busch's private status would not have insulated the School; the coercion test applies not only when government

employees do the talking, but also when the government permits private speakers to engage in coercive religious speech.

1. Reading Bible Verses Is a Religious Activity Akin to Engaging In Group Prayer.

The Establishment Clause forbids coercing children to participate in a religious activity. *See, e.g., Lee*, 505 U.S. at 587. Thus, in *Lee*, 505 U.S. at 593, and *Santa Fe*, 530 U.S. at 312, the Supreme Court prohibited the giving of prayers by clergy at public-school graduations and by students at high-school football games because such a practice coerces audience participation. *See also Sch. Dist. v. Schempp*, 374 U.S. 203, 207, 211-12 & n.4, 224-25 (1963) (reading of Bible verses at beginning of each school day violated Establishment Clause, notwithstanding that students could elect not to read verses themselves or to leave classrooms during readings); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (Establishment Clause prohibited reading of prayer at beginning of each school day, even though participation in reading was voluntary).

Based on this case law, there can be no question that reading Bible verses to a class of kindergarten students constitutes forced participation in a religious activity of the kind banned by the coercion test. Indeed, although Busch asserted below that she purposely picked what she considered to be a benign Bible verse that would not offend non-Christians, *Busch v. Marple Newtown Sch. Dist.*, No. 05-cv-2094, at *2 (E.D. Pa. May 31, 2007) (hereinafter "Slip op."), there was

unrebutted expert testimony that the chosen passage, Psalm 118, is "a powerful tool for proselytizing by the Christian community." *Id*. at *2 n.4. And while Busch argued below that "'allowing a child to express his love for the Bible, in an exercise designed to highlight *his* interests,' cannot possibly be seen to advance one religion over another, or religion over non-religion," the district court correctly drew a distinction between the mere expression of one's beliefs about the importance of religion to one's life and imposition of a religious activity upon a group of kindergartners. Slip. Op. at *11 & n.21.

The *amici* supporting Busch fault the district court for distinguishing between (1) Bible reading and (2) "speak[ing] with the children about the importance of religion in [one's] family life" or "describ[ing] the time [one] spend[s] reading the Bible and attending church." Brief of *Amici Curiae* at 9-10; slip op. at *10. The district court's distinction, however, was entirely proper in light of this Court's decision in *Walz v. Egg Harbor Township Board of Education*, 342 F.3d 271 (3d Cir. 2003). *Walz*, like this case, arose in the context of a kindergarten class and a mother's efforts "to promote a religious message through the channel of a benign classroom activity." *Id*. at 280. The activities in question were the distribution of (1) pencils with the imprint, "'Jesus [Loves] the Little Children' (heart symbol)"; and (2) candy canes attached to a religious story about how the candy symbolized the birth, life, and crucifixion of Jesus. *Id*. at 273-74.

This Court, like the court below, differentiated between expression in a school setting that "implicates religion if [it relates to] personal observance" and expression that constitutes "outward promotion" of religion or "proselytizes a particular view." *Id*. at 278. The Court described as "appropriate" a school district policy that prohibits promotion or disparagement of any religious belief in classes or school-sponsored activities, but that allows religion to be acknowledged during school activities "if presented in an objective manner and as a traditional part of the culture and religious heritage of [a] particular holiday." *Id*. at 278 n.5. The district court thus correctly held that Busch's Bible reading would go beyond simply sharing information about her family's personal observances and would invade the rights of other students.

2. The Audience Members for the Proposed Bible Reading Were Captive, So Their Participation Would Have Been Mandatory.

It has long been recognized that the potential for coercion to participate in religious activity is particularly strong in the public schools. *Lee*, 505 U.S. at 592 (collecting cases). Students, regardless of age, may experience not only "overt compulsion," but also "pressure" that is "subtle and indirect." *Id*. at 593. And "[i]n elementary schools, the concerns animating the coercion principle are at their strongest because of the impressionability of young elementary-age children." *Peck v. Upshur County Bd. of Educ*., 155 F.3d 274, 287 n.* (4th Cir. 1998); *see also Berger v. Rensselaer Cent. Sch. Corp*., 982 F.2d 1160, 1170 (7th Cir. 1993)

("If the Supreme Court was concerned about the coercive pressures on [a] fourteen-year old [in *Lee*], then we must be even more worried about the pressures on ten- and eleven-year old fifth graders . . . ."). And, in "the classroom setting . . . the risk of compulsion is especially high." *Lee*, 505 U.S. at 596.

The district court properly characterized Busch's son's classmates as "a captive audience" for her performance. Slip op. at *10. The mandatory nature of the children's attendance substantially heightens the coercive effect. The Seventh Circuit, in *Berger*, put it this way:

> [P]ublic school officials entrusted with the education of youngsters can never give up total control over the content of what transpires in classrooms, not least because the children are a captive audience. If they don't like what they see or hear, they are most assuredly not free to get up and leave . . . . [Nor do] we . . . expect young children to put cotton in their ears and scrunch up their eyes to avoid overtly religious messages by the state.

982 F.2d at 1167.

3. Busch's Status as a Parent Does Not Make the Proposed Bible-Reading Any Less Coercive.

Although neither Busch's brief nor the brief of her *amici* addresses the coercion test, both rest in large part on the notion that Busch's proposed Bible reading was allegedly "private speech," and thus essentially free from regulation. *E.g.*, Brief of Appellant at 17-20; Brief of *Amici Curiae* at 6-12. It is well-settled, however, that unconstitutional coercion arises not only when government officials

present religious messages to a captive audience, but also when the government allows private speakers to do so. For example, in *Lee*, the court held that schools could not invite local clergy to present prayers at graduation ceremonies. *See Lee*, 505 U.S. at 587-88. Similarly, in *Santa Fe*, the Supreme Court held that the coercion test prohibited schools from allowing students to present prayers at high-school football games, even though students alone voted on whether to have prayers. *Santa Fe*, 530 U.S. at 310-13. In *Black Horse Pike*, this Court reached the same conclusion in the context of student-voted and student-given prayers at graduation exercises. 84 F.3d at 1480-83; *see also Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 981, 984-85 (9th Cir. 2003) (school would have violated coercion test by allowing students to give proselytizing speeches at graduation); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1097, 1104 (9th Cir. 2000) (same). The courts have likewise held that outsiders cannot be permitted to enter school grounds to distribute religious materials such as Bibles to students in the classroom. *See, e.g., Doe v. South Iron R-1 Dist.*, ___ F.3d ___, 2007 WL 2363216, No. 06-3373, at *4 (8th Cir. Aug. 21, 2007); *Berger*, 982 F.2d at 1171.

Indeed, a holding that Busch's status as a private citizen freed her from the restrictions of the coercion test would effectively eviscerate the Establishment Clause's prohibition against coercion in the public school context because it would allow schools to set up systems whereby students would be allowed (on some

neutral basis, such as rotation or lottery) to invite private individuals to speak in classes or even periodic mandatory assemblies, and students who (or whose parents) wanted to promote religion could then invite into the school preachers or others who could in turn give extensive proselytizing speeches. Such an arrangement would undo the longstanding prohibition on an outsider "using the machinery of the state as a vehicle for converting his audience." *Walz*, 342 F.3d at 278 (quoting *Chandler v. James*, 180 F.3d 1254, 1265 (11th Cir. 1999)); *accord Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) (Establishment Clause prohibits "use of the state's compulsory public school machinery" to aid "dissemination of religious doctrines"). Allowing a parent to engage a captive audience of kindergartners in a religious classroom activity plainly runs afoul of that prohibition, for here the "machinery of the state" is the public school classroom, where attendance is required.

B. Reading Bible Verses to Kindergartners During Class Constitutes Governmental Endorsement of Religion.

The endorsement test prohibits the government from "conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989). The "essential principle" behind the endorsement test is that the "Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief." *Id*. at 593-94.

Amici supporting plaintiff argue in a footnote that the endorsement test does not apply here. Brief for *Amici* at 9 n.1. They bizarrely contend that the district court erred in relying on *Allegheny* for basic endorsement-test principles because that case dealt with religious displays on government property. *Id.* But the Supreme Court has made clear that the endorsement test is fully applicable in the public school context. *See Santa Fe*, 530 U.S. at 308; *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985).

1. The Perspective of a Reasonable Kindergartner Must Be Used to Determine Whether the Proposed Bible Reading Would Violate the Endorsement Test.

When a religious communication is directed at the general public, courts use the perspective of a hypothetical "reasonable observer" in determining whether the communication violates the endorsement test. *E.g., Allegheny*, 492 U.S. at 635-36; *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1447-48 (3d Cir. 1997). In cases involving schoolchildren, the Supreme Court has articulated the test in terms of a reasonable observer in the position of a student of the relevant age. *See Santa Fe*, 530 U.S. at 308 (applying endorsement test from perspective of "an objective Santa Fe high school student"); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) (endorsement analysis based on viewpoint of "an objective observer in the position of a secondary school student").

Busch's *amici* nevertheless argue — erroneously relying on *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), and *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District*, 386 F.3d 514 (3d Cir. 2004) — that the "reasonable observer" used for the endorsement test in this case should be an adult rather than a kindergartner. Brief of *Amici Curiae* at 27-30. But, in *Good News*, the Court deemed the relevant audience for purposes of the *coercion* test to be parents, not children, because children could not attend the religious meetings at issue without parental permission. *See Good News*, 533 U.S. at 115. Here, by contrast, parents would not be given an opportunity to consent before the Bible would be read to their children.

With respect to the *endorsement* test, neither *Good News* nor *Child Evangelism Fellowship* held that the viewpoint of a reasonable child of the relevant age should be ignored. Instead, those two opinions simply concluded that neither reasonable children *nor* reasonable adults would perceive an endorsement of religion based on the specific facts of the cases (facts that, as explained below, are quite different from those here). *See Good News*, 533 U.S. at 115-19; *Child Evangelism Fellowship*, 386 F.3d at 531-34. And, in those two cases, it would have been improper to focus solely on the perceptions of reasonable students, because communications about the religious meetings went to the parents, who served as a filter against any religious messages actually reaching their children.

See Good News, 533 U.S. at 117; *Child Evangelism Fellowship*, 386 F.3d at 532-34. In contrast, the target audience of Busch's communication was an unfiltered class of kindergartners.

2. A Reasonable Kindergartner, Confronted With an Adult Reading Bible Verses in the Classroom, Would Perceive the Activity as School-Endorsed.

In analyzing whether student speech permitted by a school in an elementary school classroom would be viewed by students as speech endorsed by the school, this Court stated in *Walz*:

> [I]n an elementary school classroom, the line between school-endorsed speech and merely allowable speech is blurred . . . . While "secondary school students are mature enough and are likely to understand that a school does not endorse or support speech that it merely permits on a nondiscriminatory basis," *kindergartners and first graders are different*.

342 F.3d at 277 (quoting *Mergens*, 496 U.S. at 250) (emphasis added); *accord Peck*, 155 F.3d at 287 n.* ("[B]ecause children of [young elementary-age] may be unable to fully recognize and appreciate the difference between government and private speech . . . the [conduct] could more easily be (mis)perceived as endorsement rather than neutrality."); *Bell v. Little Axe Indep. Sch. Dist. No. 70*, 766 F.2d 1391, 1404 (10th Cir. 1985) ("Elementary schoolchildren are vastly more impressionable than high school or university students and cannot be expected to discern nuances which indicate whether there is true neutrality toward religion on

the part of a school administration.") (disapproved of on other grounds by *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986)).

Here, as the district court explained, (1) "the context was a kindergarten classroom"; (2) "the speech at issue would have come from a parent, typically seen as an authority figure by young children"; (3) the parent would be "standing at the front of the classroom to present in place of the teacher"; and (4) the presentation was "part of the school curriculum." Slip op. at *8. Such a "situation," as stated by the district court, "clearly creates a perception of school-endorsed speech." *Id.*

3. The Cases Cited By Busch and Her *Amici* Are Inapposite.

Busch's *amici* rely on *Good News Club*, 533 U.S. 98, and *Child Evangelism Fellowship*, 386 F.3d 514, to argue that allowing the Bible reading would not have endorsed religion. Brief of *Amici Curiae* at 27-30. Those cases, however, are wholly distinguishable.

In *Good News*, a Christian club for children sought to conduct club meetings in public-school facilities to which secular groups had access. The Court concluded that allowing the meetings would not be perceived as governmental endorsement of religion for several reasons, including that (1) a child could only be exposed to the club's religious meetings if the child's parent gave the child permission to attend; (2) the meetings would take place during non-school hours; (3) the meetings were not led or supervised by schoolteachers; and (4) the children

eligible for the club were "not all the same age as in the normal classroom setting," for their ages ranged from six to twelve. *Id*. at 115-18.

In *Child Evangelism Fellowship*, this Court considered whether a Christian club could advertise its activities within a school by distributing flyers, displaying posters, and participating in "Back-to-School nights," where secular groups had access to the same advertising channels. 386 F.3d at 518-20. This Court found that allowing such advertising would not violate the endorsement test because: (1) parents had to provide consent in order for children to attend club meetings; (2) the school played no role in composing the advertisements; (3) the teachers did not discuss the advertisements in class; (4) the club's meetings were privately run and not school-sponsored; and (5) the advertisements themselves did not have proselytizing content. *Id*. at 522, 531-32.

The facts here are quite different from those in *Good News* and *Child Evangelism Fellowship*. If the Bible reading had been allowed, the speech would have taken place during school hours, in class, as part of a school-sponsored activity, in a setting supervised by a schoolteacher. And the students would have been exposed to proselytizing religious speech without their parents' consent.

In ruling against a school policy that allowed an outside organization to distribute Bibles in class, the Eighth Circuit concluded that *Good News* and similar cases do not apply to classroom activities:

> The recent Supreme Court cases have expanded religious groups' access to school funding and facilities, but none of those cases involved distributing religious materials or holding religious activities in the classroom during the day.

Doe v. South Iron R-1 Dist., 435 F. Supp. 2d 1093, 1098 (E.D. Mo. 2006), *adopted in relevant part*, ___ F.3d ___, 2007 WL 2363216, No. 06-3373, at *4 (8th Cir. Aug. 21, 2007). Here, too, the reading of the Bible to a captive kindergarten class is starkly different from after-school access to classrooms and noncurricular distribution of materials. Thus, here, in addition to violating the coercion test, allowing the Bible reading would have run afoul of the endorsement test.

C. Compliance With the Establishment Clause Is a Compelling Governmental Interest.

Because allowing the Bible-reading would have violated the Establishment Clause, the district court's judgment should be affirmed regardless of the level of scrutiny that applies to Busch's free speech claim, and regardless of whether the School's conduct entailed content or viewpoint discrimination, because avoiding violations of the Establishment Clause is a compelling governmental interest. *See, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995) (plurality opinion) ("There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech"); *id.* at 783 (O'Connor, J., concurring) (same); *C.H. v. Oliva*, 226 F.3d 198, 211 (3d Cir. 2000) (en banc) (Alito, J., dissenting) ("a

public school may even restrict speech based on viewpoint if it can show a compelling interest for doing so"); *accord Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 633 n.11 (2d Cir. 2005) (general prohibition against viewpoint discrimination is "subject to being trumped by the existence of a compelling state interest," such as avoiding an Establishment Clause violation).

II. THE SCHOOL DID NOT VIOLATE BUSCH'S FIRST AMENDMENT RIGHTS TO FREEDOM OF SPEECH.

Even if the Bible reading would not have violated the Establishment Clause, the School was not constitutionally required to permit it. In *Locke v. Davey*, 540 U.S. 712, 718 (2004), the Supreme Court explained that there is room for "play in the joints" between the Establishment Clause and the other provisions of the First Amendment. In other words, just because the Establishment Clause does not forbid certain conduct does not mean that the conduct is protected by another part of the First Amendment. *See id.* at 718-19. The proposed Bible reading (if it is not entirely prohibited by the Establishment Clause) falls within the play in the joints, so the School had discretion to disallow it.

Busch argues that in denying her the opportunity to read to her son's kindergarten class a Psalm that is "a powerful tool for proselytizing" (slip op. at *2 n.4), the School violated her First Amendment right to freedom of speech. In particular, Busch argues that by inviting the parents of her son's kindergarten class to participate in the All About Me program and to "share [with the class] a talent,

short game, small craft, or story" (slip op. at *1), the School abandoned its right and obligation to control the content of any parental speech expressing a "viewpoint," whether or not those views were appropriate for kindergarten-age children or consistent with the goals of the classroom program.

But by inviting the parents of the class to participate in a kindergarten social studies exercise by reading a story, the School did not remotely convert the kindergarten classroom into a soapbox (or pulpit) from which parents were free to express their views, whatever they may be. Nor did the School forego its right and duty to control the content of material presented to its kindergarten students to ensure that it is consistent with the purpose of the classroom program, appropriate for kindergarten-age students, respectful of the rights and religious beliefs of other students and their parents, and otherwise consistent with school policies. And Busch's wish to express religious views does not trump the rights of kindergarten-age students to be free from the imposition upon them of school-sponsored religious expression, or the rights of their parents to guide their children's religious and spiritual upbringing.

A. The School Enjoys Wide Latitude in Controlling the Content of Speech in its Kindergarten Classroom.

The strength of Busch's claims that she has a First Amendment right to read Bible verses to schoolchildren is significantly affected by whether her speech would be reasonably perceived to be attributable to the school:

> [W]hether the First Amendment requires a school to tolerate particular student speech — the question that we addressed in *Tinker* [*v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)] — is different from the question whether the First Amendment *requires a school affirmatively to promote particular student speech*. The former question addresses an educator's ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over . . . expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum . . . .

Hazelwood v. Kuhlmeier, 484 U.S. 260, 270-71 (1988) (emphasis added).

Here, the district court properly held that the speech of the parents participating in the All About Me program would be reasonably viewed by the students as school-sponsored. Slip op. at *8. The speech would be that of a parent, who, as the District Court properly held, is "typically seen as an authority figure by young children." *Id*. There was no evidence that the school was opening the kindergarten class to parents for unbridled expressive activity. Rather, the parents' speech was heavily circumscribed — being limited to "shar[ing] a talent, short game, small craft, or story," *id* at *1 — to render it consistent with the teacher-designed curriculum. That is, the school was merely inviting parents to assist with the education of the children in the context of a supervised learning program, where the parent "stand[s] at the front of the classroom to present in place of the teacher and as part of the school curriculum." *Id.* Such a situation

"clearly creates a perception of school-endorsed speech." *Id.*; *see also Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2000) ("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.") (citations and quotation marks omitted).

In *Hazelwood*, 484 U.S. at 271, the Supreme Court held that when speech "might reasonably [be] perceive[d] to bear the imprimatur of the school," "[e]ducators are entitled to exercise greater control . . . to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." Under *Hazelwood*, the following test applies to First Amendment claims in the context of such speech: "educators do not offend 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 272-73 (emphasis added). *Hazelwood* further holds that "[i]t is only when the decision to censor . . . expression has *no valid educational purpose* that the First Amendment is so 'directly and sharply implicate[d]' . . . as to require judicial intervention to protect students constitutional rights." *Id.* at 273 (emphasis added) (citation omitted).

Thus, schools are accorded broad deference under *Hazelwood*. For example, this Court held in *Walz*:

> Determining the appropriate boundaries of student expression is better handled by those charged with educating our youth. School officials who exercise judgment based on their expertise and authority should be afforded leeway in making choices designed to foster an appropriate learning environment and further the educational process. . . .

342 F.3d at 277. This Court further stated in *Walz* that "the age of the 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." *Id.* at 276-77. The Court went on to recognize the very wide latitude that schools are granted under *Hazelwood* in controlling expression in the classrooms of young children: "where an elementary school's purpose in restricting student speech within an organized and structured educational activity is reasonably directed towards preserving its educational goals, we will ordinarily defer to the school's judgment." *Id*.

B. The School's Decision Had Nothing to Do with Busch's Viewpoint, and Everything to Do with Pedagogical Concerns.

The District Court properly found that the School's conduct fell well within the bounds of its broad discretion under *Hazelwood.* While members of a religiously diverse and pluralistic society such as ours might reasonably differ over the appropriateness of certain expression in different school settings, and over

whether a school has the authority to control such expression, a school clearly retains the ability to bar from a kindergarten classroom expression that is fairly characterized as advocacy, proselytizing, or the promotion of one particular religion over others. As this Court correctly held in *Walz*, "[a]s a general matter, the elementary school classroom, especially for kindergartners and first graders, is not a place for student advocacy. To require a school to permit the promotion of a specific message would infringe upon a school's legitimate area of control." *Id.* at 277; *see also id.* at 278 ("'a student's right to express his personal religious beliefs does not extend to using the machinery of the state as a vehicle for converting his audience,'" and, accordingly, "in the context of an organized curricular activity, an elementary school may properly restrict student speech promoting a specific message") (internal citation omitted).

The school's authority to curtail such speech is well-grounded in a school's legitimate interests in communicating to students and parents that the school welcomes religious diversity, and in respecting the rights of parents to control their children's religious upbringing. "Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private belief of the student and his or her family." *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

In addition, it is well-recognized that schools have a legitimate and important interest in ensuring that "the views of the individual speaker are not erroneously attributed to the school." *Hazelwood*, 484 U.S. at 271. The School also had a legitimate interest in avoiding an Establishment Clause lawsuit, even if permitting Busch to read the chosen Psalm to her son's class would not have actually amounted to a violation of that Clause. *See Bishop v. Aronov*, 926 F.2d 1066, 1078 (11th Cir. 1991) ("[t]he University can restrict speech that falls short of an Establishment Clause violation"); *Webster v. New Lenox Sch. Dist.*, 917 F.2d 1004, 1008 (7th Cir. 1990) (avoiding "*possible* establishment clause violations" constitutes "legitimate concern" (emphasis added)). And the risk of both attribution to the school and the likelihood of a lawsuit are significantly enhanced when the speech amounts to religious advocacy.

In light of the nature of Busch's speech — which sought to engage students in a religious activity rather than to simply share information about her family's personal religious observance — this Court need not determine in this case whether *Hazelwood* prohibits "viewpoint" discrimination, an issue that this Court was unable to resolve in its *en banc* decision in *Oliva*, 226 F.3d 198, and over which a number of Circuit Courts have divided, *see* slip op. at *8. The answer to that question may differ depending on the context and nature of the school-sponsored activity at issue, and is perhaps best resolved on a case-to-case basis.

Here, Busch sought to read a passage that urged children to "[g]ive thanks unto the Lord," slip op. at *2, a proselytizing message entirely distinct from a parent informing children about Christmas or Hanukkah or sharing any other information about personal religious observance. *See id.* at *10 ("reading verses of the Bible to students is significantly different from passing around an ornament and describing its personal meaning"); *see also Walz*, 342 F.3d at 278 (noting "marked difference between expression that symbolizes individual religious observance . . . and expression that proselytizes a particular view"). There is no reason to believe that the School would have allowed a parent to advocate Buddhism or Islam, Secular Humanism or Atheism, or an anti-religious worldview (or, for that matter, to speak in favor of one political party or candidate over another, to advocate political or social doctrines such as Marxism or Nazism, or to opine on political or policy questions such as stem-cell research, abortion or the Iraq war). That is, the school could legitimately conclude, as a matter of content rather than viewpoint discrimination, that any advocacy about such matters should be left to the private, parental sphere.

This Court employed a similar analysis in *Walz*, applying *Hazelwood* to affirm the right of a school to prevent a student from distributing various religious gifts to elementary school students. The Court relied upon the broad authority of schools, particularly in the context of a kindergarten or first grade class, to prohibit

all school-sponsored expression that falls outside the boundaries of the school's curricular program. The Court ruled, "[w]here student expression interferes with the legitimate teaching of an organized and pedagogically-based classroom activity, a school may reasonably restrict or limit expression beyond the bounds of what the activity intends to teach." *Walz*, 342 F.3d at 276; *see also id.* ("a school's need to control student behavior will necessarily result in limitations on student speech. . . . [A] 'show and tell' exercise may be restricted to age-appropriate items to prevent unsuitable discussions in a kindergarten classroom."); *id.* at 278 ("Where a student speaks to his classmates during snack time, he does so as an individual. But absent disruption, this is fundamentally different from a student who controverts the rules of a structured classroom activity with the intention of promoting an unsolicited message."). Here, the Psalm that Appellant wished to read clearly fell outside what the School intended to teach through the All About Me program, as the program was designed merely to allow students to learn more about their classmates, not to give parents the opportunity to promote their political, social, or religious views in the classroom.

In sum, the record below demonstrated that the School's actions were related to "legitimate pedagogical concerns," and Busch has not shown that the School had "no valid educational purpose" in disallowing her proposed reading of the Bible to her son's class.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision.

Respectfully submitted,

/s/ Edward B. Schwartz

Ayesha N. Khan
Alex J. Luchenitser
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234

Charles B. Wayne
Edward B. Schwartz
DLA PIPER US LLP
500 8th Street, N.W.
Washington, D.C. 20004
(202) 799-4000

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,820 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in 14-point Times New Roman type, a proportionally spaced font.

/s/ Edward B. Schwartz

CERTIFICATIONS UNDER THIRD CIRCUIT LOCAL RULES

In accordance with this Court's Local Rules, I hereby certify:

1. The electronic version of this brief is identical to the paper copies filed with the Court and served on counsel for plaintiff-appellant and *amicus curiae*.

2. A virus detection program (McAfee) has been performed on the file containing the electronic version of this brief, and no virus was detected.

3. Each of the attorneys whose names appear on this brief is a member of the bar of this Court.

/s/ Edward B. Schwartz

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 2007, two copies of the foregoing Brief *Amicus Curiae* of Americans United for Separation of Church and State, on Behalf of Defendants-Appellees, in Support of Affirmance were served by first-class mail on:

Jason P. Gosselin
Drinker Biddle & Reath LLP
One Logan Square
18th & Cherry Streets
Philadelphia, PA 19103

Mark A. Sereni
Diorio & Sereni, LLP
Front and Plum Streets
Media, PA 19063

Ellis H. Katz
Jonathan P. Riba
Sweet Stevens Katz & Williams, LLP
331 Butler Avenue
New Britain, PA 18901

Benjamin W. Bull
Alliance Defense Fund
15333 N. Pima Rd., Suite 165
Scottsdale, AZ 85260

David A. Cortman
Alliance Defense Fund
1000 Hurricane Shoals Road
Building D, Suite 600
Lawrenceville, GA 30043

/s/ Edward B. Schwartz