

APPEAL No. 07-2967

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

DONNA KAY BUSCH,  
PLAINTIFF-APPELLANT,

v.

MARPLE NEWTOWN SCHOOL DISTRICT, *ET AL.*,  
DEFENDANTS-APPELLEES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN  
DISTRICT OF PENNSYLVANIA

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**BRIEF OF *AMICI CURIAE* ALLIANCE DEFENSE FUND AND PENNSYLVANIA  
FAMILY INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT, DONNA KAY  
BUSCH, AND REVERSAL OF DISTRICT COURT OPINION**

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Alliance Defense Fund is a non-profit corporation with no parent corporation and no stockholders.

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## **INTERESTS OF *AMICI CURIAE***

ALLIANCE DEFENSE FUND (“ADF”) is a non-profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties. ADF and its allied organizations represent hundreds of thousands of Americans who desire to maintain their right to religious expression. ADF has advocated for the rights of Americans under the First Amendment in hundreds of significant cases throughout the United States, including cases before the Supreme Court such as *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); and *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000). Because the decision below poses serious dangers to the right of religious expression in public schools, its reversal is a matter of significant concern to ADF and those whom it represents.

PENNSYLVANIA FAMILY INSTITUTE (“PFI”) is a non-profit organization whose mission is to strengthen families by restoring to public life the traditional, foundational principles essential for the well-being of society. PFI advances this mission by researching and educating, producing policy reports, promoting responsible citizenship, and promoting unity among pro-family groups. The right to religious liberty is among the most important of the traditional, foundational principles PFI seeks to preserve. PFI is concerned that the decision below seriously

undermines religious liberty by permitting school officials to discriminate against private religious expression at Pennsylvania’s public schools.

## I. INTRODUCTION

The purpose of this *amicus* brief is to demonstrate the many legal errors made by the lower Court. However, it is important at the outset to mention two findings where the lower Court was correct. First, the lower Court correctly held that the “All About Me” assignment is a limited public forum. (Opinion (“Op.”) 13-14.) Second, the lower Court correctly held that the School committed viewpoint discrimination by prohibiting Ms. Busch from reading the Bible on behalf of her son, Wesley. (Op. 15.)

What is astounding about the lower Court’s opinion is that after making the above findings, it then proceeds to hold that viewpoint discrimination—the most “blatant” and “egregious” form of discrimination against speech, *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995)—is constitutionally required. A bevy of Supreme Court and Third Circuit cases dealing with the rights of religious speakers to access speech fora have held precisely the opposite. See *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *Good News Club v. Milford Central Sch. Dist.*, 533 U.S. 98, 112-20 (2000); *Rosenberger*, 515 U.S. at 845-46; *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394-97

(1993); *Gregoire v. Centennial Sch. Dist.*, 907 F. 2d 1366, 1379-1382 (1990); *Pope v. East Brunswick Board of Education*, 12 F. 3d 1244, 1254-1256 (3d Cir. 1993); *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F. 3d 211, 226-27 (3d Cir. 2003); *Child Evangelism Fellowship of New Jersey, Inc. (“CEF”) v. Stafford Twp. Sch. Dist.*, 386 F. 3d 514, 530-34 (3d Cir. 2004).

The lower Court’s radical departure from settled First Amendment law poses a serious threat to religious expression. The Court’s decision transmutes private speech into government speech, grants school authorities unchecked power to restrict protected religious expression based solely on the “level of religiosity” perceived, and holds, contrary to binding precedent, that a school’s desire to avoid a perceived Establishment Clause violation is a compelling interest that justifies blatant viewpoint discrimination. The lower Court’s ruling that the worst form of discrimination under the First Amendment is permissible, indeed required, must be rejected by this Court.

## **II. STATEMENT OF FACTS**

Donna Kay Busch (Plaintiff-Appellant) is the mother of Wesley Busch, a student who attends Culbertson Elementary School (“School”). (Op. 1.) The School is a division of the Marple Newtown School District. (*Id.*) At the time the controversy in this case arose, Wesley was a student in Jaime Reilly’s kindergarten class. *Id.* As part of the social studies curriculum, Ms. Reilly included a class

assignment called “All About Me.” (*Id.*)

The purpose of the “All About Me” assignment was to provide students an opportunity to “identify individual interests and learn about others.” (*Id.*) A different child was featured each week. (*Id.* at 2.) During his or her week, the child would “‘share information about themselves’ by bringing in a ‘poster with pictures, drawings or magazine cut outs of [their] family, hobbies, or interests.’” (*Id.*) The children also brought in a stuffed animal and shared a snack with the class. (*Id.*) Ms. Reilly invited parents to participate in the “All About Me” assignment, by coming to school to “‘share a talent, short game, small craft, or story’ with the class.” (*Id.*) Many parents read their child’s favorite book as part of the “All About Me” assignment, including *The Grinch Who Stole Christmas*, *The Jolly Roger*, and *Green Eggs and Ham*. (*Id.* at 7.) The “All About Me” guidelines do not include any restrictions on the subject matter or content of student responses to the assignment. (App. at 1137.)

The School permitted the discussion of religion within the context of the “All About Me” assignment. (*Id.* at 30 n.25.) Because Wesley liked to go to Church, he created a poster that included a picture of a church with the words “I like to go to church” below it. (*Id.* at 2.) This poster was displayed on the wall. (*Id.* at 3.) Wesley presented his poster to the class and “describe[d] why he had placed a picture of a

church on that poster.” (*Id.* at 30 n.25.) In addition to religion being discussed within the context of the “All About Me” assignment, Ms. Reilly also permitted a parent to come to the class to discuss the Jewish religious holidays of Passover and Hanukkah. (*Id.* at 7-8.)

Ms. Busch asked her son what book he wanted her to read for the “All About Me” assignment. (*Id.* at 3.) Wesley responded, “the Bible.” (*Id.*) The School prohibited Ms. Busch from reading her son’s selection because the School viewed the Bible as “proselytizing” and as “promoting a specific religious point of view.” (*Id.* at 5.) After the School prohibited Ms. Busch from reading the Bible, Ms. Reilly suggested Ms. Busch read a book “about witches and Halloween” instead. (*Id.* at 6.)

### **III. THE LOWER COURT OPINION INCLUDES SEVERAL ERRORS OF LAW.**

The “All About Me” assignment solicited the private views of students. The assignment’s guidelines did not restrict the content of student responses to the invitation for them to “share information about themselves” with their classmates. (Op. 1.) The student responses (including the books parents read at the request of their children) addressed a wide range of topics, with parents reading books about Christmas (*The Grinch who Stole Christmas*), pirates (*The Jolly Roger*), and classics like Dr. Seuss’s *Green Eggs and Ham*. (*Id.* at 7). In addition to these topics, books

about “witches and Halloween” were also permissible. (*Id.* at 6.) Under these facts, the “All About Me” assignment is a classic speech forum pursuant to this Court’s precedent. *CEF*, 386 F. 3d at 524 (schools create fora for private speech by “facilitat[ing] the expression of ‘a diversity of views from private speakers’”).

Religion was also a permissible subject matter to discuss in response to the “All About Me” assignment, as Wesley designed and explained a poster to his classmates regarding his love of Church. (*Id.* at 2.) In fact, the only views the School prohibited in response to the “All About Me” assignment were particular religious viewpoints. Indeed, Wesley’s request that his mother read the Bible did not violate a single assignment guideline. Instead, the School censored Wesley’s speech based solely on its religious perspective. (*Id.* at 5.) Such clear-cut viewpoint discrimination against religious speech in such a wide-open speech forum has never been permitted. Because of this legal error, and the many other legal errors highlighted below, the lower Court’s decision must be reversed.

**A. THE SPEECH AT ISSUE HERE IS CLEARLY PRIVATE.**

The lower Court erred by holding that *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Supreme Court case that governs school-sponsored as opposed to private speech, applies to the religious speech at issue in this case. In addition to contradicting controlling precedent, the lower Court’s holding is based on

its incorrect view that Ms. Busch is aligned with the School. (Op. 19.) Instead, Ms. Busch’s reading of the Bible is private speech expressed on behalf of her son, Wesley. (Op. 3.) Indeed, the Bible reading at issue in this case is Wesley’s speech: his mother came to the class at his request, to read his book selection, so that he could share himself with his classmates. (Op. 1-3.)

**1. The Assignment Called For A Diversity Of Views From Private Speakers.**

This Court made clear in *CEF*, 386 F.3d at 514, that *Hazelwood* applies to speech only “when a public school . . . aims ‘to convey its own message.’ By contrast, when a school . . . facilitates the expression of ‘a diversity of views from private speakers,’ the resulting expression is private.” *CEF*, 386 F.3d at 524 (quoting *Rosenberger*, 515 U.S. at 833-34).

Here, the School is not conveying “its own message” through the student responses to the “All About Me” assignment, but rather soliciting “a diversity of views from private speakers.” *CEF*, 386 F. 3d at 524. The “All About Me” assignment was designed to allow students to “identify individual interests and learn about others.” (Op. 1.) The assignment guidelines did not exclude the expression of any aspect of a child’s person or self-identification. The “All About Me” forum consisted, among other things, of the children designing posters depicting their

families, hobbies, and interests, which they explained to the class, and the children's parents coming to school to share "a talent, short game, small craft, or story." (*Id.* at 2-3.) Thus, the purpose of the "All About Me" assignment is to provide students, with their parents' assistance, an opportunity to express who they are to their classmates.

The speech that takes place within the context of such an assignment is not the School's speech, but rather the private expression of the students, whether expressed by the students or through their parents. Indeed, other parents spoke to Wesley's classmates, both within the context of the "All About Me" assignment and on other occasions. In response to the "All About Me" assignment, parents read books like *Green Eggs and Ham*, *The Grinch Who Stole Christmas*, and *The Jolly Roger* to the class. (Op. 7.) Also, the School permitted one parent to tell the children about the Jewish religious holidays of Passover and Hanukkah. (*Id.* at 7-8.) Ms. Busch's reading of the Bible on behalf of Wesley is no more the School's "own speech," *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001), than the messages of the other parents who read books selected by their children in the "All About Me" forum, or the religious speech of the parent who explained Jewish holidays to the class. Under these facts and this Court's precedents, *Hazelwood* does not apply to the students' responses to the "All About Me" assignment, including the books they

selected for their parents to read.

The lower Court mistakenly asserts that elementary-age children would perceive that the School sponsored the passages of the Bible read by Ms. Busch, and that therefore *Hazelwood* applies. (Op. 19.)<sup>1</sup> But the Court fails to account for a blatant contradiction in its reasoning. As noted *supra*, the School opened the “All About Me” assignment to religious speech. In fact, the lower Court found that Ms. Busch would have been permitted to “speak[] with the children about the importance of religion in their family life” and to “describ[e] the time she and Wesley spend reading the Bible and attending church.” (Op. 24.) This begs an obvious question: why would the children perceive school sponsorship when a parent reads the Bible, but not when a parent describes and extols their family’s religious beliefs? So too, why would the children not perceive school sponsorship when a parent reads *The*

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<sup>1</sup> The lower Court incorrectly relies on *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), in making this argument. The Court’s reliance on *Count of Allegheny* is misplaced. In citing this case, the lower Court confuses two distinct legal tests. *County of Allegheny* dealt with whether governmental religious displays violate the Establishment Clause. The question here—whether Ms. Busch’s reading of the Bible on behalf of Wesley is private or school-sponsored speech—is not governed by the endorsement test, but by the legal principles this Court set out in *CEF*, 386 F. 3d at 524, and *Saxe*, 240 F. 3d at 214, regarding when *Hazelwood* is applicable. *County of Allegheny* and any other case dealing with the constitutionality of governmental religious displays are simply inapplicable to determining whether speech occurring within the context of the “All About Me” forum is school-sponsored or private speech under *Hazelwood*.

*Grinch Who Stole Christmas* or speaks about Hanukkah and Passover, but perceive sponsorship when a parent reads the Bible? The Court’s approach to *Hazelwood*’s applicability means that, within the context of the same speech forum, some speech is governed by *Hazelwood* while other speech is not. The School either sponsors all the speech that came in response to the “All About Me” assignment, or none of the speech. Under the facts and binding precedent, the School sponsors none of it, and *Hazelwood* does not apply.

**2. The Court Erred In Holding That When Ms. Busch Reads The Bible On Behalf Of Her Son, She Is Aligned With The School, Rather Than With Her Son.**

The lower Court also finds *Hazelwood* applicable by arguing that parents are seen by children as authority figures, thus Ms. Busch would automatically be viewed as being aligned with the School when presenting her son’s views. (Op. 19.) The Court’s conclusion is mistaken both factually and legally. Factually speaking, the School communicated to students and parents that the “All About Me” assignment was an opportunity for students to “identify individual interests and learn about others” and to “share information about themselves.” (Op. 1-2.) The School also made it clear that in addition to student’s creating posters and explaining them to the class, parents would be asked to express their children’s views as part of the assignment as well.

For legal support, the lower Court cites *Walz v. Egg Harbor Township Board of Education*, 342 F. 3d 271, 277 (3<sup>rd</sup> Cir. 2003), but this case cuts the other way. *Walz* involved a pre-kindergarten student who distributed religious gifts to his peers at several in-class parties. In *Walz*, the school did not invite students to distribute gifts at the parties. Instead, the school asked students’ parents to donate “generic” gifts to the Parent-Teacher Organization and the PTO—not the students—would distribute them to the students. *Id.* at 273.

Unlike the “All About Me” assignment, the gift exchange in *Walz* was not designed as an outlet for students to communicate personal messages; rather, it was designed to provide students with “generic gifts like candy and No. 2 pencils.” *Id.* at 280. This Court emphasized that “[a]t no point during the holiday parties did the school solicit individual views from the young students about the significance of the holiday to them personally.” *Id.* at 279. The court distinguished the in-school parties from an activity where the school invited students to express their personal views, like a “show and tell” assignment, which is indistinguishable from the “All About Me” assignment. *Id.* at 278. Significantly, this Court held that where a school invites student responses, the resulting speech is private and entitled to full First Amendment protection. *Id.* at 279 (“Individual student expression that articulates a particular view but that comes in response to a class assignment or activity would appear to be

protected”); *id.* at 280 (“And where the School solicits individual views in a classroom setting, students should be able to respond in a non-disruptive manner”).

Therefore, under *Walz*, Wesley’s speech in response to the “All About Me” assignment is private speech fully protected by the First Amendment. Through the “All About Me” assignment, the School solicited Wesley’s views about who he is and what his interests are. Wesley responded by engaging in religious expression, which included asking his mother to read from the Bible. In the context of the “All About Me” assignment, Ms. Busch is a private actor speaking as an extension of her child. The Court legally erred by finding that Ms. Busch was aligned with the School when reading her son’s favorite book to the class. Neither the parent who explained Hanukkah and Passover to the children, nor any other parent who read a book on behalf of their children as part of the “All About Me” assignment, including Ms. Busch, are aligned with the School, but are engaging in private expression on behalf of their children.

**B. THE SCHOOL’S VIEWPOINT DISCRIMINATION FAILS AS A MATTER OF LAW.**

The lower Court made two legal errors in its discussion of *Hazelwood*. First, it erred in holding that viewpoint-based discrimination is permissible under *Hazelwood*. Second, the Court erred in holding that a School’s desire to avoid the

appearance of endorsing “proselytizing” religious speech is a valid educational purpose that justifies viewpoint discrimination.

**1. Viewpoint-Based Discrimination Is Not Permitted Under *Hazelwood*, Nor Under This Court’s Precedent.**

The lower Court held that *Hazelwood* permits viewpoint-based discrimination. (Op. 20.) This finding directly conflicts with this Court’s precedent. In *Brody v. Spang*, 957 F.2d 1108, 1118 (3d Cir. 1992) (emphasis added), this Court stated that “since the [*Hazelwood*] Court found that the newspaper was a non-public forum, it further held that any reasonable non-viewpoint-based restrictions were acceptable, provided that the school’s regulations were ‘reasonably related to legitimate pedagogical concerns.’” *Brody* also discussed the types of speech restrictions that are permissible within a nonpublic forum under *Hazelwood*, and notably stated that reasonable “content based restrictions” are permissible, so long as they are “not simply pretexts for viewpoint discrimination.” *Id.* at 1122.

Like this Court, a majority of federal Courts of Appeal have concluded that *Hazelwood* prohibits schools from regulating speech on the basis of its viewpoint. *Searcey v. Harris*, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989) (“[T]here is no indication that the [*Hazelwood*] Court intended to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker’s views”); *Downs v. Los*

*Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1010 (9th Cir. 2000) (same); *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005) (“we conclude that a manifestly viewpoint discriminatory restriction on school-sponsored speech is, prima facie, unconstitutional, even if reasonably related to legitimate pedagogical interests”).

The Supreme Court’s decision in *Hazelwood* confirms that viewpoint discrimination is unlawful. In *Hazelwood*, the Supreme Court analyzed the school newspaper at issue under both *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985), and *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983), to determine the type of forum. See *Hazelwood*, 484 U.S. at 267-70. This is significant because in both *Perry* and *Cornelius* the Court ruled that viewpoint discrimination is prohibited even in limited public and non-public fora. *Cornelius*, 473 U.S. at 811; *Perry*, 460 U.S. at 46. Concluding that the newspaper was a non-public forum, the *Hazelwood* Court cited *Perry* for the standard that should be applied:

School officials did not evince either ‘by policy or by practice,’ *Perry Education Assn.*, 460 U.S. at 47, 103 S.Ct., at 956, any intent to open the pages of Spectrum to ‘indiscriminate use,’ *ibid.*, by its student reporters and editors, or by the student body generally. . . . Accordingly, school officials were entitled to regulate the contents of Spectrum in any reasonable manner. *Ibid.* It is this standard . . . that governs this case.

*Hazelwood*, 484 U.S. at 270. Importantly, the Court did not distinguish *Perry*'s holding with respect to the viewpoint neutrality requirement, thus *Hazelwood* requires a School's speech restrictions to be viewpoint neutral.

The lower Court correctly ruled that the School's prohibition on Ms. Busch reading the Bible on her son's behalf constituted viewpoint discrimination. (Op. 15.) And while the Court incorrectly concluded that *Hazelwood* applies to this case, under controlling precedent the School's discrimination must be enjoined because viewpoint discrimination is unlawful even under *Hazelwood*.

**2. Avoiding The Appearance Of Endorsing "Proselytizing" Religious Speech Is Not A Valid Educational Purpose Sufficient To Justify Viewpoint Discrimination.**

In addition to incorrectly holding that *Hazelwood* permits schools to engage in viewpoint discrimination, the lower Court also erred in holding that the School's interest in avoiding the appearance of endorsing "proselytizing" religious speech is a legitimate pedagogical concern that justifies viewpoint discrimination. (Op. 22.)

Incredibly, the lower Court does not even mention *CEF*, 386 F.3d at 514, which is binding precedent that directly conflicts with its ruling. *CEF* involved the distribution of flyers produced by community organizations to students. *Id.* at 519. Teachers distributed these flyers to students during school hours, *id.* at 520, and many of the students who received flyers were elementary-age, *id.* at 518. The school

district argued that it violated the Establishment Clause for teachers to hand elementary students flyers that promoted a particular religious belief, and that elementary school children would likely view “school facilitation of private speech as . . . endorsement of the speech.” *Id.* at 532. This Court disagreed, holding instead that permitting the distribution of such flyers by teachers to elementary students during school hours did not violate the Establishment Clause. *Id.* at 534.<sup>2</sup>

If there was no Establishment Clause violation in *CEF*, there cannot be one here. In *CEF*, the teacher handed religious materials directly to elementary students during school hours and there was no endorsement problem. Here, a parent is expressing her son’s religious viewpoint in the context of an assignment given to her son to explain his interests to his classmates. Ms. Busch and all other parents who spoke to the class as part of the “All About Me” assignment are private actors speaking messages chosen by their children.

While conspicuously avoiding *CEF*, the lower Court relies on *Walz* to support its argument that restricting religious viewpoints is a valid educational purpose. (Op. 22.) But, as stated, *Walz* cuts the other way. In *Walz*, this Court held, “Where student

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<sup>2</sup> Notably, the Federal District Court of New Jersey, following *CEF*, recently rejected a School District’s argument that, under *Hazelwood*, “it had a legitimate pedagogical concern in distancing itself from proselytizing religious speech” sufficient to justify viewpoint discrimination. *Turton v. Frenchtown Elem. Sch. Dist. Bd. of Educ.*, 465 F. Supp. 2d 369, 380 (D.N.J. 2006).

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.” *Id.* at 276. As described *supra*, in *Walz* the school instructed students to provide generic gifts to the PTO for distribution at in class parties, but the plaintiff “skirted the structure of th[ese] organized activit[ies]” by bringing gifts expressing his religious views and handing them directly to his classmates during the parties. *Id.* at 279. Accordingly, the school’s restriction on his speech was permissible because his gifts were “at cross-purposes with [the] educational goal” of the parties. *Id.* at 280.

What the lower Court overlooks is that *Walz* also states that student expression that comes in response to a class assignment is fully protected by the First Amendment, unless it is disruptive. *See supra* pp. 11-12 (discussing *Walz*). Ms. Busch’s reading of the Bible as part of the “All About Me” assignment did not skirt any rules (and in fact complied with all of the assignment’s guidelines) and represented Wesley’s response to the “All About Me” assignment. Under *Walz*, therefore, Wesley’s expression of his religious views (and his mother’s expression of Wesley’s views on his behalf) are entitled to the full protection of the First Amendment.

**3. The Lower Court’s Holding That Schools May Restrict Speech They Determine Is “Proselytizing” In Nature Poses A Serious Threat To Religious Liberty And Expression.**

The lower Court’s ruling poses serious dangers to religious expression. The lower Court presumes that certain religious speech—i.e., religious speech that crosses some indeterminate threshold where it becomes “too religious”—automatically violates the Establishment Clause, and thus may constitutionally be censored. This holding is plain legal error under controlling precedent. Moreover, it impermissibly interjects government officials into the affairs and doctrines of religion.

The lower Court held that school officials can restrict “proselytizing” religious speech while allowing the expression of other religious views. (Op. 24.) This holding is in direct conflict with *CEF*, wherein this Court held that distinguishing between religious speech and “proselytizing” religious speech is an “incoherent” distinction, and that excluding religious speech from a forum based on its “proselytizing” nature is a “euphemism[] for viewpoint-based religious discrimination.” 386 F.3d at 527.

*CEF*’s holding on this point does not break new ground. The Supreme Court has long held that government officials may not accord lesser protection to religious speech because it “proselytizes,” promotes a particular religious view, or constitutes an “act of worship.” Indeed, in *Capitol Square Review and Advisory Board v.*

*Pinette*, the Supreme Court held:

Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, or even acts of worship.

515 U.S. 753, 760 (1995) (citations omitted) (emphasis added). And in *Good News Club*, the majority rejected the dissent's view that a Christian Club's speech was permissibly excluded from a speech forum because it was "an evangelical service of worship." 533 U.S. at 138 (Souter, J., dissenting). As the majority put it, "we see no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys." *Id.* at 112 n.4. Accordingly, the lower Court committed reversible error when it held that "proselytizing" religious speech should be accorded less protection under the First Amendment than other religious speech.

The lower Court's ruling also errs at a more fundamental level. The Constitution forbids government officials from classifying religious speech on the basis of its perceived level of "religiosity," which is precisely what the lower Court's opinion requires. The argument between the majority and dissenting Justices in

*Rosenberger*, 515 U.S. at 819, illustrates this point. In *Rosenberger*, the Court held that a public university committed unlawful viewpoint discrimination when it denied funds to a student organization that published a newspaper that espoused a religious viewpoint, while at the same time providing funds to other student newspapers that espoused non-religious viewpoints. *Id.* at 830-31. The dissenting Justices combed through the religious newspaper at the source of the funding controversy, and concluded:

This writing is no merely descriptive examination of religious doctrine or even of ideal Christian practice in confronting life's social and personal problems. [Rather] [i]t is straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ, and to satisfy a series of moral obligations derived from the teachings of Jesus Christ.

*Id.* at 867-868. Based on their interpretation that the student newspaper espoused more than mere religious speech, but rather “preach[ed] the word,” the dissenting Justices concluded that funds were permissibly denied. *Id.* at 868.

The *Rosenberger* majority bluntly rejected the dissent's argument. As the Court put it, “Were the dissent's view to become law, it would require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question-speech otherwise protected by the Constitution-contain too great a religious content.” *Id.* at 844. Quoting *Widmar*, the Court stressed that the view that religious speech that is “too religious” may be permissibly restricted is

impossible to administer and would lead to unconstitutional entanglement of government in religion:

“[E]ven if the [dissent’s] distinction [between religious speech and speech about religion] drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Merely to draw the distinction would require the university-and ultimately the courts-to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.

*Id.* at 844-845 (quoting *Widmar*, 454 U.S. at 269-70 n. 6) (citations omitted).<sup>3</sup>

The lower Court’s reasoning illustrates why government officials are constitutionally prohibited from drawing distinctions between religious speech. The lower Court first correctly asserts that reading the Bible expresses a “religious viewpoint,” yet mistakenly concludes that other religious speech does not. (Op. 16.) The lower Court expands on this assertion, stating that it would have been permissible for Ms. Busch to have “responded to the assignment by speaking with the children about the importance of religion in their family life and describing the time she and Wesley spend reading the Bible and attending church.” (*Id.* at 24.) To justify

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<sup>3</sup> This Court addressed a similar issue in *Gregoire*, 907 F. 2d at 1382, and, following *Widmar*, held that “[a]ttempting to draw a line between religious discussion and worship would only exacerbate establishment clause concerns, requiring [the defendant school] to entangle itself in what would almost certainly be complex content-determinations.” *Id.*

this distinction, the lower Court mysteriously concludes, with no explanation, that such a presentation “would not have promoted a specific message.” (*Id.*) Later, the lower Court again draws an arbitrary line between permissible and impermissible religious speech, asserting that “there is a distinct difference between expressing one’s love of the Bible and reading verses from it. The former can be accomplished, without creating an Establishment Clause problem, by speaking about the Bible in a way that does not promote a religious viewpoint or carry the potential to offend those who do not similarly believe.” (*Id.* at 27 n. 21.)<sup>4</sup>

The Court’s mistake is its assumption that government officials are capable of classifying religious speech into different categories based on the content of the message. Whether a person is reading the Bible, explaining the importance of the Bible, or expressing love for the Bible, that person is expressing a religious viewpoint. The lower Court’s various stabs at justifying its and the School’s disparate treatment of religious speech are indistinguishable from the rationales rejected by this Court in *CEF*, 386 F. 3d at 527. Further, the lower Court’s ruling proposes that school officials have the authority (indeed, the constitutional duty) to

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<sup>4</sup> Of course, restricting speech on the basis that it may be controversial or offensive is viewpoint discrimination under this Court’s precedent. *CEF*, 386 F. 3d at 527 (“To exclude a group simply because it is controversial or divisive is viewpoint discrimination”).

closely scrutinize religious speech, and act as the final arbiter regarding which religious views may be expressed in our Nation’s public schools. This Court should not countenance such a drastic departure from First Amendment jurisprudence.

**C. THE LOWER COURT ERRED IN ITS INTERPRETATION AND APPLICATION OF THE ESTABLISHMENT CLAUSE.**

In its discussion of the Establishment Clause, the lower Court erroneously concludes that private religious speech expressed in the context of a school-created speech forum violates the Establishment Clause (Op. 27 n.21, 24 n.18), then holds that a school’s desire to avoid this Establishment Clause violation is a compelling interest that justifies excluding the religious speech, (*id.* at 25.) This circular reasoning allows government officials to discriminate against religious speakers with impunity. Controlling precedent demonstrates the errors the lower Court made in interpreting and applying the Establishment Clause.

**1. Precedent Of The Supreme Court And This Circuit Demonstrate That There Is No Establishment Clause Violation Under The Circumstances Of This Case.**

The lower Court held that “a school’s avoidance of an Establishment Clause violation is a compelling interest such that it justifies viewpoint based restriction of speech.” (Op. 25-26.)<sup>5</sup> The Court’s holding on this point is without basis and has

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<sup>5</sup> The Supreme Court has yet to answer the question of whether the Establishment Clause, if transgressed, would be a compelling interest sufficient to

been repeatedly rejected by the Supreme Court. *Widmar*, 454 U.S. at 276; *Good News Club*, 533 U.S. at 112-20; *Rosenberger*, 515 U.S. at 845-46; *Lamb's Chapel*, 508 U.S. at 394-97.

Following Supreme Court precedent, this Court has rejected school district arguments that the Establishment Clause justifies content and viewpoint discrimination against religious speakers in the context of speech forums similar to the one at issue here. *Gregoire*, 907 F. 2d at 1379-1382 (Establishment Clause did not justify school district's exclusion of religious group from renting school facilities); *Pope*, 12 F. 3d at 1254-1256 (Establishment Clause did not justify school district's prohibition on religious student club using school facilities); *Donovan*, 336 F. 3d at 226-27 (Establishment Clause did not justify school district's viewpoint discriminatory prohibition on religious student club meeting when all other student clubs met); *CEF*, 386 F. 3d at 530-34 (Establishment Clause did not justify school district's viewpoint discriminatory exclusion of religious materials from forum created for community organizations to provide information to students).

The lower Court's mistaken holding is based on its failure to appreciate the difference between private and government speech within the context of a forum for

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justify viewpoint discrimination. *Good News Club*, 533 U.S. at 112-13. Here, no such violation has occurred. Thus, the lower Court's holding goes well beyond what the Supreme Court has ever held.

private expression, like the “All About Me” assignment. As the Supreme Court has explained: “there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990).

The Court’s error on this point is highlighted by its reliance on *Engel v. Vitale*, 370 U.S. 421 (1962). *Engel* dealt with a State-composed prayer that New York required teachers to recite with their students each day at the beginning of class. *Id.* at 422-23. The Supreme Court struck down this practice as a violation of the Establishment Clause. *Id.* at 424. Unlike *Engel*, where the Court was faced with teachers leading students in reciting the “officially approved religious doctrine of [the] State,” *id.* at 436, this case deals with a school-created speech forum in which the private views of students were solicited by the School.

Indeed, the lower Court correctly held that the “All About Me” assignment created a limited public forum. (Op. 13-14.) And under this Court’s precedent, the speech that takes place within such a forum is private, not government, speech. *CEF*, 386 F. 3d at 524. Thus, like all other speech in the “All About Me” forum, any religious message expressed is attributable to the student and parent who express that message, not the School, and therefore there is no Establishment Clause violation.

The lower Court’s error is also illustrated by its view that banning religious speech satisfies the constitutional duty of neutrality toward religion. (Op. 30.) Contrary to the lower Court’s view, it is well-established that, in the context of forums for private expression, like the “All About Me” assignment, neutrality toward religion is achieved through equal treatment of religious speakers. See *Good News Club*, 533 U.S. at 114 (“For the ‘guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse’”) (citation omitted); *Mergens*, 496 U.S. at 248 (“[T]he message [of equal access] is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion”). In short, neutrality is achieved when religious speech occurs in a public forum as a result of neutral access criteria, which is precisely how the “All About Me” forum operates.

The lower Court’s holding regarding the Establishment Clause turns decades of First Amendment jurisprudence on its head by permitting government officials to discriminate against private religious views expressed within a forum opened for private expression, and must be reversed.

**2. The Lower Court Erred In Its Application Of The Endorsement Test By Focusing On Elementary-Age Children, Rather Than The Reasonable Observer, As The Relevant Audience.**

The lower Court mistakenly assumes that elementary-age students would perceive that the School endorsed Ms. Busch’s reading of the Bible, thereby justifying the School’s viewpoint discrimination in this case. (Op. 19) The Supreme Court, this Court, and other federal Courts of Appeal have flatly rejected the “impressionability” of students as a justification for excluding private religious speech from a school-created speech forum. *CEF*, 386 F.3d at 531-34 (citing cases).

This Court set out the parameters of the endorsement test in *CEF*, 386 F. 3d at 530-34. Under *CEF*, to determine if a challenged practice constitutes an endorsement of religion, it “must be judged in its *unique circumstances*.” *CEF*, 386 F.3d at 531 (quotation marks and citations omitted). The key to the endorsement analysis is that “the challenged practice must be considered from the perspective of a hypothetical reasonable observer who is aware of the history and context of the community and forum.” *Id.* (quotation marks and citations omitted).

The lower Court errs in applying the endorsement test by focusing on elementary-age children as the relevant observer. The Supreme Court addressed this precise argument in *Good News Club*, and held that when a school child encounters

private religious speech on campus (pursuant to a neutral access policy like that governing the “All About Me” assignment), the parent—not the child—is the relevant reasonable observer. 533 U.S. at 115. This is especially the case here, where the School informed parents that the “All About Me” assignment gave their children an opportunity to express who they are, and that parents were to participate in the assignment by addressing the class on behalf of their child.

Moreover, the *Good News Club* Court also bluntly rejected the school district’s argument in that case that “any risk that small children would perceive endorsement” justifies prohibiting religious speech at school:

We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which . . . religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive.

*Id.* at 119. The Supreme Court further explained that “even if we were to inquire into the minds of the schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.” *Id.* at 118.<sup>6</sup>

Importantly, in *CEF* this Court fully adopted the Supreme Court’s reasoning

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<sup>6</sup> Moreover, it goes without saying that elementary age students understand that their own parents, and the parents of other students, are not the same as the School.

in *Good News Club*. In *CEF*, the school district argued that the relevant observer in that case “is an elementary school child and that such a child is likely to interpret school facilitation of private speech as amounting to an endorsement of the speech.” *Id.* at 532. Relying on *Good News Club* and on four other Courts of Appeal decisions which rejected similar arguments, this Court held that granting “Child Evangelism equal access to the fora in question would not have constituted an endorsement of religion.” *Id.* at 534.

In light of these authorities, the lower Court erred by relying on the rejected theory that religious speech should be excluded if there is any risk that young schoolchildren may misperceive endorsement of that speech. Yet the lower Court’s approach is even more problematic than the approaches rejected in *Good News Club* and *CEF*. According to the lower Court, students could have “express[ed their] love of the Bible” as part of the “All About Me” assignment without an unconstitutional endorsement occurring, but that reading the Bible results in an unconstitutional endorsement. (Op. 27 n.21.) The Court does not, and cannot, explain why a school child would perceive school endorsement when the Bible verse John 3:16 is read, but not when someone expresses their love for the same Bible verse. The lower Court’s erroneous approach to the endorsement question demonstrates the wisdom of the Supreme Court and this Court in rejecting the view that religious speech should be

“proscribed on the basis of what the youngest members of the audience might misperceive.” *Good News Club*, 533 U.S. at 119. Any other approach would lead to inconsistent and unworkable precedents which would be impossible for school officials to understand or enforce.

#### **IV. CONCLUSION**

The lower Court’s “reasoning” sounds the death knell for religious freedom in public schools. By transmuting private religious speech into government speech, granting school officials carte blanche authority to determine what religious speech is “too religious,” and holding that a school’s desire to avoid a perceived Establishment Clause violation justifies viewpoint discrimination, the lower Court’s opinion permits a blatant violation of the Constitution. For these reasons, the *Amici* respectfully urge this Court to reverse the lower Court’s decision.

Respectfully submitted this 28th day of August, 2007,

/s/ Jeremy D. Tedesco

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**CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)(C)**

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the foregoing *Amici Curiae* brief is proportionally spaced, has a typeface of 14 points or more, and contains 6942 words, as calculated by Corel Word Perfect, the word processor used in its preparation.

Dated: August 28, 2007

/s/ Jeremy D. Tedesco  
Jeremy D. Tedesco

**CERTIFICATE OF COMPLIANCE WITH LAR 31.1(c)**

I hereby certify that the electronic version of this brief submitted to this Court is identical to the text of the brief submitted in paper format pursuant to LAR 31.1(a).

I also hereby certify that a virus detection program was run on the electronic version of this brief and that no virus was detected. The virus detection program used was McAfee VirusScan Enterprise, version 8.0.0.

Dated: August 28, 2007

/s/ Jeremy D. Tedesco  
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## **CERTIFICATE OF ADMISSION**

Pursuant to LAR 46.1(e), I hereby certify that Benjamin Bull is a member of the bar of this Court, and that Jeremy Tedesco, David Cortman, and Joshua Bolinger have applications for admission pending before this Court.

Dated: August 28, 2007

/s/ Jeremy D. Tedesco  
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 28, 2007, ten copies of the foregoing Brief of *Amici Curiae* Alliance Defense Fund and Pennsylvania Family Institute in Support of Plaintiff-Appellant were sent via UPS overnight delivery to:

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