No. 09-__ 09-315 SEP 9 - 2009

IN THE

Supreme Court of the United States

DONNA KAY BUSCH,
Petitioner,

v.

MARPLE NEWTOWN SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a public school may, consistent with the First Amendment, engage in viewpoint discrimination of invited speech based solely on the "reasonableness" of the restriction, rather than a compelling interest.

PARTIES TO THE PROCEEDING

Petitioner is Donna Kay Busch, in her individual capacity and as the parent and next friend of Wesley Busch, a minor. Respondents are Marple Newtown School District; Marple Newtown School District Board of Directors; Robert Mesaros, Superintendent of the Marple Newtown School District; and Thomas Cook, Principal of Culbertson Elementary School.

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PETITION FOR A WRIT OF CERTIORARI

Donna Kay Busch, in her individual capacity and as the parent and next friend of Wesley Busch, a minor, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., *infra*, 1a-41a) is reported at 567 F.3d 89. The opinion of the district court (Pet. App., *infra*, 42a-88a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2009. On August 21, 2009, Justice Alito

extended the time within which to file a petition for a writ of certiorari to and including September 30, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT

Petitioner Donna Kay Busch brought suit against respondents in the United States District Court for the Eastern District of Pennsylvania, contending, *inter alia*, that respondent Marple Newtown School District (Marple Newtown) restricted speech in a manner that violated the Free Speech Clause of the First Amendment. The district court granted summary judgment to respondents, Pet. App. 42a-88a, and a divided panel of the Third Circuit affirmed, *id.* at 1a-41a.

A. "All About Me" Classroom Exercise

At the time of the events giving rise to this action, Wesley Busch was a kindergartener in the Marple Newtown School District. As part of the kindergarten unit of study, Marple Newtown included a classroom exercise known as "All About Me." C.A. App. 857-58. There were two stated objectives for the "All About Me" exercise: the first was for students to

identify individual interests and learn about others, and the second was for students to identify sources of conflict with others and ways that those conflicts could be resolved. *Id.* at 919. "All About Me" had been an informal part of Marple Newtown's curriculum for many years and was officially codified as part of the curriculum in 2004. *Id.* at 1007. Each kindergarten teacher had the authority to design lessons for "All About Me" and to determine whether to allow parent participation. *Id.* at 86. Consequently, choices relating to specific classroom activities were generally left to each teacher. *Ibid.*

B. Jaime Reilly's Kindergarten Class

Wesley's kindergarten teacher for the 2004-05 school year was Jaime Reilly. C.A. App. 1155-56. Ms. Reilly implemented "All About Me" by featuring a different student each week. *Id.* at 1079. Thus, each student was able to enjoy his or her own "All About Me" week. *Ibid.* During the selected student's week, the student was given the opportunity to share his or her interests with the class through multiple classroom exercises and homework assignments. *Id.* at 1081-82. At the beginning of the school year, Ms. Reilly circulated a description of "All About Me" that also invited parents to participate. *Id.* at 1084-85. The invitation stated:

> All About Me
>
> Each child will have the opportunity to share information about themselves during their "All About Me" week. To start off your child's All About Me week, please send in a poster with pictures, drawings, or magazine cut outs of your child's family, hobbies, or interests. Your child may bring in a special toy or stuffed animal

> during the week to introduce to the class. Your child may also bring in a favorite snack to share with the class during their "All About Me Week." If any parent would like to come to school to share a talent, short game, small craft, or story with us during your child's "All About Me" week please contact me 1 week in advance to schedule a day and time.

Id. at 1137. According to Ms. Reilly, the objectives of "All About Me" were met in her classroom by the students' sharing information about themselves with other students, and discussing their likes and dislikes. *Id.* at 1079.

C. Wesley Busch and His Family

Eric Busch and petitioner Donna Busch are Wesley's parents. C.A. App. 1521-22. For more than nine years, the Busch family has attended Spruce Street Baptist Church in Newtown Square, Pennsylvania. *Id.* at 1042. The Busch family routinely reads the Bible together at breakfast and before going to bed, *id.* at 1231, 1537-38, and Mrs. Busch regularly reads the Bible to her two younger boys in the morning before school, *id.* at 1537-38. Wesley also frequently asks his parents to read the Bible to him. *Ibid.* According to Wesley, the time he shares with his mother reading the Bible is special to him. *Id.* at 1639. At the time of the incident giving rise to this lawsuit, Wesley considered the Bible his favorite book. *Ibid.*

D. Preparations for Wesley's "All About Me" Week

As Wesley's "All About Me" week approached, Mrs. Busch met with Ms. Reilly to inform her that, per Ms. Reilly's invitation, Mrs. Busch wished to participate

in Wesley's week, and she sought ideas for her participation. C.A. App. 1182-83, 1197. Ms. Reilly offered Mrs. Busch several suggestions, such as reading Wesley's favorite book, preparing a dessert or snack, or one of the other items identified in the invitation to parents. *Id.* at 1198-99. After her meeting with Ms. Reilly, Mrs. Busch talked to Wesley about her coming to his classroom, and she asked him what story he would like her to read. *Id.* at 1167. Wesley told his mother that he wanted her to read from the Bible. *Ibid.* The night before her visit, Mrs. Busch decided to read the Old Testament's Psalm 118, verses 1 through 4, and verse 14. *Id.* at 1247, 1252. Those verses state:

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

Psalms 118:1-4, 14 (King James).

Three principal considerations led Mrs. Busch to choose verses from Psalms. C.A. App. 1248, 1250. First, she and Wesley frequently read from Psalms, and she knew Wesley liked Psalms. *Id.* at 1249. Second, she thought the children in Wesley's class would enjoy Psalms because they are similar to poetry and songs. *Id.* at 1249, 1375. Third, she

wanted to avoid references to Jesus Christ, which she believed might spark concerns. *Id.* at 1248-50.

Mrs. Busch intended to introduce herself to the students and explain that she was there for Wesley's "All About Me" week, and that Wesley had asked her to read from the Bible, his favorite book. C.A. App. 1478. Mrs. Busch intended only to read five verses from Psalm 118, and not to teach or talk about what they mean. *Id.* at 1376. If asked questions about them, Mrs. Busch intended to tell the students that Psalms are ancient poetry and something Wesley enjoys. *Id.* at 1252-53. Mrs. Busch did not plan to spend more than fifteen minutes in front of Wesley's class. *Ibid.*

E. The School District's Refusal to Permit Mrs. Busch to Read the Selected Verses

When Mrs. Busch arrived at Wesley's class, she advised Ms. Reilly that she intended to read excerpts from Psalm 118. C.A. App. 1254. Unsure of whether to allow Mrs. Busch to read from the Bible, Ms. Reilly contacted Principal Thomas Cook. *Id.* at 1102, 1268. When Principal Cook arrived, he told Mrs. Busch that she should know better than to try to read the Bible in school and that it was against the law. *Id.* at 1276-78, 1286. Principal Cook told Mrs. Busch that "reading the Bible to a kindergarten class violated the doctrine of [separation] of church and state." *Ibid.*; *see also id.* at 1024. He further stated that it was improper to read from the Bible to a class of kindergarten students because, in his view, the "Bible is holy scripture * * * * [I]t's the word of God. And * * * reading that to kindergarten students is promoting religion and it's proselytizing for promoting a specific religious point of view." *Id.* at 1024-25. When Mrs. Busch informed Principal Cook that her

other son had obtained a book from the school library entitled *Gershon's Monster: A Story for the Jewish New Year*, Principal Cook responded that that book was "cultural" and continued to forbid her from reading her desired selection. *Id.* at 1277.[1] Principal Cook did not afford Mrs. Busch the opportunity to explain which verses from Psalm 118 she intended to read, or why she intended to read them. *Id.* at 1290. At Principal Cook's direction, Mrs. Busch chose a different book to read to Wesley's class. *Ibid.*; *see also id.* at 1024.

F. The District Court Decision

Ms. Busch then brought suit against respondents in the United States District Court for the Eastern District of Pennsylvania, contending, *inter alia*, that Marple Newtown had restricted speech in a manner that violated the Free Speech Clause of the First Amendment.[2] Following cross-motions for summary judgment, the district court granted summary judgment in favor of Marple Newtown. Noting that the case raises "very perplexing questions of Constitutional law," Pet. App. 55a, the district court first held that the school, at most, constituted a limited public forum, *id.* at 58a, and that, within this forum, the

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[1] In her classroom, Ms. Reilly kept a small library of books that she periodically read to her class, including several about the Jewish holidays such as *Hooray for Hanukkah* and *The Magic Dreidels*. C.A. App. 1090-92. Additionally, twice during Wesley's school year, another parent gave presentations to the kindergarten class about Hanukkah and Passover; during both, the parent read a book about the respective holiday to the class. *Ibid.*

[2] Mrs. Busch also alleged violations of the Establishment and Due Process Clauses and of the Pennsylvania Constitution. Those allegations are not at issue here.

school's conduct toward Mrs. Busch "constituted viewpoint discrimination." *Id.* at 60a; *see ibid.* ("Clearly, the school did not preclude all speech that dealt in any way with religion but precluded speech in this situation because it expressed a religious viewpoint.").

The district court then observed that the "circumstances under which viewpoint discrimination is permitted is a matter of disagreement among the Circuit Courts." *Id.* at 61a. Concluding that Mrs. Busch's speech constituted "school-endorsed" speech, the district court sided with those circuits that have interpreted *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), to hold that "where there is a likelihood of a perception of school-endorsed speech," schools "may restrict speech even based on its viewpoint 'so long as their actions are reasonably related to legitimate pedagogical concerns.'" Pet. App. 62a (quoting *Hazelwood*, 484 U.S. at 272-73). The district court drew support from the Third Circuit's decision in *Walz* v. *Egg Harbor Township Board of Education*, 342 F.3d 271 (2003), which the district court read "as permitting viewpoint discrimination in limited circumstances when there is a valid educational purpose." Pet. App. 68a. The school's actions were permissible, the court concluded, because it had been seeking to avoid an Establishment Clause violation, which constitutes a "legitimate interest that justifies viewpoint discrimination," *id.* at 69a, and because the "All About Me" exercise was designed to "help students learn about one another," not call for the expression of "specific religious views," *id.* at 70a.

G. The Third Circuit Decision

A divided panel of the court of appeals affirmed. Relying heavily on *Walz* and citing *Hazelwood*, the

court observed that "[r]estrictions on speech during a school's organized, curricular activities are within the school's legitimate area of control"; accordingly, "[c]onsistent with its [*sic*] pedagogical goals, educators may appropriately restrict forms of expression in elementary school classrooms." Pet. App. 14a. With respect to invited speech, schools "may properly require that the solicited speech respond to the subject matter at hand," including "when parents participate in an elementary school's curricular activities." *Id.* at 15a (citing *C.H. ex rel. Z.H.* v. *Oliva*, 226 F.3d 198, 211 (3d Cir. 2000) (en banc) (Alito, J., dissenting) ("[I]f a student is asked to solve a problem in mathematics or to write an essay on a great American poet, the student clearly does not have a right to speak or write about the Bible instead.")).

The court of appeals then rejected Mrs. Busch's contention that her speech should have been permitted because she "intended to express a solicited view on the pertinent subject matter"—namely, her son Wesley and his favorite things. The court held that prohibiting Mrs. Busch from reading Psalm 118 was permissible because the school "believed it proselytized a specific religious point of view," and, "as in *Walz*, the school's reasons—to prevent promotion of a religious message in kindergarten—were 'designed to prevent * * * speech that, if permitted, would be at cross-purposes with its educational goal and could appear to bear the school's seal of approval.'" *Id.* at 18a (quoting *Walz*, 343 F.3d at 280). The court concluded that "elementary school administrators and teachers should be given the latitude within a range of reasonableness related to preserving the

school's educational goals," and that the school's actions "were not unreasonable." *Id.* at 20a.[3]

Judge Hardiman dissented. He first criticized the majority's failure to distinguish between content and viewpoint discrimination. Reviewing Supreme Court precedent, Judge Hardiman noted that "viewpoint discrimination occurs when the government targets not just subject matter, but also particular views taken by speakers on a subject." *Id.* at 26a. He also observed that the Supreme Court has "consistently held that discrimination based on the religious character of speech is properly classified as viewpoint discrimination." *Ibid.* Echoing the district court, Judge Hardiman stated that "this case involves viewpoint discrimination," inasmuch as Mrs. Busch's "attempt to read Psalm 118 to her son's class fell within the specified subject matter—*i.e.*, something of interest to her son and important to his family—and the sole reason for excluding her speech was its religious character." *Id.* at 29a.

Second, Judge Hardiman argued that the majority's reliance on *Walz*, which in turn relied on *Hazelwood*, was misplaced. *Hazelwood* "is limited to situations in which the speech may be interpreted as coming from the school itself," and Judge Hardiman found "no risk that Busch's speech would 'bear the imprimatur of the school.'" *Id.* at 34a (quoting *Hazelwood*, 484 U.S. at 271). Judge Hardiman observed that "[e]verything from the title of ["All About Me"]—to the specific requests made by the teacher,

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[3] Judge Barry concurred, observing that she found "something unsettling about this case and others like it" but nevertheless joined the majority opinion because it "correctly applie[d]" Third Circuit precedent. Pet. App. 24a (Barry, J., concurring).

indicated that the student (or, in reality, the parent) was speaking and not the school." *Id.* at 34a-35a.

Finally, Judge Hardiman concluded that even accepting the majority's view that Mrs. Busch's speech constituted "school-endorsed" speech under *Hazelwood*, the school's conduct was not justified. "In holding that a school may regulate school-sponsored expressive activities so long as the regulation is 'reasonably related to legitimate pedagogical concerns,'" according to Judge Hardiman, *Hazelwood* permits discrimination "on the basis of *content*," and does not "offer any justification for allowing educators to discriminate based on *viewpoint* absent a compelling government interest." *Id.* at 37a. He noted that "the question of whether school-sponsored speech can discriminate on the basis of viewpoint remains open" and the "courts of appeal are split on this issue." *Id.* at 38a. Rejecting the majority's position, Judge Hardiman concluded that while "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," it "does not follow * * * that the state may regulate one's viewpoint merely because speech occurs in a schoolhouse." *Id.* at 40a.

REASONS FOR GRANTING THE PETITION

A divided Third Circuit panel held in this case that a public school may engage in viewpoint-related discrimination so long as the school's justification falls within a "range of reasonableness related to preserving the school's educational goals." Pet. App. 20a. In so holding, the court of appeals endorsed a construction of this Court's decision in *Hazelwood* that, as both the district court and dissent observed, has divided the circuits. Three circuits, including the

Third Circuit, have read *Hazelwood* to permit public schools to restrict school-sponsored speech on the basis of viewpoint so long as the restrictions are reasonably related to legitimate pedagogical concerns. Three other circuits, however, have rejected this interpretation and the proposition that *Hazelwood* created an exception to this Court's longstanding instruction that viewpoint-based speech restrictions, even in the school setting, may only be justified by a compelling government interest. The Third Circuit's decision, moreover, is flawed, for this Court has never sanctioned the use of viewpoint-based speech restrictions absent anything less than a compelling government interest. The malleable standards of "reasonableness" and "pedagogical concerns" that the Third Circuit adopted depart from well-established precedent. This case therefore presents an issue of exceptional importance that warrants the Court's review.

ARGUMENT

A. The Circuits Are Split As To Whether Public Schools May Restrict Speech Based on Viewpoint Absent a Compelling Interest

As both the district court and dissent below observed, the courts of appeals are squarely split over whether a public school may place viewpoint-related restrictions on speech in the absence of a compelling interest. Three circuits, including the Third Circuit, have interpreted this Court's decision in *Hazelwood* to hold that a school may engage in viewpoint discrimination so long as the restrictions are reasonably related to a school's educational goals. Three circuits have held otherwise, concluding that

Hazelwood did not *sub silentio* disrupt longstanding precedent requiring the government to demonstrate a compelling interest before engaging in viewpoint-based restrictions. This Court's review is necessary to resolve these widely divergent positions and clarify the standard that a school must satisfy in order to restrict speech on the basis of viewpoint.

1. Circuits Requiring Viewpoint Neutrality Absent a Compelling Government Interest

Three circuits have found that public schools' restrictions on speech during school-sponsored activities must be viewpoint-neutral absent a compelling government interest. The Eleventh Circuit, for example, has expressly rejected the proposition that *Hazelwood* permits school officials to engage in viewpoint discrimination. *Searcey* v. *Harris*, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989). It held instead that "[a]lthough *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*," it does not "offer[] any justification for allowing educators to discriminate based on viewpoint." *Id.* at 1325. Accordingly, while *Hazelwood* "did not discuss viewpoint neutrality," the Eleventh Circuit stated, "[t]here is no indication that the Court intended to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views." *Id.* at 1319 n.7. The "prohibition against viewpoint discrimination is firmly embedded in first amendment analysis," the court concluded; thus, it would "continue to require school officials to make decisions relating to speech which are viewpoint neutral." *Id.* at 1325. *See also Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1215 (11th Cir.

2005) ("*Hazelwood* does not allow a school to censor school-sponsored speech based on viewpoint.").

Similarly, the Second Circuit has rejected the proposition that "*Hazelwood* permits schools to discriminate on the basis of viewpoint—so long as such discrimination is, itself, reasonably related to a legitimate pedagogical interest." *Peck v. Baldwinsville Central School District*, 426 F.3d 617 (2d Cir. 2005). Similar to the circumstances here, the plaintiffs in *Peck*, a kindergarten student and his parents, alleged violations of free speech after the student's school censored a poster made for a school assembly in response to an assignment on the environment, which included images of Jesus and the church in addition to environmental images. *Id.* at 620-23. Vacating the district court's grant of summary judgment to the school district, the Second Circuit "decline[d] * * * to depart, without clear direction from the Supreme Court, from what has, to date, remained a core facet of First Amendment protection." *Id.* at 633. Rather, it concluded "that a manifestly viewpoint discriminatory restriction on school-sponsored speech is, prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests." *Ibid.* (emphasis added).

The Ninth Circuit, too, has read *Hazelwood* to require viewpoint neutrality absent a compelling government interest. In *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District,* 941 F.2d 817 (9th Cir. 1991) (en banc), the court held that a school district's refusal to publish abortion related advertisements in a high school yearbook was "not an effort at viewpoint discrimination," *id.* at 830, and, accordingly, was subject to the more relaxed "reasonableness" standard articulated

in *Hazelwood*, *id.* at 829. In so holding, the court cited prior Supreme Court decisions requiring viewpoint neutrality in nonpublic and limited public forums. *See ibid.* (citing *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985), and *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)). The Ninth Circuit has subsequently confirmed that *Planned Parenthood* "incorporated [a] 'viewpoint neutrality' analysis into nonpublic forum, school-sponsored speech cases." *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1010 (9th Cir. 2000).[4]

2. Circuits Permitting Viewpoint-Based Restrictions Absent A Compelling Government Interest

In addition to the Third Circuit below, which sanctioned viewpoint discrimination by a public school where the restriction was "within a range of reasonableness related to preserving the school's educational goals," Pet. App. 20a, two other circuits have held that, after *Hazelwood*, a school may place viewpoint-based restrictions on school-sponsored speech provided the regulation relates to pedagogical interests. The Tenth Circuit, in *Fleming* v. *Jefferson County School District R-1*, 298 F.3d 918 (10th Cir. 2002), expressly held that "*Hazelwood* allows educators to make viewpoint-based decisions about school-sponsored speech." *Id.* at 926. Noting the disagreement among the circuits on the question, *ibid.*, the

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[4] In *Kincaid* v. *Gibson*, 191 F.3d 719 (6th Cir. 1999), a panel of the Sixth Circuit construed *Hazelwood* as allowing "reasonable, non-viewpoint-based restriction[s]." *Id.* at 727. The en banc court, however, granted rehearing and reversed on other grounds. See 236 F.3d 342 (6th Cir. 2001).

court concluded that *Hazelwood* "does not require educators' restrictions on school-sponsored speech to be viewpoint neutral" because, in part, *Hazelwood* "makes no mention that the school's restriction must be neutral with respect to viewpoint," *id.* at 928. Accordingly, it permitted the school to exclude religious symbols from a school memorial display, finding these viewpoint-based restrictions to be "reasonably related to a pedagogical interest." *Id.* at 932-34.

Furthermore, the First Circuit has squarely held that *Hazelwood* "did not require that school regulation of school-sponsored speech be viewpoint neutral." *Ward* v. *Hickey*, 996 F.2d 448, 454 (1st Cir. 1993). Like the Third Circuit below, the First Circuit instead observed that "whether a regulation is reasonably related to legitimate pedagogical concerns"—the standard of *Hazelwood*— "will depend on, among other things, the age and sophistication of the students, the relationship between the teaching method and valid educational objective, and the context and manner of the presentation." *See* Pet. App. 12a ("[T]he appropriateness of student expression depends on several factors, including the type of speech, the age of the locutor and audience, the school's control over the activity in which the expression occurs, and whether the school solicits individual views from students during the activity." (quoting *Walz*, 342 F.3d at 278)).[5]

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[5] In *C.H. ex rel. Z.H.* v. *Oliva*, 195 F.3d 167 (3d Cir. 1999), a panel of the Third Circuit observed that "*Hazelwood* clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored activities so long as those restrictions are reasonably related to legitimate pedagogical concerns." *Id.* at

3. The Circuit Conflict Calls For Supreme Court Review

As set forth above, the courts of appeals are squarely and evenly divided on the application of *Hazelwood* to viewpoint-based discrimination and the showing a public school must make before restricting speech on the basis of viewpoint. Moreover, courts on both sides of the split—as well as the district court and dissent below—have recognized the disarray and have remarked upon the lack of clarity on this question following *Hazelwood*. *See Peck*, 426 F.3d at 631-32 ("Whether *Hazelwood* represents a departure from the long-held requirement of government neutrality in any and all government restriction of private speech is an issue that has been the subject of much debate among Circuit Courts, which have reached conflicting conclusions." (citation omitted)); *id.* at 632 (noting that the question is "anything but clear"); *Downs*, 228 F.3d at 1010 n.2; *Fleming*, 298 F.3d at 926 ("Our sister circuits have split over whether *Hazelwood* requires that schools' restrictions on school-sponsored speech be viewpoint neutral."); *see also Chiras v. Miller*, 432 F.3d 606, 615 n.27 (5th Cir. 2005) (stating that "[a] split exists among the Circuits on the question of whether *Hazelwood* requires viewpoint neutrality" but declining to consider the question).[6] This clear, recognized, and balanced split among the circuits warrants this Court's review.

172-73. The en banc court, however, granted rehearing and ultimately resolved the case on procedural grounds without addressing the viewpoint neutrality question. See 226 F.3d 198 (3d Cir. 2000).

[6] Recent academic commentary has also highlighted the divide and the need for greater clarity. *See* Emily Gold Waldman, *Returning To Hazelwood's Core: A New Approach To*

B. The Court of Appeals' Decision Is Erroneous

The Third Circuit erred in holding that Marple Newtown's viewpoint-based restriction of the speech here was permissible because it was "within a range of reasonableness related to preserving the school's educational goals." This Court has never sanctioned viewpoint-based speech restrictions absent anything less than a compelling government interest. *Hazelwood* does not provide to the contrary: Its holding that a school may restrict school-sponsored speech if "reasonably related to legitimate pedagogical concerns" arose only in the acknowledged context of restrictions based on content, not viewpoint. The Third Circuit's endorsement of viewpoint-based speech restrictions that are "not unreasonable" is not supported by *Hazelwood* or any other decision of this Court. Its departure from well-established First Amendment principles calls for this Court's review.

1. This Court's Precedent Does Not Permit Viewpoint-Based Discrimination Absent a Compelling Governmental Interest

The First Amendment provides that "Congress shall make no law * * * abridging the freedom of speech." U.S. Const. Amend. I. As this Court has

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Restrictions On School-Sponsored Speech, 60 Fla. L. Rev. 63, 64 (2008) ("[A] sharp split has developed over whether *Hazelwood* goes so far as to permit viewpoint-based speech restrictions, which are generally prohibited under the First Amendment."); R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. Ill. U. L.J. 175, 191 (2007) ("The courts are deeply divided on how to crucially interpret *Hazelwood*.").

repeatedly noted, the government's ability to restrict speech typically varies depending on the particular forum involved. *See Cornelius*, 473 U.S. at 806; *Peck*, 426 F.3d at 625-26. Even in non-public forums, however, in which the government is afforded the greatest latitude in regulating speech, the Court has consistently held that speech restrictions must remain viewpoint-neutral. *See Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 189 (2007) ("[W]hen the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum."); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993) ("[C]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." (quoting *Cornelius*, 473 U.S. at 806) (citing *Perry*, 460 U.S. at 46))); *cf. Tinker* v. *Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 511 (1969) (prohibiting the "expression of one particular opinion" by students without evidence of potential disruption).

The reason for such vigilance is clear: viewpoint discrimination is "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *see also Perry*, 460 U.S. at 62 (Brennan, J., dissenting) (remarking that "viewpoint discrimination is censorship in its purest form"). Accordingly, while "a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum * * * or if he is not a member of the class of speakers for whose especial benefit the forum was

created," the government "violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius*, 473 U.S. at 806.

Furthermore, "[t]he Supreme Court has made it clear that discrimination based on the religious character of speech is viewpoint discrimination." *C.H. v. Oliva*, 226 F.3d 198, 210 (3d Cir. 2000) (en banc) (Alito, J., dissenting); *see also Lamb's Chapel*, 508 U.S. at 393 ("[I]t discriminates on the basis of *viewpoint* to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint" (emphasis added)); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828-30 (1995) (holding that university guidelines prohibiting religious student publication from benefiting from student activities fund constituted unconstitutional viewpoint discrimination). Accordingly, speech restrictions based on religion constitute viewpoint discrimination, permissible at most only if the government can demonstrate a compelling interest in imposing such restrictions. *See, e.g.*, *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 112-13 (2001); *Lamb's Chapel*, 508 U.S. at 395; *cf. Morse* v. *Frederick*, 551 U.S. 393, 436 (2007) (Stevens, J., dissenting) (remarking that "censorship that depends on the viewpoint of the speaker * * * is subject to the most rigorous burden of justification"); *see also C.H.*, 226 F.3d at 211 (Alito, J., dissenting) ("It follows that public school authorities may not discriminate against student speech based on its religious content if the discrimination cannot pass strict scrutiny.").

2. *Hazelwood* Did Not Establish an Exception Permitting Viewpoint-Based Discrimination In a School Setting

Contrary to the view of the Third Circuit, the Court's decision in *Hazelwood* did not depart from the long line of authority holding that viewpoint-based speech restrictions are impermissible absent a compelling government interest. In *Hazelwood*, the Court upheld a principal's deletion of articles on teen pregnancy and divorce from a school-sponsored newspaper. It concluded that school-sponsored speech, that is, expression that others "might reasonably perceive to bear the imprimatur of the school," *id.* at 271, may be regulated by a school so long as its "actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. Three features of *Hazelwood*, however, reveal that the standard it articulated applies only to content-based regulation, and not viewpoint-based discrimination.

First, the facts of *Hazelwood* did not offer the Court occasion to disturb well-established precedent concerning viewpoint-based discrimination. The school in *Hazelwood* conceded that any restrictions on the newspaper had to be viewpoint-neutral. *See id.* at 287 n.3 (Brennan, J., dissenting). Indeed, the articles at issue were removed because of their subject matter; there was no indication that the principal was motivated by disagreement with the views expressed in the articles, which themselves did not take a position on the subjects but merely described students' experiences. *See id.* at 263.

Second, the Court itself expressly held that "educators do not offend the First Amendment by exercising editorial control over the *style* and *content* of" school-sponsored speech "so long as their actions are rea-

sonably related to legitimate pedagogical concerns." *Id.* at 273 (emphases added). The Court's choice of words reflects an understanding that content-based restrictions are permissible in circumstances falling short of a compelling government interest. The Court did not suggest, however, that this standard applies to viewpoint-based restrictions, long the most "egregious" form of government censorship, *Rosenberger*, 515 U.S. at 829.

Third, the precedent *Hazelwood* drew upon illustrates an intention to limit its holding to content-based speech restrictions, and not viewpoint-based regulation. In determining the type of forum the school created by establishing and offering a student newspaper, the Court relied considerably on its prior decisions in *Cornelius* and *Perry*. *See* 484 U.S. at 267-70. Both decisions squarely hold that the First Amendment precludes the government from engaging in viewpoint-based discrimination. *See Cornelius*, 473 U.S. at 811; *Perry*, 460 U.S. at 46. Yet *Hazelwood* never distinguished these cases in announcing a lower standard. It would be odd to suggest that the Court extensively cited *Cornelius* and *Perry*, which plainly and unconditionally prohibit viewpoint discrimination, but then overruled them in part. This is especially unlikely in view of *Hazelwood*'s reference to "style and content," rather than viewpoint.

3. The Third Circuit Erroneously Endorsed a View of *Hazelwood* Permitting Viewpoint-Based Discrimination Absent a Compelling Interest

The Third Circuit's decision below erred in endorsing a view of *Hazelwood* that permits schools to engage in viewpoint-based discrimination of speech so long as the restriction is "within a range of reasonableness related to preserving the school's educational goals." Pet. App. 20a. Citing *Hazelwood* and *Walz*, a circuit precedent relying on *Hazelwood*, the court held that "*specific religious messages*" could, "consistent with * * * pedagogical goals," be "appropriately restrict[ed]." *Id.* at 14a; *see also id.* at 15a (schools may prohibit "specific messages"). It then applied a "reasonableness" standard to evaluate the viewpoint-based responses of the school to Mrs. Busch's planned speech, concluding that they were "not unreasonable."[7] This reasoning has no support in *Hazelwood* or in any precedent of the Court, all of which require a compelling interest in order to justify a viewpoint-based restriction on speech.

Moreover, the Court's application of a "reasonableness" standard to the facts of the case directly contravenes the instruction of this Court. Mrs. Busch argued below that "once she was invited to speak,

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[7] There is no dispute in this case that Marple Newtown's response to Mrs. Busch's attempted speech constituted viewpoint discrimination. The district court so found, *see* Pet. App. 60a, and Marple Newtown did not challenge that finding on appeal, *see id.* at 30a (Hardiman, J., dissenting) ("Donna Busch was denied the opportunity to read the story her son chose because it expressed a *religious viewpoint*, rather than a secular one. This plainly constituted viewpoint, not subject matter, discrimination.").

any restriction on her speech was impermissible so long as her speech was about Wesley." Pet. App. 17a. *Cornelius* counsels that the government "violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." 473 U.S. at 806 (emphasis added). The Third Circuit, however, upheld the school's actions because the principal believed Mrs. Busch's speech—regardless of whether it fell within the purview of the "otherwise includible subject" of her son and his favorite things—constituted "a specific religious point of view." Pet. App. 18a. Permitting such a "point of view," the court held, would "be at cross-purposes with [the school's] educational goals," and thus the school could forbid it. But such a position is squarely "at cross-purposes with" *Cornelius*, demonstrating the Third Circuit's misreading of this Court's precedent.

Finally, the Third Circuit's decision, like those of other circuits that have adopted a relaxed standard for assessing viewpoint-based restrictions, is not only unfounded but unwise. The decision leaves neither public school administrators nor students, parents, or any other party with any clear guidance as to when a school may or may not suppress a particular viewpoint in the context of school-sponsored activity. Contrary to the more rigorous "compelling interest" standard, "reasonableness" and "pedagogical objectives" are malleable concepts that schools could use to justify any view-point-based restriction. *Cf. Morse*, 551 U.S. at 409 ("[M]uch political and religious speech might be perceived as offensive to some."); *id.* at 423 (Alito, J., concurring) (deeming an argument that "the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission'" as one that "can

easily be manipulated in dangerous ways"). Indeed, in this case, *allowing* Mrs. Busch's participation would have met the pedagogical objective of the assignment, which was to recognize individual student interests and identify sources of conflict and their resolution. Moreover, as Judge Hardiman stated in dissent, "[i]f schools could impose viewpoint-based restrictions on all student speech that might be perceived as school-sponsored, the promise of *Tinker*—that students 'do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'—would mean very little." Pet. App. 38a (Hardiman, J., dissenting) (quoting 393 U.S. at 506). This Court's intervention is therefore necessary to correct the incorrect and imprudent decision of the Third Circuit below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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