UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
DOCKET NO. 07-2967

DONNA KAY BUSCH, in her individual capacity and as the parent and next friend of Wesley Busch, a minor,

Appellant

v.

MARPLE NEWTOWN SCHOOL DISTRICT, MARPLE NEWTOWN SCHOOL DISTRICT BOARD OF DIRECTORS, ROBERT MESAROS, FORMER Superintendent of the Marple Newtown School District, and THOMAS COOK, Principal of Culbertson Elementary School

Appellees.

Appeal from the United States District Court for the Eastern District of Pennsylvania, No. 05-2094

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION AND PENNSYLVANIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES, MARPLE NEWTOWN SCHOOL DISTRICT, *ET AL*, AND AFFIRMANCE OF THE DISTRICT COURT DECISION

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CORPORATE DISCLOSURE STATEMENTS

In compliance with FRAP 26.1, Amici Curiae provide the following information:

The National School Boards Association is a non-profit corporation with no parent corporations and it has no stockholders.

The Pennsylvania School Boards Association is a non-profit corporation with no parent corporations and it has no stockholders.

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STATEMENT OF INTEREST

The National School Boards Association represents the approximately 95,000 school board members who govern our nation's local school districts. The Pennsylvania School Boards Association is a voluntary school board association representing all of the state's 501 school districts, as well as vocational technical schools and intermediate units in Pennsylvania. As organizations representing school boards in the Third Circuit and throughout the United States, *Amici* have an interest in ensuring that the application of the First Amendment in public school settings is clear, so that school officials are able to adopt and implement policies that preserve the accountability of school districts for their curriculum and preserve parental confidence in the religious neutrality of public schools while protecting First Amendment freedoms.

This brief is filed with the consent of both parties.

ARGUMENT

I. Introduction

For over fifty years, public schools have found themselves front and center in an ongoing legal, cultural, and political debate about the proper application of the First Amendment's Free Exercise and Establishment Clauses to public schools. School boards are charged with establishing policies that are consistent with principles the courts themselves often have trouble articulating. The school

boards, in turn, charge their administrators and teachers with the task of implementing these policies on a daily basis, at a moment's notice, and rarely with the luxury of time to consult with legal counsel before making a judgment call that could land them in court over issues of constitutional dimension.

Some principles seem clear – that states cannot require recitation of even a nondenominational prayer during school hours;[1] that schools cannot require opening exercises including Bible reading or the Lord's prayer, even if individual students can opt out;[2] that the state cannot, with no secular purpose, require a moment of silence for mediation or voluntary prayer in school;[3] that school districts cannot invite local clergy to give prayers at public school graduations;[4] that schools run afoul of the Establishment Clause when students are invited to vote on whether to have prayer at football games;[5] the that use of school facilities after school hours must be granted on a basis that is neutral with regard to religious purposes. [6]

However, to the extent courts and plaintiffs suggest that a school should not find it difficult to determine when its conduct amounts to endorsement of a religious viewpoint and when it has properly distanced itself to ensure the

[1] *Engle v. Vitale,* 370 U.S. 421 (1962).
[2] *School District of Abington Twp. V. Shempp,* 374 U.S. 203 (1963).
[3] *Wallace v. Jaffree,* 472 U.S. 38 (1985).
[4] *Lee v. Weisman,* 505 U.S. 577 (1992).
[5] *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000).
[6] *See, e.g., Good News Club v. Milford Central School Dist.,* 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384 (1993).

neutrality required, they are mistaken. *See, e.g. Board of Education of Westside Community Schools v. Mergens,* 496 U.S. 226, 250 (1990) (with regard to permitting private religious clubs in secondary schools to meet on an equal basis with noncurricular clubs under the Equal Access Act, the plurality commented, "The proposition that schools do not endorse everything they fail to censor is not complicated."). The available guidance still does not begin to prepare school personnel to address the multitude of issues that arise in this area each year. As with the present case, the determination as to where and when to draw the lines is dependent on facts presented in infinite variety and shades of gray, with teachers and administrators seeking to protect the constitutional rights of all students at any given moment of the public school day. The lack of clear guidance has the unfortunate consequence of drawing schools away from their primary purpose of educating students, forcing them to spend their limited time on costly and contentious litigation.

While any government show of partiality or hostility to religion is fair game for review under the First Amendment, the challenge for public schools is particularly daunting. Students are required by law to attend school under compulsory attendance laws. Public schools have an obligation to safeguard the constitutional rights of all their students. This is particularly true during

instructional time, those periods of the day when schools are solely responsible for what instruction students receive.

This case is about instruction of children in a public elementary school and the duty of public schools to control their curriculum, to ensure that instruction is age appropriate and meets a school's legitimate pedagogical goals, and to protect the constitutional rights of its students. Just as importantly, it is about the need to avoid creating legal disincentives for schools to do all they can to engage parents in their children's educations.

The question of what standard governs a parent reading to a class during an instructional activity typifies the kind of factual variation in this area that continues to spawn litigation. A ruling for the parent in this case would force school districts to re-evaluate parent participation in school projects on the basis that they can ill afford the loss of control over the curriculum, legal complications, and potential liabilities that would come of creating limited public fora in classrooms. For just as today we confront a complaint by Donna Busch that her right to free speech is implicated in the school's decision not to permit her to read from the Holy Bible to a classroom of kindergartners, schools can be sure that tomorrow, other parents will raise legal objections to having their young children placed in a position where they are required to listen to scripture in school.

It is against this backdrop that *Amici* urge this Court to provide clear judicial guidance to public schools and parents in order to minimize wasteful litigation and distracting controversy.

II. ARGUMENT

1. This Court should refrain from undermining the ability of school districts to establish curricula based on legitimate pedagogical considerations and ensure that instruction is consistent with the curricula, while protecting the constitutional rights of all students in the classroom

The constitutional violation alleged in this case is that Mrs. Busch was not permitted to read from the Holy Bible in a presentation to Wesley's kindergarten class during *instructional* time. 22 Pa. Code §11.2 ("Instruction time for students shall be time in the school day devoted to instruction and *instructional activities* provided as an integral part of the school program under the direction of certified school employees") (emphasis supplied).

Parent participation in the "All About Me" project in Wesley Busch's kindergarten classroom was an instructional activity provided under the direction of a certified teacher (Mrs. Reilly) as an integral part of the kindergarten curriculum. The project was a social studies assignment for kindergartners

attending Marple Newtown School District ("School"). Mrs. Reilly provided parents with a handout on the project.[7]

Mrs. Busch states she dropped in to ask Mrs. Reilly about "All About Me" week and what she should do for the week and that Mrs. Reilly:

> said something like, you know, you can do a favorite book, you can do a dessert, you know, **just the different things on this paper. Basically what this paper is saying is what Mrs. Reilly covered**."

App. at 143 (emphasis supplied). The reference to "this paper," was to the handout quoted at n. 8, above. By this, Mrs. Busch indicates her understanding that she was invited to participate in an instructional exercise during the school day, in consultation with Wesley's teacher and consistent with "the paper."

All of the other parents of kindergartners in Mrs. Reilly's class interpreted this assignment to permit them to read children's books to the kindergarten class, to guide the children through a craft project, or to talk about the child's pet and show it to the class. App. at 1051-1052. Mrs. Busch decided to read five verses from Psalm 118 of the King James Version of the Holy Bible, verses one through

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[7] The handout read as follows, "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." App. at 143.

four and verse fourteen . App. at 1370.[8] Mrs. Reilly, a certified teacher, remained in the classroom for each parent's participation in this social studies assignment.

Schools exist for the specialized purpose of educating young children. As this Court has noted:

> [W]here 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. … [I]n the context of an organized curricular activity, an elementary school may properly restrict student speech promoting a specific message. …

Walz v. Egg Harbor Tp. Board of Education, 342 F. 3d 271, 278 (3d Cir. 2003) (holding that school was justified in requiring student in kindergarten and first grade to refrain from distributing gifts with religious message at class parties). This Court has recognized that even classroom parties have a defined curricular purpose and that gift giving at such a party, even among the students, is not protected speech. That being so, surely a school is not more limited in its discretion over a parent's reading to a class of young children during instructional time.

[8] The verses she planned to read from Psalm 118 are:

> " O give thanks unto the Lord; for he is good: because his mercy endureth for ever."
> " Let Israel now say, that his mercy endureth forever."
> "Let the house of Aaron now say that his mercy endureth for ever."
> "Verse 14, 'the Lord is my strength and song and is become my salvation."

App. at 1370.

The concern the school district faced when Mrs. Busch sought to read the Bible to the class on Wesley's behalf was whether this is tantamount to the school's promoting a particular religious message. If it was, then the school had an obligation to restrict this expression in order to "prevent proselytizing 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 280.

Pennsylvania courts recognize that public school teachers have no First Amendment right to impart their personal views on political or religious matters in the classroom. *See, e.g., Rhodes v. Laurel Highlands School District,* 544 A. 2d 562 (Pa. Cmwlth. 1988) (teacher may not promote his religious beliefs to a public school class during instructional time); *Fink v. Warren County School District*, 442 A. 2d 837 (Pa. Cmwlth. 1982), *app. dismissed*, 460 U.S. 1048 (1983) (teacher's right to free exercise of religion does not extend to conducting religious exercises in the classroom). *Cf. Seyfried v. Walton*, 668 F. 2d 214, 216-217 (3d Cir. 1981) (theater production involving after-school rehearsals and performances was directly related to the school curriculum and selection of the play is indistinguishable from selection of curriculum. In selecting curriculum, a school is endorsing the curriculum. The school could reject a particular play in that it "…has an important interest in avoiding the impression that it has endorsed a viewpoint at variance with its educational program."); *Edwards v. California*

University of Pennsylvania, 156 F. 3d 488, 491 (3d Cir. 1998) (university could properly forbid a professor from using religious materials in teaching an education methodologies class. "Our conclusion that the First Amendment does not place restrictions on a public university's ability to control its curriculum is consistent with the Supreme Court's jurisprudence concerning the state's ability to say what it wishes when it is the speaker. …"); *Lee v. York County School District,* 484 F. 3d 687 (4th Cir. 2007) (classroom bulletin board is curricular and curricular matters, per se, are not subjects of public concern: School could properly forbid teacher from posting a National Day of Prayer poster and articles about religious activities in his classroom); *Mayer v. Monroe County Community School Corp.*, 474 F. 3d 477 (7th Cir. 2007) (teacher did not have the right to express her opinions about the war in Iraq to her students, which is distinct from teaching about the war).

In arriving at these rulings, the courts recognized that schools, not instructors, must govern the content and delivery of their curricula because, "[c]hildren who attend school because they must, ought not be subject to a teacher's idiosyncratic perspectives."[9] This is consistent, as well, with the Supreme Court's recognition in *Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819 (1995) that when the government uses private speakers

[9] *Mayer, supra.* at 479.

to transmit information pertaining to its own program, it may take appropriate steps to "regulate the content of what is or is not expressed. …" *Id.* at 833.

Amici submit that activities which take place during instructional time in public schools must be subject to school control, and that the mere invitation to parents to help out with classroom activities or homework assignments cannot result in carte blanche to teach anything one pleases to a captive audience of public school students. "[A] state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines…," *McCollum v. Board of Education of School District No. 71,* 333 U.S. 203, 211 (1948) (prohibiting religious instruction during the instructional day, even with parental consent.) Mrs. Busch acknowledges that Wesley's school could place some limits on what is read in the classroom, based on various considerations such as age appropriateness, but she then suggests that as long as a parent was responding to the "All About Me" project, parents could properly choose for kindergarteners: readings praising Satan, books espousing Nazism or Communism, and books endorsing killing all Christians. App. at 1409-1414. The only subject Mrs. Busch thought might be restricted for kindergartners were readings with sexual content. *Id.*

Given the well-established prohibition against public school religious exercises that mandate Bible reading and even a moment of silence for voluntary prayer, it is little wonder that Mrs. Reilly sought advice from her supervisor when she learned that Mrs. Busch intended to read the Bible to her kindergarten class. The courts have long recognized that the government cannot, consistent with the First Amendment's prohibition against excessive government entanglement with religion, mandate religious exercises in a public school classroom, *School District of Abington Township v. Schempp,* 374 U.S. 203 (1963). The religious exercises carried out in *Schempp* were held under the supervision and with the participation of teachers in the schools. The court recognized that even if there was a partly secular reason for these exercises,

> … it is sought to be accomplished through readings, without comment, from the Bible. Surely the place of the Bible as an **instrument of religion** cannot be gainsaid, and the State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting nonattendance at the exercises. None of these factors is consistent with the contention that the Bible is here used either as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects.

Schempp at 224 (emphasis supplied). In the situation before this Court, a teacher was present during the school day when a parent, Donna Busch sought to read the Bible, an "instrument of religion," to Mrs. Reilly's kindergarten class. At issue, and where guidance is needed, is this: May a parent do what a teacher cannot do

during an instructional period of the public school day? If so, how can school districts maintain the neutrality required of them in this constitutional minefield?[10]

2. Public school classrooms are not transformed into limited public fora by virtue of a parent's volunteer activities during instructional time

By inviting parents to participate in the "All About Me" activities, Mrs. Reilly and Culbertson Elementary School did not, as Appellants argue, turn Wesley's kindergarten classroom into a limited or designated public forum. To establish this position, this Court must find that Culbertson Elementary School **intentionally** opened up a kindergarten classroom for **indiscriminate** use by the public as a place for expressive activity. *See, Gregoire v. Centennial School District*, 907 F. 2d 1366, 1370 (3d Cir. 1990) ("A 'designated open public forum' is created when public property is **intentionally** opened by the state for **indiscriminate** use by the public." (emphasis supplied)).

The Supreme Court recognizes that certain messages that take place pursuant to authorized government policy, while on government property, and at government-sponsored school events may be viewed as government speech. *See, Santa Fe Independent School District v. Doe,* 530 U.S. 290, 302 (2000) (finding

[10] *Amici* do not agree that Mrs. Busch's reading a book in class constituted expression by Wesley such that this plan to read the Holy Bible became his expression. However, this argument does not relieve school districts of the need to govern student expression in its curricular activities under these circumstances.

that the school district did not intend to open its pre-game ceremonies to indiscriminate public expression when it allowed elected student chaplain to give a an invocation prior to football games). "Selective access does not transform government property into a public forum." *Id.* at 303, citing *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 47 (1983). In this case, only parents of students in the class were invited to participate in a social studies assignment by making a presentation to the entire class. The public was not generally invited, and those who were invited were invited for a specific purpose connected with a homework assignment.[11]

Mrs. Busch has adduced no evidence that the "All About Me" assignment was intended to permit **indiscriminate** public expression in the classroom. The kinds of things parents were invited to do and, in fact, the kinds of things all the other parents did in connection with this activity were rather conventional kindergarten activities such as reading children's books, providing students with craft projects, and showing pets to the students. While the list of possible activities may not have been exhaustive—and while it did not explicitly forbid parents from reading the Bible to the class, or praying with the class, or giving their opinions on

[11] There is support for the proposition that classrooms are per se nonpublic fora., *See, e.g., Murray v. Pittsburgh Board of Education,* 919 F. Supp. 838, 843 (W.D. Pa. 1996), *affirmed without publication* 141 F. 3d 1154 (3d Cir. 1998) (Table). (Mere fact that teachers are encouraged to decorate classrooms does not support argument school opened designated or limited public forum allowing teacher to decorate her class in a manner endorsing and use Learnball, a particular classroom management technique barred by the school district.)

the war in Iraq—inherent in the exercise was the fact that it would take place in a public school kindergarten classroom and that the school was obligated to exercise reasonable control over the classroom. *See also,* Section II. 1, *supra.*

Finding a constitutional right for a classroom volunteer to voice to the students her personal views on any topic, religious or not, would open up a whole new range of potential troubles for schools, legal, political and parental, and could deter schools from pursuing this critical form of community engagement. Schools will not invite parents or other community members to be involved in school sponsored activities if the rules are so unclear about what these volunteers can or cannot say to students, or if schools have to engage in a forum analysis every time they invite someone to speak to a class of elementary school students. Schools may choose to forgo such involvement, despite their desire to promote parent and community engagement, if it means figuring out the constitutional dimensions of every fifteen-minute visit to the classroom and inviting potential litigation and liability.

3. The school had legitimate concerns that this exercise could be viewed as a violation of the Establishment Clause, and clear guidance is needed to avoid further costly litigation in this area.

Current precedent strongly supports the school's concern over potential liability under the Establishment Clause. The students in this kindergarten class represent a classic "captive audience". They attend public school under

compulsory attendance laws and at the behest of their parents. While in school, they are under the supervision of their teacher or other public employees. The courts have cautioned that during the instructional day, schools must be particularly careful to preserve their neutrality and ensure that the religious liberties of all its students are scrupulously observed. *See, Schempp, supra.*

Indicia frequently used to determine whether an Establishment Clause violation is implicated, thereby raising a compelling basis for a school's restriction on expression, suggest that this is just such a situation where the school reasonably determined that they could face a charge of impermissibly favoring religion if they let Mrs. Busch carry out her plan to read scripture to Wesley's kindergarten class. *See, Good News Club v. Milford Central School,* 533 U.S. 98, 113-115 (2001). For example, it is relevant whether an after-school or in-school activity is at issue. This was an in-school activity during instructional time. The court must consider whether the activity is school sponsored. The school invited parents into the kindergarten classroom to participate in the social studies curriculum. No private group sponsored this event: It was school sponsored. Was the activity open to the public? No. Was attendance at this kindergarten class that day conditioned on express parental consent to participate in this type of activity? No. The children were merely going to school and their parents had no say in what would be presented to them that day.

Had the school permitted Mrs. Busch to go forward, it is very likely that it would have had to defend a challenge that it violated the First Amendment Establishment Clause. Even if there were advance warning that would permit children to skip Mrs. Busch's reading, the school could not avoid a constitutional violation. *See, e.g., Lee v. Weisman,* 505 U.S. 577, 584-585 (1992).[12] For example, with respect to the graduation ceremony in *Lee*, the court stated, "To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity **in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high**. … [T]he fact that attendance at the graduation ceremonies is voluntary in a legal sense does not save the religious exercise." *Id.* at 596-597 (emphasis supplied).

Based on previous rulings, a plaintiff bringing an action against the school for having allowed Mrs. Busch to read the Bible to kindergartners could argue as follows: Since the school district supervises and controls its classrooms (just as it controls graduation ceremonies), students who object to this religious exercise experience public and peer pressure to behave in a respectful manner that signifies

[12] *Lee* involved a complaint that the practice whereby the school district invited local clergy to offer nonsectarian prayers at high school graduations violated the First Amendment rights of students who objected to this religious exercise. The court recognized that the Constitution guarantees the government may not coerce anyone to support or participate in religion or its exercise. A student attending graduation had no way "to avoid the fact or appearance of participation." *Id.* at 588.

approval of the religious exercise or to protest. This improperly places school children in the untenable position of having to either participate, signaling agreement with the exercise, or to protest. If it is unreasonable to expect graduating seniors to participate, "with all that implies," or to protest a nondenominational prayer at graduation, how could a school teacher or administrator expect a child in kindergarten whose upbringing does not comport with the proposed religious exercise to avoid participation or to protest? This is the untenable position Wesley's classmates would experience if Mrs. Busch went forward with this Bible reading. *See, Lee* at 593-596.

The children in Wesley Busch's kindergarten class were not given the option of skipping Donna Busch's presentation or of standing aside while she led the class in what the school reasonably perceived as a religious exercise. Had she been permitted to read the verses praising God and expressing that he is her strength and her salvation to the class, the children would have had to follow the ordinary classroom rules. Their parents would have had neither advance warning of this nor any opportunity to question it or object to it prior to its being carried out. As this Court observed in *Walz*:

> [I]n an elementary school classroom, the line between school-endorsed speech and merely allowable speech is blurred, not only for the young, impressionable students but also for their parents who trust the school to confine organized activities to legitimate and pedagogically based goals. *See Edwards*, 482 U.S. at 584 … ("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 beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.").

Walz, supra. At 277.

This, and other decisions by this Court, strongly suggest that the school not only was justified in its decision to disallow the reading of the scripture but that, in fact, it would have violated the Establishment Clause had it decided otherwise. Certainly the school's apprehension of liability was reasonable. If this Court decides to the contrary, that the school misunderstood the Court's past rulings, it is critically important that it issue an opinion that protects schools from liability from the other direction and provides enough clarity as to avoid the waste entailed by endless litigation in this area.

III. CONCLUSION

Public schools must retain control over instructional activities during the school day. A kindergarten social studies class does not become a limited public forum by virtue of a parent's voluntary participation in a classroom activity. Culbertson Elementary School did not intentionally open up its classroom to indiscriminate public expression, and a ruling to the contrary will chill schools' use of parents as classroom volunteers. Public schools must be able to make appropriate determinations that safeguard the constitutional rights of all children,

including potential violations of the Establishment Clause. The decision of the district court should be affirmed.

Respectfully submitted,

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

I hereby certify that, pursuant to Red. 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 4044 words, as calculated by Microsoft Word's word count function.

Dated: October 2, 2007

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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. A virus protection program was run on the electronic version of this brief and no virus was detected. The virus detection program used was Symantec AntiVirus, Corporate Edition.

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CERTIFICATE OF ADMISSION

I hereby certify, pursuant to LAR 46.1(c) that Francisco M. Negrón, Jr. and Emily J. Leader are members of the bar of this Court.

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