No. 07-2967

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DONNA K. BUSCH,

Plaintiff-Appellant,

v.

MARPLE NEWTOWN SCHOOL DISTRICT, *et al.*,

Defendant-Appellees.

On Appeal from the Order of the United States District Court
for the Eastern District of Pennsylvania, C.A. No. 05-CV-2094
Honorable Hon. Richard Barclay Surrick Granting Summary Judgment

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BRIEF OF THE ANTI-DEFAMATION LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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RULE 26.1 DISCLOSURE STATEMENT

Amicus Curiae The Anti-Defamation League is a civil rights organization. It is not a publicly held corporation, has no parent corporation, and no company owns 10% or more of its stock.

The following are the attorneys who have appeared or are expected to appear for The Anti-Defamation League in this case.

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INTEREST OF THE *AMICUS CURIAE*

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of Church and State embodied in the Establishment Clause of the First Amendment. Separation, ADL believes, preserves religious freedom and protects our democracy.

ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and beliefs in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, ADL can testify that the more government and religion become entangled, the more threatening the environment becomes for each. In the familiar words of Justice Black: "A union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

Accordingly, ADL has frequently participated as *amicus* in this Court and in numerous courts around the country, including the United States Supreme Court.[1]

ADL also publishes a widely used resource pamphlet for educators and parents entitled: "*Religion in the Public Schools: Guidelines For A Growing And Changing Phenomenon*."

ADL is filing this brief with the consent of the parties.

[1] *See e.g.,* ADL briefs *amicus curiae* filed in *Locke v. Davey*, No. 02-1315 (U.S. filed 2003); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Lee v. Weisman,* 505 U.S. 577 (1992); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Committee for Public Educ. And Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Engel v. Vitale*, 370 U.S. 421 (1962); and *McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

SUMMARY OF ARGUMENT

1. The line that the school district drew between talking about religious and cultural practices and reading from scripture is valid – indeed, essential. A class assignment cannot be allowed to become a vehicle for religious proselytization. The interplay among the three parts of the First Amendment requires the courts to distinguish between speech *about* religion and speech that *is* religion. The District Court mistakenly found that the school district engaged in viewpoint discrimination, but correctly concluded that the reading of scripture to a kindergarten class is barred by the Constitution.

2. Although the District Court erroneously suggested that the classroom here might be a "limited public forum," the District Court correctly focused on the kindergarten context and on the right of the children compelled to be present to be free from religious proselytization. The existence of a "captive audience" imposes limits upon a religiously motivated speaker. The captive audience of kindergarten students was particularly impressionable because of its youth and, as the District Court correctly noted, unlikely to appreciate fine distinctions between public and private speakers in a public school classroom.

The First Amendment fosters broad discussion and debate but was not intended to be, has not been understood to be, and should not be a mechanism for indoctrinating the most impressionable members of society with a particular

religious creed inside of a public school. The court below reached the correct conclusion and its decision should be affirmed. This appeal also presents an opportunity for this Court to clarify the issues involved and provide further guidance to public school officials in their efforts to promote robust discussion while staying within the boundaries set by the Establishment Clause.

ARGUMENT

I. The Constitution Not Only Permits, but Compels the Distinction that the School District Drew between Talking about Religious and Cultural Practices and Reading from Scripture

Entry of summary judgment was appropriate in this case. There is a fundamental and constitutionally required difference between the activities that were permitted at various times in Appellees' kindergarten classroom – for example, drawing and displaying a poster containing a church, or "show and tell" explaining the significance of a menorah or a dreidel – and the disallowed reading directly from Holy Scripture. A line can and must be drawn that protects free and open discussion of cultural and religious differences but does not permit proselytizing in the public schools.

A. Taking about Religious Practices is Fundamentally Different from Reading from Scripture

In the defendant's kindergarten class, in the course of activities unrelated to the "All About Me" activity at issue in the litigation, information relating to various religious and cultural practices was conveyed or made available. Parents could read from books discussing or describing religious holidays; there were books in the classroom about Easter, Christmas and Hanukkah; the teacher discussed Christmas and Kwanzaa as part of the social studies curriculum; and a parent was permitted to make class presentations about Hanukkah and Passover. *Busch v. Marple Newtown School Dist.*, 2007 WL 1589507, at *3 (E.D. Pa. May

31, 2007). The District Court correctly concluded that such practices are fundamentally different from reading scripture to kindergarteners.

In *Walz v. Egg Harbor Township Board of Education,* 342 F.3d 271, 278 (3d Cir. 2003), this Court held that "There is a marked difference between expression that symbolizes individual religious observance, such as wearing a cross on a necklace, and expression that proselytizes a particular view." *Walz*, 342 F.3d at 278-79. Indeed, *Walz* explicitly approves and distinguishes the showing of dreidels in the classroom:

> The appropriateness of student speech must be viewed in its educational context. For a student in "show and tell" to pass around a Christmas ornament or a dreidel, and describe what the item means to him, may well be consistent with the activity's educational goals; likewise, a lesson that includes a mock debate invites individual student expression on the relevant topic. In those scenarios, the student speaker is expressing himself in the context of a school assignment or activity where the school has sought students' personal views.

Id. at 278.

The *Walz* court continued, "Nevertheless, in the context of an organized curricular activity, an elementary school may properly restrict student speech promoting a specific message." *Id.* The same rationale applies here. Indeed, in the context of an attempt to read scripture to a classroom of kindergarteners, the restriction is compelled. *See School Dist. of Abington Twshp. v. Schempp*, 374 U.S. 201, 210, 224 (1963) (reading from Bible without comment in public school

classroom is inconsistent with Establishment Clause; "Surely the Bible as an instrument of religion cannot be gainsaid").

Not even Appellant argues that she or her son were prohibited from simply describing their own religious and cultural traditions. The record demonstrates the contrary – that Wesley Busch *was* permitted to display, as part of "All About Me" week, a poster that included, among other things, a picture of a church and a statement to the effect that he loved going to church. *Busch*, 2007 WL 1589507, at *1.

What Appellant was not permitted to do was to read directly from Holy Scripture – the King James Bible – to her son's kindergarten classmates. *Id.* Nowhere in the record is there any indication or suggestion that any other parent (or child) was allowed to read from any holy text, be it the Bible, the Torah, the Koran, or any similar canon. The question this case presents, then, is whether the Constitution distinguishes between discussions "about" religion – the significance of religious observance in the culture and lives of students – and the practice of religion itself. *Amicus* respectfully submits that the Constitution not only permits, but compels that distinction.

Further, the record contains undisputed expert testimony that the Biblical passage in question was a "powerful tool" for Christian proselytizers. *Id.* at *2 n.4. To equate the reading of such a passage with a child showing his or her classmates

how to play dreidel or drawing angels (or a church) on a poster, would set a dangerous precedent indeed. It would extend the Establishment Clause far beyond its accepted scope, to bar not only religious observance, but virtually any form of religiously-related culture, from the classroom. There is no support for this position in precedent or common sense.

B. The School District Did Not Engage in Viewpoint Discrimination

Although the District Court correctly upheld the School District's line between discussions about religion and reading scripture, en route to that conclusion the District Court erroneously held that the school engaged in viewpoint discrimination (as opposed to content discrimination).

The District Court analogized this case to *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) and *Lamb's Chapel v. Center Moriches U.F.S.D.,* 508 U.S. 384 (1993) precedents – in which speech was restricted based on its religious perspective. The Court distinguished "content" discrimination, which would exist if (in the District Court's example) religious speech were restricted in a forum designated for the study of mathematics. *Busch*, 2007 WL 1589507, at *7. Although the District Court ultimately reached the right result by concluding that the avoidance of an Establishment Clause violation constituted, on these facts, a compelling interest sufficient to justify viewpoint

discrimination,[2] it did not need to go that far. Rather, the District Court erred in concluding that there had been viewpoint discrimination in the first place.

In reaching that conclusion, the District Court incorrectly relied upon then-Judge Alito's dissent in *C.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000) (en banc), *cert. denied*, 533 U.S. 915 (2001). *Busch*, 2007 WL 1589507, at *7. The dissent does not stand for the proposition for which the District Court cites it.

In *Oliva,* the plaintiffs complained that the school officials had (i) removed (and later replaced in a less prominent position) a poster that, but for its religious content, was responsive to a classroom assignment and (ii) prevented the student from reading from a "children's Bible" to his first grade class. The evenly divided *en banc* panel affirmed a District Court decision in favor of the school board with respect to both matters. *Oliva*, 226 F.3d at 200.

Then-Judge Alito found that the school had engaged in "viewpoint discrimination" – *with respect to the removal of the poster* – because the rest of the kindergarten class' posters were treated differently. *Id.* at 210-213 (Alito, J., dissenting). The dissent did *not* address whether there was "viewpoint discrimination" with respect to the reading of the Bible.

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[2]Earlier this year, in a high school context, the Supreme Court "conclude[d] that "it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting." *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007) (political speech advocating drug use at extracurricular high school event could constitutionally be restricted).

There was no such discrimination here. Unlike the poster in *Oliva*, Appellant's son's poster (showing a church) was displayed in the same manner as every other child's poster and he was given the opportunity to explain the various items on it to the class. *Busch*, 2007 WL 1589507, at *1. With regard to the Bible reading, the only thing prohibited here was something nobody else tried to or did do – read from a religious text to the class.

The difference between subject matter (or content) and viewpoint is substantial here, although it can be minimal in other contexts. The Supreme Court held, for example, that where a forum is open to discussions by private actors about morals and character, the exclusion of religious voices cannot be construed as anything other than viewpoint discrimination. *Good News Club v. Milford Central School*, 533 U.S. 98, 111-2 (2001) ("speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint"). *See also Lamb's Chapel*, 508 U.S. at 393-5*; Child Evangelism Fellowship, Inc. v. Stafford Township School Dist.*, 386 F.3d 514, 526 (3d Cir. 2004) (having undertaken to facilitate speech by a broad array of community groups through a number of non-classroom school-controlled fora, the school board could not exclude religious groups).

The Supreme Court, in *Good News Club*, did not suggest that restricting any and all aspects of religion is always viewpoint discriminatory. Rather, "the nature

of those [constitutional] rights is what is appropriate for children in school." *Morse*, 127 S. Ct. at 2627. The Court has always taken pains to resolve whatever tension exists between the Free Exercise Clause and the Establishment Clause in such a way that eviscerates neither and without succumbing to the fallacy, which Appellant advances here, that safeguarding the neutrality of our public schools evidences a hostility towards religion or that complying with the Establishment Clause constitutes a violation of the Free Exercise Clause. *See Abington v. Schempp*, 374 U.S. at 225-6 (disallowing state-mandated religious exercise does not deny to proponents the free exercise of religion). The constitutional protection against having the instruments of the state used as tools for proselytization does not mandate the exclusion of all things remotely religious in origin; however, listening to a Bible reading is materially different from hearing about holiday traditions or religious practices.

As the Supreme Court held in *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948):

> To hold that 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 and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.

333 U.S. at 211-12.

Thus, excluding Biblical (or other scriptural) passages from public school instruction (while allowing occasional forays into religion as culture or, in higher grades, religious texts in a literary, cultural or historical context) is not viewpoint discrimination. Classroom instruction is a directed curriculum, not a "public forum," and is unlike the student-run clubs in *Good News Club*. In the process of teaching, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).[3] *See Walz,* (quoting Judge Alito's dissent in *Oliva*, "if 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").

In *Walz*, the Court held that a 'show and tell' exercise may be restricted to age-appropriate items to prevent unsuitable discussions in a kindergarten classroom." 342 U.S. at 276. Similarly, in *Duran v. Nitsche*, 780 F. Supp. 1048 (E.D. Pa. 1992), the court held that *Hazelwood* applied to instructional activities in

[3]The record provides no support for any claim that only religious views were limited in this kindergarten setting. Many different topics could have been constitutionally excluded for "legitimate pedagogical" reasons. The "About Me" curriculum certainly implies that children's books could be read.

the classroom. *Id.* at 1054 n.8 (noting that the activity was not merely school "sponsored" but was rather "school itself"). There is no support for the proposition that, if the Constitution prohibits Bible reading in a kindergarten classroom, it necessarily must also prohibit the school chorus from singing Christmas carols or "The Battle Hymn of the Republic."

As in *Hazelwood* and *Walz*, the classroom setting in this case compels limitations upon educational content that were appropriate and necessary because they were reasonably related to legitimate pedagogical concerns. Moreover, in this case, the demands of creating a curriculum must be viewed in light of the specific nature (discussed above) of the kindergarten classroom, where many or most of the children are too young even to know how to read or to critically judge statements made or authorized by the teacher.

The overall limitation of a kindergarten instruction to discussions appropriate to kindergarten students should incline the courts, in contexts similar to this one, to afford teachers more discretion for legitimate "content" restriction than, either a university campus or a high school club. There may be "some uncertainty at the outer boundaries as to when courts should apply school-speech precedents . . . but not on these facts." *Morse*, 127 S.Ct. at 2624.

For "legitimate pedagogical" reasons, a discussion of ultimate religious truth need not have been permitted at all in a kindergarten classroom. Moreover, to

allow Appellant, an evangelical Christian, to read from the King James Bible would, undeniably, create a right on the part of other speakers likewise to have their Holy Writ read in class – precisely to avoid what would then be well-founded allegations of viewpoint discrimination. If the school board cannot constitutionally exclude one scripture, then surely it cannot exclude all others. The Court, were it to side with Appellant, would be transforming every kindergarten "show and tell" exercise into a display of competing religious viewpoints.[4]

The First Amendment does not allow such a display. What the First Amendment protects – both as a matter of free speech and free religious observance – is the broadest possible latitude for discussions of cultural and religious differences consistent with the pedagogical goals of the school and with the restrictions imposed by the Establishment Clause. To further the dual purposes of the First Amendment, a line must be drawn between discussions of religious and cultural values, on the one hand, and efforts to present the "truth" of any religion's version of the Gospel.

[4]To be clear, allowing adherents of any religious faith to advocate their version of religious truth in a kindergarten classroom would violate the Establishment Clause. Allowing a Jewish parent to discuss Jewish holidays and traditions, however, while disallowing a reading from scripture, did not evidence discrimination against the Protestant "viewpoint." Appellant's son was encouraged to present his poster and was not prevented from talking about being a Christian or from explaining Christian beliefs or practices.

If a line between discussions of religious practices or traditions and proselytizing based upon religious truth and Holy Scripture could not be meaningfully drawn, then the Establishment Clause would become an all or nothing proposition. In that unhappy circumstance, nothing short of banning anything and everything related to the religious meaning of Christmas or Hanukkah would suffice to prevent a member of the clergy from having a right to preach a sermon in a public school classroom. That has never been, and should not become, the law.

II. The District Court Correctly Emphasized the Youth and Impressionability of the Audience, although it Incorrectly Found that the Classroom Was a "Limited Public Forum"

The District Court correctly focused on the kindergarten context and on the right of the children compelled to be present to be free from what reasonably appeared to be government promotion of religion. The existence of a "captive audience" imposes limits upon a religiously motivated speaker, as freedom of speech does not extend to forcing one's way into the minds of others. The captive audience of kindergarten students was particularly impressionable because of its youth and, as the District Court correctly noted, unlikely to appreciate fine distinctions between public and private speakers in a public school classroom. Indeed, for that and other reasons, the kindergarten classroom could not be considered any type of "public forum," whether "limited" or otherwise.

Schools generally may not regulate student speech in a manner that suppresses unpopular voices (or for that matter, popular ones), restricts the free exchange of ideas, or attempts to mold students into a homogeneous mass. *E.g.*, *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 511-12. The kindergarten classroom context presented by this case does significantly restrict the freedom that speakers would otherwise enjoy in a traditional public forum, though. The younger and the more impressionable the audience in question is, the more appropriate the restrictions are. *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.2d 412 (3d Cir. 2003).[5]

The District Court below held that the "All About Me" program created "at most" a limited public forum in which specific people were invited into the classroom for a "specific delineated purpose." *Busch*, 2007 WL 1589507, at *6. However, there was no "limited public forum" here.

Inviting students' parents to come into a classroom for a limited purpose of, essentially, show and tell, would not satisfy the public forum test established by the Supreme Court in *Hazelwood.* "School facilities may be deemed to be public forums only if school authorities have 'by policy or practice' opened those facilities

[5] This Court in *Walker-Serrano* found constitutionally permissible actions by school officials to curtail a third grade student's ability to circulate a petition during recess and during a reading period, reasoning that "if third graders enjoy rights under Tinker, those rights will necessarily be very limited. . . ." *Id.* at 417-8.

'for *indiscriminate use* by the general public.'" *Hazelwood,* 484 U.S. at 267 (emphasis added). This Court, in *Gregoire v. Centennial School Dist.,* 907 F.2d 1366 (3d Cir. 1990), stated the complementary principle in holding that a "non-public forum…exists when publicly-owned facilities have been dedicated to use for either communicative or non-communicative purposes but have never been designated for indiscriminate expressive activity by the general public." *Id.* at 1370-71.

This case presents the antithesis of opening for "indiscriminate" use, as it involves individual visits by a single group (parents) for a single purpose (the "All About Me" exercise). In *Walz*, this Court did not even see the necessity of categorizing a similar school classroom as any type of forum, be it public, limited public, designated public or non-public holding, instead, that "[i]n the elementary school setting, age and context are key." 342 F.3d at 275.

The case relied upon by the District Court for its finding of "limited public forum," *Peck v. Baldwinsville Central School*, 426 F.3d 617 (2d Cir. 2005), does not support such a finding. *Peck* involved an open house where student-produced posters were exhibited to parents. The Second Circuit held that even that event – much more "public" than the individual in-classroom visits by individual parents here – did not result in creation of a public forum. *Id.* at 626. If there was no public forum in that case, surely there can be none here.

A. A Speaker Has No Constitutional Right to Capture an Audience.

Where an audience is free to leave, the burden is upon the listeners, rather than the speaker, to avoid unwanted expression. "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Schenck v. Pro-Choice Network*, 519 U.S. 357, 373 (1997); *Boos v. Barry*, 485 U.S. 312, 322 (1988) (same). In a free, public forum, the privilege to leave or not listen is consistent with the speaker's First Amendment right to speak. The same rule applies also to religious speech in a public forum where there is no captive audience. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression").

In *Erznoznick v. City of Jacksonville*, 422 U.S. 205 (1975), the Supreme Court pointed out that the captive audience situation is different. The principle that the listener has to close his or her ears, and not the speaker's mouth, is inapplicable where "the degree of captivity makes it impractical for the unwilling viewer to avoid exposure." *Id.* at 209.

The foundational case is *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), in which the Supreme Court upheld a ban on political advertisements in

rapid transit cars. The deciding vote was cast by Justice Douglas, who rested his opinion squarely on the rights of a captive audience of transit riders:

> While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it.

Id. at 307 (Douglas, J., concurring). The instant case follows *a fortiori* from *Lehman*. If adult users of public transportation are a captive audience, kindergarten students who cannot leave the classroom are even more so. Moreover, kindergarten students are unlikely to challenge the truthfulness of statements uttered by adults whom their teachers allow to address the class -- and lack the critical capacity to even consider whether they would prefer not to listen to those statements.

The Supreme Court has recognized a wide range of circumstances in which speech may be appropriately limited to protect captive audiences:

> The First Amendment permits the government to prohibit offensive speech as intrusive when the "captive" audience cannot avoid the objectionable speech. ... The target of focused picketing banned by the [local] ordinance is just such a "captive." The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech.

Frisby v. Schultz, 487 U.S. 474; 487-88 (1988) (upholding ordinance prohibiting the picketing of a residence). "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit." *Rowan v. U.S. Post*

Office Department, 397 U.S. 723, 737 (1970) (government could require mailers of "sexually provocative" advertisements to remove unwilling addressees).

Similarly, in *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court upheld an order against a radio station that had broadcast a scatological monologue in the early afternoon. Following *Rowan*, and noting in particular the probable exposure of children to the monologue against the wishes of their parents, the Court found that the government could appropriately restrict the expressive rights of the broadcaster rather than in effect requiring the recipient to change the channel. *Id.* at 748-50. *Accord*, *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 768, 772-4 (1994) ("First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests"); *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 127-8 (1989) (unlike *Pacifica*, only willing listeners were exposed to "dial-a-porn" service); *Bolger v. Young Drug Products*, 463 U.S. 60, 72 (1983) (quoting *Consolidated Edison Co. v. P.S.C.*, 447 U.S. 530, 542 (1980) that First Amendment "does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech.").[6]

[6]This Court has likewise protected captive audiences in various situations. *See Northeast Women's Center, Inc. v. McMonagle,* 939 F.2d 57, 62-6 (3d Cir. 1991) (upholding injunction against picketing at a women's health center and at homes of employees); *Pennsylvania Alliance for Jobs & Energy v. Council of Borough of Munhall*, 743 F.2d 182, 185-7 (3d Cir. 1984) (borough need not allow

B. Public School Students Comprise a Captive Audience.

While in class, kindergarten students are not free to leave or even (to the extent enforceable) to refuse to listen. Mandatory attendance laws compel their presence. They are thus a consummate captive audience. *See Bethel ISD v. Fraser*, 478 U.S. 675, 684 (1984) (children, especially when part of a "captive audience" at school, can be protected against inappropriate speech that might in other settings be protected); *Ingebretsen v. Jackson Public School Dist.*, 88 F.3d 274 (5th Cir. 1996) (invalidating statute that "invocations, benedictions or nonsectarian, nonproselytizing student-initiated voluntary prayer shall be permitted during compulsory or noncompulsory school-related student assemblies, student sporting events, graduation or commencement ceremonies and other school-related student events"; the students in question were "a captive audience that cannot leave without being punished by the state"); *Muller v. Jefferson Lighthouse School Dist.*, 98 F.3d 1530, 1541 (7th Cir. 1996) (students as captive audience justifies pre-distribution review of student leaflets).

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charity to solicit donations at residences after 5:00 P.M.); *International Soc. for Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Authority*, 691 F.2d 155, 162 (3d Cir. 1982) (religious group's solicitations need not be permitted since "Meadowlands fans are a captive audience who 'may well be unable to escape an unwanted message'"). *Compare Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Auth.*, 148 F3d 242, 254-5 (3d Cir. 1998) (*Lehman* rule inapplicable if government authority had policy to accept similar advertisements).

Even when student attendance at a given event is not absolutely mandatory, the compulsory nature of public education alone has been enough to disallow the use of the public schools, during school hours, for religious instruction. In *McCollum*, the Court struck down a program that allowed adult volunteers to enter public schools to offer religious instruction to students who could choose not to participate. Even though the religious instruction itself was not mandatory, it was constitutionally impermissible for the state to provide "sectarian groups [with] an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery." *Id.* at 212.

In *Berger v. Rensselaer Cent. School Dist.*, 982 F.2d 1160 (7th Cir. 1993), the court held that school officials could not permit the distribution of Bibles by the Gideons to students in a classroom. *Id.* at 1167-71. As here, the Establishment Clause violation was contended to be a "mere" accommodation of the Free Speech rights of the Gideons to evangelize – purportedly recognized in *Widmar v. Vincent*, 454 U.S. 263 (1981). The Seventh Circuit was not persuaded – because school children were a captive audience:

> There was no captive audience in *Widmar*—the classrooms were empty. In Rensselaer schools, however, children have no choice but to sit through the Gideons' presentation and distribution of Bibles. Even if we were to accept defendant's patently unrealistic assertion that the fifth grade students at Rensselaer Central Middle School did not feel coerced to accept and the read the Gideon version of the Bible, they were still urged by Gideon representatives to study the Christian Bible.

Widmar, 982 F.2d at 1167 (footnote omitted).[7]

Appellant simply cannot proselytize children in a public school classroom – even if she thinks she was doing something else. "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." *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). These children attended kindergarten due to state-law mandate. No right to freedom of speech extends to require captive audiences – especially impressionable young children – to sit through scripture reading during class in a public school.

[7] The court in *Berger* also commented on the forum classification question: "It is all the more odd, then, to analyze this case in terms of public forum jurisprudence. A designated public forum is a place. Children, of course, are not. Nor does it follow that, having opened a child's mind to one 'use,' the child's mind must be open to all uses." *Id.* at 1167.

C. The Constitution Specifically Protects Against Compelled Participation in Religious Speech.

Even if the Establishment Clause did not of its own force prohibit coerced participation in religious exercises, religious speakers such as Appellant cannot demand that the state provide them access to captive audiences.

The Supreme Court so held in *Lee v. Weisman*, 505 U.S. 577 (1992). *Lee* determined that even graduating high school seniors – far more mature than the kindergarten children here – cannot be forced to choose between attending graduation and being forced to listen to prayers.

> One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people. To compromise that principle today would be to deny our own tradition and forfeit our standing to urge others to secure the protections of that tradition for themselves.

Id. at 592.

Lee considered the effect of graduation prayers on the captive student audience: "We . . . consider the position of the students, both those who desired the prayer and [those] who did not." *Id*. at 590. Because all students, dissenting and consenting, were effectively compelled to attend their graduation and lacked the ability to avoid the prayers in that confined environment – an environment created and controlled by school officials – the Court held the practice unconstitutional. *Id*. at 593.

This Court, sitting *en banc*, held in *ACLU of New Jersey v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996), that the First Amendment precluded the inclusion of prayer in a public high school's graduation ceremony even where the graduating senior class voted to include it. *Id.* at 1474. The Court drew on *Lee*, noting that:

> the hypothetical dissenter in *Lee* is replaced by 140 students who voted not to have a formal prayer at their public high school graduation. The Board's policy would have required each of those 140 students to participate (or at the very least maintain respectful silence) as others engaged in student-led worship.

Id. at 1480.

Lee was consistent with long-settled precedent that the Free Exercise Clause may not be invoked by students wishing to engage in "voluntary" school prayer, selected and conducted by them, when their peers formed a captive audience. In *Abington v. Schempp*, which struck down a state statute requiring the reading of the Bible in public school classrooms even where participation was optional, the Court declared: "While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs." 347 U.S. at 226 (emphasis original). This Court has found that the state can restrict religious solicitations to prevent the disturbance of gamblers at the Meadowlands.

International Soc. for Krishna Consciousness, 691 F.2d at 162.[8] Even prison inmates are a captive audience that may not be subjected to mandatory religious speech. *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996); *Campbell v. Cauthren*, 623 F.2d 503 (8th Cir. 1980). Kindergarten students should enjoy at least the same protection.

The present case is hardly unique. In *Walz*, this Court held that an elementary school student does not have a "First Amendment right to promote an unsolicited religious message during an organized classroom activity." 342 F.3d at 276. *Walz* held that "in 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." *Id.* at 276-7.[9]

Similarly, in *DeNooyer v. Livonia Public Schools*, 799 F. Supp. 744 (E.D. Mich. 1992), *aff'd mem.*, 12 F.3d 211 (6th Cir. 1993), a second-grade student sued when he was prevented from converting a class assignment – a talk about his life –

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[8] "At the race track…patrons have only a short interval before a race begins to ascertain the final odds and reach a betting window. Yet it is on these especially inappropriate occasions, when time is short and money is in hand, that [the religious solicitor] proposes to stop people and ask for contributions." *Id.*

[9] *See also Collins v. Chandler Unified School District*, 644 F.2d 759 (9th Cir. 1981) (invalidating policy of allowing student volunteers to offer prayer at school assemblies); *Jager v. Douglas County School Dist.*, 862 F.2d 824 (11th Cir. 1989) (invalidating policy of allowing student led prayer at football games).

into an opportunity to proselytize his classmates by sharing a videotape on which he sang a religious song. The school argued that its refusal to show the tape was justified by the Establishment Clause, but the court decided that the First Amendment rights of the captive audience, alone, sufficed to uphold the school's action:

> [T]he court need only find that concern about the impact of the religious message of the tape on a second grade audience, presented during class time, was a legitimate pedagogical concern. . . . This Court merely finds that the School District's restriction on Kelly's speech was reasonable, regardless of whether permitting the speech would have violated the Establishment Clause.

799 F. Supp. at 751. The school's interest in avoiding the appearance of school sponsorship of religious speech also made its actions reasonable and appropriate under the First Amendment. *Id*. at 751. The same is true here – all the more so, since Holy Scripture is far more of an imposition than singing a religiously-themed song.[10]

[10] In a *per curiam* unpublished disposition the Sixth Circuit affirmed the District Court on the grounds that "the medium of the videotape itself, regardless of its contents" was inappropriate. *Denooyer v. Merinelli*, 1993 WL 477030 at *3 (6th Cir. 1993).

D. Equal Treatment of Religious and Secular Speech Does Not Vitiate the Protection of Captive Audiences.

In a series of cases beginning with *Widmar*, 454 U.S. 263, and extending through *Westside Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel*; *Capitol Square Review*; *Rosenberger*; and *Good News Club*, the Supreme Court dealt with claims that the Establishment Clause required explicit discrimination against private religious speech in public fora.[11]

None of those cases involved the rights of a captive audience *nor did any of them involve activities during school instructional time*. Thus they do not stand for the proposition that Appellant and her *amici* advance – that she somehow has a constitutional right to read Holy Scripture to children as part of public school classroom activity. *See also Black Horse Pike*, 84 F.3d at 1481 ("The First Amendment is a shield that prohibits the state from interfering with a person's

[11]This Court has also addressed such claims. *See Child Evangelism Fellowship,* 386 F.3d at 526 (school could not deprive religious group of use of school-controlled fora available to other groups for similar purposes); *Donovan v. Punxsutawney Area School Bd.*, 336 F.3d 211, 226-7 (3d Cir. 2003) (pursuant to Equal Access Act and First Amendment, school could not deny access during non-instructional time to a club that discusses current issues from a biblical perspective solely because of the club's religious nature); *Pope by Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1254-5 (3d Cir. 1993) (pursuant to Equal Access Act, school that had allowed other noncurriculum groups to meet during non-instructional time could not exclude Bible Club); *Gregoire*, *supra* (school district could not refuse to rent public school facilities to groups or individuals solely because of the religious content of their speech).

right to worship as he or she pleases. It is not a sword that can be used to compel others to join in a religious observance at a state sponsored event.").

Westside Bd. of Educ. v. Mergens is particularly illustrative. In *Mergens*, the Court considered the constitutionality of the Equal Access Act, which prohibits schools that receive federal funds and that allow student groups to meet during noninstructional time from discriminating against particular groups on the basis of religious, political or philosophical content. 496 U.S. at 235. The plurality held, in distinguishing *Edwards v. Aguillard*, that because the challenged program "expressly limits participation by school officials at meetings of student religious groups [and requires] that any such meetings must be held during 'noninstructional time' [it] therefore avoids the problems of 'the students' emulation of teachers as role models' and 'mandatory attendance requirements.'" *Mergens*, 496 U.S. at 251 (quoting *Edwards v. Aguillard,* 482 U.S. at 584). Likewise, the concurring opinions emphasized that club activities could take place ***only*** when attendance was purely voluntary. *Id.* at 261 (Kennedy, J.); *id.* at 269-270 (Marshall, J.). Justice Kennedy in his concurring opinion wrote that:

> "[t]he inquiry with respect to coercion must be whether the government imposes pressure upon a student to participate in a religious activity. This inquiry, of course, must be undertaken with sensitivity to the special circumstances that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw."

Id. at 261.[12]

Where activities that occur only when classes are not in session are concerned, the coercive effect of compulsory attendance is dissipated by a freedom to walk away.[13] In distinguishing *Edwards v. Aguillard*, which did involve classroom instruction, the *Mergens* Court indicated that the outcome would have been different had the clubs been permitted to meet in class during instructional time when attendance was compulsory. *Id.* at 251. None of this line of cases supports the purported right of Appellant to read scripture to a captive audience who could not walk away. Her arguments misapply the principles enunciated in *Widmar* and its progeny to activities that are instructional, rather than extracurricular, and to an audience that is not free to leave.

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[12]Justice Marshall was even more guarded, writing that "[w]hen the government, through mandatory attendance laws, brings students together in a highly controlled environment every day for the better part of their waking hours and regulates virtually every aspect of their existence during that time, we should not be so quick to dismiss the problem of peer pressure as if the school environment had nothing to do with creating and fostering it. The State has structured an environment in which students holding mainstream views may be able to coerce adherents of minority religions to attend club meetings or to adhere to club beliefs. Thus, the State cannot disclaim its responsibility for those resulting pressures." *Id.* at 269-70.

[13]Other cases construing the Equal Access Act have likewise focused on the time when the club meetings took place. *See Donovan*, 336 F.3d at 222-4 (time between homeroom and the start of classes in morning was non-instructional time because there was no "actual classroom instruction" during the time period at issue); *Ceniceros v. Bd. of Trustees*, 106 F.3d 878, 880 (9th Cir. 1997) (lunch time was non-instructional time under Act because students need not be on campus).

CONCLUSION

For the reasons stated, the judgment should be affirmed.

Respectfully submitted,

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COMBINDED CERTIFICATES OF COMPLIANCE

The undersigned counsel for *Amicus* hereby certifies:

1. I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

2. This brief complies with the type-volume limitation set forth in F.R.A.P. (32)(a)(7)(C). It contains 6,258 words as calculated by Microsoft Office Word 2003, excluding items listed as excludable under F.R.A.P. 32(a)(7)(B)(iii).

3. In accordance with L.A.R. 31.1(c), (i) the text of the electronic version of this brief is identical to the text in the paper copies filed with the Court and served on the parties specified below and (ii) a virus detection program, Symantec AntiVirus (version 10/31/2007 rev. 16), has been run on the file being submitted electronically and no virus was detected.

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