UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

O.T., by and through her next friends, ROBERT T. TURTON and MARYANN TURTON, Plaintiff, v. FRENCHTOWN ELEMENTARY SCHOOL DISTRICT BOARD OF EDUCATION, a political subdivision of the State of New Jersey; CATHERINE LENT, individually and in her official capacity as President of Frenchtown Board of Education; and JOYCE BRENNAN, individually and in her official capacity as President of Frenchtown Elementary School District and Principal of Frenchtown Elementary School, Defendants.	CIVIL ACTION NO. 05-2623 (SRC) Hon. Stanley R. Chesler

BRIEF OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The controversy in this case arises from the Defendants' refusal to permit O.T., an eight-year old student at Frenchtown Elementary School ("Frenchtown Elementary"), to sing "Awesome God" in the school's talent show because of the "overtly" religious content of the song. Under well-established principles set forth in Supreme Court and Third Circuit precedent, the Defendants' censorship was unconstitutional.

Pursuant to the Court's order granting leave to participate as amicus curiae, the United States submits this brief in support of the plaintiffs' motion for summary judgment. In summary, the brief addresses the most prominent issues raised in the case: (1) whether the singing at the talent show could reasonably bear the imprimatur of Frenchtown Elementary; (2) whether the Defendants engaged in viewpoint discrimination by prohibiting the performance of "Awesome God" based on its religious content; and (3) whether Defendants have a viable defense that permitting equal access to religious speech would violate the Establishment Clause.

MATERIAL FACTS[1]

The Frenchtown Elementary Talent Show ("Talent Show") was held on Friday, May 20, 2005, at 7:00 p.m. (Jt. Ex. 5.) The event was open to the public, and no admission was charged. (Brennan Dep. at 15:2-22.) All students in grades kindergarten through eighth grade were eligible to perform in the Talent Show. (Comp. ¶ 13; Answer ¶ 13.) The Talent Show was not part of any class offered by Frenchtown Elementary. (Brennan Dep. 37:25-38:3.) Students received no academic credit for their performances, and attendance was completely voluntary.

[1] The parties agree that "there is no genuine issue as to any material fact"; therefore, summary judgment is appropriate. Fed. R. Civ. P. 56(c).

(Brennan Dep. 37:13-24; Comp. ¶ 23; Answer ¶ 23.)

Participating students chose the acts they wished to perform in the Talent Show, subject to basic guidelines developed by Erica Bruner, a music teacher at Frenchtown Elementary. (Compl. ¶ 15; Answer ¶ 15; Jt. Ex. 6, at 50.) These guidelines permitted a broad range of acts, including dance, vocal and instrumental songs, martial arts, gymnastics, and skits. (Jt. Ex. 6, at 50.) To ensure that all acts were "G-rated," the guidelines also stated that materials, costumes and acts could not be "revealing, distracting, [or] suggestive," nor "depict[] profanity, weapons, alcohol, drugs or illegal substances." (Id.) Otherwise, the guidelines placed no other restriction on a prospective act's content or form. Moreover, participating students were required to develop and practice their Talent Show acts at home, without the assistance of school faculty. (Jt. Ex. 5.)

Ms. Bruner organized the Talent Show, for which she received a stipend. (Defs.' Answers to Interrogs., Jt. Ex. 4, at 6.) She and two other teachers, Jennifer Tappen and Allison Okolichany, comprised a "Preview Committee," which reviewed and approved all proposed acts for the Talent Show. (Id.) On May 9, 2005, O.T. provided the Preview Committee with the lyrics of "Awesome God," the song she ultimately chose to sing at the Talent Show. (Brennan Certification ¶ 10.) The Preview Committee believed that the song was inappropriate for the Talent Show because of its religious content. (Bruner Dep. 27:7-22.) The next day, Ms. Bruner brought the lyrics of "Awesome God" to Joyce Brennan, the principal of Frenchtown Elementary and the superintendent of the Frenchtown Elementary School District. (Id. at 39:19-24; Brennan Certification ¶ 12.) At that time, Ms. Brennan advised Ms. Bruner that the song was not appropriate for the talent show. (Defs.' Answers to Interrogs. at 11.) Ms. Brennan refused to

allow the song because she concluded that it "is the musical equivalent of a spoken prayer and constitutes a form of proselytizing." (Id. ¶ 13.) She also maintained that the song could not be performed "because of its overtly religious message." (Id. ¶ 15.)

Ms. Bruner subsequently informed O.T. that she would not be permitted to sing "Awesome God" at the Talent Show and gave her a book of other songs she could perform, including songs with religious content. (Defs.' Answers to Interrogs. at 11.) Moreover, students have performed other songs with explicit religious content and references in previous talent shows at Frenchtown Elementary. (Jt. Ex. 53, at 137; Jt. Ex. 58, at 143-44) Nonetheless, despite the efforts of O.T.'s mother to convince school officials to permit O.T.'s performance of "Awesome God," the Frenchtown Elementary School District Board of Education upheld Ms. Brennan's decision. (Jt. Exs. 19, 21.) This lawsuit followed.

ARGUMENT

The song that O.T. chose to sing in the Talent Show represented private student expression that could not reasonably bear the imprimatur of Frenchtown Elementary or be considered part of the curriculum. The censorship of the song constituted discrimination based on the song's viewpoint, and is unconstitutional because it was not supported by a compelling government justification.

I. Hazelwood Is Inapplicable Because O.T.'s Song Constituted Private Speech In A Noncurricular Setting

A. Legal Standards Governing Student Expression

The Supreme Court has broadly identified "two categories of student expression in the school environment, each of which merits a different degree of judicial scrutiny in connection with school-imposed speech restrictions." Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617,

627 (2d Cir. 2005), cert. denied, 2006 WL 151587 (Apr. 24, 2006). In Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the Court explored the first category, which encompasses "personal expression that happens to occur on school premises." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988); Peck, 426 F.3d at 627. Schools may only restrict such private student expression if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." Tinker, 393 U.S. at 513. After Tinker, the Supreme Court held that schools could also prohibit "offensively lewd and indecent speech." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

The Hazelwood decision introduced the second category of student expression: "school-sponsored" student speech that occurs in a curricular setting. 484 U.S. at 271; Peck, 426 F.3d at 628. Thus, "Hazelwood controls all expression that (1) bears the imprimatur of the school, and (2) occurs in a curricular activity." Bannon v. Sch. Dist. of Palm Beach County, 387 F.3d 1208, 1214 (11th Cir. 2004) (citing Hazelwood, 484 U.S. at 271-73). Two representative examples of activities that "may fairly be characterized as part of the school curriculum" and might reasonably be perceived to "bear the imprimatur of the school" are school-sponsored publications and theatrical productions. Hazelwood, 484 U.S. at 271. In such contexts, educators may "exercis[e] editorial control over the style and content of student speech . . . so long as their actions are reasonably related to legitimate pedagogical concerns." Id. at 273. Schools may, for example, choose which play to perform as the spring play. See, e.g., Seyfried v. Walton, 668 F.2d 214, 215 (3d Cir. 1981) (holding that school could cancel the play Pippin on grounds that its sexual content made it "inappropriate for school sponsorship").

B. O.T.'s Song (And Every Other Talent Show Act) Could Not Reasonably Bear the Imprimatur of Frenchtown Elementary

In this case, the touchstone of Hazelwood's applicability is whether O.T.'s song would "bear the imprimatur"of Frenchtown Elementary. "The imprimatur concept covers speech that is so closely connected to the school that it appears the school is somehow sponsoring the speech." Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 925 (10th Cir. 2002). Accordingly, as the Third Circuit has emphasized, "school 'sponsorship' of student speech is not lightly to be presumed." Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.) (citing Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1298 (7th Cir. 1993) (rejecting the general notion that a school "endorses whatever it permits")). "[F]or expressive activity to be school-sponsored, the school needs to take affirmative steps in promoting the particular speech." Westfield High Sch. L.I.F.E. Club v. City of Westfield, 249 F. Supp. 2d 98, 117-18 (D. Mass. 2003) (emphasis added) (citations omitted).

The Third Circuit has stressed that, under Hazelwood, speech is only school-sponsored speech "when a public school . . . aims 'to convey its own message.' By contrast, when a school . . . facilitates the expression of a 'diversity of views from private speakers,' the resulting expression is private." Child Evangelism Fellowship of N.J., Inc. v. Stafford Township Sch. Dist., 386 F.3d 514, 524 (3d Cir. 2004) (Alito, J.) (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833-34 (1995)).

Here, the Defendants facilitated a "diversity of views from private speakers" via the Talent Show, and no reasonable observer could infer that any particular Talent Show performer's speech was the school "convey[ing] its own message." Id. In 2005, the Talent Show boasted fifteen unique performances, including patriotic and pop songs, instrumental solos, skits and yo-

yo tricks. The school did not affirmatively select or promote any specific act, but rather screened all acts using general criteria to ensure age-appropriateness. Moreover, teachers did not assist students in preparing their acts, and students were required to practice at home. Most importantly, each child attending would know that the children performing in the Talent Show chose their own acts, and thus would immediately connect those acts to the performing children.

Defendants attempt to escape the conclusion that the individual songs and other performances were student speech and not the school's speech by focusing on Frenchtown Elementary's sponsorship of the Talent Show in which these various songs and performances occurred. (Defs.' Br. at 7-11.) But this ignores the fact that, in this case, the school has not undertaken to sponsor a theatrical event with particular content, as it would if it had chosen to present The Lion King or a Shakespeare festival. Rather, it sponsored what was in effect a G-rated open-mike night or kareoke show on a Friday night. It is thus akin to the student activities period in Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211 (3d Cir. 2003), which was established by the school, took place during school hours, required groups to be monitored by faculty, and even counted towards the school's tally of total hours of "instruction time" for meeting state requirements. Id. at 214-15, 224. The Third Circuit nonetheless rejected the contention that a school's sponsorship of a student activity period converted the religious expression of a student group meeting during that period into school-sponsored religious expression that would violate the Establishment Clause. Id. at 226. In operating the activities period, the school

> simply permits students to participate in a broad range of student activities during noninstructional time, and [the plaintiff] merely seeks an equal opportunity to express herself along with other like-minded students. The varied options available to . . . students, the voluntariness of student participation, and the fact

> that any religious speech engaged in would be initiated by students themselves militate against any government endorsement of or entanglement with religion if [the student religious group] were to have been able to meet during the activity period.

Id. at 227; see also Bd. of Educ. of the Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 252 (1990) (plurality) ("[T]he broad spectrum of officially recognized student clubs at Westside, and the fact that Westside students are free to initiate and organize additional student clubs, counteract any possible message of official endorsement of or preference for religion or a particular religious belief."); Child Evangelism Fellowship, 386 F.3d at 525 (rejecting the argument that a school establishing a program permitting a multitude of youth-serving groups to distribute literature at school, and requiring approval by the school and satisfaction of various substantive criteria, made the speech school-sponsored).

Unlike the selection by a school of a particular play in which the choice of play, and its themes and ideas, would bear the imprimatur of the school, see Hazelwood, 484 U.S. at 272; Seyfried, 668 F.2d at 215, the individual selections of students to perform songs, skits, and acts of their choice at an evening talent show are, under Third Circuit precedent, properly viewed as the expression of students within a school-sponsored activity, and not as the expression of the school.[2] The individual songs do not bear the imprimatur of the school, and thus this necessary

[2]The "imprimatur test" demonstrates why this case is distinguishable from Bannon, a case on which the Defendants heavily relied. In Bannon, the school invited students to paint murals on plywood panels in the interior and exterior hallways of the school. 387 F.3d at 1210. A student painted three murals with religious symbols and messages, and sued when school officials forced him to remove their religious content. Because of the "prominent locations" of the religious murals near the main office and in a main hallway, the Eleventh Circuit concluded that "there is no question students, parents, and other members of the public might reasonably believe [the] murals bear the imprimatur of the school." Id. at 1214. In contrast to the murals in Bannon, which would have been part of the school for several years, O.T.'s religious song would be fleeting in nature, would be immediately identified by the audience as her song, and would be

condition for Hazelwood to apply is not met.

C. *The Defendants Fail To Establish That The Talent Show Was A Curricular Activity*

While the absence of the imprimatur of the school makes Hazelwood inapplicable to O.T.'s song, Hazelwood is also inapplicable because the Talent Show was not part of the school curriculum. Expressive activities under Hazelwood are curricular if they "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." Hazelwood, 484 U.S. at 271 (emphasis added). The Talent Show does not meet this standard.

First, taking the holistic, common sense view that Hazelwood implies, unlike the theatrical productions and school newspapers that Hazelwood sets forth as examples of curricular activities, an evening talent show with voluntary, student-selected performances cannot be "fairly . . . characterized as part of the school curriculum." Id.

Second, turning to the specific elements of curricular activities that Hazelwood identifies as appropriate for analysis, the Defendants have failed to offer any evidence demonstrating that the Talent Show was "designed to impart particular knowledge or skills to student participants and audiences." Id. (emphasis added). Instead, without citing any evidence in the record, the Defendants merely state, post hoc, that the Talent Show "serves to 'impart particular knowledge and skills to student participants and audiences' . . . since . . . a participant . . . has to develop and/or practice the particular talent itself, as well as the art and discipline of

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in the context of an evening, voluntary performance where students were permitted to select their own acts.

performance/presentation." (Defs.' Br. at 11) (emphasis added). The Defendants do not show that Frenchtown Elementary designed, i.e., intentionally created, the Talent Show to teach students anything. Moreover, the Defendants' position on this issue contradicts their earlier admission that "[t]he purpose of the Talent Show is to showcase the talents and skills of individual students in the school system." (Compl. ¶ 14; Answer ¶ 14.) Such a purpose implies the display of pre-existing ability, not the impartation of new knowledge or skills.

Furthermore, Defendants neglect to identify the "particular knowledge and skills" that the Talent Show was "designed to impart" to audiences as well as performers, as would a school newspaper or a theatrical production selected by the school. With a school play, students in the audience would be exposed to and learn about the particular play that the school chose for part of its curriculum, such as learning about the Salem witch trials through seeing a performance of The Crucible. Here, the audience would only learn the messages that individual students chose to impart. That distinction is critical, and further illustrates why the Talent Show was not curricular, and Hazelwood is inapplicable.

II. The Defendants' Censorship of O.T.'s Song Was Unconstitutional Viewpoint Discrimination

Although the parties dispute whether the Talent Show should be categorized as a limited public forum or a nonpublic forum, the Court need not address the issue because viewpoint discrimination is forbidden in both types of fora. Defendants are constitutionally bound to regulate student speech in a viewpoint-neutral manner. Here, the Defendants admit that they prohibited O.T. from singing "Awesome God" because of its religious perspective. This rationale offends the Constitution's proscription of viewpoint discrimination.

A. The First Amendment Prohibits Viewpoint Discrimination in All Speech Fora

"Viewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or the perspective of the speaker is the rationale for the restriction." Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)). The axiom of viewpoint neutrality applies not only to public and limited public forums, but also to nonpublic forums. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (2001); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985); Child Evangelism Fellowship, 386 F.3d at 526; Brody v. Spang, 957 F.2d 1108, 1122 (3d Cir. 1992); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1371 (3d Cir. 1990).

As the Supreme Court reaffirmed in Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993):

> [a]lthough a speaker may be excluded from a nonpublic 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.

Id. at 394 (quoting Cornelius, 473 U.S. at 806) (internal citations omitted). Thus, the Court need not decide whether the forum here was a designated public forum[3] or a nonpublic forum, because

[3]In this case, the breadth of student eligibility and the variety of student-selected acts permitted at the Talent Show tend to support a finding that the event was a limited public forum, see Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211, 225 (3d Cir. 2003) (accepting parties' view that activities period during the school day was a limited public forum), though whether a limited public forum has been created is a fact-intensive question. See Brody, 957 F.2d at 1122 (remanding case for determination whether high school graduation ceremony was

viewpoint discrimination is forbidden in both types of fora.

Viewpoint neutrality is also a core part of the protections of Tinker. In Tinker, the Court recognized that, "[c]learly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school or discipline, is not constitutionally permissible." 393 U.S. at 511. The Tinker Court further emphasized that "a student's rights . . . do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam."[4] Id. at 512-13.

Thus regardless of the nature of the forum, Defendants may not discriminate against O.T.'s speech based on its viewpoint.[5]

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limited public forum).

[4]In Saxe, the Third Circuit indicated that the Tinker standard applies to private student speech that "fall[s] outside [the Hazelwood] categor[y]." 240 F.3d at 214. As a general rule, Tinker only permits school regulation of private student speech that "substantially disrupt[s] school operations or interfere[s] with the right of others." Id. (citations omitted). The Tinker standard does not exclusively apply, however, in the context of a school-created forum for student expression, such as the Talent Show, for which the school maintains general subject-matter and content restrictions. See Brody, 957 F.2d at 1118. Nonetheless, to the extent that Tinker is apposite, it confirms that the Defendants' censorship was unconstitutional. Indeed, the Defendants do not suggest, nor does the evidence imply, that O.T.'s performance of "Awesome God" would "materially disrupt classwork or involve substantial disorder." Tinker, 393 U.S. at 513. The evidence also fails to support any assertion that O.T.'s song would violate the rights of Talent Show attendees.

[5]Even if Hazelwood were to apply here, the Third Circuit has stated that Hazelwood does not permit viewpoint discrimination against student speech. See Brody, 957 F.2d at 1118 (stating that, "[s]ince the [Hazelwood] Court found that the newspaper was a non-public forum, it further held that any reasonable non-viewpoint-based restrictions were acceptable, provided that the school officials' regulations were 'reasonably related to legitimate pedagogical concerns.'") (emphasis added); see also Walz v. Egg Harbor Township Bd. of Educ., 342 F.3d 271, 279 (3d Cir. 2003) ("Individual student expression that articulates a particular view but that comes in response to a class assignment or activity would appear to be protected.").

B. Defendants Engaged in Viewpoint Discrimination Against O.T.'s Speech

The Supreme Court and the Third Circuit have repeatedly made clear that discrimination against speech that otherwise would be permitted because the speech has a religious perspective constitutes viewpoint discrimination. See, e.g., Good News Club, 533 U.S. at 109-111; Lamb's Chapel, 508 U.S. at 393; Child Evangelism Fellowship, 386 F.3d at 529.

The Defendants have repeatedly defended their censorship of "Awesome God" because of the song's "overtly religious" and "proselytizing" character. Under the precedents of the Supreme Court and the Third Circuit, discriminating against speech because it is "overtly religious" is classic viewpoint discrimination. See Child Evangelism Fellowship, 386 F.3d at 529 (noting that Supreme Court has held that expression that is "'quintessentially religious' or 'decidedly religious in nature'" may not be excluded on that basis) (quoting Good News Club, 533 U.S. at 111); see also Hedges, 9 F.3d at 1297 ("[N]o arm of government may discriminate against religious speech when speech on other subjects is permitted in the same place at the same time.").

The Defendants may not escape the inexorable conclusion that they have discriminated on the basis of viewpoint by excluding O.T.'s song by labeling the song as "proselytizing." (See, e.g., Brennan Certification ¶¶ 12-13) ("I reviewed the song 'Awesome God' and determined it to be inappropriate for the Talent Show because of its overtly religious nature, and the fact that the song was not merely a statement of religious beliefs. Instead, the song is a pronouncement to all about the wisdom, power and magnificence of God, and of the need to follow the teachings of God. . . . In my view, this song is the musical equivalent of a spoken prayer and constitutes a form of proselytizing.").

But the First Amendment does not countenance any principled difference between "proselytizing speech" and other religious speech. In Capitol Square Review and Advisory Board, the Supreme Court emphasized that it has "not excluded from free-speech protections religious proselytizing, or even acts of worship." 515 U.S. at 760 (citing Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981); see also Widmar v. Vincent, 454 U.S. 263, 270 n.6 (1981)). Similarly, in Widmar, the Court flatly rejected the argument that "singing hymns, reading scripture, and teaching biblical principles" warrant any less First Amendment protection than "singing, teaching, and reading" about religion. 454 U.S. 263 at 270 n.6; accord Church on the Rock v. City of Albuquerque, 84 F.3d 1273, 1278 (10th Cir. 1996) (rejecting "the notion that speech about religion, religious speech designed to win converts, and religious worship by persons already converted should be treated differently under the First Amendment") (citations omitted). Therefore, "[t]he fact that speech is in the form of proselytizing does not alter the nature of that speech for First Amendment purposes." Clark v. Dallas Indep. Sch. Dist., 806 F.Supp. 116, 121 n.3 (N.D. Tex. 1992) (striking down "[a] blanket prohibition on high school students' expression of religious views and even proselytizing on campus") (citing Heffron, 452 U.S. at 647).

Following Widmar, the Third Circuit has also held that "both religious discussion and worship constitute speech protected by the first amendment." Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1382 (3d Cir. 1990). The Gregoire court's elaboration of this holding is particularly apposite to this case:

> Attempting to draw a line between religious discussion and worship would only exacerbate establishment clause concerns, requiring [the defendant school] to entangle itself in what would almost certainly be complex content-determinations. We believe that the neutrality interest of the school is best preserved where

government is content-neutral.

Id. As Gregoire's admonition suggests, the Defendants' effort in this case to draw a line between a proselytizing religious song and an otherwise "appropriate" religious song is a constitutionally impermissible–not to mention difficult–task.

In Child Evangelism Fellowship, the Third Circuit rejected the argument that a school could exclude Child Evangelism Fellowship from distributing literature about its meeting on the grounds that it was a proselytizing group, calling this label a "euphemism[] for viewpoint-based religious discrimination." 386 F.3d at 527. The court explained that, when the defendants claimed they excluded groups that proselytize, they meant that they excluded "religiously affiliated groups that attempt to recruit new members and persuade them to adopt the groups's views" but not other groups seeking to recruit new members and persuade them to adopt their views. Id. at 528. "This," the court concluded, "is viewpoint discrimination." Id. Here, there was no requirement that songs or skits avoid attempting to persuade people of the correctness of any particular view. Indeed, as the Plaintiffs point out, songs allowed by the Defendants include exhortations to help the poor, take care of the Earth for future generations, and rely on friends in times of trouble, to name but a few. (See Pls.' Brf. at 6.) Defendants' "proselytizing" objection to O.T.'s song was based on the fact that it was an exhortation from a religious perspective. This is viewpoint discrimination.[6]

[6]Defendants also argue that the purported "violent imagery" in "Awesome God" was an additional basis for censoring the song as not age-appropriate. (Defs.' Br. at 12.) The United States believes, however, that the Plaintiffs have demonstrated that, in light of other speech permitted in the Talent Show, this argument is specious. (See Pls.' Br. at 12-13.)

C. The Defendants Had No Compelling Reason to Justify Their Censorship

Because the Defendants prohibited "Awesome God" due to the song's religious viewpoint, the censorship is unconstitutional unless it "is a precisely drawn means of serving a compelling state interest." Perry Educ. Ass'n, 460 U.S. at 66 (citations omitted). The Defendants' rationalizations for censoring O.T.'s song fall woefully short of satisfying the compelling interest test.

The Defendants argue that censorship of O.T.'s song was necessary to avoid an Establishment Clause violation.[7] This defense, however, is unpersuasive. The Supreme Court and the Third Circuit have repeatedly rejected the position that the Establishment Clause justifies suppression of free speech rights of religious speakers who have been given equal access to a school-sponsored forum. See, e.g., Good News Club, 533 U.S. at 112-20; Rosenberger, 515 U.S. at 839; Child Evangelism Fellowship, 386 F.3d at 530-31.

Remarkably, the Defendants do not cite this compelling line of precedent. Instead, the Defendants rely on several distinguishable cases. Three of these involve school-sponsored prayer, and are plainly inapposite to the present case. (See Defs.' Br. at 21-23) (citing Lee v. Weisman, 505 U.S. 577 (1992); ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996) (en banc); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000)). Two of the cases, from the Ninth Circuit, do involve genuinely student-initiated expression by valedictory

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[7]As noted above, see supra note 5, the alternative justification that the song was too violent is specious, and thus is not a compelling justification. That the Defendants were more concerned with the song's religious perspective than any purported violent imagery is evidenced by its failure to ask O.T. to alter the lyrics in question, as it did with the performances of the song "You Give Love a Bad Name" and the witches scene from MacBeth. (Defs.' Answers to Interrogs. at 10.) Instead, the Defendants banned "Awesome God" in its entirety. Such a solution neither satisfies a compelling interest nor remotely qualifies as precisely drawn.

speakers at high school graduations. (See Defs.' Br. at 23-25) (citing Lassonde v. Pleasanton Unified Sch. Dist., 320 F.3d 979 (9th Cir. 2003); Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092 (9th Cir. 2000)). No other circuit has followed the Ninth Circuit on this issue. Indeed, there is a circuit split on the point. See Adler v. Duval County Sch. Bd., 206 F.3d 1070 (11th Cir. 2000) (allowing graduating seniors chosen as speakers through neutral processes to pray or make religious statements constitutes individual expression and not school expression and thus does not violate the Establishment Clause), vacated, 531 U.S. 801, original opinion reinstated, 250 F.3d 1330 (11th Cir. 2001). Even if this court were persuaded by the Ninth Circuit's reasoning, however, those two cases are distinguishable. First, they did not involve equal access to a wide variety of speakers, as in this case. Second, an optional evening talent show does not carry the same mantel of school ceremony, formality and sponsorship as graduation exercises. And third, as the Supreme Court held in Lee v. Weisman, it hardly can be said that attendance at one's graduation is optional, whereas attendance at an after-school talent show truly is. 507 U.S. at 597-98.

This case falls squarely within the line of Supreme Court and Third Circuit cases holding that providing equal access to a school-sponsored forum and declining to censor religious speech does not violate the Constitution. See, e.g., Mergens, 496 U.S. at 250 ("The proposition that schools do not endorse everything they fail to censor is not complicated."); Good News Club, 533 U.S. at 113-19; Donovan, 336 F.3d at 227 (holding that the diversity of student clubs, voluntariness, and "the fact that any religious speech engaged in would be initiated by students themselves militate against any government endorsement of . . . religion").

Finally, the Defendants erroneously rely on Walz v. Egg Harbor Township Bd. of Educ.,

342 F.3d 271 (3d Cir. 2003), to assert that the age and impressionability of students in the Talent Show audience warranted censorship of "Awesome God." Walz, however, is inapposite. That case involved choices by a teacher in shaping an "organized curricular activity," occurring in an "elementary school classroom." Id. at 277-78. In contrast, the Supreme Court and the Third Circuit have held that when a school has permitted a range of speakers to choose their expression, censoring religious speech poses just as great a risk of sending children a message of hostility toward religion as the risk that some might misperceive an endorsement of religion if the speech were permitted on an equal basis. See Good News Club, 533 U.S. at 118 ("even if we were to inquire into the minds of schoolchildren . . . , we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the [religious speech] were excluded."); see also Child Evangelism Fellowship, 386 F.3d at 532 (quoting Good News Club); Gregoire, 907 F.2d at 1381 n.12 ("The impressionability argument, even if it were persuasive in this context, cuts two ways. If we presume . . . that students and parents are incapable of understanding the lack of endorsement when equal access is granted, it is at least as likely that they will misapprehend the exclusion of religious speech as discrimination against religion."). The Court in Good News Club thus concluded that "[w]e decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive." 533 U.S. at 119.

Defendants have failed to demonstrate that its censorship was a precisely drawn means to serve a compelling interest. Accordingly, the Court should find that the Defendants violated O.T.'s free speech rights.

CONCLUSION

For the foregoing reasons, this Court should grant summary judgment in favor of the plaintiffs.

Respectfully submitted,

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