

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DOCKET NO. 04-10998

DANIEL CHIRAS and CONSUELO RODRIGUEZ,
as Next Friend of Minor Rocio Rodriguez,

Plaintiffs-Appellants,

v.

GERALDINE MILLER, in Her Official Capacity as Chair of the
State Board of Education; DAVID BRADLEY, in His Official Capacity
as a member of the State Board of Education and in His Individual Capacity; DON
McLEROY, in His Official Capacity as a member of the State Board of Education
and in His Individual Capacity; DAN MONTGOMERY, in His Official Capacity
as a member of the State Board of Education; CYNTHIA THORNTON,
in Her Official Capacity as a member of the State Board of Education and in
Her Individual Capacity; and GRACE SHORE, in Her Individual Capacity,

Defendants-Appellees.

On Appeal From the United States District Court
for the Northern District of Texas – Dallas Division
Hon. Barbara M. G. Lynn, United States District Judge

BRIEF FOR *AMICUS CURIAE*
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STATUTES

Fed. R. App. P. 29(a) 1

**IDENTITY OF THE *AMICUS CURIAE*
STATEMENT OF ITS INTEREST IN THE CASE,
AND SOURCE OF ITS AUTHORITY TO FILE**

The Student Press Law Center (the “Center”) is a nonprofit, non-partisan organization which, since 1974, has been the nation’s only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. The Center provides free legal advice and information, as well as low-cost educational materials for student journalists on a variety of legal topics.

Because the Center’s work focuses in part on issues relating to the First Amendment rights and responsibilities of high school and university students, their parents, and school district and government officials, the Center has a special interest in the potential consequences of the decision in the United States District Court in this matter, which substantially implicate issues of viewpoint discrimination and censorship in public high schools and universities.

Pursuant to FED. R. APP. P. 29(a), this Brief is being filed without a motion seeking leave of the Court, because both the appellants and the appellees have consented to its filing.

INTRODUCTION

As determined by the district court, this case does not involve government speech. Rather, it involves the speech of a private speaker in a government-sponsored, nonpublic forum. The First Amendment requires that any government restrictions on speech in a nonpublic forum be viewpoint neutral. This is a “bedrock principle” underlying the First Amendment and has been consistently enunciated in the decisions of the United States Supreme Court and the Fifth Circuit Court of Appeals.

The Supreme Court repeatedly has emphasized this principle in the context of educational institutions and has applied it to school-sponsored speech by students and others whose speech occurs in the context of curriculum-related activity.

In the landmark *Tinker* case, the Supreme Court declared that students in the public schools do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gates.” *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969). And in the case at the center of this appeal, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), nineteen years later, the Supreme Court cited *Tinker* for the proposition that students “cannot be punished merely for expressing their personal views on the school premises – whether ‘in the cafeteria, or on the playing field, or on the

campus during the authorized hours,’ [citing *Tinker*, 393 U.S. at 512-513] – unless school authorities have reason to believe that such expression will ‘substantially interfere with the work of the school or impinge upon the rights of other students’ [citing *Tinker*, 393 U.S. at 509].” *Hazelwood*, 484 U.S. at 266.

In *Hazelwood*, the Supreme Court acknowledged that students might be entitled to a lesser level of First Amendment protection, under certain circumstances, when their expression occurs in a school-sponsored activity such as a curriculum-based student newspaper. *Hazelwood*, 484 U.S. at 270-271. The Court acknowledged that “the First Amendment rights of students in public schools ‘are not automatically coextensive with the rights of adults in other settings,’” citing *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), and further, “must be ‘applied in light of the special characteristics of the school environment,’” *id.*, at 266, citing *Tinker*, *supra*, at 506.

But the Court explicitly determined that public forum analysis, as defined over the previous thirty years, first be applied. *Hazelwood*, 484 U.S. at 267. Under that analysis, the Court determined that when student expression occurs in a school-sponsored activity that is a nonpublic forum, the expression can only be restricted if school officials can show that their censorship is “reasonably related to legitimate pedagogical concerns.” *Hazelwood*, 484 U.S. at 273. Nowhere, however, does the Supreme Court in *Hazelwood* say anything about abandoning

the viewpoint neutrality standard that constitutes a bedrock principle of forum analysis. The district court in this case nonetheless has decided on a motion to dismiss that *Hazelwood* has created a “carve-out” from the ban on viewpoint discrimination for all school-sponsored speech, whether by students, teachers or third parties.

Going beyond the limitations expressly enumerated in *Hazelwood*, based on the special characteristics of schools, such as speech restrictions where the topics are “unsuitable for immature audiences” or that promote “drug or alcohol use” or “irresponsible sex,” the district court has decided that school officials are free to censor and chill any expression of viewpoints in a school-sponsored, nonpublic forum, including those of students, if it does not meet their self-defined “legitimate pedagogical concerns.”

The breadth of the control accorded to school officials to use their “discretion” to limit viewpoints is amply demonstrated in this case. Here, according to the appellants’ brief, the district court found that it was within the Texas School Board of Education’s (“SBOE”) broad discretion to ban an environmental science textbook by a recognized author that: (i) was factually correct; (ii) met the Texas Essential Knowledge and Skills (“TEKS”) requirements; and (iii) was recommended by the Texas Commissioner of Education. According to appellants, the ban was imposed because, at an added day of hearings, two

outside organizations argued that the book was “anti-Christian” and “anti-free enterprise,” among other things. The SBOE’s rejection was based solely on the author’s alleged viewpoints on issues of economic policy and religion, and not the book’s subject matter, accuracy or compliance with TEKS requirements.

Allowing no discovery, and with no evidence, the district court affirmed the SBOE’s rejection, citing their “broad discretion” to engage in viewpoint discrimination under the so-called *Hazelwood* “carve-out.”

The Student Press Law Center respectfully submits that the district court’s dismissal, and more specifically, its analysis of *Hazelwood*’s impact on the viewpoint neutrality standard, will have a devastating effect on freedom of speech and a free press in high schools. The decision potentially throws open the doors to widespread censorship and intimidation of student speech and press whenever school officials disagree with the opinions of students expressed therein. This sweeping elimination of the viewpoint neutrality doctrine will allow school officials to exclude any student expression that varies from “approved” viewpoints on such issues as the environment, government policy, business, the economy and politics.

And, according to the district court, school officials will need only cite to some ill-defined “pedagogical concerns,” as they did here. The facts alleged in this

case and the district court's disposition demonstrate that no meaningful challenge will be possible.

The Student Press Law Center submits that the United States Supreme Court's decision in *Hazelwood* does not empower school officials to discriminate against any viewpoint. Accordingly, the district court's decision to expand the *Hazelwood* analysis to restrict any and all opinions and viewpoints in school-sponsored speech, including that of students, parents and third parties, violates the bedrock principle of viewpoint neutrality, and deprives students and others of their constitutionally-protected freedom of speech.

ARGUMENT

I. THE FIRST AMENDMENT REQUIRES THAT GOVERNMENT RESTRICTIONS BE VIEWPOINT NEUTRAL.

The Student Press Law Center seeks to protect the First Amendment freedom of speech and of the press for students to express their viewpoints and opinions on a wide range of educational, economic, political and governmental issues. This protection is consistent with the jurisprudence of the United States Supreme Court decisions both pre-*Hazelwood* and post-*Hazelwood*, and with the jurisprudence of this Court as reflected in several recent decisions.

A. Viewpoint Neutrality is a Bedrock First Amendment Principle

The First Amendment requires that any government restrictions on speech in any kind of forum be viewpoint neutral. This is a bedrock principle underlying the First Amendment that has been enunciated repeatedly and consistently in decisions of the United States Supreme Court. *See Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806 (1985) (“control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable ... and are viewpoint neutral.”) (internal citation omitted); *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Arkansas Television Commission v. Forbes*, 523 U.S. 666, 682 (1998).

B. Viewpoint Neutrality Applies in All Forums

The viewpoint neutrality principle has been enunciated by the Supreme Court, using the traditional forum analysis, as one that is applicable to all forums, *i.e.*, public forums, limited (or designated) public forums, and nonpublic forums. *See Cornelius*, 473 U.S. at 811 (“The existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination.”); *Forbes*, 523 U.S. at 682 (“To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker’s viewpoint and must otherwise be reasonable in light of the purpose for the property.”).

C. The Exception for Government Speech Does Not Apply

The only exception to the viewpoint neutrality requirement is when the government is speaking directly. *See Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 833 (1995). As the district court recognized, however, this case does not involve direct government speech, so that exception does not apply here. *See Chiras v. Miller*, 2004 WL 1660388, at *8 (N.D. Tex. July 23, 2004).

II. THE DISTRICT COURT’S HOLDING THAT VIEWPOINT DISCRIMINATION IS PERMITTED IS CONTRARY TO SUPREME COURT PRECEDENT PRIOR TO *HAZELWOOD* AND IS NOT BASED ON THE LANGUAGE OF *HAZELWOOD* ITSELF.

A. Supreme Court Decisions Before Hazelwood

The district court’s decision to grant the SBOE’s motion to dismiss, and to deny plaintiffs’ claims at the earliest stage of the litigation, could not be based on the authority of any Supreme Court decision prior to *Hazelwood*. Rather, all relevant precedents declare clearly that any government restrictions on speech must be viewpoint neutral, except when the government speaks directly, an exception not applicable here.

In *Cornelius v. NAACP Legal Defense and Education Fund, Inc* , 473 U.S. 788 (1985), the Supreme Court considered whether the Combined Federal Campaign, a fundraising campaign, violated the First Amendment by limiting participation to “voluntary, charitable, health and welfare agencies” supporting health and welfare services to individuals or their families, and excluding “[agencies] that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation” on behalf of others. *Id.*, 473 U.S. at 795 (internal citations omitted).

The Supreme Court described the standard to be applied to a nonpublic forum: “Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the

purpose served by the forum and *are viewpoint neutral*. *Id.* at 806 (emphasis added). Though a speaker may be excluded where the topic or subject is not encompassed within the purpose of the forum, “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 includable subject.” *Id.*

The *Cornelius* Court held that the exclusion of certain groups from the campaign was reasonable, but further held: “The existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a façade for viewpoint-based discrimination” or save “an exclusion that is in fact based on the desire to suppress a particular point of view.” *Id.* at 811-812, citing *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 49 (1983)(other citation omitted). Consequently, the Court remanded for a ruling on the viewpoint neutrality issue. *See also Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972)(government may not grant access to forum for groups whose views it finds acceptable, but deny access to groups expressing less favored views); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 505 (1984).

B. The Language of *Hazelwood*

The district court’s dismissal finds no support in the language of the *Hazelwood* decision itself. The district court itself acknowledges that in

Hazelwood, “the Supreme Court did not address whether ... educators’ control over curricular speech must be viewpoint-neutral in order to withstand constitutional scrutiny.” *See Chiras*, 2004 WL 1660388, at *10. Instead, the district court granted the motion to dismiss based on its own multi-layered inference that, notwithstanding the *Hazelwood* Court’s silence on the subject, the decision in fact created a “carve out” that exempted curricular speech from the viewpoint neutrality principle set forth in prior Supreme Court decisions. *See Chiras*, 2004 WL 1660388, at *9-10. The district court further ignored language in *Hazelwood* indicating that the Supreme Court had no intention of abandoning viewpoint neutrality but merely recognized the power of school officials to restrict subject matters that are inappropriate.

Although the *Hazelwood* Court also clarified the differences between public and nonpublic forums, the fact that the Court did not overrule or limit the application of *Cornelius*, *Bose* or other prior decisions addressing viewpoint neutrality in the school context confirms that the Court did not intend to do so.

III. THE DISTRICT COURT’S HOLDING THAT VIEWPOINT DISCRIMINATION IS PERMITTED IS CONTRARY TO POST-HAZELWOOD DECISIONS BY THE SUPREME COURT.

The district court’s ruling departs from subsequent Supreme Court rulings in *Arkansas Television Commission v. Forbes*, 523 U.S. 666, 682 (1998), and in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), ten and thirteen

years, respectively, *after Hazelwood*. These later cases affirmed that the viewpoint neutrality principle continues to limit government restrictions on school and other education-related speech, in both limited public and nonpublic forums. The Fifth Circuit Court of Appeals also has affirmed the continued application of the doctrine. *E.g., Chiu v. Plano Independent School District*, 260 F.3d 330, 347 (5th Circuit 2001) (“*Chiu I*”), citing *Forbes* 523 U.S. at 677-678 (internal citation omitted).

Forbes involved a public television station that excluded an independent candidate from the election debates it televised. The Supreme Court held that the television debate was a nonpublic forum, and as with any other forum, viewpoint discrimination is not permitted: “To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic **forum must not be based on the speaker’s viewpoint** and must otherwise be reasonable in light of the purpose for the property.” *Forbes*, 523 U.S. at 682 (emphasis added). The Court further held that the station barred the independent candidate for legitimate reasons not involving the candidate’s viewpoint on any issues, and therefore did not violate the First Amendment. Although apparently overlooked by the district court, the Supreme Court in *Forbes* expressly acknowledged that the ban on viewpoint-based restrictions continues to apply to schools after *Hazelwood*. The Supreme Court declared: “So too was the requirement of viewpoint neutrality compatible with the

university's funding of student publications in *Rosenberger*....” *Forbes*, 523 U.S. at 673, citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

In *Good News Club*, the Supreme Court held that the public school's refusal to allow a Christian club to have access to the school's facilities because of its religious viewpoint violated the First Amendment. The Court again recited the principle that restrictions on speech “must not discriminate against speech on the basis of viewpoint” *Good News Club*, 533 U.S. at 106-07. The Court then went on to hold “that the exclusion constitutes viewpoint discrimination,” and therefore violates the First Amendment. *Id.* at 107.

By maintaining the viewpoint neutrality principle in decisions involving education settings after *Hazelwood*, the Supreme Court reaffirmed that the restrictions permitted by the *Hazelwood* holding are limited to subject matter or content, and do not constitute a limitation on the viewpoint neutrality doctrine.

IV. THE DISTRICT COURT MISREAD *ROSENBERGER*, THE SUPREME COURT DECISION ON WHICH IT PRINCIPALLY RELIES.

To bolster its conclusion that *Hazelwood* empowers states to suppress dissenting viewpoints in the curricular context, the district court purported to discern the Supreme Court's intent based on “inferences” from the following *dicta* in *Rosenberger*:

A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles. See, e.g., *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 270-72 (1988).

Rosenberger, 515 U.S. at 844. According to the district court, the Supreme Court cited *Hazelwood* here as an example of a school's "own speech" being "controlled by different principles," thereby "suggesting" that restrictions on school-sponsored speech in a nonpublic forum such as that in *Hazelwood* are not subject to the viewpoint neutrality requirement. *Chiras*, 2004 WL 1660388, at *11. This conclusion is irreconcilable with the *Rosenberger* opinion itself and inconsistent with the district court's own analysis elsewhere in its opinion.

In reaching for the conclusion that the speech at issue in *Hazelwood* was cited as an example of a school's "own speech," the district court avoided mentioning *Mergens*, the other case cited by the *Rosenberger* Court in the quoted passage. *Mergens* held that a high school's extending recognition to a student religious club, as required under the Equal Access Act, would **not** constitute direct government speech endorsing religion in violation of the Establishment Clause: "We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Mergens*, 496 U.S. at 250. Thus, *Mergens*

and *Hazelwood* could not, as the district court opined, have been cited in *Rosenberger* as examples of a school's "own speech" that may be subjected to viewpoint discrimination. To the contrary, as discussed above, *Rosenberger* recognized the continuing application of viewpoint neutrality to all forums by reaffirming that principle with a citation to *Hazelwood*.

The district court's strained construction of *Rosenberger* also betrays an inconsistency within its own opinion. Earlier in its decision, the district court undertook a painstaking analysis to determine whether classroom use of a textbook is pure government speech or speech that merely bears the imprimatur of the government, recognizing that "[w]hen the government itself is speaking, the government may determine the content of its speech." *See Chiras*, 2004 WL 1660388, at *3-*9. The district court then concluded that the use of the textbook here was not the school's own speech, but rather speech bearing the school's imprimatur that could not be censored at will. *Id.* at *8. Then, however, in its discussion of the "controlled by different principles" *dicta* from *Rosenberger*, the district court did an about-face and put curricular speech back in the category of a school's "own speech" that can be suppressed based on its viewpoint. *Id.*, at *11. Having recognized the critical distinction between pure government speech and speech that merely bears the imprimatur of government, the district court contradicted itself and erred by erasing that line to further its own interpretation of

Rosenberger. That the district court relied on such a tortured and selective reading of *dicta* confirms the absence of any Supreme Court precedent for its endorsement of viewpoint discrimination.

V. THE DISTRICT COURT DISREGARDED POST-HAZELWOOD DECISIONS BY THIS COURT AFFIRMING THAT THE VIEWPOINT NEUTRALITY DOCTRINE IS STILL APPLICABLE TO CURRICULAR SPEECH.

In dismissing the plaintiffs’ claims, the district court disregarded not only these Supreme Court precedents, but also this Court’s recent post-*Hazelwood* decisions in *Chiu I* (2001) and *Chiu v. Plano Independent School District*, 339 F.3d 273 (2003) (“*Chiu II*”), in which this Court clearly affirmed the bedrock principle that any government restrictions on speech, other than when the government speaks directly, must be viewpoint neutral.

In *Chiu v. Plano Independent School District*, 260 F.3d 330 (5th Cir. 2001) (“*Chiu I*”), the Fifth Circuit concluded that even in nonpublic forums, viewpoint discrimination is still a violation of the First Amendment. In *Chiu I*, the school district held a “Math Night” conference to discuss a new curriculum called Connected Math. Parents opposed to this new curriculum sought permission to distribute flyers and other written materials criticizing the curriculum at the conference, but were not permitted to do so.

After deeming the facts insufficiently developed to determine whether the forum at issue was a limited public forum or a nonpublic forum, this Court held:

“Even if Math Nights were determined to be nonpublic forums, government actors may not discriminate on the basis of the views espoused.” *Id.* at 351. This Court also noted: “Plaintiffs have alleged viewpoint discrimination that would, if proven, violate the First Amendment whether Math Nights were designated or limited/nonpublic forums.” *Id.* at 349. Thus, thirteen years after *Hazelwood*, this Court of Appeals held directly that viewpoint discrimination, even in nonpublic forums such as a “Math Night” at a public school, violates the First Amendment.

This Court remanded the *Chiu* case to the district court in Texas to determine the motivations of the school district, and whether the decision to not permit the parents’ written materials was based on viewpoint. In *Chiu v. Plano Independent School District*, 339 F.3d 273 (5th Cir. 2003) (“*Chiu II*”), this Court again affirmed the ongoing requirement that government restrictions be viewpoint neutral. “It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. As such ... regardless of whether the Math Nights were public forums, **government actors violate a clearly established right if they discriminate on the basis of the views espoused by the speaker.**” *Id.* at 280 (internal citations omitted)(emphasis added).

The opinion of the district court ignores this Court’s decisions in *Chiu I* or *Chiu II* even though, as in this matter, *Chiu* involved the regulation of speech by a school district in what the *Chiu* defendants alleged was a nonpublic forum

involving the school's academic curriculum. Despite this Court's clear holdings in the *Chiu* opinions many years after *Hazelwood*, the district court construed *Hazelwood* as creating a carve-out that allows viewpoint discrimination by school officials in the educational setting, disregarding this Court's explicit recognition that such discrimination is constitutionally impermissible in light of Supreme Court doctrine.

VI. THE DISTRICT COURT FAILED TO CREDIT OR OTHERWISE DISTINGUISH OTHER CIRCUITS' HOLDINGS THAT VIEWPOINT NEUTRALITY IS REQUIRED UNDER *HAZELWOOD*.

The district court did not seem troubled that three other federal circuits have declined to read *Hazelwood*'s silence on viewpoint discrimination as a disavowal of the viewpoint neutrality requirement in the context of school-sponsored speech in a nonpublic forum. In *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989), the Eleventh Circuit held that a school board violated the First Amendment by excluding from a school-sponsored career day a peace organization because the school board disagreed with the organization's views regarding military careers. *Id.* at 1325. Rejecting the argument apparently accepted by the district court here, the Eleventh Circuit held that a restriction on school-sponsored speech that is reasonably related to pedagogical concerns under *Hazelwood* must still be viewpoint neutral under *Cornelius* to pass constitutional muster. *Id.* at 1319 & n. 7, 1324-25. The *Searcey* court emphasized that the Supreme Court in *Hazelwood*

did not abandon the well-established principle that viewpoint discrimination is unconstitutional in any forum:

Although *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*, we do not believe it offers any justification for allowing educators to discriminate based on viewpoint. The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis. Without more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral.

Id. at 1325 (original emphasis)(citations omitted). The Eleventh Circuit recently reaffirmed this holding, in a case decided after the district court decision here, involving school-sponsored speech by a student. *See Bannon v. School Dist. of Palm Beach County*, No. 03-13011, 2004 WL 2283490, at *6 (11th Cir. Oct. 12, 2004) (citing *Searcey* and holding that *Hazelwood* would not allow school to censor school-sponsored student murals based on religious viewpoint).

In *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*, 941 F.2d 817 (9th Cir. 1991), the Ninth Circuit considered whether a school district's refusal to publish Planned Parenthood advertisements in school-sponsored publications violated the First Amendment. *Id.* at 829. The court held that the restriction was permissible only after determining that it was both reasonable under *Hazelwood* and viewpoint-neutral under *Cornelius* and *Perry*

Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). *Planned Parenthood*, 941 F.2d at 829-30.

Similarly, the Sixth Circuit has recognized that school censorship of a college yearbook, whether or not subject to *Hazelwood* analysis, must be viewpoint neutral. *Kincaid v. Gibson*, 191 F.3d 719, 727-29 & n. 4 (6th Cir. 1999), *rev'd and remanded on other grounds*, 236 F.3d 342 (6th Cir. 1999)(*en banc*).¹

While noting the existence of these precedents, *see Chiras*, 2004 WL 1660388, at *10, the district court made no effort to criticize or distinguish them, effectively ignoring them in favor of its own interpretation of *Hazelwood*'s silence and inapposite Supreme Court *dicta*. The district court followed two other circuits that have relied on similarly strained inferences to conclude that *Hazelwood* created a "carve-out" allowing discrimination among viewpoints in school-sponsored speech.² *Chiras*, 2004 WL 1660388 at *10; *see Fleming v. Jefferson*

¹ The panel decision in *Kincaid* was vacated for *en banc* review, and the *en banc* court held that the panel had erred in concluding that a yearbook in the university setting was a nonpublic forum subject to *Hazelwood* rather than a limited public forum. *Kincaid v. Gibson*, 236 F.3d 342, 346 (6th Cir. 2001) (*en banc*). However, the *en banc* court effectively affirmed the panel's application of viewpoint neutrality under *Hazelwood* by holding that, even assuming the yearbook was a nonpublic forum, the school officials' confiscation of the publication constituted impermissible viewpoint discrimination. *Id.* at 355-56.

² Another appellate court, the Third Circuit, reached a similar holding but vacated this opinion in its entirety for *en banc* review. *C.H. v. Oliva*, 195 F.3d 167, 172-73 (3d Cir. 1999), *vacated by* 197 F.3d 63 (3d Cir. 1999). The *en banc*

(continued...)

County Sch. Dist., 298 F.3d 918, 926-29 (10th Cir. 2002) (following a vacated Third Circuit decision and relying largely on *Hazelwood*'s silence to conclude that it does not require viewpoint neutrality); *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993) (“[T]he Court in [*Hazelwood*] did not require that school regulation of school-sponsored speech be viewpoint neutral.”). The district court erred by adopting this flawed reasoning without regard for clear Supreme Court precedent, both before and after *Hazelwood*, this Court’s controlling decisions in *Chiu I* and *Chiu II* and persuasive opinions from three other circuits, all of which confirm that viewpoint discrimination remains unconstitutional in any forum, including in the context of expression that is school-sponsored.

VII. THE DISTRICT COURT’S HOLDING THAT VIEWPOINT DISCRIMINATION IS PERMITTED IN SCHOOL-SPONSORED NONPUBLIC FORUMS WILL HAVE A DEVASTATING IMPACT ON THE EXPRESSION OF VIEWPOINTS AND OPINIONS OF STUDENTS AND OTHERS.

The Student Press Law Center respectfully submits that the district court’s grant of the motion to dismiss, and more importantly, its analysis of *Hazelwood*’s impact on the viewpoint neutrality standard, will have a devastating effect on freedom of speech and a free press in high schools and, ultimately, on the

(continued...)

court was equally divided on this issue and therefore did not address it at all. *C.H. v. Oliva*, 226 F.3d 198, 200 (3d Cir. 2000) (*en banc*).

inculcation of the values of a democratic society. With the district court's sweeping elimination of the viewpoint neutrality doctrine in schools, district officials will have broad discretion to chill the free speech rights, and censor student speech and press, on issues such as the environment, government policy, business, the economy, religion and politics, whenever school officials disagree with the opinions of students expressed therein, or conclude that the opinions will be unpopular.³

As a practical matter, students would have little meaningful opportunity to challenge or reverse such wide-ranging suppression of viewpoints and opinions.

For example, suppose a high school student newspaper staff decides to create a special section in one issue devoted to environmental issues and invites four students to present their views on the causes of pollution. One writes that pollution is a natural by-product of business activity and is an unavoidable cost; the second states that pollution is a natural by-product of business activity but can be reduced through improved business practices at reasonable costs; a third says that

³ The district court's suggestion that school officials possess virtually unlimited discretion to determine what constitutes a legitimate justification for censorship, even when no viewpoint discrimination is at issue, is also in conflict with the clear language of *Hazelwood* that any restriction must be "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. *See also Desilets v. Clearview Regional Board of Education*, 647 A.2d 150 (N.J. 1994)(rejecting school officials' justifications for censoring a student newspaper under *Hazelwood* standard as "undefined and speculative.")

pollution is largely unnecessary and can be avoided altogether without any significant costs through better planning and use of scientific techniques; and the final student writes that pollution is primarily the result of deliberate decisions by business leaders such as burning coal for energy when cleaner but more expensive energy sources are available, and that burning coal should be banned as a matter of public policy. In this example, school officials do not attempt to ban the subject matter, namely, a discussion of the environment. Rather, relying on the district court's carve-out analysis, the school principal permits only the latter two students' opinion pieces to be published, but **bans the first and second columns** because the principal disagrees with their views, or believes that those views will be unpopular in the community.

Under the approach endorsed by the district court, school officials could, for example, **permit students** to express their opinion that student-led prayer in school violates the Constitutional requirement mandating a separation between church and state, but **prohibit student speech, or articles in the student press** expressing support for the right of students in school to pray on their own. Under the approach endorsed by the district court, school officials could, for example, **permit students** to express their opinion that the minimum wage laws advance the economic well-being of society, but **prohibit student speech, or articles in the student press**, expressing the view that the current minimum wage laws are no

longer just because a free market is the best way to determine a fair wage and governmentally-imposed “minimums” operate as a ceiling in many sectors of the economy. Similarly, school officials could **permit student speech** asserting that public road and sanitation conditions have improved in a city or town, but **prohibit student statements** that road and sanitation conditions have declined in certain neighborhoods and are a public safety hazard because local public officials refuse to improve the situation for political reasons..

In these and other similar situations, the district court’s declaration that *Hazelwood* has eliminated the viewpoint neutrality requirement in the public schools and in curricular speech would permit a chilling effect on student speech, and such rampant censorship of the student press, that student speech and public education would be forever changed.

In a recent decision, a federal court in the Sixth Circuit addressed precisely this issue. *See Hansen v. Ann Arbor Public Schools*, 293 F. Supp. 2d 780 (E.D. Mich. 2003). In *Hansen*, the court addressed claims by a high school student that her First and Fourteenth Amendment rights had been violated when the school invited sympathetic clergy as panelists on an assembly program on homosexuality, but barred the student from expressing her view that homosexuality was a sin, either at the panel presentation or at a subsequent student assembly. In reviewing the matter, the court noted that, under *Hazelwood*, the school officials “were

certainly entitled to some degree of editorial control over the school-supervised programs so long as their actions were reasonably related to legitimate pedagogical concerns.” 293 F. Supp. 2d at 797.

The *Hansen* court noted, however, that putting aside for the moment the proffered pedagogical concerns, “[school officials] overlook the fact that even under *Hazelwood*, a school does not have a completely unfettered right to restrict speech. A school’s restrictions on speech reasonably related to legitimate pedagogical concerns must still be viewpoint-neutral.” *Id.* at 799, citing *Searcy v. Harris*, 888 F.2d 1314, 1319, 1325 (11th Cir. 1989); *Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (1991) and *Kincaid v. Gibson*, 191 F.3d 719, 727 (6th Cir. 1999), *rev’d and remanded on other grounds*, 236 F.3d 342 (6th Cir. 2001)(*en banc*). The court also noted the contrary view of the Tenth Circuit in *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918 (10th Cir. 2002), but concluded that *Fleming’s* reasoning was “flawed” because it relied on other appellate decisions involving government speech, which is not subject to the viewpoint neutrality requirement, rather than school-sponsored speech. *Hansen*, 293 F. Supp. 2d at 798, n.23.

After reviewing the evidence before it, the *Hansen* court concluded that notwithstanding the claim that they were motivated by legitimate pedagogical concerns, the school officials were motivated “by their disagreement with [the

student's] message and ... their decisions restricting [her] speech and excluding her viewpoint from the Homosexuality and Religion panel were not 'viewpoint neutral.' ” *Id.*, 293 F. Supp. 2d at 803.

Equally important, the *Hansen* court recognized the broad threat of censorship and the chilling of all manner of student speech implicit in the conclusion that viewpoint neutrality was not required in regulating school-sponsored speech. The court noted: “[t]he danger in this is quite evident ...if schools are permitted to stifle opposing viewpoints ... what is to prevent school administrators in other districts [from engaging in similar restrictions].” *Id.* The *Hansen* court concluded: “No matter how well-intentioned the stated objective, once schools get in the business of actively promoting one political or religious viewpoint over another, there is no end to the mischief that can be done in the name of good intentions.” *Id.*

CONCLUSION

The Student Press Law Center respectfully submits that the elimination of the viewpoint neutrality standard, and the introduction of unfettered school district discretion to control the expression of opinions and viewpoints by students and others engaged in school-sponsored speech in a nonpublic forum, was never the intention of the United States Supreme Court in *Hazelwood*.

The district court's decision to recognize a *Hazelwood* carve-out permitting regulation of all viewpoints and opinions expressed in school-sponsored speech violates the bedrock principle of viewpoint neutrality. It is contrary to clear Supreme Court and Fifth Circuit precedent both prior to and after *Hazelwood*. The decision deprives students who express themselves in school-sponsored speech, as well as teachers and other contributors to school-sponsored speech, of fundamental, long-recognized First Amendment protections vital to preparing young people to be citizens in a democratic society.

For all the reasons set forth above, *amicus* the Student Press Law Center respectfully requests that the district court's judgment be reversed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that this Brief for *Amicus Curiae* Program in Psychiatry and the Law complies with the type – volume limitation, because excluding the Table of Contents, the Table of Citations, the Proof of Service, and this Certificate of Compliance, and according to the word processing system used to prepare the Brief (Microsoft Word), the Brief contains 5,567 words.

J. MICHAEL MONAHAN

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the electronic and paper forms of the above and foregoing instrument were forwarded via U.S. First Class Mail to each of the following counsel of record:

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