IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

JOEL CURRY, a minor, by and through his parents PAUL and MELANIE CURRY, Plaintiffs,	)	
vs.	)	Case No. 04-10143-BC Hon. David M. Lawson
SCHOOL DISTRICT OF THE CITY OF SAGINAW, and IRENE HENSINGER, Principal, Handley School, in her official and individual capacities, Defendants.	)	

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

STATEMENT OF THE ISSUE PRESENTED

Whether Defendants violated the First and Fourteenth Amendments by censoring student speech within the context of a school-wide exercise meant to teach about commerce when the student's speech satisfied all of the assignment's requirements but was barred because of its religious viewpoint.

STATEMENT OF FACTS

For the purposes of this Memorandum, the United States relies on the parties' Stipulated Facts ("S.F.") and the factual admissions in Defendants' Motion for Summary Judgment.

ARGUMENT

I. DEFENDANTS' ARGUMENTS FOR AVOIDING REACHING THE MERITS ARE INAPPLICABLE TO PLAINTIFFS' CLAIM FOR INJUNCTIVE RELIEF

Most of the Defendants' arguments focus not on the merits of the case, but on whether an action for damages may be sustained against the school district, and whether the individual Defendants have qualified immunity. While interesting, these arguments are beside the present point, as Plaintiffs seek not only nominal money damages, but also injunctive relief. A suit against state officials under § 1983 to enjoin them from engaging in unconstitutional conduct presents a straightforward application of *Ex parte Young*, 209 U.S. 123, 159-60 (1908). *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989) ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official capacity actions for prospective relief are not treated as actions against the State'") (citation omitted). Thus as to the claim for injunctive relief, this Court must reach the merits.

II. DEFENDANTS VIOLATED THE FIRST AMENDMENT BY CENSORING JOEL CURRY'S SPEECH

A. *Hazelwood* Requires That Restrictions on Student Speech in School-Sponsored and Controlled Expressive Activities Be Reasonable and Viewpoint Neutral.

Three types of student speech occur in school settings. First, there is "a student's personal expression that happens to occur on the school premises." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). Such speech is governed by the standard of *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), *see Hazelwood*, 484 U.S. at 270-71, and may only be censored if it "would 'materially and substantially interfere with the requirements of

appropriate discipline in the operation of the school.'" *Tinker*, 393 U.S. at 509 (citation omitted).

The second type of student speech occurs when a school has created a designated or limited public forum for free student expression. *See Kincaid v. Gibson*, 236 F.3d 342, 347-49 (6th Cir. 2001) (en banc) (describing different types of fora generally, and holding that college yearbook was limited public forum); *Dean v. Utica Cmty. Schs.*, 345 F. Supp. 2d 799, 806-09 (E.D. Mich. 2004) (high school newspaper under particular facts of case was limited public forum); *Demmon v. Loudoun County Pub. Schs.*, 342 F. Supp. 2d 474, 483 (E.D. Va. 2004) (high school created limited public forum in fundraiser selling personalized bricks for walkway). In a limited public forum, any content-based restrictions on speech must be "'narrowly tailored to serve a significant government interest.'" *Kincaid*, 236 F.3d at 348 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

The third type is student speech within the context of "school-sponsored expressive activities" where the school creates a vehicle for student expression "under its auspices," as with a school dramatic production or student publications where the school retains editorial oversight. *Hazelwood*, 484 U.S. at 272-73. Under *Hazelwood*, "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." *Id.* at 273.

Hazelwood did not explicitly address the issue of viewpoint neutrality, because, as Justice Brennan noted, "[the school defendants] themselves concede[d] that '[c]ontrol over access to

[the newspaper] is permissible only if the distinctions drawn . . . are viewpoint neutral.'" *Id.* at 287 n.3 (Brennan, J., dissenting) (ellipses in original) (internal quotation marks and citation omitted). *Hazelwood*, however, grew out of the Supreme Court's "nonpublic forum" jurisprudence, and was simply an application of its general principles to the school context. Those principles are well understood. In *Perry Educ. Ass'n*, for example, the Supreme Court held that a school's internal mail system was properly classified as a non-public forum in which the school could limit access to certain speakers and subject matters, so long as the restrictions were reasonable and viewpoint neutral. 460 U.S. at 46-50. Similarly, in *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, the Court held that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." 473 U.S. 788, 806 (1985). In *Hazelwood*, the Supreme Court applied this "reasonable in light of the purpose served by the forum" test to the particular factual context of a school, holding that content-based restrictions must be "reasonably related to legitimate pedagogical concerns." 484 U.S. at 273. This is a straightforward application of the non-public forum standard to the particular context of student expression in school-sponsored curricular activities, and leaves unchanged the requirements that restrictions be both viewpoint neutral and reasonable.

The Ninth Circuit and the Eleventh Circuit have explicitly held that under *Hazelwood,* government restrictions on speech in a school-sponsored forum still must be viewpoint neutral. *See Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989) ("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."); *Planned Parenthood of S. Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (en banc) (holding that school newspaper, sporting event programs, and yearbook were school-sponsored, non-public fora under *Hazelwood* and *Cornelius*, and, therefore, "'[c]ontrol over access . . . 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.*'") (emphasis added) (quoting *Cornelius*, 473 U.S. at 806).

Similarly, a panel of the Sixth Circuit in *Kincaid* described *Hazelwood* as holding that "school officials may impose any reasonable non-viewpoint-based restriction on student speech exhibited therein." *Kincaid v. Gibson*, 191 F.3d 719, 727 (6th Cir.), *vacated*, 197 F.3d 828 (1999). However, the en banc Sixth Circuit did not address the issue in its opinion on rehearing, and thus there is no current Sixth Circuit holding on the issue. Other courts likewise have held that *Hazelwood* does not change the general rule for nonpublic fora and that teachers and administrators must not discriminate based on the viewpoint of students' speech in school-sponsored activities. *See Seidman v. Paradise Valley Unified Sch. Dist. No. 69*, 327 F. Supp. 2d 1098, 1109 (D. Ariz. 2004); *Dean*, 345 F. Supp. 2d at 813; *Hansen v. Ann Arbor Pub. Schs.*, 293 F. Supp. 2d 780, 797 (E.D. Mich. 2003). *But see Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 926 (10th Cir. 2002) (holding that *Hazelwood* permits viewpoint-based discrimination against student speech in school-sponsored activities). Thus, to satisfy *Hazelwood*, restrictions on student speech in school-controlled fora must be both reasonable and viewpoint neutral.

B. The Defendants' Censorship of Joel Curry's Speech Violates *Hazelwood*.

Plaintiffs argue that a *Tinker* analysis or limited public forum analysis should apply to censorship of student expression within the Classroom City exercise, rather than a *Hazelwood* analysis.[1] While it is true that *Tinker* provides the general background principles of student expression at school, and a school can be found to have created a limited public forum based on particular factual findings about the school's intent, *see, e.g., Dean*, 345 F. Supp. 2d at 806-09; *Demmon*, 342 F. Supp. 2d at 483-84, the difficult questions of the impact of *Tinker* on this case or whether Classroom City is a limited public forum need not be reached here, since Defendants fail the *Hazelwood* test for two separate and independent reasons. First, their censorship was not reasonably related to a legitimate pedagogical goal; and second, it was not viewpoint neutral.

1. *Defendant's Censorship was not Reasonable*

The "Classroom City" exercise was intended to teach "literature, marketing, government, civics, economics and math." (S.F. ¶ 2) Students were free to create whatever product they believed would sell, based on a market survey that gauged demand for the proposed product, so long as the product cost less than $10 to make and was neither food nor a game of chance. (Joint

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[1]It is important to note one category of speech analysis that is not at issue here: government speech. *Hazelwood* applies to cases addressing school restrictions on *student* expression within the context of a school-sponsored activity. It does not address situations where the *school itself* is the speaker. When the school is the speaker, such as when it chooses books or topics for the curriculum, or when a teacher or principal addresses a class or the school, the school may select those viewpoints it wishes to espouse and reject those that it does not. *See Dean*, 345 F. Supp. 2d at 805 ("'Government speech,' such as a principal speaking at a school assembly, is subject to any viewpoint-based regulation because the school itself may always choose what to say and not to say.") (citing *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 833 (1995)); *Hansen*, 293 F. Supp. 2d at 793 ("When the government itself is the speaker, it may make viewpoint-based choices and choose what to say and what not to say.").

Ex. 1 at 2) Joel followed these requirements to the letter. (S.F. ¶ 34) A candy-cane ornament was viewed by Defendants as an acceptable choice – even a candy cane with an attachment describing the origins of the candy cane "in a historical manner." (Defendants' Memorandum in Support of Their Motion for Summary Judgment ("Defs. Mem.") at 5) Joel's description of the candy cane's history was censored solely because it described the candy cane's origins in a religious manner. (S.F. ¶¶ 17, 20, 31)

Joel's choice was thus fully within the parameters of the educational exercise, except for the fact that it was religious. Thus, the facts here are readily distinguishable from those cases within the Sixth Circuit in which school districts have been constitutionally permitted to regulate a student's religious speech in response to an assignment. *See Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 155-56 (6th Cir. 1995) (First Amendment not violated when student was not allowed to write research paper on the life of Jesus Christ where student did not receive permission to change her topic from a paper on drama, did not use requisite number of sources, and topic was contrary to assignment's purpose of developing research skills by having students write on unfamiliar issues); *DeNooyer v. Merinelli*, No. 92-2080, 1993 WL 477030, at *2 (6th Cir. Nov. 18, 1993) (per curiam) (see attached) (First Amendment not violated when student was not allowed to show videotaped performance where assignment required a live classroom presentation in order to increase students' verbal communication skills).

Defendants' censorship based solely on the religious nature of Joel's historical description was unreasonable. The only grounds cited by Defendants to justify their viewpoint discrimination was fear of violating the Establishment Clause. (Defs. Mem. at 2-5) But it is

plain that permitting Joel to "sell" the candy-cane ornaments with attachments as one product out of 56 sold in Classroom City, where students all understood that they were free to make products of their own choosing, and where, as in the real marketplace, consumers were free to accept or reject each product, would not create any Establishment Clause concerns.

In *Rusk v. Crestview Local Sch. Dist.*, the Sixth Circuit held that an elementary school policy that permitted community groups to distribute literature to student mailboxes, including a religious group advertising a meeting of "games, Bible stories, crafts and songs that celebrate God's love," did not violate the Establishment Clause because the school was merely adopting a policy of nondiscrimination among a wide variety of community groups serving children. 379 F.3d 418, 419 (6th Cir. 2004). The Court held that declining to censor religious speech, far from establishing religion, was the approach that best adhered to the stance of government neutrality toward religion that the Establishment Clause commands: "if [the district] were to refuse to distribute flyers advertising religious activities while continuing to distribute flyers advertising other kinds of activities, students might conclude that the school disapproves of religion." *Id.* at 423. The Sixth Circuit's holding in *Rusk* is in accord with every circuit that has addressed the issue of school distribution of religious community groups' literature.[2]

Courts have similarly held that equal access for religious speech in public schools does not violate the Establishment Clause in a variety of other contexts. *See Good News Club v.*

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[2]*See Child Evangelism Fellowship ("CEF") v. Stafford Township Sch. Dist.*, 386 F.3d 514, 518 (3d Cir. 2004); *CEF v. Montgomery County Pub. Schs.*, 373 F.3d 589, 591 (4th Cir. 2004); *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1046 (9th Cir. 2003) (per curiam); *Sherman v. Cmty. Consol. Sch. Dist. 21*, 8 F.3d 1160, 1165-67 (7th Cir. 1993).

Milford Cent. Sch., 533 U.S. 98, 113-14 (2001) (allowing religious program for elementary students access to school facilities immediately after school did not violate Establishment Clause); *Board of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 247-48 (1990) (allowing student group equal access to school facilities did not violate Establishment Clause); *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330, 1333-34 (11th Cir. 2001) (allowing student graduation speaker to choose to give a religious message did not violate Establishment Clause). Given the facts that each student had a choice of what to create; that more than 50 products were selected, designed, and promoted by individual students; and that students could purchase or not purchase any given product, there was no reasonable risk that students could have mistaken Joel's speech for the school's. The neutrality the Constitution demands both among religions and between religion and non-religion requires equal access and equal treatment, not such disparate exclusion.

Because allowing Joel to sell his candy-cane ornaments with the religious message attached would not create any Establishment Clause issues, Defendants' only proffered reason for censoring his speech evaporates. Nor are there any other legitimate reasons that Defendants could put forth. The facts are undisputed that Joel in all respects met the requirements of the assignment. There is no evidence that his messages would have caused a disruption or in any way compromised the educational experience of the Classroom City exercise. The censorship was thus not reasonably related to any pedagogical concern.

2. *Defendants Discriminated Based on Viewpoint*

Under *Hazelwood*, as discussed in § II.A *supra*, restrictions on speech in a school-

sponsored forum must be viewpoint neutral. It is undisputed that the descriptive cards were otherwise includable subject matter, and were censored solely because of their religious content. Defendants make the point quite starkly when they admit that if the origins of the candy cane were described in "a historical manner," that would have been acceptable, but because this issue was addressed in a religious manner, it was not. (Defs. Mem. at 5) Excluding otherwise includable speech solely because it expresses a religious viewpoint is quintessential viewpoint discrimination. *See Good News Club*, 533 U.S. at 108-09; *Rosenberger*, 515 U.S. at 829-30. Defendants' censorship is thus invalid on this basis as well.

CONCLUSION

For the foregoing reasons, the United States requests that this Court grant the Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

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This 18th of February, 2005

SIGNATURE AND SERVICE CERTIFICATION

I hereby certify that on February 18, 2005, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to Joshua A. Carden and Jeffrey A. Shafer, counsel for the Plaintiffs, and Philip A. Erickson, counsel for the Defendants.

By: s/William Rhee

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