

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1667

TITLE BETHEL SCHOOL DISTRICT NO. 403, ET AL., Petitioners  
V. MATTHEW N. FRASER, A MINOR AND E. L. FRASER,  
GUARDIAN AD LITEM

PLACE Washington, D. C.

DATE March 3, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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BETHEL SCHOOL DISTRICT NO. :  
403, ET AL., :  
Petitioners :  
v. : No. 84-1667  
MATTHEW N. FRASER, A MINOR, AND :  
E. L. FRASER, GUARDIAN AD LITEM :

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Washington, D.C.  
Monday, March 3, 1986

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 1:00 o'clock p.m.

APPEARANCES:

WILLIAM A. COATS, ESQ., Tacoma, Washington;  
on behalf of Petitioners.  
JEFFREY T. HALEY, ESQ., Seattle, Washington;  
on behalf of Respondents.

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1                                P R O C E E D I N G S

2                    CHIEF JUSTICE BURGER: Mr. Coats, you may  
3 proceed whenever you're ready.

4                    ORAL ARGUMENT OF WILLIAM A. COATS, ESQ.

5                    ON BEHALF OF PETITIONERS

6                    MR. COATS: Mr. Chief Justice and may it  
7 please the Court:

8                    The issue in this case is whether a public  
9 school district may regulate indecent speech in a public  
10 school setting that does not amount to obscene speech  
11 under this Court's Miller versus California standard.  
12 The facts in this case are that on April 26th, 1983,  
13 Matt Fraser, a 17 year old high school senior, gave a  
14 speech to the associated student body. The speech was  
15 to introduce his candidate for the vice president's  
16 position of the associated student body.

17                    He gave a crude and vulgar speech. The speech  
18 is set forth in full in the briefs and there's no  
19 purpose to repeat it here. It is important to note that  
20 Mr. Fraser did obtain significant reaction to his  
21 speech, that some of the students hooted and hollered,  
22 some of the students looked bewildered, some looked  
23 embarrassed. Some students even acted out certain  
24 physical acts symbolizing various sexual acts.

25                    After the speech, the school administration



1 investigated the incident and provided Mr. Fraser with  
2 his due process rights and suspended him for three days  
3 and struck him from the list of those candidates who  
4 would be considered to be a graduation speaker.

5           Mr. Fraser appealed to the district court.  
6 The district court, as affirmed by the Ninth Circuit,  
7 has ruled that public school districts can only regulate  
8 student speech if it is obscene under the Miller versus  
9 California standard, or the one exception they seemingly  
10 recognized is if the speech caused a physical disruption  
11 or there was a reasonable prediction of a physical  
12 disruption.

13           Finally, the district court, as affirmed by  
14 the Ninth Circuit, struck down the district's disruptive  
15 conduct rule, holding it was overbroad and vague.

16           It is well decided and we agree that students  
17 do not shed their constitutional rights at the  
18 schoolhouse door. However, it is equally well decided  
19 that those constitutional rights will be administered in  
20 a way that is sensitive to the speech environment.

21           We are here because the Ninth Circuit we  
22 believe has misconstrued the extent of the rights a  
23 student has under the First Amendment in the public  
24 school setting. They failed to recognize the special  
25 relationship between students and their teacher; and

1 finally, they failed to recognize the secondary effects  
2 such conduct has in the public school setting.

3 In beginning our analysis of the First  
4 Amendment, it is useful to compare this case with this  
5 Court's decision in Tinker versus Des Moines School  
6 District. In Tinker, the facts were that students wore  
7 black arm bands into the public schools in protest of  
8 the Vietnam War. There was nothing intrinsically  
9 harmful about the black arm bands.

10 What the school officials were concerned about  
11 was that the black arm bands stood for protest against  
12 this Government's position in Vietnam. Tinker was a  
13 viewpoint discrimination case, where the school  
14 officials determined that that viewpoint on an important  
15 student policy issue should not be interjected in the  
16 school system.

17 Contrasting that case with this fact pattern,  
18 it is noteworthy that Mr. Fraser at testimony was asked,  
19 "What was the purpose of your speech?" He responded  
20 quite candidly: "I gave the speech to humor my  
21 audience, in the hopes they would vote for my  
22 candidate."

23 There's no overriding public policy.

24 QUESTION: Did his candidate win?

25 MR. COATS: His candidate did win.

1 QUESTION: How many students are there  
2 involved here?

3 MR. COATS: Approximately 600, Justice  
4 Marshall, in this school setting.

5 QUESTION: What was the grade or age range of  
6 the students?

7 MR. COATS: It's a school that has sophomores  
8 through seniors, so the youngest would be 14, the oldest  
9 would be 18, and they would range in there according to  
10 their grades.

11 Mr. Fraser -- you will note that the district  
12 did not take cavalierly his claims that he was being  
13 discriminated against or that somehow his viewpoint was  
14 being suppressed. If you review the record in this  
15 case, you'll find that Mr. Fraser appealed to the  
16 district's hearing officer from the decision of his  
17 building principal, and I think if you read that  
18 decision, which is part of the joint appendix, that one  
19 of the conclusions that was not overturned by the  
20 district court was that there was no viewpoint  
21 discrimination here, that the district's sole concern  
22 was to limit vulgarity and indecent language in the  
23 school setting.

24 This Court has been very clear and has oft  
25 repeated that it does not want to get involved in the

1 daily operations of the school system, that it only  
2 wants to get involved when core constitutional values  
3 are involved and sharply implicated.

4           This Court has also indicated that the  
5 regulation of vulgarity and indecent speech is on the  
6 periphery of the First Amendment. We submit to this  
7 Court that when you review this case one of the issues  
8 is where does the federal court system relate itself to  
9 the public schools. And we would suggest to you, with  
10 the rights herein involved and the speech here involved,  
11 absent viewpoint suppression, that there should be  
12 minimal court review and that all a school district  
13 should be required to do is to justify its actions with  
14 a reasonable educational purpose.

15           QUESTION: Mr. Coats, may I ask you a  
16 question? This is an extracurricular assembly? It's  
17 not part of the regular -- the students were not  
18 required to attend, is that right?

19           MR. COATS: Well, I want to be very clear on  
20 what the context is, because I think that's important.  
21 It was, students had the option of either going to the  
22 assembly or going to a study hall.

23           Now, the ASB, however, in the State of  
24 Washington is an activity that is statutorily recognized  
25 and required. And those statutes, which are



1 RCW-28A.58.115 through 120, I think you'll find that  
2 they're somewhat uniquely specific in this area compared  
3 to the other states that I have seen.

4 And they make very clear that this activity is  
5 under the direction and control of the public school  
6 setting. So this is no more an elective activity that,  
7 for example, when a student elects to take drama rather  
8 than going to a study hall. This is a part of the  
9 educational program of this particular school district,  
10 as it is in other school districts in of Washington.

11 QUESTION: In your view, would it be  
12 permissible, given that setting, for the school board to  
13 prohibit the discussion of any religious topics during  
14 any campaign speech or any prayer activities? Let's all  
15 say a prayer for candidate X?

16 MR. COATS: Clearly this is not the case of  
17 Bender versus Williamsport.

18 QUESTION: Well, that's really my question.

19 MR. COATS: And I think it's important to note  
20 that. Bender involved independent student activities.  
21 This activity is supported by public funds. It's under  
22 the direction and control and supervision of the school  
23 authorities.

24 The school officials lead the activity. We  
25 assign advisors to it. We subsidize it with public

1 funds.

2 QUESTION: I understand. What is your answer  
3 to my question?

4 MR. COATS: Well, the answer is it's not the  
5 same case at all.

6 QUESTION: Well, what is your answer to my  
7 question, whether in your view the school board could  
8 prohibit during this particular kind of meeting any  
9 discussion of religious topics or any prayer activities  
10 in support of a candidate?

11 MR. COATS: The answer to your question is  
12 yes.

13 QUESTION: You think they could?

14 MR. COATS: I would think they would be  
15 compelled to. This is something that occurs during the  
16 student day, when students are required to either be  
17 there or in a study hall, and I think it would clearly  
18 further that religious activity under the establishment  
19 clause.

20 QUESTION: Mr. Coats, would it make any  
21 difference in your view if the school had tried to  
22 discipline the student for activities occurring at  
23 lunchtime or on the school premises after school?

24 MR. COATS: I think in the school setting  
25 there could be enclaves of privacy, and I think it is

1 important that this case comes up under the disruptive  
2 conduct rule of the district, and that one of the things  
3 that the district has found in its disruptive conduct  
4 rule is that obscene and profane speech is inherently  
5 harmful in a school setting.

6 Now, we would say that if somebody is, for  
7 example, swearing around others in a school setting,  
8 that would be a concern to us and we could discipline  
9 the student for that. They're under the control of the  
10 school and we have a --

11 QUESTION: Do you think that the school could,  
12 for instance, prohibit the use of so-called four letter  
13 words at any and all times the students are on school  
14 grounds, before, after, during?

15 MR. COATS: As long as it was a school  
16 activity. There are certain private activities that  
17 involve students that rent school space. But as long as  
18 it is a school activity, my answer would be yes. I  
19 think the school and the board, through its rulemaking  
20 authority, have determined that that's inherently  
21 harmful to the school climate. As long as there is a  
22 school activity, my answer to your question would be  
23 yes.

24 QUESTION: Well, is lunchtime a school  
25 activity, when the students break for lunch?

1           MR. COATS: They're under the control, and I  
2 think that the school has a definite educational  
3 interest in maintaining an environment around the school  
4 premises free from vulgarities. Students essentially  
5 are required to be there. It's a captive audience of  
6 school children.

7           QUESTION: Do you think the school could  
8 implement its discipline in this case had there been no  
9 school regulation at all on the subject?

10          MR. COATS: Clearly, I think procedural due  
11 process requires us to have regulations in effect. And  
12 actually, the Washington Administrative Code requires  
13 that and, it is my understanding, your decisions in Goss  
14 versus Lopez.

15          So yes, we have to have pre-existing rules.  
16 In this case, we did have a rule and the student was  
17 charged under that rule.

18          QUESTION: Do we have to decide in this case  
19 whether the rule was sufficiently specific to give  
20 notice to Mr. Fraser of what was prohibited?

21          MR. COATS: The Ninth Circuit has struck down  
22 the rule, claiming it was overbroad and vague. They  
23 overbreadth argument depends on their determination that  
24 our discipline and our disciplining a student for use of  
25 obscene and profane language is in excess of our



1 authority.

2           The vagueness argument is a due process  
3 argument that says the rule is excessively vague, and  
4 that is an issue that is before the Court.

5           I do think it is important in looking at the  
6 educational interests to keep in mind that there are  
7 really twofold educational interests. One of those  
8 interests relates more to the educational nature of this  
9 particular activity, that one of the requirements, and  
10 something this Court has oft recognized, is that schools  
11 teach societal values.

12           Indeed, there's a statute in the State of  
13 Washington that expressly makes it a duty of the school  
14 district to teach morality, self-respect for others, and  
15 civility. The purpose of this ASB activity is  
16 multifold, but certainly one of them is to teach these  
17 students basic societal values.

18           Another object of this activity, particularly  
19 this assembly, is to teach students the art of public  
20 discourse. Now, in this education activity there is a  
21 special relationship between the students and their  
22 instructors.

23           Indeed, the school officials feel they would  
24 have been remiss if they had not corrected Mr. Fraser.  
25 His speech was inappropriate. It was a bad speech.

1 They as educators had a duty to correct it. But they  
2 not only had a duty to Mr. Fraser, but they also had a  
3 duty to the other students who were present. I think  
4 when you look at the fact pattern here, you have a  
5 senior student, a student who had received honors, who  
6 was a gifted orator, and he gives a speech such as that  
7 contained in the record.

8 The impression that other students get at that  
9 assembly is that that speech is appropriate in that  
10 particular context. The speech district --

11 QUESTION: As a matter of fact, wasn't that  
12 speech given to a teacher the day before?

13 MR. COATS: The record on that, it was given,  
14 he claims, to three teachers. Two teachers testified.  
15 Approximately ten minutes in advance of the assembly,  
16 Mr. Fraser went in, and the teacher was the teacher that  
17 had the responsibility for the newspaper.

18 Other students were present, and that teacher  
19 told Mr. Fraser, she said, Matt -- and this is her  
20 testimony -- "That speech is inappropriate, don't give  
21 it."

22 He then went to another teacher, Mr. DeHart.  
23 Mr. DeHart told him, and his testimony will show:  
24 "Matt, that speech is inappropriate, don't give it."  
25 Mr. DeHart also testified that it was his recollection

1 that he intimated there would be severe consequences if  
2 he did. That is the record of --

3 QUESTION: He wasn't told by the principal?

4 MR. COATS: Well, the principal didn't know he  
5 was going to give a speech. The two teachers who  
6 reviewed it told him it was inappropriate and not to  
7 give it.

8 QUESTION: Well, I know that, but did the  
9 teachers have authority to stop him from making the  
10 speech?

11 MR. COATS: I think the teachers exercised --

12 QUESTION: I'm asking you, did they or did  
13 they not have authority to stop him from making the  
14 speech?

15 MR. COATS: They would have authority, for  
16 example, to demand that he go to the office. But I  
17 would submit to you that that's really not how  
18 discipline works and is not a realistic view, that if a  
19 teacher in a school setting tells the student, that's  
20 inappropriate, don't do it, and then the student doesn't  
21 respond, then it becomes appropriate for disciplinary  
22 action.

23 QUESTION: Well, it seems to me that if a  
24 teacher teaching chemistry tells the child, don't go to  
25 dance class, that wouldn't be enforceable. That's why I

1 was asking what authority. Was this his teacher? Was  
2 it his home room teacher?

3 MR. COATS: I think that there is --

4 QUESTION: Was it just a teacher?

5 MR. COATS: -- a significant question of prior  
6 restraint, and if the teacher, you know, could ask him  
7 -- I would think that we would be premature there, in  
8 that we did not have a proper basis for disciplinary  
9 action until after he gave the speech.

10 QUESTION: I think what I'm getting at -- I'm  
11 not trying to be mysterious about it. If the school had  
12 a possibility, had notice and an opportunity to stop the  
13 speech, it would be a different case, wouldn't it?

14 MR. COATS: Yes. That is not the facts here.

15 QUESTION: Well, that's what I'm trying to get  
16 at.

17 MR. COATS: Okay. Excuse me. I misconstrued  
18 your question. The record is as I recited it.

19 QUESTION: Right.

20 MR. COATS: The school district did have a  
21 duty to these other students to impress upon them that  
22 in this educational activity this type of speech wasn't  
23 appropriate in any way whatsoever. And I think it's  
24 important to note that the district acted with  
25 restraint.



1           Again, if you read the record from the school  
2 district, one of the findings of the hearing officer who  
3 considered this was that a lesser form of corrective  
4 action would not have corrected this particular  
5 problem. Indeed, the speech district feels strongly  
6 that in its capacity as an educator and dealing with  
7 these students it had an obligation to respond to this  
8 particular speech.

9           Mr. Fraser seems to argue that the school  
10 district's sole remedy is to talk it over with him, to  
11 debate with him the appropriateness of this. We submit  
12 to this Court that Mr. Fraser's argument misconstrues  
13 the relationship of a student to an educator. It's not  
14 a relationship of one debater to another, that indeed  
15 the educator has authority over the student when  
16 properly exercised.

17           Finally, we submit to you that the real  
18 question is if the speech district could regulate this  
19 speech. This Court held as recently as last week in the  
20 Public Utilities case out of California that the First  
21 Amendment does not dictate that you respond or ignore a  
22 speech, or as we would phrase it, the First Amendment  
23 may restrict a school district's ability to censor  
24 various views in the student school system, but once  
25 they are able to regulate an area, such as vulgarity and

1 indecency, the First Amendment does not dictate how they  
2 must go about that.

3           We also note that there are important  
4 secondary effects in this case. We think it's important  
5 that this came up under the school district's disruptive  
6 conduct rule, and when you read that rule, clearly a  
7 school district has the right to proscribe disruptive  
8 conduct in the school setting. And this board of  
9 directors in advance gave notice and concluded that  
10 obscene and profane speech was inherently harmful and  
11 disruptive to the public school setting.

12           Essentially what the Ninth Circuit has held is  
13 that a public school district cannot reach that  
14 conclusion and cannot have such a rule.

15           We submit to you that the board's  
16 determination that vulgarity and indecency was  
17 inherently harmful in the public school setting is  
18 supported by a rational basis. First of all, the school  
19 has a duty to protect the young adults, who are there in  
20 essentially a captive audience.

21           Secondly, such conduct is inherently demeaning  
22 to the school setting. This is where we require in the  
23 State of Washington students to come to learn. As this  
24 Court has recognized in cases such as Pico, where the  
25 plurality spoke, and where it expressed its concern in

1 that opinion that the district did not have the  
2 authority to suppress ideas in the school setting, but  
3 it had no problem, it said, if there had been a facially  
4 neutral rule designed to prohibit indecent language in a  
5 public school setting.

6 QUESTION: Mr. Coats, may I just ask ask on  
7 the rule, the rule prohibits disruptive -- I mean,  
8 material and substantial interference with the  
9 educational process, including obscene and profane  
10 language.

11 Now, what is -- precisely that is your  
12 position, that this was obscene language within the  
13 meaning of the rule?

14 MR. COATS: Yes. You'll find that that was  
15 considered again by the hearing officer's decision at  
16 the school district, and the school district's  
17 interpretation of its own rule is that obscene should be  
18 given its common and ordinary meaning, which includes  
19 lewd and vulgar language.

20 QUESTION: Of course, we're dealing by  
21 hypothesis with speech that's non-obscene for  
22 constitutional purposes.

23 MR. COATS: The speech does not meet the  
24 standard of Miller versus California. We concede that.  
25 It's not close.

1           But I would point out to you that the standard  
2 that was set out in Miller versus California on  
3 obscenity according to this Court was designed only to  
4 prescribe hard-core pornography. And this Court has  
5 recognized that there are some lesser standards which  
6 may apply in particular situations, such as in FCC  
7 versus Pacifica, the Mini Theatres case out of Detroit.

8           And we're suggesting that a lesser standard is  
9 appropriate in a public school setting. Now, the  
10 standard that we have proposed essentially is that first  
11 you look at the constitutional right we're enforcing,  
12 and that when there is a suppression of ideas or a  
13 discrimination against ideas, that the school district  
14 have to show with a higher standard or show some  
15 compelling interest its reason for suppressing those  
16 ideas.

17           But here, where the only -- where the record  
18 clearly shows that the only purpose for the school's  
19 action was to suppress vulgarity and indecency in the  
20 public school setting, then we would suggest to the  
21 Court that a school district should only have to meet a  
22 standard of showing a rational educational basis, and  
23 clearly there is such a basis.

24           QUESTION: May I just ask this question about  
25 it? I understand that the board construed the word



1 obscene in this case to cover this speech. Is there any  
2 prior history indicating within the school's own  
3 proceedings of any kind that the word "obscene" as used  
4 in the rule was intended to be as broad as interpreted  
5 in this case?

6 MR. COATS: Were there prior cases?

7 QUESTION: Anything that would fairly -- the  
8 question is the same thing, I think, maybe Justice  
9 O'Connor was driving at, the fair notice to the student  
10 as to whether this speech was covered by this word.

11 MR. COATS: I think my response to you was  
12 that we have no written decisions in construing this,  
13 and that to my knowledge this is the first time that the  
14 district had construed its own rule where there was a  
15 record kept.

16 Now, school rules are enforced on a daily  
17 basis in the public school setting, and I can assure you  
18 that if a student swears or is vulgar in the school  
19 setting, whether it's in a classroom, in the hall, or in  
20 an assembly, school officials have taken corrective  
21 action. But most of the time we don't get an appeal  
22 from that.

23 Here there was also, as is shown in the  
24 record, there was a prior occasion the year before where  
25 a student used, actually in a ASB assembly, used

1 inappropriate speech. And indeed, the district called  
2 the student into the office, and in fact the principal  
3 talked to him and what we would consider disciplined  
4 him, told him that, you know, that better be stopped or  
5 he's going to be in trouble.

6 Now, Mr. Fraser construes that, he says, well,  
7 he knew that speech was given and he thought that the  
8 only that happened was the principal called him in and  
9 talked to him about it, big deal. I mean, he gives  
10 probably the best evidence we have of why the district  
11 in this case was compelled to take a more demonstrative  
12 action to impress upon the students that this was not  
13 appropriate speech in that particular forum, in that  
14 public setting.

15 If possible, I'd like to reserve the remaining  
16 time for rebuttal.

17 CHIEF JUSTICE BURGER: Very well.

18 Mr. Haley.

19 ORAL ARGUMENT OF  
20 JEFFREY T. HALEY, ESQ.  
21 ON BEHALF OF RESPONDENTS

22 MR. HALEY: Mr. Chief Justice, may it please  
23 the Court:

24 I will begin my rebuttal, my response, with  
25 some response to positions taken by my opposing counsel,

1 and I will begin with what was the most important error  
2 by opposing counsel in characterizing the record. He  
3 said that two teacher told Matt Fraser don't give it, is  
4 what he said.

5 I will quote from the records: "I told Matt  
6 that his speech was inappropriate and that he probably  
7 should not deliver it." That was the first teacher, who  
8 was most critical of the speech, Mrs. Hicks. That's at  
9 page 30 of the joint appendix.

10 The second teacher, I'm quoting: "My response  
11 at that time was that I told Matt that this would indeed  
12 cause problems and that it would raise eyebrows." That  
13 was the extent of his warning not to give the speech.  
14 None of them suggested that it might violate a school  
15 rule.

16 If fact, the first teacher, who was most  
17 critical of it, said in her testimony afterwards at the  
18 trial: "I wasn't aware that there was a school rule  
19 regarding that."

20 In this case, if the teachers don't have any  
21 idea that such a speech might violate a school rule,  
22 when they are charged with enforcement of the school  
23 rule as among their duties as teachers, the rule is  
24 clearly so vague and so lacking of adequate notice, at  
25 least when it comes to First Amendment rights, freedom

1 of speech, that they cannot punish a student who gave a  
2 speech after previewing it with three teachers.

3 QUESTION: Does the school have a written rule  
4 that one shall not swear in Latin class?

5 MR. HALEY: The written rule is the same rule  
6 that we're talking about here.

7 QUESTION: I know. I'm asking you, yes or  
8 no?

9 MR. HALEY: Yes, it does.

10 QUESTION: That one shall not swear in Latin  
11 class?

12 MR. HALEY: The rule does not say one shall  
13 not swear in Latin class. The rule says that obscene or  
14 profane language will be considered disruptive.

15 Certainly, the disruptive conduct exception  
16 articulated by Tinker can reach the content of speech,  
17 can reach speech which due solely to its content is  
18 disruptive. And I suggest in Latin class profanity  
19 would distract students from the lessons at hand, would  
20 show disrespect to the teacher, and would disrupt the  
21 order of the class, and would be disruptive of the  
22 educational process.

23 QUESTION: But you think it's all right in the  
24 assembly?

25 MR. HALEY: Well, we must distinguish



1 carefully between profanity or dirty words, which are  
2 relatively easily identified, and which have very few  
3 purposes that are other than to insult or to create a  
4 negative emotional reaction or to vent a negative  
5 emotional reaction, and sexual metaphors, which,  
6 especially in this case, did not have any such purpose,  
7 to insult or to vent an emotional reaction or to create  
8 a negative emotional reaction.

9 QUESTION: Suppose it were a school rule that  
10 explicitly said that speech that stimulated simulated  
11 sexual conduct would be disciplined, and then suppose  
12 this speech had been given. Also assume the rule was  
13 posted on the bulletin board of every room in the  
14 schoolhouse.

15 MR. HALEY: A rule which prohibited speech  
16 describing sexual conduct?

17 QUESTION: That stimulated simulating sexual  
18 conduct. What I'm interested in is whether, if adequate  
19 notice were given so that no one could have misconstrued  
20 it, that this sort of speech would result in punishment,  
21 what would your response be?

22 MR. HALEY: I think it's very difficult for  
23 students, or for that matter for anyone, to anticipate  
24 how other juvenile students will respond to any  
25 particular speech.

1 QUESTION: So you're saying that notice really  
2 doesn't matter?

3 MR. HALEY: I'm saying that a rule which  
4 prohibits speech that might stimulate a response by  
5 someone else which has a sexual character would be a  
6 rule that would be far too vague and too overbroad to  
7 withstand First Amendment scrutiny.

8 QUESTION: Can you conceive of any rule that  
9 would not be too vague?

10 MR. HALEY: Well, certainly a rule which  
11 prohibits obscene speech, and obscene speech --

12 QUESTION: You mean obscene in the Miller  
13 sense, our decision in Miller?

14 MR. HALEY: No. I think counsel is  
15 misconstruing the opinions of this Court when they  
16 suggest that Miller is the test that must be met for  
17 obscenity in the high schools. Ginsberg suggests that  
18 obscenity is a much lower standard, a much easier  
19 standard to meet for children, and this speech might  
20 well have been obscene for elementary schools or junior  
21 high schools under the proper Miller and Ginsberg test.  
22 I don't think that we need a full Miller test at the  
23 high schools.

24 QUESTION: How would you limit the use of  
25 "obscene" in this particular rule, then?

1 MR. HALEY: How would I limit the use of  
2 "obscene"?

3 QUESTION: Yes. That word was in the rule.

4 MR. HALEY: That word was in the rule. In the  
5 case of FCC versus Pacifica, there was a -- that rule  
6 prohibited indecent speech.

7 QUESTION: Yes.

8 MR. HALEY: This rule does not prohibit  
9 indecent speech. It only prohibits "obscene, profane  
10 language or gestures." When it refers to language, it's  
11 clearly talking about words, as in the result in the FCC  
12 case. It's talking about dirty words.

13 QUESTION: If it had prohibited indecent  
14 speech, would your position be different?

15 MR. HALEY: With respect to vagueness of the  
16 rule, it certainly would.

17 QUESTION: Well, Mr. Haley, supposing that the  
18 rule has simply prohibited this particular speech in  
19 haec verba, so that there could be no question that the  
20 person who was about to deliver the speech knew that it  
21 was prohibited by the rule. Do you think that rule is  
22 bad under the First Amendment?

23 MR. HALEY: The issue before -- we have two  
24 issues before us.

25 QUESTION: Can you answer the question?

1           MR. HALEY: One, whether the rule can survive  
2 scrutiny under vagueness and overbreadth; and two,  
3 whether this speech would be protected no matter what  
4 rule was promulgated by the school before it was  
5 presented.

6           QUESTION: I asked you a question.

7           MR. HALEY: If this speech cannot be  
8 protected, then certainly that rule would be sufficient  
9 to punish Mr. Fraser in this case.

10          QUESTION: And that is your answer, that a  
11 rule that prohibited this speech in so many words would  
12 be constitutional?

13          MR. HALEY: If this speech can be prohibited  
14 under the First Amendment.

15          QUESTION: Well, can you give me a  
16 non-hypothetical answer to my question?

17          MR. HALEY: Well, a rule which prohibits  
18 speech that's protected by the Constitution is not a  
19 valid rule.

20          QUESTION: I agree with you.

21          MR. HALEY: This Court has yet to decide  
22 whether this speech, although it's been decided by two  
23 courts below, is protected by the Constitution.

24          QUESTION: But what's your position?

25          MR. HALEY: My position is this speech is in



1 fact protected by the Constitution.

2 QUESTION: So that no matter how specific the  
3 rule in giving notice, it would be bad under the First  
4 Amendment?

5 MR. HALEY: That's correct.

6 QUESTION: Are you suggesting that the  
7 students were confused or this student was confused by  
8 the use of the word "indecent" or "obscene" instead of  
9 "indecent"?

10 MR. HALEY: Well, in fact this student was not  
11 given the handbook until after he was disciplined in  
12 this case, and so I'm not suggesting that he actually  
13 read the rule and was confused. But this is the rule  
14 that had guided the school for all the years that he had  
15 been at the school, and it had not been applied to  
16 speeches which used no profanity, were not in any way  
17 disruptive of a class or any curricular activity, or for  
18 that matter any extracurricular activity.

19 And there were speeches that had been given at  
20 the same nominating assembly one year earlier which  
21 contained a four letter word and contained a sexual  
22 reference. That student was not suspended from school.  
23 He was simply lectured in what I would suggest is an  
24 appropriate fashion under the First Amendment.

25 QUESTION: Mr. Haley, what if the student here

1 had, instead of the sexual innuendo in the talk,  
2 incorporated instead a string of profane words? Would  
3 that have survived First Amendment analysis?

4 MR. HALEY: Well, I think the proper standard  
5 for profane words in the high schools is the Tinker  
6 standard, and profane words might in most cases, almost  
7 all cases, be disruptive of the educational process.  
8 They would, when they're used from one student to  
9 another, tend to --

10 QUESTION: Well, let's suppose there was the  
11 same amount of disruption we had in this case, but  
12 instead of sexual innuendo, it was a string of profane  
13 words.

14 MR. HALEY: Whether each particular speech is  
15 protected by the Constitution depends upon the context  
16 of that speech. I can easily imagine that his use of  
17 profanity might have created antagonism between  
18 students, as a racial slur or a religious epithet might  
19 have, and yet --

20 QUESTION: Assuming the same amount of  
21 disruption that we have here, would my example create a  
22 problem under the First Amendment?

23 MR. HALEY: If the school had a rule which  
24 prohibited the use of dirty words --

25 QUESTION: The same rule that we have here.

1 We don't have the notice question. I'm interested in  
2 the First Amendment aspect.

3 MR. HALEY: It's a difficult question, but I  
4 think that it could be prohibited and the punishment  
5 would be appropriate.

6 QUESTION: Well, I'm not sure that I know the  
7 basis for the distinction then in your view for First  
8 Amendment analysis.

9 MR. HALEY: The basis is twofold for  
10 distinguishing between the use of profanity or dirty  
11 words and mere sexual allusion or imagery. First of  
12 all, we know what dirty words are, we know what  
13 profanity is. It's a much clearer line and a much  
14 easier standard to apply, both for administrators in the  
15 schools and for courts developing principled decisions  
16 under it.

17 QUESTION: Second of all, there are very few  
18 uses for profanity in the school context which do not  
19 tend to create antagonism between students or tend to  
20 create disrespect between students and teachers or tend  
21 to have divisive, disruptive effects within the school  
22 situation. There are so few uses that the school might  
23 constitutionally pass, adopt a rule which said its use  
24 is entirely prohibited.

25 I suggest that a better rule would say its use

1 in public is prohibited, and that between consenting  
2 students on the school grounds they might use such  
3 profanity, but any time it's used in public it is so  
4 inherently likely to disrupt that we're going to rule it  
5 out in all cases.

6 I think that would be constitutional.

7 QUESTION: In the last analysis, though, isn't  
8 it a regulation of the manner of speech, as opposed to  
9 viewpoint suppression?

10 MR. HALEY: Well, I do not see this rule as  
11 applied in this case as a time, place and manner  
12 restriction. I see it very much as a content  
13 restriction. That does not mean that it is  
14 impermissible in the schools, because certainly schools  
15 can regulate the content of speech under the Tinker  
16 standard -- disruption.

17 But in this case, this particular speech was  
18 not disruptive. The sexual metaphor that was used in  
19 this speech was not in any way intended to insult or  
20 create divisiveness between students or cause any  
21 disruption, and the record shows that there was no  
22 disruption.

23 First of all, when Matt Fraser was accused of  
24 violating a school rule no one mentioned that they  
25 thought he disrupted the educational process. They



1 presented five letters to him which characterized the  
2 speech as inappropriate, obscene, profane, et cetera,  
3 and those letters did not mention that they thought that  
4 there had been any disruption.

5 It wasn't until the attorneys for the school  
6 district got involved with this case that the  
7 justification on the basis of disruption was advanced.

8 QUESTION: Counsel, do you tell me that if I  
9 find that it was any one of those three words I have to  
10 rule against you?

11 MR. HALEY: That if it was profane or  
12 obscene?

13 QUESTION: You had a third one.

14 MR. HALEY: Or indecent?

15 QUESTION: Yes.

16 MR. HALEY: Well, the rule does not prohibit  
17 indecent speech. My Webster's Seventh Collegiate  
18 Dictionary does not define the word "obscene" to include  
19 "indecent." The dictionary which they cite includes  
20 "offensive to modesty," and I submit that any speech  
21 which is offensive to modesty cannot be prohibited  
22 within the school rules.

23 QUESTION: Well, a stupid speech might be  
24 offensive. A stupid speech might be offensive.

25 (Laughter.)

1 MR. HALEY: It might indeed. Stupid speeches,  
2 and for that matter humorous speeches, are protected by  
3 the Constitution.

4 QUESTION: Wouldn't you find this speech  
5 offensive to intelligent people?

6 MR. HALEY: No, personally I don't find it  
7 offensive. The record suggests that most of the  
8 students were quite entertained by the speech, that it  
9 did succeed in establishing a rapport with the students,  
10 and that they -- it succeeded in getting the candidate  
11 elected.

12 Sex is not a forbidden topic for students.

13 QUESTION: You think that speech got him  
14 elected?

15 MR. HALEY: His candidate.

16 QUESTION: Do you think that speech got that  
17 candidate elected?

18 MR. HALEY: The candidate might have been  
19 elected had the speech not been given.

20 QUESTION: Do you really want to blame that on  
21 600 people?

22 MR. HALEY: Say that again?

23 QUESTION: Do you want to blame that on 600  
24 people?

25 MR. HALEY: Well, the school district attempts

1 to justify its punishment on the assertion that some  
2 students in the audience might have been offended by the  
3 speech, and I don't think that's a sufficient  
4 justification to prohibit speech in our society. In our  
5 society, especially in the political context, which this  
6 speech certainly was, speech which offends a few people  
7 because they choose not to hear a speech of that sort is  
8 nevertheless protected by the Constitution. That is one  
9 of the elements of our system of government, our system  
10 of democracy, that gives it its strength.

11 QUESTION: Do you think this was political  
12 speech?

13 MR. HALEY: It is very much a political  
14 speech.

15 QUESTION: It's a student political campaign,  
16 but it's nothing like the speech in Tinker, which really  
17 related to politics. Here, do you think the words that  
18 are particularly involved had anything to do with the  
19 political campaign?

20 MR. HALEY: The messages that he conveyed, the  
21 content, which included sexual allusions, was part of a  
22 political speech.

23 QUESTION: Are you suggesting there could be  
24 no -- that the school couldn't regulate at all what one  
25 said in political speech?

1 MR. HALEY: No, I'm not suggesting that.  
2 Within the school environment, speech within political  
3 speech can be regulated which is disruptive of the  
4 educational process. Any disruption which is likely to  
5 spill over into the hallways or classrooms or create  
6 personal antagonisms between students might well be  
7 prohibited.

8 QUESTION: There's some evidence of disruption  
9 here, isn't there? Some teacher?

10 MR. HALEY: The teachers, before they talked  
11 to their attorneys, did not claim that the speech  
12 disrupted the educational process. The trial court  
13 specifically found that there was no disruption of the  
14 educational process.

15 Both of the judges in the majority of the  
16 Court of Appeals found that there was no disruption of  
17 the educational process, and the judge who dissented in  
18 the Court of Appeals in his dissenting opinion did not  
19 find any disruption shown in the record.

20 QUESTION: May I just ask you one other  
21 question, then I'll try to keep quiet. Do you think  
22 public schools have a duty to teach anything except  
23 reading, writing, and arithmetic, history, biology,  
24 chemistry?

25 Do you think they have any duty to teach



1 societal values, decency in speech, moral values?

2 MR. HALEY: I do very much think they have  
3 duties to teach moral values, decency in speech,  
4 societal values. But teaching is best accomplished  
5 through persuasion and example, not mere punishment,  
6 which tends to produce rebellion within adolescents.  
7 And that is a more than adequate alternative in this  
8 case for teaching those community values, for achieving  
9 that state interest.

10 QUESTION: The Court of Appeals' opinion here  
11 indicates that he intentionally and knowingly used  
12 sexual innuendo in his speech, and then it goes on to  
13 say: "Fraser did so because he thought it would be  
14 effective to establish a rapport with his fellow  
15 students and perhaps amuse them. Whether he succeeded"  
16 -- this is still the judge speaking. "Whether he  
17 succeeded or whether he went over the line of good taste  
18 and became offensive is for his fellow students to judge  
19 when they cast their ballots in the school election."

20 Is that really -- am I reading what a judge of  
21 the federal court said?

22 MR. HALEY: Well, I think the federal court

23 --

24 QUESTION: That the new test is whether it  
25 works?

1 MR. HALEY: Certainly the courts should not be  
2 in the position of deciding what is in good taste and  
3 what is not in good taste, what is appropriate and what  
4 is not appropriate.

5 QUESTION: Well, this suggests that if the  
6 candidate he was supporting had been defeated they might  
7 have had a different view, but because it worked it is  
8 all right. Is that your view, too?

9 MR. HALEY: That's not my reading of the  
10 opinion. My reading of the opinion --

11 QUESTION: Well, what does it say? I'll read  
12 it to you again: "Whether he succeeded or whether he  
13 went over the line and became offensive is for his  
14 fellow students to judge when they cast their ballots."

15 Is that your view, too?

16 MR. HALEY: I think that the judge is saying,  
17 and this would be my view, that the courts should not  
18 involve themselves in questions of whether the speech  
19 was inappropriate or distasteful. The question is  
20 whether this speech is protected by the First Amendment,  
21 and those who are in a position to judge whether it's  
22 distasteful or inappropriate are the students and, for  
23 that matter, the teacher and administrators who might  
24 tell the students and tell this particular student that  
25 the speech is distasteful and inappropriate and they

1 think that it should not be used in a political  
2 assembly.

3 But once the students are granted the forum to  
4 exercise student politics, to say you can have an  
5 experience in American politics, but it won't be a  
6 complete experience because we're not going to give you  
7 freedom of speech, we're going to censor what you have  
8 to say and limit it, we're going to prohibit from you  
9 speech which is on a very important topic to your peers,  
10 a topic that is constantly on the minds of teen-agers,  
11 really gives them an inappropriate message.

12 QUESTION: But this wasn't a speech about  
13 sex. I mean, it was about politics, with sexual  
14 innuendo in the speech.

15 Are you saying that if the school board  
16 decides that there shall be a campaign for student  
17 government and student body president, as apparently the  
18 State of Washington requires, they can place no limits  
19 on the methods of campaigning that aren't placed on  
20 campaigning in the main political forum?

21 MR. HALEY: Of course they can place the limit  
22 that the method of campaigning or the content of  
23 campaign speeches not be disruptive within the  
24 educational environment.

25 QUESTION: How about if they just said it's

1 got to be in good taste?

2 MR. HALEY: No, I don't -- once they grant the  
3 students a forum for political speech, for conducting  
4 their own political exercises, they cannot tell the  
5 students that their speeches must be in good taste.

6 QUESTION: What is they said that this forum  
7 is granted to you on this condition, that you speak in  
8 good taste?

9 MR. HALEY: I don't think that the schools can  
10 do that. I think that once they --

11 QUESTION: Can they require students' answers  
12 in a classroom to be in good taste?

13 MR. HALEY: Certainly they can. That is a  
14 curricular activity.

15 QUESTION: So if a student got up and made an  
16 answer in a classroom that was comparable to this, you  
17 would say that could be punished by the school?

18 MR. HALEY: Certainly. They could give him a  
19 bad grade, they could kick him out of the classroom. If  
20 it were a repeated problem, they could suspend him.

21 QUESTION: So the difference that you see is  
22 that this was in an organized assembly, rather than in a  
23 classroom?

24 MR. HALEY: This was in an extracurricular  
25 activity. When we're balancing the interests, the state



1 interests --

2 QUESTION: When you say "extracurricular  
3 activity," it was -- no student was free to leave this  
4 assembly and go home, was he?

5 MR. HALEY: Well, no. But whenever students  
6 are granted a period of time to conduct extracurricular  
7 activities, they aren't free to go home. They must  
8 choose one of the extracurricular activities or go to a  
9 study hall, and that was the choice here. There was  
10 only one extracurricular activity offered, participating  
11 in student politics.

12 But just because the state says they must  
13 offer the students an opportunity to conduct student  
14 politics doesn't mean that students have to attend.  
15 They could all have gone to study hall.

16 QUESTION: Is there anything in the record  
17 below that indicates what percentage of the student body  
18 turned out for this assembly?

19 MR. HALEY: The estimates are that almost all  
20 the students or virtually all the students did attend  
21 the assembly.

22 QUESTION: Are you familiar with the rules of  
23 the House and the Senate, at least by legend and I think  
24 accurately, are drafted originally by Thomas Jefferson?

25 MR. HALEY: No, I am not familiar with them.

1 QUESTION: Well, then you couldn't very well  
2 have a view as to whether or not this same speech on the  
3 floor of the Senate would be subject to censure?

4 MR. HALEY: No, I wouldn't venture a view on  
5 that.

6 QUESTION: Well, let's hypothetically -- we've  
7 gotten into some, you have -- suppose it did. Would you  
8 say the First Amendment would render the rule of the  
9 Senate unconstitutional, if this same rule were applied  
10 and a Senator were censured for making this kind of a  
11 speech on the floor of the Senate?

12 MR. HALEY: Well, if you would like my off the  
13 cuff analysis, it seems to me that once a group of  
14 people assemble together they can adopt rules among  
15 themselves to control their own behavior within the  
16 organization.

17 And likewise, the students themselves could  
18 have adopted a rule which would say: Within the conduct  
19 of our student politics or within our particular party,  
20 we're going to have a party assembly and meeting and  
21 we're going to say that none of our members will be able  
22 to give speeches of this sort, or this topic is taboo.

23 Yes, I do think they could do that as a matter  
24 of the rules of the body of an organization.

25 QUESTION: Well, do you mean the First

1 Amendment would permit the students to put a limit which  
2 the teachers and the school system could not?

3 MR. HALEY: If the students are voluntarily  
4 participating in an organization and that organization  
5 adopts rules for the conduct of its own meetings or  
6 activities, then yes, I think that organization can  
7 adopt such rules.

8 QUESTION: That's a unique view of the First  
9 Amendment. We've stricken statutes adopted by  
10 legislatures sometimes because they violated the First  
11 Amendment.

12 MR. HALEY: Well, you're asking for my off the  
13 cuff analysis and I'm viewing it as an organization that  
14 is analogous to a private organization.

15 The state has various interests in the public  
16 schools that must be balanced against the First  
17 Amendment interests within the public schools. In the  
18 classroom the interest tips strongly in favor of the  
19 state, because there are many sorts of speeches which  
20 based on their content might be disruptive of the  
21 educational process.

22 In the extracurricular activities, it tips  
23 much more the other way; and in student politics it tips  
24 the farthest of any of those extracurricular  
25 activities. Politics is an area where speech is

1 accorded its highest protection.

2           If we allow schools to tell students that they  
3 will have an experience in politics within America and  
4 then tell them that they can be punished if they give  
5 expression which the administrators find distasteful or  
6 inappropriate, but nothing more serious than that, we  
7 are teaching the students an ugly lesson, that those in  
8 power can suppress the speech of those with whom they  
9 disagree.

10           This is a pure speech case. This case does  
11 not involve the maintenance of discipline in the school,  
12 the control of the use of drugs, weapons or violence.  
13 It's not a situation where the school administrators  
14 need more tools to maintain an educational environment.  
15 If the educational environment were disrupted by this  
16 speech, yes, it could be prohibited. But it wasn't.

17           The teachers of this country believe that they  
18 have adequate tools to deal with this problem, that this  
19 is not a serious problem within the schools, when  
20 students present speech which contain sexual metaphors  
21 no different from what they're taught in the classes in  
22 Shakespeare. Romeo and Juliet is a standard text within  
23 the classes and there are sexual allusions and metaphor  
24 in Romeo and Juliet that are more explicit, that are  
25 actually describing sexual activity.



1           When students are allowed to -- are presented  
2 this in the classroom, teachers do not find that they  
3 have a problem dealing with this problem with students.

4           I will respond to the assertion of the captive  
5 audience. All audiences, of course, are to a certain  
6 extent captive. But the form of expression used in this  
7 case is not unusual for high school students. This is  
8 not something that the audience who attended this  
9 assembly would have been surprised to hear. They heard  
10 a sexual reference and a four letter word in a speech at  
11 a similar assembly one year earlier.

12           Sexuality is a topic that is of great interest  
13 to teenagers. Commonly known statistics show that a  
14 great number of teenagers are in fact becoming pregnant  
15 while in high school.

16           If we want to teach students to discuss the  
17 topic of sexuality properly, appropriately, responsively  
18 --

19           QUESTION: You're suggesting that this is part  
20 of the teaching process?

21           MR. HALEY: I'm suggesting that if the schools  
22 want to teach the students that this speech is  
23 inappropriate, they should tell that to the students.  
24 They should conduct -- convene an assembly of the  
25 students and give them a presentation on why this speech

1 is inappropriate, a presentation on what political  
2 speech in America is all about and what kind of speech  
3 in the adult world is persuasive and what is offensive.

4           They should present that to all the students.  
5 They could present that to Matt Fraser himself. And  
6 that -- and the National Education Association has taken  
7 the position that that is a more than adequate tool for  
8 dealing with this problem, that sexual metaphor is not a  
9 serious problem in the schools, unlike other discipline  
10 problems.

11           QUESTION: The NEA represents teachers, not  
12 school administrators, doesn't it?

13           MR. HALEY: That is correct.

14           My opposing counsel suggests that speech can  
15 -- that the local rules should be adopted by local  
16 school boards and with presumably the approval of the  
17 local parents, and that those rules ought to apply  
18 whether -- no matter what the rules are. Well, the  
19 cases of Tinker and West Virginia versus Barnette show  
20 that that cannot be the law in this country, Tinker and  
21 West Virginia versus Barnette make it clear that the  
22 Constitution does restrict the latitude of local school  
23 boards from adopting rules of that nature.

24           Let me return to the vagueness issue. The  
25 construction that the school board has applied in this

1 case to the rule was made after the speech was  
2 presented. There is nothing that was done to construe  
3 this rule or give the students notice that a rule  
4 prohibiting obscene, profane language would apply to a  
5 speech which contains no profanity or no speech -- no  
6 words which by themselves would cause offense.

7 QUESTION: Well, he must have been somewhat  
8 concerned about it, don't you think, Mr. Haley? He went  
9 to some teachers and asked their judgment on it.

10 MR. HALEY: I do think that shows that he was  
11 concerned that it might violate a school rule, and that  
12 when he was told -- when none of the teachers suggested  
13 that it might violate a school rule and none of them  
14 took any action to block the presentation of his speech,  
15 none of them told him not to give the speech or went to  
16 the administration and said --

17 QUESTION: Well, they came pretty close to  
18 telling him not to give the speech. If he has any  
19 sensitivity, he'd know that that is what they were  
20 saying.

21 MR. HALEY: The record shows that the teachers  
22 responded in the proper fashion under the First  
23 Amendment. They gave more speech to present their view  
24 of the propriety of his speech and they indicated to  
25 him, but Matt, we will leave it up to you; if you think

1 that this is a speech that you want to present at that  
2 political assembly, then we're not going to stop you.

3 QUESTION: They said that in so many words?  
4 You haven't read those words to us.

5 MR. HALEY: Well, the third teacher, whose  
6 testimony was not explicitly stated in the record of the  
7 trial court, but whose analysis of the speech was  
8 presented in a letter given to the administration, which  
9 is reprinted at the end of the --

10 QUESTION: Why did he go to the teachers at  
11 all?

12 MR. HALEY: Well, the record does not suggest  
13 why he went to the teachers at all in any specific  
14 manner. My understanding from working on this case from  
15 the beginning is that he went to the teachers for two  
16 reasons: One, to see whether they thought that he would  
17 get in trouble for presenting the speech or whether this  
18 was something that they wanted to stop; and two, because  
19 he had a relationship with these teachers of student and  
20 teacher and he wanted to show them what he was doing, he  
21 wanted to show them how clever he was and how artfully  
22 he had created a speech which would be very entertaining  
23 to his classmates.

24 QUESTION: You regard this as a clever  
25 speech?



1 MR. HALEY: I believe the record contains the  
2 analysis, the comments of some of the people in the  
3 school, teachers or students, who did view the speech as  
4 clever. I think within the context of the adolescent  
5 mind and the kinds of things that they're interested in,  
6 they did find it very clever.

7 My time is up.

8 CHIEF JUSTICE BURGER: Mr. Coats.

9 REBUTTAL ARGUMENT OF  
10 WILLIAM A. COATS, ESQ.,  
11 ON BEHALF OF PETITIONERS

12 MR. COATS: Thank you, Mr. Chief Justice, and  
13 may it please the Court:

14 By way of response, Mr. Haley did read from  
15 the record, but he didn't go on. And I did ask, when  
16 the teacher said, I told him I thought it could cause  
17 problems, I said: Well, could you explain what you  
18 thought you implied?

19 And the teacher said: Well, I think by saying  
20 that it could cause problems and raise eyebrows, I also  
21 realized that the speech was indeed ambiguous and could  
22 be interpreted a number of ways. So rather than debate  
23 with Matt the morality and profanity in it, I thought it  
24 might be best to just point out or at last try to reason  
25 that it could indeed cause problems as far as his

1 remaining few weeks at the school. I didn't know what  
2 the consequences could be.

3 And indeed, the teacher does not administer  
4 the discipline. But when you read, a fair reading of  
5 the record, when you realize this is ten minutes before  
6 the speech, when these teachers had other students  
7 present, I think that they went -- their comments could  
8 not be construed as giving this student license to say  
9 anything he wants to say at that assembly.

10 I want to respond first to Justice Powell's  
11 question, is this political speech? And Justice Powell,  
12 I'd refer you to this Court's decision in Conick versus  
13 Meyers, and in that case the Court considered speech  
14 between an assistant district attorney, or actually a  
15 petition an assistant district attorney circulated in  
16 the office, and she was fired as a result of that  
17 petition.

18 And this Court in considering that case said  
19 that there was only one question in that petition that  
20 had any public significance and the rest of it was just  
21 an internal communication within the office, and that  
22 this Court should not involve itself.

23 We would suggest to you that that case applies  
24 here, that there is no big political issue being  
25 discussed. It was a crude joke.

1           Secondly, I want to follow up on Mr. Justice  
2 Renquist's question about, does it make any difference  
3 is this is a classroom or an assembly? And I would  
4 suggest to you that it's not up to Mr. Fraser to  
5 determine the school district's curriculum. And indeed,  
6 what the statute says is that a school district shall  
7 have an associated student body, and it's under the  
8 control and direction of the board of directors.

9           Now, if the board of directors concludes that  
10 the best educational environment is a school assembly,  
11 that that's the proper place to inculcate values, that  
12 that's the proper place to in fact allow the students to  
13 learn public discourse, that that does not change any of  
14 the factors which give school districts the authority to  
15 regulate the content of speech in a school setting.  
16 There is still the relationship of student to teacher.  
17 There are still other students around.

18           Now, he tried to distinguish away the captive  
19 audience. But I would suggest to you that what he's  
20 suggesting is that in order to participate in your  
21 school activities such as this, in your own school  
22 government, you should have to put up with this type of  
23 behavior. That's clearly not the law.

24           Now going to the issue of notice and this  
25 Court's concern about a disruptive conduct rule, I

1 think, first of all, it's important you understand how  
2 these rules are adopted, and I think the record is  
3 clear, first of all, that we do distribute student  
4 codes.

5 This is the total student code for Bethel.  
6 Mr. Fraser testified that it was available to him. Now,  
7 we can't force him to read it. But the board of  
8 directors sets out its rules.

9 QUESTION: They were passed out to the  
10 students?

11 MR. COATS: It's available in the school for  
12 students to take.

13 QUESTION: I know also that a \$2 million  
14 portrait is also available to me if I put up \$2 million  
15 for it. Was it given to the students?

16 MR. COATS: Mr. Justice Marshall, I don't --

17 QUESTION: Yes or no?

18 MR. COATS: It was available to the students  
19 in the office, where they could pick it up without cost  
20 and where it was available to them. Now, I cannot say  
21 it was passed out in class.

22 QUESTION: But you had to go to the office to  
23 get it?

24 MR. COATS: You would have to go to the office  
25 to get it, is my understanding. It was clearly



1 available, however. We don't pass out, for example,  
2 criminal justice statutes either, but they are  
3 available.

4 I suggest to you that even the argument that  
5 the teachers should somehow be able to waive -- even if  
6 the teacher said the speech was all right, they  
7 shouldn't be able to waive and undo the board of  
8 directors' own rule.

9 Now, in looking at the rule, I would point out  
10 that, in the area of vagueness and overbreadth, that  
11 outside of the criminal justice area this Court has  
12 recognized a much broader standard. For example, in the  
13 case of Arnett versus Kennedy, this Court held that a  
14 standard of efficiency of the service is a basis for  
15 firing an individual.

16 In almost every labor contract throughout  
17 these United States, the standard for disciplining  
18 employees is cause or just cause. In addition, in the  
19 State of Washington the standard for firing teachers is  
20 sufficient cause, without any further elaboration.

21 These rules do not have to meet the same  
22 specificity requirement as criminal statutes.  
23 Furthermore, it would be totally impractical,  
24 impractical for two reasons --

25 QUESTION: What is a teacher gave this speech

1 at an assembly like this? Could he be fired under the  
2 sufficient cause rule?

3 MR. COATS: Your Honor, I think if a teacher  
4 gave that speech at a school assembly, it would be a  
5 proper basis for disciplining that teacher and it would  
6 be --

7 QUESTION: Could he be discharged under the  
8 sufficient cause rule, do you think?

9 MR. COATS: I would have some question of  
10 whether, if it was a first offense and there was no  
11 prior offense, whether we would --

12 QUESTION: Assume it was a first offense and  
13 he just thought it would be a bright idea and a real  
14 clever speech.

15 MR. COATS: The reason why it's difficult for  
16 me to respond yes or no is that it is a sufficient cause  
17 standard. I have no doubt there'd be a basis for  
18 discipline. Now, whether we could sustain a discharge  
19 in front of an independent hearing officer, I have some  
20 question in my mind whether it's severe enough, whether  
21 the penalty fit the crime.

22 QUESTION: If the nature of the penalty makes  
23 a difference, would you suggest that perhaps in this  
24 context maybe you could have called the student in and  
25 given him a severe lecture, but maybe not deprive him of

1 the right to graduate? Or do you think that it doesn't  
2 make any difference?

3 MR. COATS: We didn't deprive him of the right  
4 to graduate.

5 QUESTION: Well, I suppose you could have,  
6 though, couldn't you?

7 MR. COATS: Yes, we could. There's no doubt  
8 and I think there's a reasonable education debate on  
9 what was the appropriate punishment here. But I'd  
10 suggest to you that that's not a question that the  
11 federal court need answer. That's something that's  
12 vested in the sound discretion of the public school  
13 administration, following the procedure --

14 QUESTION: If you're right, and you may well  
15 be, under this rule he could have been expelled from  
16 school and there'd be no constitutional objection?

17 MR. COATS: I don't think it's a First  
18 Amendment issue. I think in any discipline case there's  
19 a due process issue of whether the punishment fits the  
20 crime. You'll note in the State of Washington --

21 QUESTION: But one of the elements of the  
22 crime is the fact that it is speech?

23 MR. COATS: There's no question he's being  
24 punished for his speech here, and that that, you know,  
25 whether or not we can regulate that speech is clearly a

1 First Amendment issue. Now, once we're over that  
2 hurdle, and assuming this Court says yes, you can  
3 regulate this particular speech, the issue is then  
4 what's the effective way of doing it, should it have  
5 been a two day suspension or should we just talk to him,  
6 should it have been more, that seems to me to be an  
7 issue that the First Amendment does not dictate.

8         The First Amendment was never designed to  
9 dictate curriculum or punishment in public schools. I  
10 think that is something that's clearly vested in the  
11 discretion of the school officials, within the  
12 parameters of the due process rules under which we  
13 operate.

14         And when you look at the rule and you judge  
15 its content, I think it's important to note that in  
16 Washington the rules aren't drafted by lawyers. We have  
17 a statute that requires that students, that parents and  
18 administrators actually work on our codes and adopt  
19 them; that the legislature has adopted a policy of  
20 participation of those who have the greatest stake in  
21 the educational outcome to actually work on these rules  
22 and adopt them.

23         So when you look at the word "obscene," most  
24 of the people who are drafting this have never heard of  
25 Miller and California, I would suggest, and are not



1 aware of the standards set forth therein; and that the  
2 district's hearing officer was correct in looking at its  
3 common and ordinary meaning, which includes indecent.  
4 And so I think that we would hope that you would look at  
5 the context of the school rules, realizing that they're  
6 not drafted by attorneys for attorneys.

7 CHIEF JUSTICE BURGER: Your time has expired  
8 now.

9 MR. COATS: Thank you.

10 CHIEF JUSTICE BURGER: Some of the Justices  
11 may be interested in seeing that booklet. Would you  
12 leave it with the clerk?

13 MR. COATS: Indeed. It's Exhibit B in the  
14 record, by the way.

15 CHIEF JUSTICE BURGER: It is an exhibit, too?

16 MR. COATS: It's Exhibit B in the record, but  
17 I will leave a copy for the Court gladly.

18 Thank you.

19 CHIEF JUSTICE BURGER: Very well, gentlemen.  
20 Thank you, gentlemen. The case is submitted.

21 (Whereupon, at 2:01 p.m., the oral argument in  
22 the above-entitled case was submitted.)  
23  
24  
25

# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1667 - BETHEL SCHOOL DISTRICT NO. 403, ET AL., Petitioners V.

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MATTHEW N. FRASER, A MINOR AND E.L. FRASER, GUARDIAN AD LITEM

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

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