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

2 (12:58 p.m.)

3 CHIEF JUSTICE REHNQUIST: We will hear arguments
4 first this afternoon in No. 86-836, Hazelwood School District
5 v. Cathy Kuhlmeier.

6 Mr. Baine, you may proceed whenever you are ready.

7 ORAL ARGUMENT OF ROBERT P. BAINE, JR., ESQ.

8 ON BEHALF OF PETITIONERS

9 MR. BAINE: Thank you, Mr. Chief Justice, and may it
10 please the Court:

11 This case come before the Court to resolve the issue
12 of whether a school sponsored high school newspaper produced
13 and published by a journalism class as a part of the school
14 adopted curriculum under a teacher's supervision and subject to
15 a principal's review is a public forum for the purpose of the
16 First Amendment.

17 During the 1982-1983 school year, the Hazelwood East
18 curriculum included two journalism classes, Journalism I and
19 Journalism II. Enrollment in Journalism II required the
20 successful completion of --

21 QUESTION: No Court ever decided that question you
22 just posed, did they?

23 MR. BAINE: I believe the Eighth Circuit, Your Honor.

24 QUESTION: I thought that they said that it was not
25 part of the curriculum.

1 MR. BAINE: They said that it was not part of the
2 curriculum.

3 QUESTION: But your question was whether a journalism
4 as part of a curriculum is a public forum.

5 MR. BAINE: The trial court found that it was found
6 that it was a part of the curriculum and was not a public
7 forum.

8 QUESTION: I know.

9 MR. BAINE: The Eighth Circuit then found that
10 because of the numerous ideas expounded in the paper that it
11 was not a part of the curriculum. And I think that is really
12 the issue that is here before the Court is whether or not the
13 school having adopted a curriculum matter in the teaching of
14 journalism through a textbook and through a classroom setting
15 where the teacher according to the written curriculum attended
16 both the original teaching involving the textbook course which
17 was Journalism I and then in Journalism II continued with that
18 same class --

19 QUESTION: Do you think that just the issue of
20 whether something is part of the curriculum or not is really a
21 question for us?

22 MR. BAINE: I think, Your Honor, whether or not the
23 matter is a public forum is a matter for you, because this
24 then --

25 QUESTION: But I do not think that the Eighth Circuit

1 would have held that yes, this is a part of the curriculum but
2 it is still a public forum.

3 MR. BAINE: The Eighth Circuit found --

4 QUESTION: That was not a part of the curriculum.

5 MR. BAINE: There was a finding of fact on the part
6 of the trial court, and the Eighth Circuit never really did
7 find that the findings of the trial court were clearly
8 erroneous. What they did find was because of the diverse
9 opinions that were allowed to be present in there that the
10 newspaper was in fact a public forum. I do not think that they
11 really reversed any of the findings of fact.

12 QUESTION: Well, Mr. Baine, was is it a regulation or
13 something at the beginning of the school year that said that
14 the publication shall be consistent with the First Amendment or
15 something?

16 MR. BAINE: No, Mr. Justice, it was not that. On two
17 occasions, there were printed in the paper statements not
18 authorized by the board or anybody who developed in the
19 evidence. But there did appear on two occasions that the First
20 Amendment rights of the students would not be abridged. That
21 there were articles appearing, one was in 1980 and one was in
22 1982.

23 QUESTION: Excuse me, that appeared where?

24 MR. BAINE: That appeared in the paper itself.

25 QUESTION: In the paper itself?

1 MR. BAINE: In the paper itself. But there was no
2 developed evidence before the trial court how that all came
3 about, and no one was able to find out how that ever got in the
4 paper, but it certainly was not adopted by the board of
5 education.

6 QUESTION: But it obviously was by the teacher, the
7 journalism class teacher, or it would not have been in the
8 paper, I take it.

9 MR. BAINE: Right. And again I would respectfully
10 suggest that the journalism course is taught by the teacher in
11 accordance with the adopted curriculum. And the curriculum
12 stated specifically how it would be adopted, and how the story
13 ideas, and how the course would be developed.

14 QUESTION: Did it not appear in the editorial section
15 of the paper?

16 MR. BAINE: It did.

17 QUESTION: Did not the editorial section of the paper
18 say that the editorials did not represent necessarily the views
19 of the school or the school administration?

20 MR. BAINE: It did that. There was a provision in
21 the Hazelwood policies that matters could be submitted to the
22 school newspaper by persons outside such as letters to the
23 editor, which could be and as a matter of fact it was
24 developed. In this case, there was in the newspaper in
25 question a letter to the editor which was edited by the teacher

1 of the class and put in there. But it was something that was
2 infrequently used.

3 Basically speaking, the Hazelwood East Spectrum was a
4 newspaper that was produced as a result of students
5 successfully completing a journalism course called Journalism
6 I.

7 QUESTION: Mr. Baine, let me ask you one more
8 question.

9 MR. BAINE: Sure.

10 QUESTION: Do you think that the Eighth Circuit saw
11 this case as kind of an estoppel case where the school board
12 had in effect told the students you are going to have complete
13 First Amendment rights, or do you think that they saw it as a
14 case that it did not make any difference what the school board
15 said, that once you some students over loose on a newspaper
16 that they have got those First Amendment rights whether the
17 school board wants to have it or not?

18 MR. BAINE: The concern that I saw in the Eighth
19 Circuit's opinion which was not supported by the findings of
20 the trial court in this case was the many and diverse articles
21 that appeared in the paper that the Eighth Circuit seemed to
22 find in the record were student initiated or student sponsored.
23 And therefore, having opened the Hazelwood East Spectrum to
24 articles of diverse opinion, the board of education and the
25 principal would then have been estopped --

1 QUESTION: Lost all of its power.

2 MR. BAINE: Lost control over the paper. And we
3 submit that the record that we developed in the trial court and
4 that the trial court found in its 21 findings of fact did not
5 support that, nor did the Eighth Circuit when they found that
6 find anything clearly erroneous in the findings of fact of the
7 trial court.

8 So what we have here, again if I may respectfully
9 continue, is a newspaper which is generated in the second
10 semester by students who have been taught certain values in
11 journalism such as responsible journalism, journalistic ethics,
12 copying, writing, story development, ideas and that sort of
13 thing, and then these students are brought into Journalism II
14 to practice that art under the supervision of that teacher.

15 And in the practice of that art the teacher, as the
16 evidence in the trial court was adduced, the teacher then gave
17 these students story lines to be developed. The students
18 developed those story lines, and those story lines were then
19 submitted back and forth to the teacher for as many as four or
20 five revisions.

21 Evidence in the trial court indicated by the
22 Respondent's own witnesses that a story, for example, in this
23 newspaper on diabetes was not printed at all. So the student
24 had gone through the process of developing a story on diabetes,
25 but it just was not printed.

1 Students were given grades whether they printed a
2 story in this publication or not. So they were graded not only
3 on whether there was ultimate publication or whether their
4 article or their effort was not published. Some students did
5 not participate particularly in the writing of articles, but
6 their major job was in the layout, editing, and other things.

7 In fact, the three Plaintiffs in this case are not
8 the authors of the story in question, but rather were active in
9 the production of the newspaper as layout editor, and one of
10 the Plaintiffs I think assisted in the design of a graph that
11 was used in the story.

12 In the May 13th issue of the Spectrum, it was
13 proposed to be a six page newspaper. One additional fact which
14 I think is important in this case is that the teacher who had
15 taught these students in the fall and was teaching these
16 students in the spring semester on April 29th was granted
17 permission by the board of education to leave education and go
18 get a job, had a better offer in private industry.

19 The board of education through the administration
20 appointed an administrative level journalism teacher as a
21 substitute teacher. The trial court found that this substitute
22 teacher was a highly qualified teacher, and as a matter of fact
23 was the administrative person to supervise journalism. And the
24 reason that they appointed such a qualified person to do that
25 is that it was at the end of the year, and two responsibilities

1 remained of the Journalism II class.

2 One was the production of the final two newspapers,
3 one of which was the May 13th edition, and the other one was
4 the class legacy paper which came out later, both of which
5 according to the testimony were about 90 percent complete when
6 teacher number one left and teacher number two came in. And
7 the other was the production of the yearbook, a highly complex
8 project on the part of the students, which needed to be
9 completed. So the administration sent in a very qualified
10 teacher.

11 When that teacher received the articles from the
12 students and reviewed them, he attempted to contact, as the
13 evidence in trial court showed, he attempted to contact the
14 principal about these stories as he had an objection to them.
15 He was unable to do that, so he went and put them into proof
16 and sent the proof to the principal, and asked the principal
17 his opinion about it.

18 And the principal said that those stories because
19 they involved the subject matter that was in them, the story of
20 the three young pregnant ladies who told how they got pregnant,
21 whether they used birth control, the reaction of the father of
22 the child, the reaction of their parents to the pregnancy, and
23 other items, and the article on divorce where a freshman gave a
24 story of why or the recounting of why she believed her parents
25 got divorced and her name was involved, the principal said to

1 Mr. Emerson, who was then the substitute teacher, what can be
2 done about this.

3 Now you recall that I stated that it was a six page
4 newspaper. The principal thought at this time and the trial
5 court found, and no one has set aside this fact, the trial
6 court found that the principal believed that Mr. Emerson, the
7 substitute teacher, was at the printers and he needed a yes or
8 no answer at this point. If he said yes, it would be printed;
9 if he said no, something had to be done.

10 The principal said what could be done, and Mr.
11 Emerson said we can delete page four and five, and make page
12 six into page four, and we have got a four page paper. The
13 principal said go ahead and do that, and that is what happened.
14 So the articles that the principal had an objection to were the
15 articles involving the recounting of the tales of the pregnancy
16 of three school girls and the recounting of the tale of why the
17 parents of one of the freshman, in fact several parents of
18 students, but particularly one named freshman's parents got a
19 divorce, were deleted and the paper was then printed and
20 distributed to the class.

21 In analyzing the First Amendment issues, the District
22 Court distinguished in this case between privately initiated
23 speech which has strict constitutional rights, and student
24 speech in the context of a school sponsored publication or
25 activity that involved curricula matters.

1 QUESTION: Mr. Baine, we have not analyzed First
2 Amendment issues in the school context in public forum terms,
3 have we, have we not usually tested the First Amendment issue
4 by the Tinker test?

5 MR. BAINE: I think, Mr. Justice, that in looking at
6 Fraser, which decided on the same day, that Fraser had a
7 curricula aspect to it.

8 QUESTION: But the opinion in Fraser did not turn,
9 did it, on a public forum analysis?

10 MR. BAINE: But it did not turn on the Tinker
11 analysis either. It turned on the fact of whether or not in
12 the role of the school in inculcating values in students that
13 the school officials had some interest loco parentis in the
14 outcome. And in this case particularly, you see the
15 principal's interest in protecting.

16 QUESTION: But did not Fraser analyze the situation
17 as whether or not the speech had been disruptive?

18 MR. BAINE: I think that it analyzed it a little bit
19 differently than that. In fact, there was no indication in
20 Fraser other than a few laughs that the speech was disruptive.
21 And I think that the Court decided it on really the content and
22 the people involved in the audience.

23 And here is what the trial court did in our case. It
24 said while that there was nothing in there was really that
25 outstandingly bad, but they reckoned that the principal could

1 understand the school audience as well as anyone else in that
2 some of the information in those articles might make it appear
3 that because it was produced in a classroom exercise that the
4 school in effect had condoned the activities of these children,
5 of these young ladies who had gotten pregnant, for example.
6 And utmost in the principal's mind --

7 QUESTION: Even if the school would not appear as
8 condoning it, the school was certainly providing the paper and
9 the ink and the money to write the story, right, which was not
10 the case in Tinker?

11 MR. BAINE: Well, that is true.

12 QUESTION: It was their own arm bands in Tinker, they
13 brought them from home, the school did not provide them?

14 MR. BAINE: Right. This was not written and carried
15 about in the school.

16 I think that in looking at the story and the way that
17 it was presented in the trial court and not found to be
18 erroneous by the Court of Appeals was the fact that the lead in
19 these three pregnancy stories, the names have been changed to
20 grant these young ladies anonymity. And the trial court found
21 that the principal by reading the article felt that he knew who
22 the children were, who the young ladies were. And if that was
23 the case, he felt that others would know who they were. And if
24 the purpose espoused on the article was to grant them
25 anonymity, the article failed.

1 Now again we have to take this in the context of the
2 fact that the trial court felt that when the principal had the
3 question placed to him by the substitute teacher that he had to
4 make a decision, you know. And he looked at the article and he
5 said I know who these girls are. He looked at the article
6 about the divorce, and he said he know who this girl is and I
7 know who her parents are. I do not think that the parents have
8 had an opportunity to respond, the issue of fairness and
9 balance is missing in that article. The trial court
10 specifically commented on his finding of the credibility of the
11 principal in that case.

12 So when you take into consideration the fact that the
13 trial court found that there was a protectable interest even
14 espoused by the article, and that is the girls should remain
15 anonymous and the article did not protect that, we feel that
16 the court found that it was not a public forum, that it was
17 adopted on a curriculum basis, and that as a curricula writing
18 that it was subject to the control of the principal.

19 The Eighth Circuit really said well, the school can
20 only do that when the issue would subject the school to tort
21 liability. And in this case, the Eighth Circuit felt that the
22 only liability was for the invasion of privacy of the girls.
23 And since the girls had given their consent, obviously their
24 privacy could not be invaded.

25 We differ with that somewhat, since also the article

1 mentioned the parents of the girl, the husband of the girl, the
2 decision of whether or not to use birth control, and how the
3 sexual activities occurred. So there were other people who
4 were interested.

5 But we do not think that tort liability is really an
6 appropriate standard. That here the interests that a school
7 has in the well-being of the students far exceeds whether or
8 not the coffers of the district are going to be damaged by the
9 onslaught of litigation. Although Judge Wolman in his dissent
10 said that the majority's decision in the Eighth Circuit put the
11 school district between the Scylla of suit by the students and
12 the Charybdis of suit by somebody else who was offended by what
13 the students wrote.

14 But still and all, we feel that the true test is
15 whether or not, as expressed in Fraser and similar cases,
16 whether or not the school district has an interest in the
17 well-being and the nurturing of the students who were there.

18 QUESTION: And you would fix the limits at that point
19 I take it, the limits of what the school and its principal can
20 do, what I am trying to find out is what your standard is?

21 MR. BAINE: I think that it is similar to the
22 standard, Mr. Justice, as you said in Pico that while there may
23 be some things that cannot be removed from a library, a school
24 can make a decision whether or not those articles or books are
25 suitable for different age groups.

1 In this case, whether or not involving students in a
2 public telling of their life and putting it in a semi-official
3 publication of the school district, I think that is not a hard
4 decision for the principal to make. And certainly discussing
5 the family life, the private lives of the family members who
6 make up the patrons of the district, is not appropriate fare
7 for the school newspaper. It would give an opinion to the
8 students that there was some bridge or bar between the school
9 and the community that really does not exist. So I would
10 submit that --

11 QUESTION: Well, you would go further than that,
12 would you not, you would say that the school could censor the
13 paper if it had a lot of misspelling in it, would you not?

14 MR. BAINE: Well, that, of course, is the Reinke
15 case, Judge, which the Eighth Circuit rested quite a bit on it.
16 And according to Reinke v. Cobb County, the Federal District
17 Court there found that the Tinker standard applied to school
18 newspapers would not allow the teacher to even correct
19 misspellings.

20 QUESTION: No, I am asking what you would say.

21 MR. BAINE: I would say that defeats the issue of
22 journalism. But one agreement that I guess that we
23 had in --

24 QUESTION: What if the journalism professor just
25 thought that this article is in bad taste?

1 MR. BAINE: Well, in the scheme of things, as the
2 journalistic courses are set up at the secondary level, the
3 teacher has a lot of control over good taste. One of the
4 things that they were to learn in Journalism I was that
5 business of taste and the community standard. Where that is, I
6 think that is best left decided at a local level.

7 QUESTION: You would say that good journalists have
8 good taste, and that you can teach that in a journalism class?

9 MR. BAINE: Well, I think that you can teach not good
10 taste, but I think that you can teach an acceptable standard
11 which does not suppress viewpoint, all right, and then allow
12 the student and everybody else to grow as their time and
13 maturity grows.

14 QUESTION: Mr. Baine, supposing in this particular
15 journalism class the faculty and the school board said we are
16 going to let you put out a student newspaper and it is a little
17 bit devoted to journalism, but one thing that we want you to
18 understand above everything else is that the faculty advisor
19 has the absolute authority to censor anything if he is a man or
20 she if she is a woman wants to, it may be arbitrary but if you
21 come into the class that is what you are going to come up with.

22 MR. BAINE: Well, as a matter of fact --

23 QUESTION: Do you think that would violate the First
24 Amendment if the faculty advisor goes ahead and says look, I
25 just do not think much of this article, it does not suit me?

1 MR. BAINE: Well, Mr. Chief Justice, I think
2 that --

3 QUESTION: Can you answer the question?

4 MR. BAINE: I think that they could do that, yes. In
5 fact, I think that is what they did do when they adopted the
6 curriculum and the curriculum guide indicating that the teacher
7 was in fact an editor and not a censor. The only objection
8 that I would have with the word that you used in your question
9 was the word censor. Because I really believe that what a
10 teacher does in that case is edit.

11 QUESTION: Well, it is really kind of a fine point of
12 language. Because I suppose that the final editor might be
13 viewed as a censor, too, if that person does not agree with
14 what the people beneath him have done and changes it. You
15 know, some people might call it editing and other people might
16 call it censorship.

17 MR. BAINE: Well, the only distinction that I have
18 between censorship and editing is that censorship in my opinion
19 is somebody who is outside of the process who comes in and says
20 for some reason or other you have violated whatever you have
21 violated and I want to stop that publication.

22 QUESTION: You are saying here that the teacher was
23 part of the process.

24 MR. BAINE: Part of the process and defined by the
25 curriculum to be so and encouraged to be so, and found by the

1 trial court to be active. And again we get back into the story
2 line ideas coming from the teacher, the revision process coming
3 from the teacher, the adoption and the approval.

4 QUESTION: Mr. Baine, what that really adds up to is
5 no First Amendment protection then in that circumstance, none
6 for the students.

7 MR. BAINE: Mr. Justice, I do not believe that there
8 never is no First Amendment protection.

9 QUESTION: Well, where, in light of what you
10 answered?

11 MR. BAINE: But I believe that in assigning a
12 classroom exercise that the overriding interests of academic
13 freedom, you know, in order to teach, that there is a First
14 Amendment right inherent in teaching I think that was indicated
15 in the Ewing opinion that said that somewhere there is a
16 conflict between the academy's right to teach and the person's
17 right to speak.

18 In this case, the academy is the Hazelwood School
19 District and it is trying to demonstrate local values and
20 journalistic standards. And while the argument could be
21 endless as to what the technique would be in resolving those, I
22 think that is a balancing between that and absent a viewpoint.

23 Now again we go back to the trial court. Because it
24 was established clearly in the record that divorce, teenage
25 pregnancy, teenage sexuality, abortion, these were articles

1 that had been printed in the paper before. What had never been
2 printed in the paper before was Mary Jones' abortion, or Mary
3 Susan's pregnancy, or John Doe's divorce.

4 QUESTION: Mr. Baine, may I just interrupt. I just
5 wanted to ask you if you really meant what you said in answer
6 to Chief Justice Rehnquist's question. You said that the
7 teacher could have just total power or censorship. That would
8 mean that he could exclude all political articles that favored
9 the Republicans and print only those that favored the
10 Democrats.

11 I do not think that you mean that, do you or do you?

12 MR. BAINE: Well, first of all again, I would beg
13 that the word censorship in the classroom be eliminated.

14 QUESTION: Well, forget the label, could they do
15 that, could you give the authority to the teacher?

16 MR. BAINE: I would say that that is not the facts
17 that we have in this case.

18 QUESTION: I understand that it is not the facts.

19 MR. BAINE: And that is a tough hypothetical.

20 QUESTION: But what is your answer to it? I mean you
21 gave one answer to the Chief Justice, and I wonder if that is
22 the answer.

23 MR. BAINE: The answer is if you can establish
24 clearly on the part of the school a viewpoint of discrimination
25 that that would abridge fundamental First Amendment rights.

1 QUESTION: So then the school could not give total
2 power to the teacher to exclude anything that he wanted to?
3 You cannot have it both ways.

4 MR. BAIN: I mean there is no evidence in this case
5 that that is a fact.

6 QUESTION: That does not help us much.

7 QUESTION: Let us talk about viewpoint
8 discrimination. The principal could not exclude an article
9 that discussed teenage sexuality and pregnancy of some of his
10 students, and portray the whole thing in a favorable light in
11 effect sanctioning promiscuity by the students, but would
12 permit an article that discussed the same topic but seemed to
13 frown upon that kind of activity, that the principal could not
14 take a position on a subject like that.

15 If he allows sexuality to be talked about, he has to
16 allow both the pros and the cons of adolescence sex to be set
17 forth, is that right?

18 MR. BAIN: I guess the answer is if it is reasonable
19 in light of the circumstance, reasonable in light of the age of
20 the people, reasonable in light of the audience that they are
21 trying to reach, you know --

22 QUESTION: Well, he says we are trying to form some
23 moral attitudes in the kids in this school. It is one of the
24 things that this school does, and I do not want an article that
25 condones this sort of thing.

1 Is he going to be able to do that or not?

2 MR. BAINE: I think that what we have in this case is
3 an article that says that if we are going to talk about it that
4 we are not going to involve individuals.

5 QUESTION: I understand this case. I just want to
6 know your position.

7 Are you categorical that the principal or whoever has
8 the last word cannot exercise that last word on the basis of
9 some value judgments that discriminate between various
10 positions on particular issues?

11 MR. BAINE: I am saying that he can.

12 QUESTION: He can?

13 MR. BAINE: Yes. I would like to reserve the rest of
14 my time, if I could

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Baine.

16 We will hear now from you, Ms. Edwards.

17 ORAL ARGUMENT OF LESLIE D. EDWARDS, ESQ.

18 ON BEHALF OF RESPONDENTS

19 MS. EDWARDS: Mr. Chief Justice, and may it please
20 the Court:

21 In 1977 in Philadelphia at the Public Latin School
22 was the first student newspaper called the Students Gazette
23 that we at least have a record of today, ten years before the
24 Constitution, before the First Amendment was added. Four
25 authors for the purposes of advice both foreign and domestic

1 for the reason of the great want of a weekly newspaper got
2 together as students expressing their opinions, and recording
3 who won certain political elections for the state assembly.

4 The essence of their ability to put out a student
5 newspaper was their right to communicate with each other, with
6 other students, as well as with other members of the school
7 community. It is an institution that existed before the First
8 Amendment, and I think that the fact, and Mr. Baine did not
9 mention this at all, that this is a newspaper has to have some
10 effect upon how the Court looks at the issues.

11 QUESTION: Did the school pay for this newspaper that
12 you are talking about?

13 MS. EDWARDS: Three-quarters of the way.

14 QUESTION: Pardon.

15 MS. EDWARDS: Three-quarters of the way. Because it
16 was sold. So the people who paid a quarter for it also
17 contributed to the funds that paid for the printing.

18 QUESTION: But the school funded the printing and
19 whatnot?

20 MS. EDWARDS: Three-quarters of it in terms of dollar
21 amounts.

22 QUESTION: What school was it?

23 MS. EDWARDS: Hazelwood East High School.

24 QUESTION: No, no, I am not talking about this one.
25 I am talking about the one in 1777.

1 MS. EDWARDS: Oh, I am sorry.

2 QUESTION: I know this one.

3 MS. EDWARDS: Let us start all over. I do not know.

4 QUESTION: Do you not think that makes a difference?

5 MS. EDWARDS: I assume because --

6 QUESTION: Do you not think that makes a
7 difference -- what was the school, what was the school?

8 MS. EDWARDS: He sold it for a piece of paper.

9 QUESTION: What was the name of the school in 1777?

10 MS. EDWARDS: Oh, I am sorry, Public Latin School.
11 That is the name of the school. It became the William Penn
12 Charter High School.

13 He sold it for a scrap of paper. That is how
14 valuable paper was at the time. So I am assuming that the
15 school did not, but I do not know.

16 One thing that he did not mention in addition is the
17 concept that has been recognized of local control over
18 curriculum. And I think that an important inherent aspect to
19 that principle is that it means ideas. That when you are
20 talking about local control, you are talking about local
21 control over ideas.

22 QUESTION: When you say local control, Ms. Edwards,
23 does that mean student control?

24 MS. EDWARDS: No, sir. I am talking about the school
25 district. That the school board is elected by the people, the

1 principal, and the superintendent. I think that is an
2 established interest that they have which is valid.

3 QUESTION: And how does that help you in this case?

4 MS. EDWARDS: Well, I think that when you balance or
5 confront the First Amendment with that interest that it is very
6 dangerous because it assumes ideas and viewpoint control. So I
7 think that just means that we have to look at it a little more
8 carefully.

9 QUESTION: Than if what were otherwise?

10 MS. EDWARDS: Than if you had a situation of an Army
11 facility where the Army's interest is in security, order, and
12 maintaining a certain discipline. We are not talking about
13 suppression. The government's interest in that situation is
14 not speech related, it is not content related. It is related
15 to order, security, or another government interest. That is a
16 little bit separate sort of issue.

17 QUESTION: Let me ask you one other question.

18 In your view, does this case depend on some sort of
19 representations that were made to the students putting out a
20 newspaper by either the faculty or the school board, or would
21 it be totally the same no matter what the faculty or school
22 board had tried to establish in the way of a system?

23 MS. EDWARDS: I certainly think that it does depend.
24 Because they could have set up a newspaper, call it that, which
25 is mimeographed, which is used in class, which is handed out in

1 homerooms in which they are told to discuss only school issues,
2 be a bulletin board, and in fact we are going to give you a
3 weekly interview with the principal. Fine, they set the
4 limits, that is within their power.

5 QUESTION: Supposing they set them a little bit
6 differently, and said that this is going to be printed the way
7 that ordinary newspapers are, it does not come out during
8 class, you are going to work on it as an extracurricular
9 activity, but here are the rules. You are going to be subject
10 to review on your subject of topics, and to take Justice
11 Scalia's example, we want to promote morality as we see it. So
12 if you are touching subjects such as high school sex, we will
13 encourage and insist on one point of view rather than another.

14 MS. EDWARDS: I think that they can do that, but I
15 think that there would be trouble doing it with an
16 extracurricular activity.

17 QUESTION: Why?

18 MS. EDWARDS: Well, because I assume that
19 extracurricular means that they are only putting in the money
20 and do not have a journalism instructor there.

21 QUESTION: Well, supposing that there is an
22 instructor.

23 MS. EDWARDS: Then I think that it sort of falls
24 similarly where we do in the middle. We are not
25 extracurricular and we are not a laboratory experience only in

1 the classroom.

2 QUESTION: But what does that distinction contribute
3 to the First Amendment argument, the difference between the
4 curricular and extracurricular?

5 MS. EDWARDS: Access. The harm that the First
6 Amendment is designed to prevent is that a viewpoint that the
7 government does not like for any reason is excluded. And when
8 you have students allowed to make certain editorial control
9 decisions or allowed to have certain access to their expression
10 in the written columns, then the First Amendment applies and
11 that is protected.

12 QUESTION: Supposing it said the students are to
13 write these pieces and we are not going to write anything
14 ourselves, but the faculty advisor reserves the right to say no
15 to anything that involves taking a position that is morally
16 undesirable for high school students.

17 MS. EDWARDS: I think that the school board, the
18 principal and superintendent, superiors, can delegate the
19 editorial function to an advisor, and he can exercise that in
20 whichever way he thinks as long as it is not viewpoint based.
21 Now if he says that it is viewpoint based, then I do not think
22 that would be protected.

23 QUESTION: So the advisor cannot say I reject this
24 article which encourages what I think is immorality in the part
25 of high school students, but I will accept this article which I

1 think encourages morality?

2 MS. EDWARDS: It does not serve an editorial function
3 and it does not serve an educational interest. I do not think
4 that would be constitutional.

5 QUESTION: So you either have to have no school paper
6 or you have to have a school paper that carries articles like
7 smoking pot is fun, that is the constitutional choice?

8 MS. EDWARDS: I do not think so. I think that you
9 can allow the school to set up one that is related to their
10 educational interests, so long as they do not tell the students
11 now go and exercise your Tinker First Amendment rights.

12 QUESTION: I do not understand.

13 MS. EDWARDS: I do not think that it only has to be
14 one or the other. I mean I think that the school can --

15 QUESTION: I could set up a newspaper then and say
16 you are not going to have any articles in it that encourage the
17 smoking of pot, I can do that?

18 MS. EDWARDS: If it is viewpoint based, I do not
19 think that they can.

20 QUESTION: They cannot. So I either have to have no
21 newspaper or I have to have a newspaper that has articles
22 encouraging the kids who go to that school to smoke pot.

23 MS. EDWARDS: Along with other viewpoints, yes. They
24 have to allow that viewpoint, if that is what you are asking.

25 QUESTION: I understand your position now.

1 MS. EDWARDS: I mean I think that the viewpoint
2 discrimination is sort of a key to what they did in this case.
3 And it reminds me of something that you asked about of Mr.
4 Baine. The 1977 article on pregnancy said this is horrible,
5 trauma, leaves scars, do not ever do this, it has nothing to do
6 with, you know, being a good person in school. The 1987
7 article says I am happy having this baby. And the effect,
8 whether the principal intended it or not, was to leave out that
9 what he perceived, which you categorized as a moral choice in
10 some sense, to leave out that one viewpoint that that one
11 student had which said, you know, this is okay for me today.
12 And to only allow -- because for some arbitrary reason this
13 article on pregnancy was allowed ten years before -- to only
14 allow the viewpoint that this is a horrible thing, and do not
15 dare go and do anything like this if you want to be a decent
16 person.

17 QUESTION: What about teaching in the school, I
18 presume that you could try to teach the students that smoking
19 pot is no good or could you, would you have to have a teacher
20 come up and give the other side and say on the other hand maybe
21 smoking pot is good?

22 MS. EDWARDS: I do not think that you can pair a
23 newspaper with what they teach in social studies.

24 QUESTION: Why can the school enforce a point of view
25 in the one case and not in the other?

1 MS. EDWARDS: Because student expression as opposed
2 to the teacher's control of content of a classroom is a
3 difference. The life and families class at Hazelwood East
4 taught, and he was interviewed for our articles, taught one
5 viewpoint in class with curriculum. That is curriculum, that
6 is totally curriculum. I do not think that has anything to do
7 with student expression. I mean sure you have to answer a
8 question, you might have to write a paper. And it is
9 conceivable that you could get some First Amendment protection
10 down the road, but I do not think that it close.

11 QUESTION: So the only way to avoid all of the good
12 stuff that you are doing in the classroom teaching them that
13 smoking pot is no good is not to have a student newspaper, that
14 is the only way that you could avoid the school formally
15 subsidizing that opposing value judgment.

16 MS. EDWARDS: Not to pay for it, not to have an
17 advisor.

18 QUESTION: Right.

19 MS. EDWARDS: And not to allow the other viewpoint to
20 be presented. To only have one viewpoint, you would have to
21 have no school newspaper, yes.

22 QUESTION: So I take it on your theory that the
23 school could not even require that the students include in the
24 newspaper the idea that smoking pot is bad.

25 MS. EDWARDS: Oh, sure. That is both viewpoints to

1 be presented.

2 QUESTION: That is not First Amendment law, that is
3 not First Amendment law.

4 MS. EDWARDS: Oh, I am sorry, did you say that the
5 school could require them to put that in?

6 QUESTION: If they are going to have a story that
7 says smoking pot is great, you have to have a story that says
8 smoking pot it bad.

9 MS. EDWARDS: No.

10 QUESTION: No what?

11 MS. EDWARDS: I do not believe that is required at
12 all. I do not think that anybody said that they had to have.

13 QUESTION: What is required?

14 MS. EDWARDS: That they would have to put in a story.
15 The point is excluding a viewpoint.

16 QUESTION: I know. But the school says to the paper
17 you have put in a story that smoking pot is great, now you have
18 to put in a story along with it that smoking pot is bad.

19 Now could they do that to the newspaper?

20 MS. EDWARDS: No. The school is not the editor.

21 QUESTION: All right. So the students could
22 exclusively say only that smoking pot is great, that is your
23 theory.

24 MS. EDWARDS: If that is all the students wanted to
25 say, and it is open to the discussion of student ideas at this

1 level.

2 QUESTION: Unless red line applies. I mean maybe
3 this is like the FCC. I mean this is after all a school
4 newspaper. It is their type, it is their paper and whatnot.
5 So maybe they do have to provide viewpoints on matters of
6 public controversy.

7 MS. EDWARDS: Well, we did not require a newspaper to
8 with a political candidate.

9 QUESTION: No, your position is the school could not
10 do that.

11 MS. EDWARDS: So I do not think that a school
12 newspaper could either.

13 QUESTION: Do you think that the school newspaper can
14 impose any journalistic standards whatever?

15 MS. EDWARDS: Yes, through the advisor and through
16 accuracy. I think that if you had to push it that the
17 principal could reach down and say this is not accurate, but he
18 has to check it out. He cannot just say this is reasonable
19 belief by one person by his thought that this is not accurate.
20 He would have to either go to somebody with training in
21 journalism or he would have to let the advisor do it, or
22 investigate it himself and have some objective facts to allow
23 that.

24 QUESTION: But that advisor could not say look, if
25 you are going to say smoking pot is good, in fairness have a

1 story that gives the other side, you would say that the school
2 advisor could not do that. That is what you just said a minute
3 ago.

4 MS. EDWARDS: Yes, my sort of knee-jerk response I am
5 afraid. I really do not know the answer to that. I mean I
6 think that it has so much to do with other things such as
7 public access and things to the airwaves and things like that,
8 I really do not know.

9 QUESTION: You do not think that you could have a
10 class in which you are teaching students journalism and
11 teaching them how to produce a newspaper and maintain school
12 control over all aspects of that publication including content?

13 MS. EDWARDS: Not if the content is placed and
14 delegated to the students or jointly with the students'
15 advisor, and not if it is discussion or an expressive vehicle
16 as they admit this paper was for student expression. I think
17 that when you get student expression involved, then the
18 school's control cannot be absolute.

19 QUESTION: May I ask you this question about this
20 case. As I understand it, part of the problem arose because
21 the person who normally exercised responsibility, Mr. Stergos
22 left, and there was kind of confusion about it.

23 Supposing that he had not left and everybody was used
24 to working with him and recognized that he was the teacher who
25 controlled it, and he took plenty of time to reach the same

1 decision that the principal reached here, told the students all
2 about it, and had just as weak reasons as the principal did,
3 but he came to that conclusion that this is not a very good
4 article for the paper and you cannot print it.

5 Would you still have a case?

6 MS. EDWARDS: If he --

7 QUESTION: If he ended up after all of the
8 deliberations had gone into whether these articles ought to go
9 in or not, and he comes to the conclusion that these are not
10 very good articles for this school, I think that I will cut
11 them.

12 Do you have the same right to say?

13 MS. EDWARDS: Frankly, I think that it is not very
14 strong, no. I would say that the advisor has the ability and
15 the right because of his expertise to do some editorial
16 function. That has been delegated by the school to him, and
17 that is different than the principal.

18 QUESTION: So you would say that is a different case?

19 MS. EDWARDS: Yes, sir.

20 QUESTION: So what you are really complaining about
21 is the fact that this principal did not use very good judgment?

22 MS. EDWARDS: That they reached up and got someone
23 who was not part of the editorial function who was not skilled
24 in journalism or experienced, and did it for a reason other
25 than journalistic standards or editorial discretion.

1 QUESTION: Well, say he decided journalistic
2 standards, this article does not show the degree of maturity
3 that we think that it ought to show to have the school name on
4 it and all of the rest, there is some misspelling in it and
5 some bad grammar, a mixture of reasons, that is not enough?

6 MS. EDWARDS: The advisor, that he could do that?

7 QUESTION: If the advisor can do it, I do not
8 understand why the principal cannot.

9 MS. EDWARDS: Because the advisor is part of what has
10 been delegated by the school to be the training and practicing
11 of student expression.

12 QUESTION: It seems to me what you are saying is if
13 you are going to have censors that they have to be good
14 censors.

15 MS. EDWARDS: No, I think that they have to be
16 journalistically involved, so the motivation of the school is
17 good journalism and not a viewpoint.

18 QUESTION: It is a constitutional line whether you
19 are violating the Constitution depends on whether you have a
20 good journalist involved or not in the censorship?

21 MS. EDWARDS: The constitutional line comes with
22 whether student expression is protected or not. Once it is,
23 then I think that the scrutiny has to be very strict. I
24 thought that we were talking about a very detailed situation
25 where the actual censorship was done by one person at one level

1 with a certain motivation as opposed to another. So that
2 detail is not to me of constitutional limits, but the
3 censorship is.

4 QUESTION: Well, I would think that you would say
5 that the principal not being acquainted with journalism could
6 not order this piece deleted even it had inflammatory matters
7 in it.

8 MS. EDWARDS: I think that is because of Tinker. I
9 do not think that has so much of a policy aspect except of the
10 school's educational interests.

11 QUESTION: Here is this principal who is not the
12 advisor, and he is telling them to take it out.

13 MS. EDWARDS: I think that he could do that. Now I
14 am hoping that is not a practical situation.

15 QUESTION: But he could not say well, I think this
16 article ought to be taken out because it involves some parents
17 who really ought to have a chance to say their piece before
18 anything is published like that, he could not say that?

19 MS. EDWARDS: No.

20 QUESTION: Does not any newspaper have somebody who
21 makes a judgment as to whether what is published in the
22 newspaper will offend the community, I assume that any
23 newspaper does not try to publish stuff that is offensive?

24 MS. EDWARDS: Sure.

25 QUESTION: Now who does that when you have a school

1 newspaper. Suppose the principal says here is an article that
2 is on premarital sex, it is an interesting article, but this is
3 a very conservative rural community, our people will find this
4 offensive. If I were running the local newspaper, I would not
5 run a piece like this. Now what if he makes that judgment.
6 And if he cannot make it, who makes it in the school then. You
7 are telling me that you have school newspapers that cannot
8 exercise any judgment as to what offense be.

9 MS. EDWARDS: When the government is the publisher, I
10 do not think that we can equate it to one person with the same
11 rights as the private press. I do not have a very good answer
12 for that difficult question. I do not think that the students
13 have to be involved in that if it is their expression.

14 QUESTION: Once again, you leave us with a terrible
15 choice, either no newspapers at all or newspapers that have to
16 be offensive as no private newspapers need be.

17 MS. EDWARDS: Well, why would a student newspaper
18 need to be either. I mean I think that --

19 QUESTION: Because nobody can stop them. Well, all
20 right, you have to get very responsible adolescents who have
21 very good judgment as to what is offensive to the whole
22 community or not and care.

23 MS. EDWARDS: I think that private newspapers print
24 offensive things all of the time to some portions of the
25 population.

1 QUESTION: They do not try to, I do not think.

2 MS. EDWARDS: Well, you have this advisor, this
3 instructor supposing monitoring it a little. I mean there may
4 be some restraint because you have a teacher, you have an
5 advisor, you have a curriculum developed to try and learn how
6 to do it according to ethical and journalistic standards that
7 are better than the private. I mean the private aim at that
8 also, but you have a little bit more control because you have
9 an advisor there who hopefully has some background in
10 journalism, some experience perhaps as a reporter.

11 QUESTION: You let him do it?

12 MS. EDWARDS: Yes, I think he could.

13 QUESTION: He could exclude it because I think this
14 will offend the community?

15 MS. EDWARDS: As long as it is not only because of a
16 viewpoint discrimination, yes.

17 QUESTION: Well, but it is. I mean he thinks this
18 viewpoint will offend the community.

19 MS. EDWARDS: It seems to me that offending the
20 community would not have --

21 QUESTION: The students want to print something
22 Hitler was right. And the advisor says gee, this community
23 will not like that piece, and there is a school bond issue
24 coming up he thinks. There is just no solution for that
25 problem.

1 MS. EDWARDS: Well, I think that the advisor can
2 exercise editorial control.

3 QUESTION: But the principal?

4 MS. EDWARDS: Not viewpoint. Well, to say that he
5 cannot, what I am saying is that it requires strict scrutiny if
6 he does. And there may be a compelling state interest. That
7 is fine. It may be inflammatory. Then he can
8 constitutionally.

9 QUESTION: Well, so can the principal then?

10 MS. EDWARDS: Yes, if it is inflammatory, libel,
11 obscenity, and disrupting school, and invading rights of
12 privacy of others.

13 QUESTION: I am puzzled by the fact that the First
14 Amendment implication seems to turn on how far up in the
15 educational hierarchy that the decision is made.

16 What if you had a small rural school where you do not
17 have a whole of people and you do not have a whole any
18 journalism advisor, and the principal says I will fill in as
19 journalism advisor?

20 MS. EDWARDS: Well, I think that in attempting to
21 analogize to the private press which has a reporter, editor,
22 publisher and an owner, that we have gotten a little bit away
23 from the First Amendment application. Now it is not that that
24 is not relevant, okay. There is something that I think needs
25 to be addressed there. But the main this is this protected

1 speech or not, and what is the standard. And I do not think
2 that who makes the decision necessarily determines that. I
3 think that the type of speech that we are talking about in a
4 newspaper and the content.

5 QUESTION: I must say that I did not get that
6 impression of your case from the answers that you have given to
7 the questions. I got the impression that you thought that it
8 was very important who made the decisions, whether it was the
9 faculty advisor or the principal.

10 MS. EDWARDS: Well, I do not think that it is as
11 important as where the decision is made and the manner. We are
12 talking about a newspaper, the content of it, the basis for the
13 decision. There is no question that it is a very difficult
14 position for the advisor to be in. And the principal is far
15 removed from the journalism education going on in that
16 classroom. I do not know if that really has any constitutional
17 importance other than situations where you would have to apply
18 the First Amendment to high schools because they vary so much.

19 You know, you might have the local newspaper in
20 Carol, Iowa that publishes every Thursday that high school's
21 newspaper. The private publisher says here to the students,
22 here is your one page, publish it.

23 You have got a school with a high educational quality
24 in Hazelwood that says every three weeks we are going to have
25 six or eight pages and we want you to do all of this journalism

1 aim for learning all of these journalism things, editorials,
2 news, columns, letters to the editor, everything.

3 And then you have a place that prints its own in the
4 basement of the school, and it is going to be a mimeographed
5 sheet eight by the eleven, and they are going to hand it out to
6 the people in the classroom. I mean there is just such a
7 variety that it is true that many people in the situations that
8 the student press encompasses make those decisions. I think
9 that you can look at the issues without being stuck into one of
10 those who is the censor.

11 QUESTION: Given your different examples, is it of
12 any significance in this case that the school had no objection
13 to the distribution of xerox copies of the material that was
14 excluded from the newspaper itself, they just did not want to
15 associate the school officially with the material?

16 MS. EDWARDS: That did not happen.

17 QUESTION: Oh, did it not, I misunderstood.

18 MS. EDWARDS: It is in finding of fact No. 21 from
19 the District Court, it is in a footnote of the Eighth Circuit.
20 There is nothing in the transcript. The articles were never,
21 there is no reference. I do not know where it came from. It
22 is absolutely without any basis. They were never distributed.

23 QUESTION: Maybe it was in oral argument.

24 MS. EDWARDS: I probably said it.

25 QUESTION: Oh, you were there?

1 MS. EDWARDS: No. So I cannot answer your question
2 because it did not happen, unless you would like a
3 hypothetical.

4 QUESTION: Well, I certainly do not question your
5 representation. But when we have got a finding of fact on
6 something, I tend to treat that as part of the record, unless
7 somebody demonstrates to me that it is clearly erroneous.

8 MS. EDWARDS: I do not think that it makes a
9 difference, but that is just my --

10 QUESTION: Ms. Edwards, if I recall your response,
11 you said that it would be okay if the school said this is a
12 house organ, we are not going to allow everything to be
13 published, we are going to have the last word, that would be
14 okay.

15 Now suppose it did not say that, at the beginning it
16 said it is going to be a wide open paper, but then it begins
17 behaving otherwise, and it starts excluding material when the
18 school was exercising its own judgment that the material is not
19 very good.

20 That would violate the First Amendment then, right?

21 MS. EDWARDS: Yes.

22 QUESTION: Why should that be, I mean it is sort of a
23 violation of the First Amendment that depends on breach of
24 contract or estoppel or what. Suppose the school in the middle
25 of the school year says yes, we said at the beginning of the

1 year that it was going to be wide open but we have changed our
2 mind, from now on what comes is only what we say comes in.

3 Would that be okay, if they changed their mind in the
4 middle of the year?

5 MS. EDWARDS: Well, I might qualify my answer a
6 little. If it were communicated to the students in some manner
7 that they now knew that this was the new way to operate, then
8 it might be all right. What happens, I thought that you were
9 asking about --

10 QUESTION: This was done too informally, so this
11 First Amendment violation consists exclusively of the fact that
12 the principal did not publish a regulation or something to
13 change whatever course there was, that is the First Amendment
14 violation?

15 MS. EDWARDS: No.

16 QUESTION: It is a pretty frail protection, if that
17 is all that we are talking about.

18 MS. EDWARDS: Well, I do not think whether they write
19 a regulation or not depends upon whether the First Amendment
20 applies. But I do think that the school can limit how they run
21 their journalism program and their newspaper as they put it
22 out.

23 QUESTION: Well, the principal limited it.

24 MS. EDWARDS: He did not limit the program. He did
25 not limit the newspaper. He limited one idea.

1 QUESTION: I see, I see.

2 MS. EDWARDS: Now I think that he can limit the whole
3 thing. And maybe, you know, people might disagree.

4 QUESTION: It is the ad hoc nature of it that you are
5 objecting to here?

6 MS. EDWARDS: Well, there is some distinction between
7 practice and policy I think, so I did not know if you were
8 asking about that. You may have a practice that is different
9 than a policy, and I think that you would have to go by the
10 practice as opposed to what they wrote down.

11 QUESTION: I wonder if you are saying that your
12 students had a First Amendment right to have a teacher as good
13 as Mr. Stergos.

14 MS. EDWARDS: I suspect that things would have been
15 different had we not had this change. Thank you.

16 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Edwards.
17 Mr. Baine, you have three minutes remaining.

18 ORAL ARGUMENT BY ROBERT P. BAINE, JR., ESQ.

19 ON BEHALF OF PETITIONERS - REBUTTAL

20 MR. BAINE: Thank you, Mr. Chief Justice.

21 In answer to Justice White's question, in our
22 petition for writ, we have included the decision of the Eighth
23 Circuit. And on page A-9 it says, "Although as the District
24 Court noted, the Spectrum was produced by members of the
25 Journalism II class, its staff was essentially restricted to

1 students of the class and the Spectrum was a part of the school
2 adopted curriculum."

3 We would submit that the curriculum that was adopted
4 by the Hazelwood School District was adopted as the
5 Respondent's own witness said "in the best fashion for the
6 teaching of journalism in a secondary level," and that is under
7 the supervision of a classroom teacher as opposed to an
8 extracurricular, that the curriculum was a very well thought
9 out and well set out correlated with textbook and classroom
10 instruction. And therefore, it was a curricular matter and
11 subject to the supervision of the principal.

12 QUESTION: But the court said that it was something
13 more, too.

14 MR. BAINE: You are correct there. They added that
15 it was something more because of the diverse number of ideas
16 which I feel is a finding of clearly erroneous without saying
17 clearly erroneous. I think that if the Eighth Circuit wanted
18 to say that the District Court's finding that it was a
19 curricular matter was erroneous that they should have said it
20 or would have said it.

21 QUESTION: Is there not also some other
22 inconsistency, is there not a footnote in the Court of Appeals
23 opinion that says that there was no active involvement brought
24 by the instructor in the production, and a flat finding by the
25 District Court that there was active involvement by the

1 instructor?

2 MR. BAINE: If you read the 21 findings of fact,
3 there is a lot of activity.

4 QUESTION: Where did the Court of Appeals get that
5 from?

6 MR. BAINE: I do not know, I really do not know. I
7 think that is what they found. I think that they found facts.
8 They read the evidence and they read the record, and they read
9 it differently than the trial court did. But without going to
10 a Rule 52, it is clearly erroneous. Thank you very much.

11 CHIEF JUDGE REHNQUIST: Thank you, Mr. Baine. The
12 case is submitted.

13 (Whereupon, at 1:52 p.m., the case in the
14 above-entitled matter was submitted.)

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3 REPORTER'S CERTIFICATE

4 DOCKET NUMBER: 86-836

5 CASE TITLE: Hazelwood School District, et al. v.
6 Cathy Kuhlmeier, et al.

7 HEARING DATE: October 13, 1987

8 LOCATION: Washington, D.C.

9 I hereby certify that the proceedings and evidence
10 are contained fully and accurately on the tapes and notes
11 reported by me at the hearing in the above case before the
12 Supreme Court of the United States.

13 Date: October 20, 1987

14
15
16 *Margaret Daly*
17 _____
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