No. 86-836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HAZELWOOD SCHOOL DISTRICT, et al.,
Petitioners,

—vs.—

CATHY KUHLMEIER, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF EASTERN MISSOURI IN SUPPORT OF RESPONDENTS

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HAZELWOOD SCHOOL DISTRICT, et al.,

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vs.

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On Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF EASTERN MISSOURI IN SUPPORT OF RESPONDENTS.

Pursuant to Supreme Court Rule 36.3, the American Civil Liberties Union ("ACLU") and the American Civil Liberties Union of Eastern Missouri ("ACLU of Eastern Missouri") respectfully move for leave to file the attached Brief Amici Curiae in support of

respondents. Neither party has consented to the filing of this brief.

The ACLU is a nationwide, nonpartisan civil liberties organization comprised of more than 250,000 members. The ACLU of Eastern Missouri is one of its state affiliates. The ACLU and its affiliates have long been devoted to the protection and enhancement of fundamental liberties and basic civil rights. In particular the ACLU has long been active in defending the constitutional rights of high school students, including free speech rights. For example, the ACLU and its affiliates represented the student litigants in Bethel School District v. Fraser, 92 L.Ed.2d 549 (1986); Board of Education v. Pico, 457 U.S. 853 (1982); and Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). In addition, the ACLU and its affiliates have participated both directly and as amicus curiae in numerous

students' rights cases throughout the nation.

The ACLU of Eastern Missouri originally provided representation to these respondents in the United States District Court for the Eastern District of Missouri. In the United States Court of Appeals for the Eighth Circuit the ACLU of Eastern Missouri filed a brief and participated in oral argument solely on the issue of the denial of a jury trial, which issue has not been raised before this Court. All connection between the ACLU of Eastern Missouri and the respondents has been severed since this matter was brought to this Court. Neither the ACLU nor its affiliate have had any involvement in the preparation of respondents' brief in opposition to certiorari or their brief on the merits before this Court.

The ACLU and its affiliate nonetheless retain a strong institutional interest in the outcome of this case. They believe that

their long involvement in the issues of students' rights and the rights of mature minors will aid the Court in the resolution of this case. Amici argue concisely that the student speech at issue here, which is on topics of vital importance to teenagers, is precisely the sort of speech that the First Amendment is intended to protect. Amici demonstrate that the censorship that took place here was both exceedingly overbroad and unrelated to curricular decisions. Amici also explain that this censorship is inconsistent with this Court's standards under Tinker or this Court's public forum cases.

Amici pray that this motion for leave to file is granted so that they may bring their experience to bear upon the important questions presented by this case.

Respectfully submitted,

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The interest of amici is fully set out in the Motion for Leave to file Brief Amici Curiae.

STATEMENT OF THE CASE

Spectrum is the only student newspaper of Hazelwood East High School in St. Louis County, Missouri. Any student in the school can work on the newspaper, although it is largely produced by students enrolled in Journalism II. Students who choose to work on the newspaper receive instruction from the school on the meaning and application of the First Amendment and the role of press freedom in a democracy.

Over the years, Spectrum has carried articles proposed and written by students on topics of compelling importance to its high school readership, including articles on: the use of drugs and alcohol by students; race relations and desegregation; teen run-

aways, pregnancy, abortion, and dating; the death penalty and the draft.

In January 1983, the principal of Hazelwood East requested a copy of the galleys before each issue of Spectrum was published. The principal exercised no content control over the newspaper, however, until the censorship of two pages of the May 13 issue. That six-page issue was approved in final form by the Journalism II instructor; a replacement instructor then presented the galleys to the school principal, who "pulled" all of pages four and five.

In total, six censored articles were deleted, although the principal later testified that he only objected to two. The six censored stories addressed a series of issues vital to many teenagers. Four of the six articles contained interviews with Hazelwood East teachers or health officials, and included their advice to the students. One

story focused on the extent of teenage pregnancy in Missouri and the health, economic and educational problems arising out of teenage pregnancy and motherhood. A second, related story profiled three anonymous current and former Hazelwood East students about their teenage pregnancies.[1/] A third article reported on the high divorce rate associated with teenage marriages and a fourth reviewed the terrible impact of divorce on children. Both divorce articles centered on an interview with the school's social science teacher. The fifth article reported the judicial invalidation of the so-called "squeal rule," which would have required parental notification for all teenagers

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[1/] The article containing interviews with the three pregnant students demonstrates the clinical reality of the lead, more statistically-based article. Two of the three were unmarried, at least one had already dropped out of school, and one explained the failure to use birth control because "I don't think I'd feel right taking them."

receiving birth control devices from federally-funded clinics. The sixth censored article was on teenage runaways and juvenile delinquents. This article not only informed teenagers in trouble where they could turn for help, but also featured interviews with a school guidance counselor and law enforcement officers.

The principal's decision to censor the six articles was made unilaterally and without any articulated reasons. He did not discuss his objections with the students or raise the possibility of editorial revisions. Indeed, he did not even inform them of his actions. The students first learned that two full pages of their newspaper had been cut when the paper was released.

Subsequently, the principal indicated that his concerns were limited to two articles: the profile of two students, one pregnant and one a mother, and one pregnant

teenager who had dropped out of school, and the article on children of divorced parents. Specifically, the principal feared that the pregnant students might be identified from their profiles although their names were withheld and the article had been written with their consent. He also objected to the use of a student's name and a quotation in the divorce story. Because he did not consult with anyone about his decision, he was unaware that the student's name had already been deleted. The principal had no objection to the other four articles; nevertheless, they were deleted because they were on the same page as the allegedly objectionable ones. The censored articles were later copied and distributed by some students without punishment and/or disruption.

SUMMARY OF ARGUMENT

Students retain free speech rights so long as their speech does not materially disrupt the school environment or invade the rights of others. Here, high school students attempted to publish in the high school newspaper several informative, serious articles on issues of vital importance to teenagers. These articles are prcisely the sort of speech the First Amendment is intended to protect. The principal's censorship of this information both undermined the democratic values the school attempts to inculcate and deprived Hazelwood students of information essential to their daily decision-making.

A student newspaper occupies a unique status as a forum for student expression, particularly one such as Spectrum, which has long been open to expression on contemporary political issues of particular concern to teenagers. The production, publication, and

distribution of Spectrum is clearly "something more" than a curricular activity. Conversely, the arbitrary and overbroad censorship exercised by the principal in this case was not part of any curricular decision. Indeed, the only "educational lesson" imparted by the principal's action is that the First Amendment values taught in the journalism class are subordinate to the unfettered authority of school officials.

Whether this Court analyzes this case under Tinker alone or in conjunction with the public forum doctrine, the censorship that occurred here cannot be sustained. The school's long-standing policy and practice clearly demonstrate that Spectrum is an appropriate forum for this core protected speech. At a minimum, none of the school's excuses can justify the censorship of the four articles to which no objections were ever raised.

The censorship of the remaining two articles is also unsupportable. None of the harms identified in Tinker occurred; the mere speculation that students may later regret willingly discussing their pregnancy experiences hardly qualifies as an invasion of the rights of others. The other reasons put forth for this censorship are without basis in the record and would, if sustained, eviscerate student free speech rights.

In this year of the Constitution's Bicentennial, it would indeed be a "curious moral for the Nation's youth," New Jersey v. T.L.O., 469 U.S. 325, 386 (1985) (Stevens, J., concurring in part, dissenting in part), for this Court to uphold this arbitrary, overbroad censorship of student speech on matters so vital to their well-being.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS SPECTRUM'S RIGHT TO PUBLISH THE SIX CENSORED ARTICLES

It is simply too late in the day to claim that high school students lack free speech rights. As this Court has repeatedly recognized, secondary school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969); see also T.L.O., 469 U.S. at 336. Students' rights to express their views, although not always coextensive with those of adults, may be curtailed only when "the school authorities ha[ve] reason to anticipate that the [speech] would substantially interfere with the work of the school or impinge upon the rights of other students." Tinker, 393 U.S. at 509.

These six articles, to be published in a student newspaper that has long been a forum for student speech, were on a range of serious topics within the core of the First Amendment and of obvious interest to the audience.[2/] In the absence of any credible evidence of substantial or material harms caused by this speech, these articles were entitled to protection under the First Amendment, notwithstanding "the special circumstances of the school environment." Id. at 506.[3/]

[2/] See Bolger v. Youngs Drug Products Co., 463 U.S. 60, 68 (1983); Carey v. Population Services International, 431 U.S. 678, 700-01 & n.28 (1977).

[3/] Petitioners' assertion that Tinker applies only to viewpoint discrimination is untenable. While the Court in Tinker found it "relevant" that the school board had not banned all political symbols, 393 U.S. at 510-11, it is inconceivable that the result turned on that point. The Court has never treated students' free speech rights as limited only to viewpoint discrimination. For example, in Bethel School District v. Fraser, 92 L.Ed.2d 549 (1986), the Court did not consider the student speech per se unprotected because the school's action was viewpoint neutral. Tinker provides the constitutional standards for analyzing [footnote cont'd]

A. The Articles at Issue Here Involve Core First Amendment Speech In A Unique Expressive Forum

The censored articles dealt in a serious and informative way with topics of particular interest and undeniable importance to adolescents. This is not a case of frivolous immature speech of marginal value. Unlike the nomination speech in Bethel School District v. Fraser, 478 U.S. ____, 92 L.Ed.2d 549 (1986), there is no claim that the articles were "offensively lewd and indecent." Id. at 560. Nor do these articles fall into any other category of unprotected speech such as libel, obscenity, or incitement to violence, even as those standards might be modified with respect to adolescents. See, e.g., Ginsberg v. New York, 390 U.S. 629 (1968).

In addition, high school students here are engaged in the enterprise of publishing a

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student speech; applications may differ depending on whether or not regulation is viewpoint-based.

student newspaper. Where the forum for student expression is a newspaper, official censorship should be subject to particularly close scrutiny. Even more than a school library, the unique characteristics of a student newspaper make it an especially appropriate vehicle for the recognition of students' free speech rights. Cf. Board of Education v. Pico, 457 U.S. 853, 868 (1982). Whether or not a newspaper is produced completely apart or in conjunction with a curricular activity, it serves a function far broader than a typical classroom exercise.[4/]

A newspaper's fundamental purpose is communication of information, ideas, and

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[4/] The First Amendment status of student newspapers has been consistently recognized by the lower courts. See e.g., San Diego Committee v. Governing Board, 790 F.2d 1471 (9th Cir. 1986); Gambino v. Fairfax County School Board, 429 F. Supp. 731 (E.D. Va. 1977), aff'd, 564 F.2d 157 (4th Cir. 1977); Quaterman v. Byrd, 453 F.2d 54 (4th Cir. 1971); Eisner v. Stamford Board of Education, 440 F.2d 803 (2d Cir. 1971).

opinions on contemporary issues. A high school newspaper is a particularly unique forum in which constitutional principles have concrete, rather than abstract, meaning for students. High school journalism students receive more than classroom instruction on the values of a free press. They actually experience those principles when participating in publishing a newspaper.[5/]

This Court has appropriately acknowledged that public school boards and their agents have wide discretion in managing the

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5/ Spectrum's avowed policy, published at the beginning of each school year, stated:

> Spectrum, as a student-press publication, accepts all rights implied by the First Amendment of the United States Constitution which states that: "Congress shall make no law restricting * * * or abridging the freedom of speech or the press * * * ."
>
> That this right extends to high school students was clarified in the Tinker vs. Des Moines Community School District case in 1969.

Kuhlmeier v. Hazelwood School District, 795 F.2d 1368, 1372 n.3 (8th Cir. 1986).

affairs of their schools. All of their duties, however, must be performed "within the limits of the Bill of Rights." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943); see also Pico, 457 U.S. at 864 (plurality opinion) ("discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendant imperatives of the First Amendment.") Although "extreme examples are seldom ones that arise in the real world of constitutional rights," Pico, 457 U.S. at 908 (Rehnquist, J., dissenting), this is one of those rare cases. When actions of school officials run roughshod over students' First Amendment rights, the federal courts must, and will, step in to ensure that the Constitution is not violated.

B. The Censorship of These Six Articles Undermined the Central Goals of the First Amendment

First Amendment limitations on government censorship protect the core political and constitutional values of our democracy.[6/] Our system of free expression ensures free speech both as a value in itself, and as the means to promote access to information critical to individual decision-making on matters of personal and political concern. See First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978); Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, 425 U.S. 748, 763-64 (1976).

The unilateral and arbitrary censorship in this case harmed the student writers and student readers in the very ways the First Amendment is intended to prevent. First, the

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[6/] J. Ely, Democracy and Distrust, A Theory of Judicial Review 105-116 (1980); L. Tribe, American Constitutional Law 737 (1978).

censorship could not help but undermine student beliefs in the democratic values that Hazelwood East seeks to inculcate. Second, First Amendment concerns are heightened because the content of the censored information is the kind of information critical to teenagers' daily decision-making in their personal lives[7/] as well as important in preparing them for full participation in the political process.

As Justice Jackson recognized over forty years ago: "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional

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7/ This Court has recognized the First Amendment's role "in fostering individual self-expression but also . . . its role in affording the public access to discussion, debate, and the dissemination of information and ideas." First National Bank of Boston v. Bellotti, 435 U.S. at 783. Justice White, in dissent, agreed that the First Amendment encompasses an individual's right to self-expression as well as a "right to hear or receive information," and "to interchange ideas." Id. at 806. Ideas which are related to individual choice are entitled to the highest First Amendment protections. See id. at 807.

freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." Barnette, 319 U.S. at 637, quoted in Pico, 457 U.S. at 864-65; see also Ambach v. Norwick, 441 U.S. 68, 75-78 (1979). The transmission of democratic values simply cannot occur in an environment in which constitutional values are suppressed and in which authority is viewed as arbitrary and unfettered.[8/]

8/ See also T.L.O., 469 U.S. at 386 (Stevens, J., concurring in part and dissenting in part) (Court's decision permitting searches of students without a warrant or probable cause "is a curious moral for the Nation's youth"); Pico, 457 U.S. at 880 (Blackmun, J., concurring) (suppression of information "hardly teaches children to respect the diversity of ideas that is fundamental to the American system"); Levin, Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School, 95 Yale L.J. 1647, 1654 (1986). Social science research supports the claim that democratic values are taught to students by direct example as well as formal instruction, particularly where the student's actual observations and experiences are inconsistent with formal instruction. See id. at 1654 n.31 (collecting [footnote cont'd]

The arbitrary actions of the principal here were antithetical to the communication of democratic, constitutional values. Not only were six unobjectionable articles censored, but there was no attempt to consult or communicate with the students prior to or, indeed, after the censorship decision. When the students received the issue of Spectrum and discovered that two full pages had been censored, they also received a clear message about the importance of their classroom lessons on democratic participation, the First Amendment, and a free press. These lofty and essential principles appeared empty in the face of the unbridled official censorship of their newspaper.

A second type of harm to Hazelwood East's students resulted from eliminating access to accurate information of great significance to teenagers, particularly those

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Social Science research).

in trouble. Students from broken homes, or those who contemplated running away from home, suicide, premarital sex with or without contraception, or marriage, would have been helped by the faculty advice and factual information contained in the censored articles.[9/]

The harm from this censorship falls disproportionately on teenage girls. Its impact is potentially irreparable for the simple

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9/ Justice Powell proclaimed for the majority in Bellotti v. Baird, 443 U.S. 622, 642 (1979), that teenage pregnancy and childbearing present one of the "few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." This Court has recognized that these "significant social, medical, and economic consequences" are imposed almost exclusively on teenage girls. Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 470 (1981). Other studies verify that ignorance concerning sex, contraception and pregnancy, and the teen parenting which results from such ignorance, impact disproportionately on teenage girls. See, e.g., id. at 470 n.4; Alan Guttmacher Institute, Teenage Pregnancy: The Problem That Hasn't Gone Away, at 30 (1981) ("Teenage Pregnancy"). Because it eliminated accurate, and potentially the sole source of information for many teens, the censorship in this case had a particularly deleterious and sex specific impact.

reason that information about contraceptive laws, the dangers of pregnancy, teen motherhood and teen marriage is not readily available elsewhere, either within the school or without.10/

A great deal of the most important censored information was contained in the four articles to which the principal expressed no objection. Ironically, this information countered any relatively positive views on pregnancy contained in the profile stories, which the principal censored in part because he wanted "to avoid any appearance that the school endorsed the sexual norms of the stu-

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10/ Even a sex education course may not provide students with information comparable to that censored from the school paper. The course content of sex education classes is often so woefully uninformative that students do "not learn even basic facts such as the time of the month when pregnancy is most likely to occur." Teenage Pregnancy, supra, at 37.

dents profiled. . . ."[11/] Petitioners' Brief, at 34. These four articles not only dispel any claim that the school endorsed the behavior of the profiled students, but also provided students with accurate information about the detrimental impacts of early pregnancies on teenage girls.[12/]

[11/] As reported in the first "unobjectionable" article, teenage pregnancy is a fact of life. Apparently, the principal was able to acknowledge teen pregnancy in Missouri but not in Hazelwood High School. His censorship was viewpoint-based to the extent the censor believed reporting on pregnancy and in one case, a married teenage mother, would legitimate teenage sex. Similar censorship could be imposed against reporting on AIDS, teen suicide, and other major problems that affect teenagers. Because teenagers read, listen to and are influenced by their peers, it is essential, both from a First Amendment and a public health standpoint, that speech by teenagers be encouraged not discouraged. Surgeon-General Dr. Everett Koop recently emphasized this point: "many people -- especially our youth -- are not receiving information that is vital to their future health and well-being because of our reticence in dealing with subjects of sex, sexual practices, and homosexuality. This silence must end." "AIDS Report Calls for Sex Education," The Washington Post A13, October 23, 1986; see also 1 Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing 146 (C. Hayes ed. 1987).

[12/] Mr. Kerchkoff, a Hazelwood East teacher, was pro-
[footnote cont'd]

The principal's approach to these articles demonstrates the truth of the constitutional adage that the solution to speech "is more speech, not enforced silence." Whitney v. California, 274 U.S. 357, 377

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minently featured in the censored article "Teenage marriages face 75 percent divorce rate." He focused on the high rate of failure of teenage marriages, which are partly due to early pregnancies, and he stressed the disadvantages of both. The lead article provided valuable information on teenage pregnancy that helped counter-balance the profile story. The article unequivocally treated teenage pregnancy as a problem, not a benefit:

> Teenage pregnancy is becoming an epidemic. It has become a major health, social, and economic problem for this country.

It also described the "consequences" of teenage pregnancy as "alarming" and stated, "the rate of teenage sexual activity in the U.S. is alarmingly high."

The suppression of the "Squeal law" article denied students knowledge that a federal judge had permanently enjoined the "squeal law" from going into effect. Planned Parenthood Federation of America, Inc. v. Schweiker, 559 F. Supp. 658 (D.D.C.), aff'd, 712 F.2d 650 (D.C. Cir. 1983). As the article noted, this rule would likely have led to an increase of up to 100,000 unwanted pregnancies. At the time the rule was proposed, a great deal of confusion resulted among teenage girls. Affidavit of Melita Gesche, M.D. at A160-A162 in Joint Appendix, State of New York v. Schweiker, 719 F.2d 1191 (2d Cir. 1983). Many stayed away from birth control clinics in fear that the rule was already in effect. Planned Parenthood Federation, 559 F. Supp. at 666 n.13 (and article cited therein).

(1926) (Brandeis, J. dissenting). This Court has long recognized that the First Amendment is best served when government power to limit speech is rejected in favor of promoting more, rather than less, information on a topic. See, e.g., Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 295 (1981). People, including minors, can make responsible, intelligent decisions about competing choices only when they have information.[13/]

13/ Overwhelming recent data demonstrates the capability of teenagers' decision-making processes. See, e.g., Report on the Interdivisional Committee on Adolescent Abortion of the American Psychological Association, Adolescent Abortion: Psychological and Legal Issues, 42 Am. Psychologist 73 (Jan. 1987); Melton, Developmental Psychology and the Law: The State of the Art, 22 J. Fam. L. 445, 463-66 (1984) (and citations therein).

This Court has also recognized the ability and right of mature teenagers to make abortion and contraceptive decisions without state or parental input. See, e.g, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976); Bellotti v. Baird, 443 U.S. 622, 642 (1979). See also Carey v. Population Services Int'l., 431 U.S. 678 (1977). The State of Missouri also enables minors' to consent for treatment for venereal disease, prenatal care, and treatment for their infants. Mo.Ann.Stat. §§ 431.061; 431.065 (Vernon Supp. 1986).

While government may not be required to provide information upon which minors or adults rely for their decision-making, the First Amendment limits its power to prevent others from providing it.

The benefits of a system of free expression inure not only to the individual, but to the public.[14/] While the individual students

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14/ As explained in the first article, and as repeatedly and eloquently recognized by this Court, see infra, n. 15, teen childbearing often destroys a teenager's educational opportunities and thus her ability to assume a full role as a responsible citizen in a democracy. Mothers who give birth before age 18 are only half as likely to have graduated from high school as those who postpone childbearing until after age 20. Women who delay childbearing until their twenties are four to five times more likely to finish college than those who become mothers in their teens. Card and Wise, Teenage Mothers and Teenage Fathers: The Impact of Early Childbearing and Educational Attainment, 9 Fam. Plan. Persp. 199 (1978); see also Moore and Waite, Early Childbearing and Completion of High School, 17 Fam.Plan.Persp. 234 (1985). Likewise, the children of teenage parents suffer educational disadvantages: lower I.Q. and achievement scores and more likely to repeat at least one grade. Baldwin and Cain, The Children of Teenage Parents, 12 Fam. Plan. Persp. 37 (1980). Teenage mothers are also seven times more likely than others to be poor. Teenage Pregnancy, supra, at 33.

-- the authors and readers -- suffered direct harm from the censorship, the public too pays a penalty for government restrictions on information and actions that stifle the development of young people who are the voting citizens of tomorrow.[15/]

II. THE CENSORSHIP OF THESE SIX ARTICLES WAS CONSTITUTIONALLY IMPERMISSIBLE

A. This Censorship Was Not A "Curricular" Decision

Amici acknowledged that the school administration retains broad control over its curriculum and can determine to a considerable extent its content. See, e.g., Pico, 457 U.S. at 864 (plurality opinion); Tinker, 393 U.S. at 507. The principle of curricular

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15/ See also First National Bank of Boston, 435 U.S. at 783; see also Saxbe v. Washington Post Co., 417 U.S. 843, 864 (1974) ("The underlying right is the right of the public generally" to information needed in the political process) (Powell, Jr., dissenting); Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J. concurring) ("The very purpose of the First Amendment is to foreclose public authorities from assuming a guardianship of the public mind.").

control, however, is not a license for the unbridled censorship of student newspapers.[16/] Moreover, the principal's censorship of these six articles was not an educational decision related to any pedagogical purpose of the Journalism curriculum.

This Court has never recognized that curricular decisions are immune from First Amendment limits. See, e.g., Epperson v. Arkansas, 393 U.S. 97 (1968) (law prohibiting teaching of Darwinian theory of evolution held unconstitutional); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas'"; "the First Amendment . . . "does not tolerate laws that cast a pall of orthodoxy over the classroom."); Meyer v. Nebraska, 262

16/ Under petitioners' view, students could be compelled to recite the Pledge of Allegiance simply by making a compulsory flag salute an integral part of a civics class. Yet, we know that this the school may not do. See Barnette, supra.

U.S. 390 (1923) (state law prohibiting teaching of modern foreign languages held unconstitutional); see also Pico, 457 U.S. at 861 (plurality opinion) (recognizing "certain constitutional limits upon the power of the state to control even the curriculum and the classroom").

More important, petitioners' concept of "curriculum" is unacceptably overbroad. Spectrum is plainly not part of the curriculum in the same sense as an English or Math class. As the court below properly recognized, producing and publishing Spectrum was "something more" than merely part of the curriculum. 795 F.2d at 1373. "It was a 'student publication' in every sense." Id. at 1372. As Spectrum's advisor testified:

> It's a student paper, so that the students, first of all, decided the stories, and, you know, wrote the stories, so they obviously were deciding the content. They were writing them. I would help if there were any matters that they

> had questions of, legalwise or ethicalwise, but -- .

Id. (emphasis added).

Obviously, Spectrum had a dual function; it was both intended as a forum for student expression and as an educational tool for journalism students. In determining the constitutional role of state actors in regulating student speech it is essential to distinguish between these functions.

A classroom journalism teacher inevitably is involved in a myriad of day-to-day "editorial" decisions involving the precise content of student-written articles. The teacher's authority to ensure that the articles meet journalistic standards of grammar, style, and competence, however, has never been an issue in this case.

Spectrum was approved for publication by its faculty advisor. Then, and only then, did the principal intervene. He intervened, moreover, in the role of government censor or

regulator, as surely as did the school officials in Tinker. His decisions were unrelated to any pedagogical function of Spectrum or the Journalism II class. Objecting to parts of two articles, he deleted all six because that was the administratively convenient solution. He never consulted with the advisor or considered alternatives. The students discovered the censorship only after publication. Indeed, the only "educational" message conveyed by the principal's actions was the arbitrariness of authority and the dissonance between the rhetoric and reality of individual rights.

Of course, school administrators are not inherently removed from the educational process. But the censorship decision here was no more educational than the decision in Pico to remove school library books because they were "anti-American."

B. The Standard of Review

Every student speech case involves two subsidiary questions: whether the speech is protected and whether it is exercised in an appropriate place. The Eighth Circuit regarded these questions as analytically distinct and analyzed the latter inquiry under the public forum doctrine. Amici believe that the standard articulated by this Court in Tinker provides a suitable framework for analyzing both questions. Under either analysis, however, school officials who act as government censors must, at the very least, provide a substantial justification for their actions. On this record, that burden has not been satisfied.

1. The Tinker Standard

Under this Court's decision in Tinker, students retain free speech rights, except to the extent that such expression "would substantially interfere with the work of the

school or infringe upon the rights of other students." Tinker, 393 U.S. at 509. This standard incorporates the notion that speech must be exercised in an appropriate setting within the school.[17/]

Obviously, not all aspects of the school are equally open to student expression. See Grayned v. City of Rockford, 408 U.S. 104, 117-18 (1972). For example, Tinker's "substantial interference" standard prevents students from commandeering classrooms to discuss issues the teacher decides is inappro-

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17/ Unlike a typical public forum case, this case does not involve a party who is seeking to speak in a government facility to which he has been denied access. Here, there is no question that the Journalism II students can "speak" in the "forum" of Spectrum. The only question is, having created that access, to what extent can the government control the content of that speech. Public forum analysis may be more appropriate in the school setting when a particular group is denied access to school property or facilities that are open to other groups. See, e.g., Widmar v. Vincent, 454 U.S. 263 (1981); San Diego Committee, supra, 790 F.2d 1471; Student Coalition for Peace v. Lower Merion School District, 776 F.2d 431 (3d Cir. 1985).

priate. No one disputes that in a silent study hall, all speech can be "suppressed." On the other extreme, lunch period is generally open to students to talk freely about a wide variety of subjects.

Spectrum undoubtedly represents a medium for student speech within the school community. As such, it is no more subject to censorship than the armbands in Tinker, absent credible evidence of material disruption or invasion of the rights of others. At best this record presents the sort of "undifferentiated fear" that Tinker rejected. 393 U.S. at 508. Accordingly, amici believe that petitioners' claims can be rejected on the basis of Tinker alone.

In the following section, we nonetheless analyze this case in public forum terms because it is the approach followed by the

court below as well as other lower federal courts.[18/]

2. The Public Forum Doctrine

As discussed in Perry Education Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37 (1983), there are two kinds of public forums -- "traditional" public forums such as streets and parks, and government-created or "designated" public forums. Id. at 45-46. Within a designated public forum, any content-based exclusions must "serve a compelling state interest . . . that . . . is narrowly drawn to achieve that end." Id. at 45.

In this case, Hazelwood East created a designated public forum by opening up Spectrum for use by journalism students as a place for discussion of topics of general

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18/ See, e.g., San Diego Committee, 790 F.2d at 1474-76; Bender v. Williamsport School District, 741 F.2d 538, 544-46 (3d Cir. 1984), vacated on other grounds, 475 U.S. 534 (1986); Gambino, supra, 564 F.2d at 158.

interest to its high school audience.[19/] See, e.g., Perry Education Assoc., 460 U.S. at 45 n.7. ("A public forum may be created for a limited purpose such as use by certain groups, e.g., Widmar v. Vincent (student groups), or for the discussion of certain subjects, e.g., City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n (school board business)."). The school has no "competing" extracurricular newspaper. Spectrum "occupies" the field and students had every right to believe, until this incident, that they could express them-

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[19/] Spectrum was in part funded with public monies. Nothing in the Constitution compels Hazelwood East to finance a student newspaper. In recognizing that Hazelwood East created a limited public forum in Spectrum, the courts do not force the school board to do something it has not itself already done, nor does it require that the school board finance Spectrum indefinitely. See Perry Educ. Ass'n, 460 U.S. at 46. Whether public forum analysis would apply to student newspapers produced outside the school environment but distributed by students on school property, or to either curricular or extracurricular school-produced, but independently financed student newspapers is not at issue here.

selves freely on a wide range of subjects.

To determine whether the state has intended to create a "designated" public forum, courts must look "to the policy and practice of the government" and to "the nature of the property and its compatibility with expressive activity . . . ." Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 87 L.Ed.2d, 567, 580 (1985). Here it is difficult to imagine "property" that is more compatible with expressive activity than a newspaper.20/

20/ Unlike several cases in which the Court held that a public forum had not been created, expressive activity is not an incidental function of Spectrum, even if it is not its sole purpose. See, e.g., Cornelius, 87 L.Ed.2d at 582 ("Government did not create the [Combined Federal Campaign] for purposes of providing a forum for expressive activity," but rather, "to minimize the disruption to the workplace . . . by lessening the amount of expressive activity occurring on federal property.") (emphasis original); Lehman v. City of Shaker Heights, 418 U.S. 298, 303 (1974) (purpose of the forum -- city buses -- is to provide mass transit; advertising spaces were "incidental to the provision of public transportation."); Greer v. Spock, 424 U.S. 828 (1976) (purpose of military base is wholly apart from, and generally incom-
[footnote cont'd]

The school's policy and practice toward Spectrum further reinforces the fact that it is intended to be open as a forum for student expression on a broad range of topics of interest to teenagers. Each year, Spectrum asserted its editorial independence from the school officials and asserted its rights to publish under the protection of the First Amendment. At no point did school officials ever object to these assertions. Nor did the administration ever prevent Spectrum from speaking on numerous controversial topics.21/

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patible with, a full range of expressive activities); Adderley v. Florida, 385 U.S. 39 (1966) (same for jailhouse grounds).

21/ Petitioners attempt to make much of the fact that several months before the censorship at issue occurred, the principal orally requested that he receive a copy of the galleys of each issue prior to publication. Nothing in the record indicates, however, that the principal intended to exercise unilateral pre-publication control of the content of Spectrum. Indeed, until the censorship here, the principal took no action with regard to the several issues of Spectrum he previewed. Certainly, nothing in this Court's precedents indicate that the government closes a public forum by designation merely by requesting that it preview the speech prior to its [footnote cont'd]

Where a forum has been created for expressive activities, and where there is no evidence of a longstanding policy and practice directly limiting access to the forum, the Court has not hesitated to find a limited public forum. See, e.g., Widmar v. Vincent, 454 U.S. 263 (1981); Madison Joint School District v. Wisconsin Public Employment Relations Commission, 429 U.S. 167 (1976); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975).

This longstanding policy and practice contrasts sharply with those cases in which the Court has found that government instrumentalities are not public forums, despite their use for and compatibility with communicative functions. In all these cases, the government acted affirmatively and consistently to limit access to its property in ways that clearly demonstrated lack of intent

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distribution on government property.

to create a public forum. See, e.g., Cornelius, 87 L.Ed.2d at 581 (Government consistently limits participation in CFC to "appropriate" voluntary agencies and requires agencies to obtain permission from Campaign officials); Perry Education Assoc., 460 U.S. at 47 (practice of requiring permission from the individual school principal before gaining access to mail system); United States Postal Service v. Greenburgh, 453 U.S. 114, 129 (1981) (unlawful for almost fifty years to use mailboxes independent of the U.S. postal system); Lehman, 418 U.S. at 300-01 (for 26 years City refused access for political advertising on its buses). Here, by contrast, there is no evidence that school administrators had previously interfered with the publication of any of Spectrum's contents.

C. Petitioners Fail To Provide A Constitutionally Adequate Justification For This Censorship

1. There is No Justification For The Censorship of the Four "Unobjectionable" Articles

Under any relevant standard developed by this Court, the suppression of the four "unobjectionable" articles cannot stand. At the very least, content-based regulation of otherwise protected speech must be "reasonable." See Perry Education Association, 460 U.S. at 46. That standard cannot be met by a principal's decision to censor four articles of obvious importance to the school community for no reason other than their appearance on the same pages with two other, disputed articles. Nor is it reasonable for a principal to rely on a publication deadline without even bothering to inquire whether the deadline was flexible or could be met without the wholesale deletions ordered here. "The separation of legitimate from illegitimate

speech calls for ... sensitive tools ...." Speiser v. Randall, 357 U.S. 513, 525 (1958). "Precision of regulation must be the touchstone" when First Amendment values are at stake. NAACP v. Button, 371 U.S. 415, 438 (1963). Amici know of no case that can even be stretched to sustain the censorship of four newspaper articles that everyone agrees are fully protected by the First Amendment. At a minimum, therefore, this aspect of the principal's decision must be reversed.[22/]

22/ Petitioners' cite to Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977), for the appropriate standard of deference that should be accorded to school officials' suppression of student speech. Fortunately, this Court has explicitly rejected such an analogy: "[I]t goes almost without saying that '[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration.'" New Jersey v. T.L.O., 469 U.S. at 338 (quoting Ingraham v. Wright, 430 U.S. 651, 669 (1977)).

2. The Censored Articles Did Not Invade The "Rights" of Students

Petitioners attempt to justify this sweeping censorship by alleging that material in the profile article possibly resulted in an invasion of the rights of others." Tinker, 393 U.S. at 513; Petitioners' Brief, at 43.[23/] This allegation is neither factually correct nor, standing alone, sufficient to justify the censorship that took place. As the Court in Tinker repeatedly emphasized, "undifferentiated fear or apprehension" is not enough to overcome the right to freedom of expression even in the school setting. Tinker, 393 U.S. at 508; see also Pico, 457 U.S. at 866 (plurality opinion). Tinker clearly requires that schools demonstrate substantial and material

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[23/] Petitioners do not claim, and there is no evidence, that the news articles in any way "materially disrupt[ed] class work or involve[d] substantial disorder." Tinker, 393 U.S. at 513.

harm. 393 U.S. at 509.

Despite petitioners' urging, this case does not require the Court to define precisely Tinker's use of the phrase "invasion of the rights of others." Simply put, these articles did not "invade" any "rights", however defined, of any persons.[24/]

In support of their position, petitioners assert that the profile of pregnant students potentially threatened their privacy.

[24/] Amici agree with the Eighth Circuit that the use of the term "rights" in Tinker was not fortuitous, and that "invasions of rights" should be limited to legally cognizable rights. The word "rights" in our society is consistently and pervasively understood as relating to legal standards, particularly when used by courts. A legal definition provides standards to guide conduct that is otherwise wholly lacking from the word "rights." Especially in the First Amendment free speech area, intelligible standards are essential to prevent arbitrary and overbroad government suppression of speech. See Kolender v. Lawson, 461 U.S. 352, 358 (1983). Had the Court intended to allow suppression of a broader category of speech it could have used phrases such as "causing harm to others" or "substantially offending others." The very attempt to define "rights" without reference to legal standards demonstrates the difficulty, even futility, of the effort. The school board, for example, does not offer an alternative definition.

On this record, however, that claim has no basis. Each of the students voluntarily consented to the interview. Each was told that the interview was for purposes of a newspaper article. And each of the students was assured that their names would not be used, as in fact they were not.[25/] All of the information in the article was taken from the students' own written responses to written inquiries. They were undoubtedly as aware as anyone whether and to what extent the information they provided could identify them.

25/ The school board attempts to make an issue of the absence of parental consent to these interviews. Petitioners' Brief, at 7. The notion that students cannot speak about their reproductive choices without parental consent, although they can make reproductive choices without parental consent, see, e.g., Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74-75 (1976), is frivolous. Indeed, one of these students was married and no longer in school; another was already a mother. Under Missouri law, these teenagers were capable of making a variety of important choices concerning medical treatment and privacy choices for both themselves and their babies. See e.g., Mo. Stat. Ann. §§ 431.061; 431.065 (Vernon Supp. 1986).

Mere unsupported speculation that these high school students may later regret these profiles hardly qualifies as the invasion of rights to which Tinker referred. Whether or not school administrators or fellow students could identify these students, the article in no way "invaded" any rights that they retained after consenting to the profiles. Indeed, if the school board was truly motivated by a concern for invasions of privacy rights of the students, it would have acted as strenuously to suppress those copies that were xeroxed and distributed, or at least to punish the "wrongdoers", since the identical articles surely "invaded" the students' rights to the same degree as if they had been published in Spectrum.[26/]

[26/] Petitioners appear to abandon any claim that these articles invaded the "rights" of the profiled students' parents, husband, or boyfriends. In any case, it is extremely difficult to see what "rights" they had that were invaded. Furthermore, the Eighth Circuit's legal liability standard is particularly [footnote cont'd]

3. No Other Interests That Petitioners Assert Justify This Censorship

None of the other reasons put forth by petitioners, all unrelated to the harms identified in Tinker, can justify the censorship that occurred here. 27/ First, the school board asserts that the entire divorce article was properly suppressed because a student's name was used and because the principal believed a quotation in the article raised a

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appropriate in this context, especially where the persons affected are adults. Tinker clearly focused on the impact of student speech in the school setting, not on the outside community. 393 U.S. at 509; see also Fraser, 92 L.Ed.2d at 557. The school lacks an interest in protecting adults outside the school and adults do not need the degree of solicitude or protection that may justify more broad concerns for adolescents' well-being. Requiring an invasion of a nonstudent's legal rights prior to censoring student speech serves fully the school's interests -- protecting itself and its students from liability.

27/ Petitioners do not attempt to justify any of these reasons as compelling, and in light of the content of the articles, no such justifications would be tenable. The Court need not inquire into the compelling nature of the state's interests, however, because the regulations were not "narrowly drawn." Perry, 460 U.S. at 46.

question of "fairness." In fact, the student's name had already been deleted, as the principal would have learned had he bothered to inquire. Nor did the principal inquire into the possibility of modifying or deleting the "objectionable" language. Choosing to censor all six articles is plainly not a reasonable method to impart a "lesson" about journalistic "fairness."

Second, the claim that the divorce and profile articles were inappropriate for a high school audience is unsupportable. These are two problems that are ubiquitous among the nation's teenagers -- and Hazelwood East, as the articles show, is no exception. The notion that student speech on these topics is both inappropriate and subject to censorship demonstrates the necessity for judicial scrutiny in this case.[28/]

[28/] Fraser does not support the school board's claim that courts must defer to school officials' assertion [footnote cont'd]

The third claim, that the school did not want to appear to endorse the students' sexual norms, is an equally unsupportable basis for this censorship. As noted above, faculty members who were featured in four of the censored articles emphasized the problems of teenage pregnancy and marriage. No fair reading of the articles as a whole could be construed as official endorsement of these students' sexual norms.[29/] Furthermore, Spectrum's explicit policy of editorial independence was stated at the beginning of the

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that any speech is inappropriate. In Fraser, the Court merely held that courts would not second-guess school officials' determinations that lewd and vulgar speech is inappropriate in particular school settings. 92 L.Ed.2d at 558. In petitioners' view, courts could not review suppression of Tinker's armband if school officials call it "inappropriate."

29/ This "endorsement" argument also carries a grave threat of viewpoint discrimination. One may wonder if the school would have made the same claim if the students had stated they had made a mistake in having sex prior to graduating high school and getting married. Again, could the school board ban Tinker's armband because the school did not want to give the "appearance of endorsing" the students' opposition to the war in Vietnam?

school year and was presumably well-known among its readership.

Whatever the objection to these articles, the principal's response fell far short of a "narrowly drawn" or even "reasonable" one. He had numerous options short of deleting four other articles. The principal did not suggest any revisions, additions, or deletions that would have made them more acceptable. He did not consult with the advisor or the student journalists. He did not inquire into delaying publication to enable the pregnant students to be informed of that article's contents. Nor did he consider requesting the inclusion of a caveat stating that the administration did not endorse the views expressed therein.

D. This Ad Hoc and Standardless Censorship Procedure Violated First Amendment Due Process Principles

This censorship largely resulted from ad hoc, standardless decision-making. To avoid

such overbroad censorship and to insure "breathing space" for First Amendment rights, this Court has long required that the state act pursuant to established standards and procedures when regulating expressive activities. See NAACP v. Button, 371 U.S. at 438; see also Pico, 457 U.S. at 874 (plurality opinion). Not only did the school board have an extremely vague policy for student publications, see Kuhlmeier, 795 F.2d at 1377 nn. 6-7, (quoting Hazelwood School Board Policy Nos. 348.51),[30/] no procedures existed to implement that policy, other than the princi-

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[30/] The only arguably relevant regulation is the hopelessly vague phrase "within the rules of responsible journalism" contained in School Board Policy No. 348.51. Certainly there is no contention that the articles were "commercial, obscene, libelous, defaming to character, advocating racial or religious prejudice, or contributing to the interruption of the education process." See Policy No. 348.51, quoted in 795 F.2d at 1377 n.7. Although a school disciplinary code need not be as detailed as a criminal code, see Fraser, 92 L.Ed.2d at 560, only the vaguest of standards and no procedures existed here for prepublication review and censorship.

pal's oral request that he receive a copy of the galleys to Spectrum prior to publication.

The lack of articulable standards or procedures conferred unbridled discretion on the principal and led to this arbitrary and overbroad censorship. See, e.g., Shuttlesworth v. Birmingham, 394 U.S. 147, 150-151 (1969). Among the most efficient of the "tools" for the "separation of legitimate from illegitimate speech," Speiser v. Randall, 357 U.S. at 525, is the requirement that censorship decisions be preceded by a rational, deliberative process. As the plurality noted in Pico, "the presence of such sensitive tools in petitioners' decision-making process would naturally indicate a concern on their part for the First Amendment rights of respondents; the absence of such tools might suggest a lack of such concern." 457 U.S. at 874 n.26.

Unfortunately, no such sensitive tools

were employed here. Comportment with de minimis procedures prior to this censorship would have achieved the salutary purposes that the First Amendment due process mechanisms serve. Even the most rudimentary procedures, such as an inquiry into publication deadlines and a discussion of alternatives, would have revealed that no immediate decision on the articles was necessary and therefore any action could in fact have been narrowly tailored to precise objections. This case highlights the reality that when public officials act in the First Amendment area without standards and procedures, rational decision-making is well-nigh impossible.

CONCLUSION

For the reasons stated herein, amici respectfully request that this Court affirm the judgment of the court below.

Respectfully submitted,

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