MARGARET BORING, Plaintiff-Appellant, v. THE BUNCOMBE COUNTY BOARD OF EDUCATION; CHARLES JOHNSON, Chairman, MICHAEL ANDERS; TERRY ROBERSON; BRUCE GOFORTH; BILL WILLIAMS; GRACE BRAZIL; WENDELL BEGLEY; DR. J. FRANK YEAGER, Superintendent; FRED IVEY, Principal, each in his/her individual and official capacity, Defendants-Appellees. NATIONAL SCHOOL BOARDS ASSOCIATION; NORTH CAROLINA SCHOOL BOARDS ASSOCIATION; VIRGINIA SCHOOL BOARDS ASSOCIATION COUNCIL OF SCHOOL ATTORNEYS, Amici Curiae.

No. 95-2593

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

136 F.3d 364; 1998 U.S. App. LEXIS 2053; 13 BNA IER CAS 1189

March 4, 1997, Argued
February 13, 1998, Decided

SUBSEQUENT HISTORY: [**1] Certiorari Denied October 5, 1998, Reported at: 1998 U.S. LEXIS 4802.

OPINION

WIDENER, Circuit Judge:

The only issue in this case is whether a public high school teacher has a First Amendment right to participate in the makeup of the school curriculum through the selection and production of a play. We hold that she does not, and affirm the judgment of the district court dismissing the complaint.

I.

Margaret Boring was a teacher in the Charles D. Owen High School in Buncombe County, North Carolina. In the fall of [**3] 1991, she chose the play Independence for four students in her advanced acting class to perform in an annual statewide competition. She stated in her amended complaint that the play "powerfully depicts the dynamics within a dysfunctional, single-parent family - a divorced mother and three daughters; one a lesbian, another pregnant with an illegitimate child." She alleged that after selecting the play, she notified the school principal, as she did every year, that she had chosen Independence as the play for the competition. She does not allege that she gave the principal any information about the play other than the name.

The play was performed in a regional competition and won 17 of 21 awards. Prior to the state finals, a scene from the play was performed for an English class in the school. Plaintiff informed the teacher of that class that the play contained mature subject matter and suggested to the teacher that the students bring in parental permission slips to see the play. Following that performance, a parent of one of the students in the English class complained to the school principal, Fred Ivey, who then asked plaintiff for a copy of the script. After reading the play, [**4] Ivey informed plaintiff that she and the students would not be permitted to perform the play in the state competition.

Plaintiff and the parents of the actresses performing the play met with Ivey urging him not to cancel the production. Ivey then agreed to the production of the play in the state competition, but with certain portions deleted. The complaint states that the students performed the play in the state competition and won second place. The complaint does not state, but we assume, that the play was performed in accordance with Ivey's instructions.

In the summer of 1991 the school moved to a new facility which had a maple stage floor in the auditorium. At the time of the move, plaintiff discussed with Ivey the problems with mounting productions on the maple floor. Ivey suggested using plywood as a temporary surface over the maple floor but instructed plaintiff to obtain approval before doing any construction work in the auditorium. In the spring of 1992, plaintiff advised Ivey that she needed to construct sets for the production of a musical. Ivey responded that he understood the need for sets and that prior approval was intended to apply only to the construction of fixtures. [**5] In preparation for the musical, the surface of the maple floor of the stage was covered with plywood fixed to the floor with screws. When the plywood was removed after the play, the floor had to be refinished because of the holes left by the screws.

In June 1992, Ivey requested the transfer of Margaret Boring from Owen High School, citing "personal conflicts resulting from actions [*367] she initiated during the course of this school year." Superintendent Yeager approved the transfer stating that she had failed to follow the school system's controversial materials policy in producing the play. Plaintiff states that the purpose of the controversial materials policy is to give the parents some control over the materials to which their children are exposed in school. She alleges that at the time of the production, the controversial materials policy did not cover dramatic presentations, and that the school's policy was amended subsequently to include dramatic presentations.

Plaintiff appealed the transfer to the Board of Education. A hearing was held on September 2, 1992, following which the Board upheld the transfer. Plaintiff alleges that prior to the hearing there was considerable public [**6] discussion of the transfer, including that the play was obscene and that she was immoral. She alleges that members of the school board asked questions at the hearing that demonstrated their consideration of matters outside the evidence presented at the hearing.

Plaintiff filed the present action on January 10, 1994. Her amended complaint claims that her transfer was in retaliation for expression of unpopular views through the production of the play and thus in violation of her right to freedom of speech under the First and Fourteenth Amendments and Article I, § 14 of the North Carolina Constitution. She also claimed a violation of due process under the Fourteenth Amendment and Article I, § 19 of the North Carolina Constitution based on the allegation that members of the school board considered information that was not presented at the hearing; and a violation of a liberty interest under Article I, §§ 1 and 19 of the North Carolina Constitution.

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Plaintiff appeals only the dismissal of her federal First Amendment claim. *** We now affirm the judgment of the district court holding that the plaintiff's selection and production of the play Independence as part of the school's curriculum was not protected speech under the First Amendment.

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II.

The district court held that the play was a part of the school curriculum and:

> Since plaintiff has not engaged in protected speech, her transfer in retaliation for the play's production did not violate Constitutional standards. (A. 71)

With this holding, the plaintiff takes issue on appeal as follows:

> Whether the district court erred in holding that plaintiff's act of selecting, producing and directing a play did not constitute "speech" within the meaning of the First Amendment. (Boring's brief, p. vi)

We begin our discussion with the definition of curriculum:

> 3: all planned school activities including besides courses of study, organized play, athletics, dramatics, clubs, and homeroom program. [*368]

Webster's Third New International Dictionary, 1971, p. 557.

Not only does Webster include dramatics within the definition of curriculum, the Supreme Court does the same. In Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988), a case involving student speech [**9] in a school newspaper which was edited by the principal of a high school, the Court distinguished cases which require a school to tolerate student speech from those cases in which the school must affirmatively promote student speech. Although in different context, the reasoning of the Court as to what constitutes the school curriculum is equally applicable here.

> The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences [footnote omitted].

Hazelwood, 484 U.S. at 271.

It is plain that the play was curricular from the fact that it was supervised by a faculty member, Mrs. Boring; it was performed in interscholastic drama competitions; and the theater program at the high school was obviously [**10] intended to impart particular skills, such as acting, to student participants. These factors demonstrate beyond doubt that "students, parents, and members of the public might reasonably perceive [the production of the play Independence] to bear the imprimatur of the school." Hazelwood, 484 U.S. at 271.

So there is no difference between Webster's common definition and that of Hazelwood.

III.

With these thoughts in mind, we are of opinion that the judgment of the district court is demonstrably correct.

A.

Plaintiff's selection of the play Independence, and the editing of the play by the principal, who was upheld by the superintendent of schools, does not present a matter of public concern and is nothing more than an ordinary employment dispute. That being so, plaintiff has no First Amendment rights derived from her selection of the play Independence.

This principle was illustrated in Connick v. Myers, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), in which the Court upheld the firing of an assistant district attorney who had circulated a questionnaire questioning the manner in which the district attorney operated that office. The Court held that [**11] "if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge." Connick at 146. Because the questionnaire almost wholly concerned internal office affairs rather than matters of public concern, the court held that, to that extent, it would not upset the decision of the district attorney in discharging Myers. n1 It stated:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick at 147.

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In a case on facts so near to those in the case at hand as to be indistinguishable, the Fifth Circuit came to the conclusion we have just recited in Kirkland v. Northside Independent School District, 890 F.2d 794 (5th Cir. 1989), cert. denied, 496 U.S. 926, 110 S. Ct. 2620, 110 L. Ed. 2d 641 (1990). Kirkland was a case in which the employment contract of a high school history teacher was not renewed. He alleged the nonrenewal was a consequence of, and in retaliation for, his use of an unapproved reading list in his world history class. The high school had provided the teacher with a supplemental [**13] reading list for his history class along with a copy of the guidelines used to develop and amend that list. He was aware of the guidelines and understood that if he was dissatisfied, a separate body of reading material could be used in his class if he obtained administrative approval. The teacher, however, used his own substitute list and declined to procure the approval of the school authorities for his substitute list. The authorities at his high school then recommended that his contract not be renewed at the end of the next academic year, which was affirmed by the board of trustees, much like Margaret Boring's transfer was affirmed by the school board in this case after a recommendation by the administrative authorities.

The court held that to establish his constitutional claim, Kirkland must have shown that his supplemental reading list was constitutionally protected speech; not different from Mrs. Boring's selection of the play Independence in this case. It went on to hold that under Connick v. Myers, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), the question of whether a public employee's speech is constitutionally protected depends upon the public or private [**14] nature of such speech. It decided that the selection of the reading list by the teacher was not a matter of public concern and stated that:

> Although, the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula. [footnote omitted]

890 F.2d at 800. And the Kirkland court recognized that Hazelwood held that public school officials, consistent with the First Amendment, could place reasonable restrictions upon the subject matter of a student published newspaper and also that schools are typically not public forums.

The court stated that "we hold only that public school teachers are not free, under the first amendment, to arrogate control of curricula," 890 F.2d at 802, and concluded as follows:

> In summary, we conclude that Kirkland's world history reading list does not present a matter of public concern and that this case presents nothing more than an ordinary employment dispute. Accordingly, Kirkland's conduct in disregarding Northside's administrative process does not constitute protected speech . . . .

890 F.2d at 802.

Since plaintiff's dispute [**15] with the principal, superintendent of schools and the school board is nothing more than an ordinary employment dispute, it does not constitute protected speech and has no First Amendment protection. Her case is indistinguishable from Kirkland's.

B.

The plaintiff also contends that the district court erred in holding that the defendants had a legitimate pedagogical interest in punishing plaintiff for her speech. Of course, by speech, she means her selection and production of the play Independence.

As we have previously set out, the play was a part of the curriculum of Charles D. Owen High School, where plaintiff taught. So this contention of the plaintiff is in reality not different from her first contention, that [*370] is, she had a First Amendment right to participate in the makeup of the high school curriculum, which could be regulated by the school administration only if it had a legitimate pedagogical interest in the curriculum. While we are of opinion that plaintiff had no First Amendment right to insist on the makeup of the curriculum, even assuming that she did have, we are of opinion that the school administration did have such a legitimate pedagogical interest and that the [**16] holding of the district court was correct.

Pedagogical is defined as "2: of or relating to teaching or pedagogy. EDUCATIONAL." Webster's Third New International Dictionary, 1971, p. 1663. There is no doubt at all that the selection of the play Independence was a part of the curriculum of Owen High School.

The makeup of the curriculum of Owen High School is by definition a legitimate pedagogical concern. Not only does logic dictate this conclusion, in only slightly different context the Eleventh Circuit has so held as a matter of law: "Since the purpose of a curricular program is by definition 'pedagogical' . . . ." Searcey v. Harris, 888 F.2d 1314, 1319 (11th Cir. 1989). Kirkland, 890 F.2d at 795, held the same in the same context present here.

If the performance of a play under the auspices of a school and which is a part of the curriculum of the school, is not by definition a legitimate pedagogical concern, we do not know what could be.

In our opinion, the school administrative authorities had a legitimate pedagogical interest in the makeup of the curriculum of the school, including the inclusion of the play Independence. The holding of the district court [**17] was correct and the plaintiff's claim is without merit.

IV.

The question before us is not new. From Plato to Burke, the greatest minds of Western civilization have acknowledged the importance of the very subject at hand and have agreed on how it should be treated.

> For a young person cannot judge what is allegorical and what is literal; anything that he

> receives into his mind at that age is likely to become indelible and unalterable; and therefore it is most important that the tales which the young first hear should be models of virtuous thoughts.

Plato's Republic: Book II, Jowett Translation, Walter J. Black, Inc., 1942, p. 281.

> The magistrate, who in favor of freedom thinks himself obliged to suffer all sorts of publications, is under a stricter duty than any other well to consider what sort of writers he shall authorize, and shall recommend by the strongest of all sanctions, that is, by public honors and rewards. He ought to be cautious how he recommends authors of mixed or ambiguous morality. He ought to be fearful of putting into the hands of youth writers indulgent to the peculiarities of their own complexion, lest they should teach the humors [**18] of the professor, rather then the principles of the science.

Letter to a Member of the National Assembly (1791). IV, 23-34, found in The Philosophy of Edmund Burke, University of Michigan Press, 1960, p. 247.

And Justice Frankfurter, in concurrence, related the four essential freedoms of a university, which should no less obtain in public schools unless quite impracticable or contrary to law:

> It is an atmosphere in which there prevail "the four essential freedoms" of a university--to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Sweezy v. New Hampshire, 354 U.S. 234, 255, 263-264, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957) (quoting from a statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand, including A. v. d. S. Centlivres and Richard Feetham, as Chancellors of the respective universities [footnote omitted]).

We agree with Plato and Burke and Justice Frankfurter that the school, not the teacher, has the right to fix the curriculum. Owens being a public school does not give the plaintiff any First Amendment [**19] right to [*371] fix the curriculum she would not have had if the school were private. Connick, 461 U.S. at 147.

Someone must fix the curriculum of any school, public or private. In the case of a public school, in our opinion, it is far better public policy, absent a valid statutory directive on the subject, that the makeup of the curriculum be entrusted to the local school authorities who are in some sense responsible, rather than to the teachers, who would be responsible only to the judges, had they a First Amendment right to participate in the makeup of the curriculum.

The judgment of the district court is accordingly AFFIRMED.

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WILKINSON, Chief Judge, concurring:

Traditionally, indeed for most of our history, education has been largely a matter of state and local concern. The dissents, however, approach education as a federal judicial enterprise. The dissenters seize

upon one loose, slippery, litigious phrase-- "legitimate pedagogical concern" -- and consign it to the mercies of the federal courts. They provide not one iota of guidance to local school administrators on the interpretation of this tantalizing formulation, nor could they. What is "legitimately pedagogical" will inevitably mean one thing to one judge or jury and something else to another.

This is precisely the process by which [federal civil rights legislation] becomes an instrument of disenfranchisement. In this case, that provision would remove from students, teachers, parents, and school boards the right to direct their educational curricula through democratic means. The curricular choices of the schools should be presumptively their own -- [*372] the fact that such choices arouse deep feelings argues strongly for democratic means of reaching them. *

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* The dissents contend that all the intrusiveness occasioned by the term "legitimate pedagogical concern" can be ascribed to the Supreme Court. It is obviously not the Supreme Court's use of the phrase to which I object, but the dissents' aggressive misapplication of it to all curricular decisions.

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I would affirm the judgment of the district court.

LUTTIG, Circuit Judge, concurring:

I agree fully with the unassailable conclusion of the majority that the First Amendment does not require school boards to allow individual teachers in the Nation's elementary and secondary public schools to determine the curriculum for their classrooms consistent with their own personal, political, and other views.

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Notwithstanding its obvious recognition of the inapplicability of Hazelwood, the dissent would nevertheless import wholesale Hazelwood's test for evaluating restrictions on student speech within curricular activities into the entirely different context of teacher speech through the curriculum itself. That is, not only does the dissent deny, through simple omission of the relevant portions of text from the Court's opinion, that Hazelwood was concerned only with student speech; it fails to recognize the elementary difference between teacher in-class speech which is curricular, and teacher in-class speech which is noncurricular, because it assumes that every word uttered by a teacher in a classroom is curriculum. In the latter context of teacher in-class noncurricular speech, the teacher assuredly enjoys some First Amendment protection. In the former context of teacher in-class curricular speech, the teacher equally assuredly does not.

Of course, we are presented in this case not with student speech within a curricular activity (such as in Hazelwood), but rather, with teacher or employee speech literally through the curriculum itself. [**27] The differences are plain -- the ultimate question for our resolution being whether a teacher has a constitutional right to define, at least in part, the school's curriculum, over the informed judgments of both school boards and parents. As noted, mistakenly applying Hazelwood in the first instance, and then, in its alternative reasoning, mistakenly assuming that every word spoken in the classroom by a teacher is a matter of public concern within the meaning of Connick and Pickering, the dissent would hold that every teacher has such a right. Today, however, the court properly concludes that she does not. Of course, were it otherwise -- that is, were every public school teacher in America to have the constitutional right to design (even in part) the content of his or her individual classes, as the dissent

would have it -- the Nation's school boards would be without even the most basic authority to implement a uniform curriculum and schools would become mere instruments for the advancement of the individual and collective social agendas of their teachers.

Rhetorically, the dissent attempts to minimize the radicalization of the educational process that would follow upon its [**28] proposed holding, by assuring that school officials "must and [would] have final authority over curriculum decisions," and that all that would be required is the mere articulation by the school board of any "legitimate pedagogical concern." Even if these observations as to the dissent's proposed holding were true, the requirement that school systems across the country make their curriculum decisions in anticipation of litigation, and then engage in the time-consuming processes of discovery, pretrial litigation, and trial in federal court to defend as "legitimately pedagogical" their individual curriculum decisions, would itself represent a crushing burden, not to mention a surrender to unelected federal judges of the "final authority over curriculum decisions" that is properly that of school boards and parents.

But one should be under no illusions that the particular requirement of "legitimate pedagogy" that the dissent has in mind could ever be so easily satisfied or that, in reality, the dissent contemplates final decisionmaking authority for curriculum resting with the Nation's schoolboards. The indisputable subtext of the dissent, which could hardly go unnoticed, is that "legitimate" pedagogy [**29] will [*374] be not what the parents and schoolboards decide it should but, rather, what the judges say it will be. If any confirmation of this is necessary, one need look no further than to Judge Hamilton's separate opinion, in which he has already concluded, without even so much as an allegation to this effect by the plaintiff, that the defendants, "all for the sole purpose of shielding the principal and the Board from the wrath of the public outcry," "targeted Margaret Boring as a scapegoat and used her to shield them from the 'heat' of the negative outcry resulting from the performance of Independence." Post at 29-30 (Hamilton, J., dissenting).

Judge Wilkins and Judge Williams join in this concurrence.

HAMILTON, Circuit Judge, dissenting:

I join in Judge Motz's persuasive dissenting opinion. I write separately to emphasize several points. First, the facts as alleged in the complaint suggest strongly that this case is far from an "ordinary employment dispute," i.e., a case involving only speech of a private concern, as the majority dismissively states. Ante at 10. Instead, as gleaned from a fair reading of the complaint, this is a case [**30] about a school principal, Fred Ivey, and a county school board, the Buncombe County Board of Education (the Board), who targeted Margaret Boring as a scapegoat and used her to shield them from the "heat" of the negative outcry resulting from the performance of Independence. This is also a case about a dedicated teacher who, contrary to the implication of the majority and concurring opinions, in no way violated any aspect of an approved curriculum; who followed every previously required standard set forth for the selection and approval of the school production; who, when requested to do so, redacted certain portions of the production and only permitted its performance after that performance had been explicitly approved by her principal, Mr. Ivey; yet, who nevertheless lost her position as a result of the production, all for the sole purpose of shielding the principal and the Board from the wrath of the public outcry. *** Because this dispute originated in, and was entirely the result of, public debate, I believe that the Board, as a public employer that allegedly acted in response to that public debate, should be required to articulate some legitimate, pedagogical concern for restricting Boring's speech. This burden is hardly onerous, and it is the least we can require of public officials charged with making curriculum decisions.

Second, it should not be overlooked that this case presents one simple question: Can the Board censor

Boring's speech without proffering any legitimate pedagogical concern justifying the restriction? Judge Motz's dissent persuasively explains why the answer to this simple question is no. In all likelihood, if remanded, this case would be resolved in favor of the Board at the summary judgment stage, as several pedagogical concerns probably justified the Board's action. At this early stage, ... however, we have no basis for determining whether the Board's restriction reasonably related to legitimate pedagogical concerns. [**32] For this reason, the judgment of the district court should be reversed and the matter remanded for further proceedings.

A final note concerning the concurring opinions of Chief Judge Wilkinson and Judge Luttig. These opinions attack the dissenting opinion as consigning to the federal judiciary the responsibility for managing our public schools. Nothing could be further from reality. What these opinions ignore, however, is that any limited intrusion, whatever it may be, is precisely the intrusion required by the Supreme Court's decision in Hazelwood. The Supreme Court established the Hazelwood standard and, in doing so, clearly envisioned some minimal intrusion into public school management insofar as school administrators would be required to articulate a legitimate pedagogical concern for censoring a student's speech. The Supreme Court apparently [*375] did not believe this standard to be too ambiguous for district and appellate courts to apply, nor did it apparently believe this standard to place an unjustly onerous burden on school officials. Therefore, even if the parade of horribles feared by the concurrences came to pass, it is a parade of horribles created by a standard articulated [**33] by the Supreme Court and one to which we are bound to adhere until the Supreme Court states otherwise.

DIANA GRIBBON MOTZ, Circuit Judge, dissenting:

The majority holds that a teacher's speech in selecting, producing, and directing a school play deserves "no First Amendment protection." Ante at 15. I cannot agree and therefore respectfully dissent. In my judgment, the district court erred in dismissing Margaret Boring's complaint for failure to state a claim upon which relief can be granted.

School administrators must and do have final authority over curriculum decisions. But that authority is not wholly unfettered. Like all other state officials, they must obey the Constitution. The Supreme Court has long recognized that the Constitution, specifically the First Amendment, "does not tolerate laws that cast a pall of orthodoxy over the classroom." Keyishian v. Board of Regents, 385 U.S. 589, 603, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967). See also Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969) ("teachers" no less than "students" do not "shed their constitutional rights to freedom of [**34] speech or expression at the schoolhouse gate"). Thus, teachers' in-class speech retains some, albeit limited, First Amendment protection, as is explained in detail in the panel opinion in this case. ... To that opinion, I add only a few thoughts.

I.
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The Board may indeed have "legitimate pedagogical concerns" that are "reasonably related" to its disciplinary [**37] decision. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988). But, of course, Boring alleges no such concerns and the Board has not yet stated any. Hence, nothing in the record before us, at this early stage in the proceedings, allows us to draw such a conclusion. Prior to today, every court to consider the matter has required that school administrators offer some evidence -- if only an affidavit -- to establish the legitimacy of the pedagogical concerns purportedly related to their actions. See Boring, 98 F.3d at 1479. The majority, however, concludes that even this slight evidentiary showing is unnecessary. n1 The majority maintains that because "pedagogical" is defined as "educational," any and every curriculum decision made by school administrators is "by definition a legitimate pedagogical concern" and thus constitutionally acceptable. Ante at 16. [footnote omitted]

The Supreme Court's careful reasoning in Hazelwood, an opinion authored by Justice White and joined by all members of the present Court then sitting (the Chief Justice, and Justices Stevens, O'Connor, and Scalia), offers no support for this astonishing conclusion. n2 Rather, in Hazelwood the Court held that school administrators' curriculum choices did not offend the First Amendment "so long as their actions are reasonably related to legitimate pedagogical concerns." Hazelwood, 484 U.S. at 273 (emphasis added). Indeed, the Court went on to recognize that, on occasion, a particular curriculum decision may have "no valid educational purpose" and that in such an instance "the First Amendment is so directly and sharply implicated as to require judicial intervention." Id. (citation and internal quotation omitted; alteration in original). Thus, the Supreme Court in Hazelwood clearly did not hold, as the majority does here, that each and every curriculum decision is "by definition a legitimate pedagogical concern." Ante at 16 (emphasis added). Instead, the Court meticulously analyzed the speech before it and concluded that the school administrators had [**39] demonstrated -- through the testimony of several witnesses -- the legitimacy of their pedagogical concerns and that for this reason "no violation of First Amendment rights occurred." 484 U.S. 260 at 275-76, 108 S. Ct. 562, 98 L. Ed. 2d 592. [footnote omitted]

Nor do the two cases upon which the majority relies, ante at 16, support its holding that each and every curriculum decision of a school administration is "by definition a legitimate pedagogical [**40] concern." In neither Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794 (5th Cir. 1989); cert. denied, 496 U.S. 926, 110 L. Ed. 2d 641, 110 S. Ct. 2620 (1990), nor Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989), did the courts hold that the plaintiffs failed to state a claim upon which [*377] relief could be granted or that school administrators' decisions were motivated by legitimate pedagogical concerns simply because those decisions concerned the curriculum.

In Kirkland, the Fifth Circuit did conclude that the teacher "suffered no impairment of his First Amendment rights." Kirkland, 890 F.2d 794 at 795. But that teacher, Timothy Kirkland, unlike Boring, admitted that he refused to follow the school's well-established rules. For example, he admitted using a "nonapproved reading list." Kirkland, 890 F.2d at 795 (emphasis added). Boring, by contrast, alleges that her principal initially acquiesced in her choice and production of Independence. Moreover, Kirkland did not concede, as Boring does, that the school authorities were entitled to the broad discretion vested in them under the Hazelwood standard. Rather, Kirkland contended that "his control of the world history class curriculum [was] [**41] unlimited." Kirkland, 890 F.2d at 801 (emphasis added). The Kirkland court properly rejected this argument. Id. But the Fifth Circuit's reasoning in Kirkland does not foreclose Boring's quite different and far more modest contention that although administrators may discipline a teacher even when the teacher does follow the school's rules, they may do so only "so long as [administrators'] actions are reasonably related to legitimate pedagogical concerns." Hazelwood, 484 U.S. at 273. Actually, rather than foreclosing this reasoning, the Kirkland court seemed to embrace it: "Our decision should not be misconstrued . . . to suggest that public school teachers foster free debate in their classrooms only at their own risk or that their classrooms must be 'cast with a pall of orthodoxy.'" Kirkland, 890 F.2d at 801-02.

In Searcey, the Eleventh Circuit recognized, as I do, that curricular programs by nature have pedagogical purposes. See 888 F.2d at 1319. But it did not hold, as the majority does here, that each and every curricular decision is "by definition a legitimate pedagogical concern." Ante at 16 (emphasis added). In fact, the Eleventh [**42] Circuit's holding stands in stark contrast to that set forth by the majority. The Searcey court upheld a judgment against a school board precisely because the board offered "no evidence" to support its challenged requirement. Searcey, 888 F.2d at 1322 (emphasis added). The court reasoned "we cannot infer the reasonableness of a regulation from a vacant record." Id. (citing Hazelwood, 484 U.S. at 275 & n.8). Moreover, Searcey expressly rejected the school board's argument that even though it failed to offer any evidentiary support, a court must defer to its decision; the court concluded that this would "overstate[ ] the deference a court must pay to School Board decisions." 888

F.2d 1314 at 1321. The majority erroneously relies on Searcey to do precisely what the Searcey court itself would not do -- overstate the deference due school board decisions and infer the reasonableness of such decisions from a vacant record.

The Buncombe County Board of Education may possess legitimate pedagogical concerns reasonably related to its discipline of Boring. But, to date, the Board has not even attempted to state those concerns, let alone offered a scintilla of evidence [**43] establishing them. On this record, I do not see how a court can conclude, as the majority does, that "the school administrative authorities had a legitimate pedagogical interest" justifying discipline of Boring and dismissal of her complaint. Ante at 16.

II.

Like the district court, Boring, and the two associations that filed amici briefs on behalf of the School Board (the National School Boards Association and the Virginia School Board Association Council of School Board Attorneys), I believe that the standard articulated in Hazelwood, not that set forth in Connick v. Myers, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), provides the appropriate test for analyzing the speech at issue in this case. But, contrary to the majority's suggestion, even if Connick were applicable here, it would fail to provide an alternative basis on which to dismiss Boring's complaint.

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III.

As recognized at the outset of this dissent and in the panel opinion, school administrators [*380] must "be permitted to have the final [**51] say in setting the appropriate curriculum so that students are not exposed to material that detracts from or impedes the school's pedagogical mission." Boring, 98 F.3d 1474 at 1483. Yet, the First Amendment lives in the classroom as it does elsewhere. Indeed, as the Supreme Court stated several decades ago:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation.

Shelton v. Tucker, 364 U.S. 479, 487, 5 L. Ed. 2d 231, 81 S. Ct. 247 (1960) (internal quotation omitted). Justice Stewart wrote these words in the course of holding that the First Amendment prevented public schools from compelling teachers [**52] to list all organizations to which they had belonged or contributed in the recent past. But the words apply with equal force here. Rather than "vigilantly protecting . . . constitutional freedoms . . . in the community of American schools," the majority eliminates all constitutional protection for the in-class speech of teachers. By holding that public school administrators can constitutionally discipline a teacher for in-class speech without demonstrating, or even articulating, some legitimate pedagogical concern related to that discipline, the majority extinguishes First Amendment rights in an arena where the Supreme Court has directed they should be brought "vividly into operation." For these reasons, I must respectfully dissent.