

*“Pick”ering the Speech Rights of Public School Teachers: Arguing for a Movement by
Courts Toward the Hazelwood-Tinker Standard Under the First Amendment*

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I. Introduction

The Supreme Court stated on various occasions that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”¹ Yet, on February 23, 2006, the United States District Court for the Eastern District of Virginia held that a public school teacher had no First Amendment rights to postings he made on a bulletin board in his own classroom.² In that case, *Lee v. York County School Division*, a public high school teacher, William Lee, alleged that the school he taught at violated his free speech and equal protection rights when the principal removed religious materials from his classroom walls.³ In reaching its conclusion that the school did not violate Mr. Lee’s rights, the District Court recognized the circuit-split as to what test should apply to a public school teacher’s freedom of speech claim.⁴ The court settled on an application of the *Pickering-Connick* standard set forth by the Supreme Court and found that the postings of religious items by Mr. Lee on the bulletin board inside his classroom were curricular speech,

¹ *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967).

² *Lee v. York County Sch. Div.*, 418 F. Supp. 2d 816, 835 (E.D. Va. 2006).

³ *Id.* at 820.

⁴ See *id.* at 821 (recognizing the lines at which the circuits split as to what test to apply to the speech of public schools teachers and noting that the Third, Fourth, Fifth, and D.C. Circuits apply *Pickering*, while the First, Second, Seventh, Eighth, and Tenth Circuits employ *Hazelwood*); see also Karen C. Daly, *Balancing Act: Teachers’ Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 16 (discussing and analyzing the confusion among the circuits as to what test to apply to teacher’s First Amendment speech in public school classrooms).

and thus unprotected by the First Amendment.⁵ The court went on to state that such postings did not express matters of public concern under this test and that the government did not create a limited public forum in placing bulletin boards on high school classroom walls.⁶

This Note argues two main points. First, the district court erred in applying the *Pickering-Connick* standard to Mr. Lee's classroom speech, and instead should have applied the *Hazelwood-Tinker* test articulated by the Supreme Court for freedom of speech claims within the setting of public schools.⁷ Under *Hazelwood-Tinker* approach, the school created a designated public forum when it put bulletin boards inside teachers' classrooms and allowed them to post things without prior approval, providing them with very few guidelines on what they could not post.⁸ Once the school created this designated public forum, the

⁵ See Lee, 418 F. Supp. 2d at 821-22 (announcing that the Fourth Circuit has adopted the *Pickering-Connick* approach and that Lee's case was a question about what free speech rights he has as a public school teacher-employee).

⁶ See *id.* at 828-831 (finding that even if Lee's postings do not constitute curricular speech, they do not touch on a matter of public concern because at his deposition, Lee stated that he posted the materials because they were interesting to him, and further that the school had not created a limited public forum because the principal stated there were a lot of things that would be inappropriate to post in a public classroom and that the school simply had not given its teachers freedom to express themselves in their classrooms in any way that they please).

⁷ See *infra* Part III.A.

⁸ *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) (delineating the three categories of forums for First Amendment analysis of freedom of speech claims and setting out the guidelines for how government creates each on and to what extent it may regulate speech in

removal of Mr. Lee's postings because they were of some religious nature constituted viewpoint discrimination in violation of this First Amendment right to freedom of speech.⁹ Second, even if the *Pickering-Connick* standard applied by the court was the correct approach to analyze Mr. Lee's speech, it incorrectly found this speech to be curricular in nature and consequently should re-analyze the freedom of speech claim under public concern analysis.¹⁰ It should have been clear to any reasonable member of the public that the school was not speaking through the teachers' postings on the bulletin boards. The court found in previous cases that when the school is speaking its own message through another individual, it has broader discretion to limit such speech.¹¹ Furthermore, Mr. Lee's postings were not a

each category).

⁹ See, e.g., *id.* at 682 (1998) (asserting that the exclusion of a speaker, even from a nonpublic forum, must be reasonable in light of the purpose of the property and not based on the speaker's viewpoint); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 832 (1995) (concluding that the University's denial of funds for the third party printers of a campus newspaper based on the paper's religious outlook was impermissible viewpoint discrimination); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) (condemning the exclusion of a group from using school facilities after hours because of their religious point of view as unconstitutional viewpoint discrimination); *Sons of Confederate Veterans v. Glendening*, 954 F. Supp. 1099, 1104 (D. Md. 1997) (finding that viewpoint discrimination, even if done with noble intentions and in light of public discontent with certain speech, is nonetheless unconstitutional in any forum).

¹⁰ See *infra* Part III.B.

¹¹ See, e.g., *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 367 (4th Cir. 1998)

private grievance against his employer and they did not fall under any portion of the school's curriculum, thus under this test the court should find that the First Amendment protects Mr. Lee's postings as non-curricular speech that was closer to touching on matters of public and not private concern.¹²

II. Background

A. The Supreme Court's Decisions in the Government Employee Cases of *Connick v. Myers* and *Pickering v. Board of Education of Township High School*

The test used by the district court in *Lee* is a combination of two tests first articulated by the Supreme Court in two separate cases dealing with government employees' freedom of speech claims. The first case decided by the Court was *Pickering v. Board of Township High School*. In that case the Board of Education¹³ dismissed Marvin Pickering, a teacher at Township High School, for sending a letter to a local newspaper regarding a recently proposed tax increase, criticizing the way in which the Board and the superintendent handled past school revenue raising proposals.¹⁴ The Supreme Court found that the Board violated Mr. Pickering's First

(affirming the judgment of the district court that a teacher's selection and production of a school-sponsored play as part of the school's curriculum was not protected speech under the First Amendment).

¹² *Connick v. Myers*, 461 U.S. 138, 154 (1983) (characterizing Myers' questionnaire as an employee grievance concerning internal office policy and thus falling outside of First Amendment protection).

¹³ The word "Board" used hereinafter will refer to the school board or board of education in the case the immediate paragraph or section discusses.

¹⁴ *Pickering v. Bd. of Educ. of Township High Sch.*, 391 U.S. 563, 564 (1968).

Amendment rights and reversed the lower court's decision that affirmed his dismissal because the letter was detrimental to the school system's interests, which overrode Pickering's First Amendment rights.¹⁵ In reversing the lower court, the Supreme Court announced what has become known as the *Pickering* Balancing Test.¹⁶ The Court stated that "[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹⁷

The Court went on to apply this balancing test to the critical statements in Mr. Pickering's letter.¹⁸ The Court noted that Mr. Pickering wrote the letter after voters rejected proposed tax increase at the polls, and so his letter had no effect on the ability of the school district to raise necessary revenues.¹⁹ More importantly, the Court found that the issue of

¹⁵ *Id.* at 565.

¹⁶ E.g., *Stroman v. Colleton County Sch. Dist.*, 981 F.2d 152, 157-58 (4th Cir. 1992) (applying the *Pickering* Balancing Test to complaints raised in an employee letter regarding school official's alleged mismanagement of the budget); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800 (5th Cir. 1989) (analyzing the concept of academic freedom in the realm of controlling a school's curriculum and finding under the *Pickering* Balancing Test that a teacher does not speak out as a citizen when he offers a separate body of material for his world history class readings).

¹⁷ *Pickering*, 391 U.S. at 568.

¹⁸ *Id.* at 569-574.

¹⁹ See *id.* at 571 (rejecting the Board's allegations that the publication of the letter damaged the professional reputations of the Board and the superintendent and instigated controversy and

whether a school system needs additional funds is a matter of public concern.²⁰ The public interest in having free and open debate on matter of public importance such as this is of great weight and is in fact the core value of the Free Speech Clause of the First Amendment.²¹ Thus, the Court held that in a case such as Mr. Pickering's, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.²²

The second important case decided by the Supreme Court dealing with government employee speech, which followed *Pickering*, was *Connick v. Myers*. Sheila Myers was an Assistant District Attorney in New Orleans who was informed that she would be transferred to prosecute cases in a different section of the criminal court.²³ Ms. Myers strongly opposed this transfer and spoke with her superiors in the office about her opposition to the transfer, along with several other areas of the job that concerned her and her coworkers.²⁴ In response to a

conflict among the Board, teachers, administrators, and the residents of the district).

²⁰ See *id.* (determining that funding amounts for the schools must be open to free public debate in order to be decided on by an informed electorate).

²¹ See *id.* at 573 (demonstrating the great importance given to freedom of speech on matters of public concern by pointing to the Court's holdings that said a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when they are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth).

²² *Id.* at 574.

²³ *Connick v. Myers*, 461 U.S. 138, 140 (1983).

²⁴ *Id.*

suggestion that others in the office did not share her concerns, she conducted some research on the matter and prepared a questionnaire soliciting the views of her fellow staff members concerning various work-related topics that she distributed to them the next day.²⁵ Among these topics were: the office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns.²⁶ Upon hearing of this, the District Attorney Harry Connick returned to the office and informed Ms. Myers that she was being terminated because of her refusal to accept the transfer and that he considered her distribution of the questionnaire an act of insubordination.²⁷ Ms. Myers filed suit contending that Connick wrongfully terminated her employment because she exercised her constitutionally protected right of free speech.²⁸

After a review of the First Amendment jurisprudence that governed claims like Ms. Myers', the Court narrowly held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . a federal court is not the appropriate forum . . . to review . . . a personnel decision . . . by a public agency allegedly in reaction to the employee's behavior."²⁹ The Court distinguished this case from *Pickering* because the fact that Ms. Myers, unlike Mr. Pickering, exercised her rights to speech at the office supports Mr. Connick's fears that the functioning of his office was in

²⁵ Id. at 141.

²⁶ Id.

²⁷ Id.

²⁸ Id.

²⁹ Id. at 147.

danger.³⁰ Furthermore, the context of this dispute was important because this was not a case where an employee, out of purely academic interest, circulated a questionnaire to obtain useful research.³¹ Ms. Myers circulated her questionnaire in response to the District Attorney deciding to transfer her to another department.³² The Court recognized this as employee speech concerning office policy arising from application of that policy to the speaker, and so it gave more deference to the supervisor's view that the employee threatened the authority of the employer to run the office.³³ The Court concluded that Ms. Myers' questionnaire touched issues of public concern only in a most limited sense and was most accurately characterized as an employee grievance concerning internal office policy.³⁴ Given the nature of the questionnaire, the First Amendment did not require Mr. Connick to tolerate actions which he reasonably thought would disrupt the office, emasculate his authority, and devastate close working relationships.³⁵ Thus, finding Ms. Myers' speech resulted from a private grievance and not public concern, the balance shifted towards the government in this case and the Court found no valid First Amendment claim to protection of the speech at issue.³⁶

B. Circuit Court Application of the *Pickering-Connick* Test Articulated by the Supreme Court in Cases Involving Speech of Public School Teachers

³⁰ Id. at 153.

³¹ Id.

³² Id.

³³ Id.

³⁴ Id. at 154.

³⁵ Id.

³⁶ Id.

There have been cases before the circuit courts dealing with teachers' First Amendment rights in the public school setting, and some of the circuits chose to apply the *Pickering-Connick* test for government employee speech. In one case in the Fifth Circuit Court of Appeals, Timothy Kirkland served as a probationary history teacher for two academic years.³⁷ The high school that Mr. Kirkland taught at declined to renew his employment contract for another academic year allegedly as a consequence of his use of a non-approved reading list in his world history class, poor supervision of a special-discipline class, substandard teaching evaluations, and poor interactions with parents, students, and fellow teachers.³⁸ Mr. Kirkland claimed that the school district dismissed him in order to censor the contents of his supplemental reading list.³⁹ The school district claimed that the First Amendment did not apply to this type of dispute.⁴⁰

The Court of Appeals began by laying out the *Pickering-Connick* test, stating that if an employee's speech relates to a matter of public concern under *Connick*, it is still not absolute.⁴¹ If found to be of public concern, the Court must then balance the teacher's right as an employee in that speech against the State's interest as an employer in regulating it under *Pickering*.⁴² The

³⁷ *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 795 (5th Cir. 1989).

³⁸ *Id.* at 795-96.

³⁹ *Id.* at 796.

⁴⁰ *Id.* at 797.

⁴¹ See *Connick v. Myers*, 461 U.S. 138, 147-48 (1983) (suggesting that courts analyze an employee's speech for matters of public concern by the content, form, and context of a given statement, as revealed by the whole record).

⁴² See *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (indicating that federal courts should focus upon the manner, time, and place of the employer's expression, as well as the context in

Court goes on to dismiss Mr. Kirkland's claim with little difficulty, finding that his use of a separate reading list for world history is not a matter of public concern and that the doctrine of academic freedom has never conferred upon teachers the control of public school curricula.⁴³

One case decided in the Fourth Circuit Court of Appeals, *Stroman v. Colleton County School District*, held that the First Amendment did not protect a public school teacher's letter, which written and circulated to fellow teachers, complaining about a change in the method for paying teachers, criticizing the school district for budgetary mismanagement, and encouraging his fellow teachers to engage in a "sick-out" during the week of final exams.⁴⁴ The Court determined that the appropriate method to analyze whether the First Amendment protected the letter was to consider the letter in its entirety as a single expression of speech.⁴⁵

The Court of Appeals concluded that a personal grievance prompted the letter, which Mr.

which the dispute arose); *Pickering v. Bd. of Educ. of Township High School*, 391 U.S. 563, 568 (1968) (asserting that the state has interests as an employer in regulating the speech of its employees that differ considerably from those it possesses in relation to regulation of speech of the general public).

⁴³ *Kirkland*, 890 F.2d at 800 (reiterating the lack of First Amendment protection for Kirkland's use of a separate reading list because he did not speak out as a citizen when he offered the separate body of material for his world history class).

⁴⁴ See *Stroman v. Colleton County Sch. Dist.*, 981 F.2d 152, 159 (4th Cir. 1992) (holding that any protected speech in the letter was not a significant factor in Stroman's termination and thus he has no First Amendment claim that his rights were violated).

⁴⁵ *Id.* at 157 (rejecting the district court's decision to divide Stroman's letter into discrete components to conduct a constitutional analysis on each).

Stroman wrote in response to a change in the practice of paying teachers over the summer, and that he seemed to limit the substance of the letter to that grievance.⁴⁶ Even though the Court found that through some statements Mr. Stroman spoke as a citizen concerned with the Board's budgetary mismanagement, it decided to apply the approach in *Connick* and use the *Pickering* balancing test to see if the employee's interest in these statements outweighs the interests of the state as a provider of the public services.⁴⁷ The Court found that in providing public education, the State reasonably expects to enter into employer-employee relationships with teachers that permit it to assure delivery of the service in a manner that best serves the students and the community.⁴⁸ In this case, the Board could reasonably censor Mr. Stroman's speech in light of the fact that his letter might cause strain and disruption on the employment relationships needed to ensure the value of the students' public education.⁴⁹

⁴⁶ Id.

⁴⁷ Id. at 158.

⁴⁸ Id. at 159 (acknowledging the School District's adoption of regulations that require teachers to remain professional in their relationships with students and that impose on teachers the duty of student supervision, permitting two days of sick leave per year, but prohibiting such leave during semester and yearly exam periods).

⁴⁹ Id. (finding that Stroman's letter was not protected speech under a balancing test because providing a public education is one of the most important services a state provides its citizens and he practiced flawed judgment in calling for a "sick-out" during exams, which would certainly frustrate provision of the very service he is employed to provide).

C. The Supreme Court’s Decision in the Student Speech Cases of *Tinker v. Des Moines Independent Community School District* and *Hazelwood School District v. Kuhlmeier*

The alternative test used by some other circuits in determining whether the First Amendment protects public school teachers’ speech is the *Hazelwood-Tinker* test, articulated by the Supreme Court in a line of cases dealing with the free speech rights of students attending public education institutions.⁵⁰ In the first of these student speech cases decided by the court, *Tinker v. Des Moines Independent Community School District*, three students came to school wearing plain black armbands to show their opposition to the Vietnam War.⁵¹ As a result, the school sent them home and suspended them until they would come back without their armbands.⁵² In a famous opinion delivered by Justice Fortas, the Court stated that “it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁵³ The Court determined that students, and thus also

⁵⁰ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that educators do not offend the First Amendment by exercising editorial power over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 740 (1969) (finding that students’ conduct, by wearing black armbands to protest the war, was closely akin to pure speech which was entitled to First Amendment protection absent facts that might have reasonably led school officials to forecast substantial disruption or material interference with school activities).

⁵¹ *Tinker*, 393 U.S. at 504.

⁵² *Id.*

⁵³ *Id.* at 506.

teachers, could express opinions, even on controversial subjects, if done without “materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others.”⁵⁴ The Court then concluded that the silent and passive protest by the three students in wearing black armbands in opposition to the controversial war in Vietnam did not “substantially or materially” disrupt teachings in the classroom or order in the school, so the First Amendment protected their speech.⁵⁵ Furthermore, the passive and non-disruptive expression of a political viewpoint was speech that did not intrude upon the rights of the other students.⁵⁶

The cases that followed *Tinker* showed that the Court had merely set the ceiling to First Amendment protections within public schools; the Court lowered this ceiling in each of its following cases – beginning with *Hazelwood School District v. Kuhlmeier*.⁵⁷ In *Hazelwood*, a

⁵⁴ Id. at 513.

⁵⁵ Id. at 514.

⁵⁶ See id. at 508 (asserting that the actions taken by the students in wearing black armbands was not aggressive, disruptive or a group demonstration, but instead fell under the primary First Amendment rights akin to “pure speech”). But see *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (referring to the sexual innuendos in a students election speech as being plainly offensive to both teachers and students, who were required to attend the assembly the students spoke at or report to study hall).

⁵⁷ See, e.g., JAMIN B. RASKIN, *WE THE STUDENTS: SUPREME COURT CASES FOR AND ABOUT STUDENTS* 27 (2d ed., CQ Press 2003) (articulating the principles set forth by the Supreme Court in *Tinker* dealing with students’ free speech rights in public schools and how *Hazelwood* sharply limited them in the area of expression within school-sponsored speech activities).

high school principal objected to two articles scheduled for publication in the school newspaper that the journalism class wrote and edited.⁵⁸ He directed the supervising teacher to withhold the two pages containing these articles from publication, which consequently also withheld publication on four additional articles.⁵⁹ The articles the principal objected to appearing in the paper addressed issues concerning three Hazelwood students' experiences with pregnancy and the impact of divorce on students at the school.⁶⁰ The Supreme Court held that school facilities were public forums "only if school officials by policy or practice opened those facilities for indiscriminate use by the general public."⁶¹ The government does not create a public forum through inaction, but only by intentionally opening a nontraditional forum for public use.⁶² The Court found that since the paper was part of the journalism class curriculum, the school reserved the forum for its intended purpose of providing a supervised learning experience for the journalism students.⁶³ Thus, the Court determined that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions reasonably relate to legitimate pedagogical concerns.⁶⁴ This case limited the standard set forth in *Tinker* and gave more

⁵⁸ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263-64 (1988).

⁵⁹ *Id.*

⁶⁰ *Id.* at 263.

⁶¹ *Id.* at 267.

⁶² *Id.*

⁶³ *Id.* at 270.

⁶⁴ *Id.* at 273 (articulating the new standard governing student speech in school-sponsored activities and significantly limiting the *Tinker* standard previously applied).

deference to the school officials to censor student speech if it was inconsistent with the educational mission and especially in cases of school-sponsored speech, such as the student newspaper.

D. Circuit Court Application of the *Hazelwood-Tinker* Test Articulated by the Supreme Court in Cases Involving Speech of Public School Teachers

The Ninth Circuit chose to apply the forum analysis of the *Hazelwood-Tinker* Test to strike down a public high school teacher's claim that the school violated his First Amendment rights by removing and asking him to remove competing material that he posted in response to materials placed on bulletin boards set up by the school staff members for the purpose of recognizing Gay and Lesbian Awareness Month.⁶⁵ In that case, a teacher at the school, Robert Downs, objected to the recognition of Gay and Lesbian Awareness Month and created his own bulletin board in opposition across the hall from his classroom entitled "Redefining the Family."⁶⁶ Principal Olmstead informed Mr. Downs prior to removal of the items that he planned take them down because the items had nothing to do with school work, student work, or

⁶⁵ See *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1005 (9th Cir. 2000) (concluding that because the bulletin boards were a manifestation of the school board's policy to promote tolerance, all speech that occurred on the bulletin boards was the school board's and school's speech and not an affirmative action to open up a forum for public discussion).

⁶⁶ *Id.* at 1006 (noting the materials posted by Downs, including a portion of the Declaration of Independence, newspaper articles, various school district memoranda, and four separate excerpts about the immorality of homosexuality according to society and the Bible, the passage of anti-sodomy laws, and discussion on correct anatomical sexuality).

Board approved information.⁶⁷ The Ninth Circuit Court of Appeals concluded that the bulletin boards contained only “government speech,” and so Mr. Downs had no First Amendment right to dictate or contribute to the content of that speech.⁶⁸ The court found that the speech on the bulletin boards in the school’s hallways was directly traceable to the school and was the school speaking for itself, not opening up a forum for public discussion.⁶⁹ Finding that the school district spoke through the bulletin boards that were not free speech zones, but instead were vehicles for conveying a message from the school district in a nonpublic forum, the court concluded that the school district might formulate that message without the constraint of viewpoint neutrality and thus the principles of *Hazelwood* did not apply in this situation.⁷⁰ Additionally, the court found that the items posted by Mr. Downs were directly contrary to the school’s goal of promoting diversity and that the items were offensive, upsetting and disrespectful and thus could be disruptive to the school’s educational goals.⁷¹

⁶⁷ Id. at 1008.

⁶⁸ See id. at 1009 (determining that the school district did not act unconstitutionally in removing Downs’s materials or in ordering that the materials be removed).

⁶⁹ See id. at 1012 (discussing the fact that the school district, by issuing Memorandum No. 111 that provided posters and materials in support of Gay and Lesbian Awareness Month, and the school, by setting up the Gay and Lesbian Awareness bulletin boards, spoke to use the bulletin boards as vehicles for their policy of “Educating for Diversity”).

⁷⁰ See id. at 1011 (asserting that the school board’s actions in this case were not subjected to viewpoint neutrality under *Hazelwood* because this is a case of the government itself speaking).

⁷¹ See id. at 1007 (acknowledging various complaints by faculty members over a two-year period about the objectionable and derogatory materials posted by Downs).

In another case in the Second Circuit Court of Appeals, *Silano v. Sag Harbor Union Free School District Board of Education*, Mr. Silano, a member of the Board and a retired filmmaker, volunteered to lecture at three high school math classes.⁷² He brought various film clips that would illustrate the “persistence of vision” phenomenon, one of which, the “Birth Scene,” portrayed two women and one man naked from the waist up.⁷³ A school principal who was present at the first lecture requested that he finish the lectures without the Birth Scene clip, to which he complied.⁷⁴ The Superintendent, upon hearing about the first lecture, admonished Mr. Silano’s bad judgment in choosing the clips and banned him from visiting any of the Sag Harbor schools during school hours for the remainder of the academic year.⁷⁵ The court concluded that the *Hazelwood* analysis applied because Mr. Silano’s lecture took place in a traditional classroom setting and he designed it to impart particular knowledge to the student participants.⁷⁶ The court found that the school officials had a legitimate pedagogical purpose in restricting the display of images of bare-chested women to a tenth-grade class, especially given the fact that the disputed clip was entirely unnecessary to the lecture.⁷⁷

The court distinguished the clip in this case being part of the curriculum from the library

⁷² *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 721 (2d Cir. 1994).

⁷³ See *id.* (describing the clips Mr. Silano brought to supplement his lecture as being a variety of static and frenetic frames that would illustrate the persistence of vision phenomenon).

⁷⁴ See *id.* (pointing out the fact that removal of the Birth Scene clip did not affect Mr. Silano’s two remaining lectures in their message and content relating to the relevant subject matter).

⁷⁵ *Id.*

⁷⁶ *Id.* at 723.

⁷⁷ *Id.*

books that the court did not allow school officials to censor in *Pico* because library resources are something that students may voluntarily view at their leisure, whereas curriculum includes required material for students.⁷⁸ In this case, the students were required to attend math class, their teacher was present, and the purpose was to impart knowledge of how filmmaking relates to the class material, thus the lectures were analogous to curriculum.⁷⁹ Similarly, the First Circuit Court of Appeals found a teacher's discussion of aborting Down's Syndrome fetuses during a class instructional period part of a curriculum and a regular class activity, and thus subject to reasonable regulations that related to legitimate pedagogical needs, such as sensitive age and maturity of the listeners.⁸⁰

III. Analysis

- A. The District Court Incorrectly Applied the *Pickering-Connick* Standard to Mr. Lee's Classroom Postings and Instead Should Have Employed the *Hazelwood-Tinker* Standard To This Type of Teacher Speech**
 - i. A Forum Analysis on the Bulletin Boards in Mr. Lee's Case under *Hazelwood* Should Find That Tabb High School Created a Designated Public Forum and Should Afford the Posted Materials First Amendment Protection**

The government creates designated public forums only by purposeful governmental

⁷⁸ Id. at 723. See *Board of Education v. Pico*, 457 U.S. 853, 871-72 (1982) (holding that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion”).

⁷⁹ *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994).

⁸⁰ *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993).

action.⁸¹ Tabb High School could not create a designated public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for general open access.⁸² One circuit court previously found that the classroom is not a traditional public forum and so a teacher's statements in class during an instructional period are part of the regular class activities, and as such are subject to reasonable speech regulation.⁸³ However, the bulletin boards in Mr. Lee's case are much more akin to the library books in *Pico*, and not a teacher's statements in class, because the students who entered Mr. Lee's Spanish classroom had every right to walk by the bulletin board without looking at the postings.⁸⁴ Just as easily as the students in *Pico* could walk away from the library resources, so can students in Mr. Lee's classes

⁸¹ See, e.g., *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) (describing the three categories of forums for freedom of speech claims under the First Amendment as being traditional public fora, designated public fora, and nonpublic fora).

⁸² See *id.* (explaining how the government can create a designated public forum from something that is normally not considered a traditional public forum).

⁸³ See *Ward*, 996 F.2d at 453 (applying the forum analysis used in *Hazelwood* to find the classroom in which a teacher speaks analogous to the school newspaper in *Hazelwood* and thus a nonpublic forum that is subject to speech regulation related to legitimate pedagogical needs).

⁸⁴ See *Bd. of Educ. v. Pico*, 457 U.S. 853, 869 (1982) (plurality opinion) (announcing that a school board has less discretion when it reaches beyond compulsory environments found within classrooms into the school library and the voluntary inquiry that takes place there); *id.* (describing a teacher's statements made during an instructional period in class as curricular speech and thus part of the compulsory environment of a classroom).

walk away from his bulletin board and choose not to engage in reading the materials.⁸⁵

Mr. Lee stated that he thought the students would find the postings about the missionary who studied Spanish interesting and helpful in applying what they learned to real world situations.⁸⁶ However, the court misconstrues how Mr. Lee used these postings in the classroom by finding that they imparted knowledge on the students. Instead, the postings are more correctly characterized as having the ability to impart knowledge, just as books in a library do, but the students still had every opportunity to choose not to partake of that knowledge in both cases. Thus, it follows, that here too the court should not allow the school to remove the postings from Mr. Lee's bulletin boards simply because someone dislikes the ideas contained in them.⁸⁷ It appears that Mr. Lee posted the materials for the students to look to for inspiration on how Spanish could be useful to their futures; however, the facts never stated that Mr. Lee used the postings or materials as aides during his lectures.⁸⁸ Furthermore, Mr. Lee did not make the

⁸⁵ Id.

⁸⁶ See, e.g., *Lee v. York County Sch. Div.*, 418 F. Supp. 2d 816, 826 (E.D. Va. 2006) (indicating that Lee specifically sought materials that engaged the students' interest and that connected Spanish to their futures).

⁸⁷ See *Pico*, 457 U.S. at 872 (condemning the school board for removing library books with disfavorable ideas in order to prescribe what shall be considered orthodox in politics, nationalism, religion, or other matters of opinion).

⁸⁸ See generally *Lee*, 418 F. Supp. 2d at 826 (suggesting that Lee sought materials to inspire his students to learn Spanish by demonstrating that acquiring a foreign language skill can be useful to the students' futures).

students read the postings for class or force them to listen to him read them, unlike the students forced to see the Birth Scene slide in their math class in *Silano*.⁸⁹

Moreover, Tabb High School created a designated public forum when it placed bulletin boards in teacher's classrooms that were an area where the teachers could post materials and items of interest to them without prior approval of the principal and with very wide discretion, so long as the materials were not obscene, vulgar, or opposed to the school's educational mission.⁹⁰ These bulletin boards differed from those found to be nonpublic forums in *Downs* because the boards in Mr. Lee's case were in each teacher's individual classroom, not the hallways of the school, and could easily be recognized as portraying the teacher's speech and not that of the school itself. Additionally, the bulletin boards in Lee's case were more open for individuals' interests and not as a vehicle for some purpose announced by the school or Board, unlike the bulletin boards placed in the halls in *Downs* for the Gay and Lesbian Awareness Month.⁹¹

⁸⁹ See *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994) (pointing out the involuntary nature of the material in *Silano*'s lectures because the students were required to attend math class where his lecture was given to impart knowledge on them relating to the subject matter).

⁹⁰ See *Lee*, 418 F. Supp. 2d at 831 (conceding that Principal Zanca gave his teachers discretion without requiring prior approval on what to post in their classroom because he believed that teachers understood what probably should and should not be posted in the classrooms).

⁹¹ See *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1012 (9th Cir. 2000) (deciding that because the bulletin boards were a manifestation of the school board's policy to promote tolerance, and because the school's principals had final authority over the content of the bulletin boards, all speech that occurred on the bulletin boards was the school board's speech and not that

ii. Once the School Created This Designated Public Forum For the Teachers' Bulletin Boards, It Cannot Remove Mr. Lee's Items Based On the Viewpoint They Conveyed

Courts presume discrimination against speech because of its message to be unconstitutional.⁹² No matter what forum the court finds, to be consistent with the First Amendment, the government cannot base the exclusion of a speaker on the speaker's viewpoint and the exclusion itself must otherwise be reasonable in light of the purpose of the property.⁹³ In Mr. Lee's case, the school did not remove his postings because of their subject matter dealing with occupations involving application of the Spanish language, but instead focused on the religious viewpoint taken by Mr. Lee to convey this message.⁹⁴ Courts have found that when the government targets speech because of the view it takes, there is a blatant violation of the First Amendment rights of the speaker.⁹⁵

Supreme Court cases on this subject are on point and extremely persuasive in Mr. Lee's case. In *Lamb's Chapel v. Center Moriches Union Free School District*, a school district opened school facilities for use after school hours by community groups for a wide variety of social,

of individual teachers).

⁹² See *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641-43 (1994).

⁹³ *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

⁹⁴ See *Lee*, 418 F. Supp. 2d at 820 (discussing how Principal Zanca went into Lee's classroom when he was away, reviewed the materials, and removed those he believed to be religious in nature).

⁹⁵ See, e.g., *R. A. V. v. St. Paul*, 505 U.S. 377, 391 (1992) (finding the ordinance to be facially unconstitutional because it prohibited otherwise permissible speech solely on the basis of the disfavored views is expressed on sensitive subjects, such as race and religion).

civic, and recreational purposes.⁹⁶ The school district in *Lamb's Chapel* rejected a request from a group desiring to show a film series addressing questions about rearing children from a Christian perspective, similar to Principal Zanca's removal of Mr. Lee's postings that exhibited Christian ideas.⁹⁷ The Court's unanimous decision in *Lamb's Chapel*, which stated that the school district discriminated on the basis of viewpoint because it did not reject all presentations of views on family issues and child rearing, but only those from a religious standpoint, should be applied to Mr. Lee's case.⁹⁸ In applying this standard, the court should find viewpoint-based discrimination in the fact that the school allowed articles on world travel and future job opportunities, but removed only those including Christian perspectives.⁹⁹ Just as the Court found viewpoint discrimination based on religious perspectives in *Lamb's Chapel*, and in denying Wide Awake Productions funding for private printing costs in *Rosenberg v. UVA* because the paper avowed religious outlooks, so too should a court find Principal's Zanca's actions in removing Mr. Lee's postings from his classroom bulletin board because of their Christian point of view unconstitutional.¹⁰⁰

Additionally, just as the case in *Sons of Confederate Veterans v. Glendening*, the

⁹⁶ *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 391 (1993).

⁹⁷ See *id.* at 393 (indicating no evidence in the record that the school denied the facilities for any reason other than the fact that the presentation would have been from a religious perspective).

⁹⁸ See *id.* (finding this blatant viewpoint discrimination unconstitutional even in the case of a nonpublic forum created by the school district).

⁹⁹ *Lee*, 418 F. Supp. 2d at 820.

¹⁰⁰ See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 832 (1995); *Lamb's Chapel*, 508 U.S. at 393.

strongest argument for Principal Zanca’s actions constituting impermissible viewpoint discrimination is the timing in which they occurred.¹⁰¹ Just as the Motor Vehicle Administration (“MVA”) had no opposition to the use of the Confederate Flag on license plates in the beginning, Principal Zanca did not initially object to any of Mr. Lee’s postings.¹⁰² In fact, Principal Zanca only entered Mr. Lee’s classroom to review his materials and remove those that contained religious points of view after an individual complained to him about the religiosity of some of the materials.¹⁰³ The district court in *Sons of Confederate Veterans* found that revoking the use of the Confederate Flag only after a public firestorm erupted constituted clear viewpoint-based discrimination.¹⁰⁴ The court concluded that no matter how noble the MVA’s intentions were to restrict the use of the Confederate flag on license plates, “public intolerance or animosity cannot be the basis for abridgement of [] constitutional freedoms.”¹⁰⁵ In the same fashion, Principal Zanca’s intentions in removing Mr. Lee’s postings likely were noble and aimed to please the individual complaining about them. However, Principal Zanca’s intentions to avoid the

¹⁰¹ *Sons of Confederate Veterans v. Glendening*, 954 F. Supp. 1099, 1100 (D. Md. 1997).

¹⁰² See *Lee*, 418 F. Supp. 2d at 819 (describing Tabb High School’s policy as having a “custom and practice of allowing instructors to post upon the walls and bulletin boards of their assigned classrooms pictures and printed and illustrated materials that are consistent with the educational mission of the school”); *Sons of Confederate Veterans*, 954 F. Supp. at 1104 (recognizing that the MVA voiced no opposition to the Confederate battle flag on the license plates until after the public firestorm erupted).

¹⁰³ *Lee*, 418 F. Supp. 2d at 820.

¹⁰⁴ *Sons of Confederate Veterans*, 954 F. Supp. at 1104.

¹⁰⁵ *Id.*

discontent of others do not justify restricting Mr. Lee’s speech solely because of the religious viewpoint it espoused. In fact, the very purpose of the First Amendment is to protect the “expression of unpopular sentiments from governmental reprisals or censorship.”¹⁰⁶

iii. Under an Application of the *Tinker* Standard, Mr. Lee’s Postings Did Not Materially Or Substantially Disrupt the Classroom Setting or Educational Mission of the School

The postings by Mr. Lee on his classroom bulletin board were much more akin to the black armbands worn by the students in *Tinker* than the vulgar speech given by a student at an election assembly in *Bethel*. As noted above, Mr. Lee’s students could pass by his bulletin boards, averting their attention elsewhere, just as the Court found that the other students in *Tinker* could walk away from those wearing armbands and pay them no mind.¹⁰⁷ Mr. Lee wanted to get the students attention and engage them just as the protesters did in *Tinker*, however, the Court found that this did not impede on others’ rights so long as the students had the option of whether to allow such actions to affect them.¹⁰⁸ Mr. Lee, just as the protesters in *Tinker*, gave

¹⁰⁶ E.g., *id.* (acknowledging the irony of history in the case, which shows that the struggle for freedom that opponents of the Confederacy fought for and won during the Civil War that lead to the Fourteenth Amendment, is the very vehicle that protects those who wish to preserve the history of the Confederacy from state censorship of their license plates in this matter).

¹⁰⁷ See, e.g., *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 514 (1969) (acknowledging that the protesting students wore their armbands to exhibit their disapproval of the Vietnam hostilities and their support of an armistice, to make their views known and to influence others to espouse them).

¹⁰⁸ See *id.* (determining that the wearing of armbands by a few students neither interrupted school activities nor sought to intrude in the school affairs or the lives of others); *Lee*, 418 F.

his students the option of whether or not they wanted to pay attention to his postings and use them to supplement their application of learning Spanish to their futures in the real world and did not force such matters onto them. Accordingly, in this aspect, it should be clear that Mr. Lee's postings impeded on his students' rights only as much as the protest in *Tinker* invaded the rights of other students in that instance.

Moreover, it is evident that Mr. Lee's postings on his classroom bulletin board did not reach near the level of Fraser's speech at an assembly that all of the students were required to attend and hear.¹⁰⁹ This argument is made stronger by the fact that one individual complained to the principal about Mr. Lee's religiously-oriented materials, whereas in *Bethel* one factor in the Court finding a substantial and material disruption was the fact that multiple students hooted and yelled during the speech, made graphic gestures insinuating sexual activities, and one teacher even had to take class time the following day in order to discuss the speech with her students.¹¹⁰

Supp. 2d at 826 (asserting that Lee specifically sought materials that engaged the kids and inspired them to learn Spanish by demonstrating that acquiring a foreign language skill could be useful to them in the future).

¹⁰⁹ See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677 (1985) (noting that 600 high school students, many of them 14-year-olds, were required to attend the school-sponsored assembly or to report to the study hall).

¹¹⁰ See *id.* at 679 (referring to the Assistant Principal's meeting with Fraser about the assembly speech the following morning, where he presented him with copies of five letters submitted by teachers describing his conduct at the assembly as being in violation of the rule prohibiting the use of obscene language in the school); Lee, 418 F. Supp. 2d at 820 (describing the Principal's decision to remove materials in Lee's classroom that he believed to be violative of the

B. The District Court Should Have Applied the *Hazelwood-Tinker* Standard to Mr. Lee’s Speech, But if the *Pickering-Connick* Approach is Employed, the Speech is Still Protected Because It Was Not Curricular Speech and Instead Was Speech Touching on Matters of Public Concern

i. Mr. Lee Could Use the Materials Posted on His Bulletin Boards as Instructional Tools, However Students Were Able to Voluntarily Accept or Reject Them, Thus They Were Not Curricular in Nature

The Fourth Circuit created a simplified approach for applying the *Pickering-Connick* standard in the context of a public school teacher’s speech by holding that curricular speech does not touch on a matter of public concern and as a consequence the First Amendment provides it no protection.¹¹¹ Under an analysis of Mr. Lee’s postings under this standard, the court should find that these materials did not constitute curricular speech and instead were examples of Mr. Lee speaking on matters of public concern, including religion, travel, politics, and job opportunities connected to a foreign language skill. The district court found evidence that Mr. Lee provided that the materials he posted *could* be used for instructive purposes, however, the court never points to examples of Mr. Lee actually using these materials in his classroom lessons.¹¹²

Establishment Clause after an individual complained of their religiously-oriented nature while Lee was on sick leave from his teaching duties).

¹¹¹ See *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998) (finding that a drama teacher’s transfer for producing a student play that dealt with divorce, dysfunctional families, lesbianism, and illegitimate children reasonable because the play was part of the school’s curriculum and the school, not the teacher, had the right to fix the curriculum).

¹¹² See *Lee*, 418 F. Supp. 2d at 825-26 (proffering that Lee could readily use the materials he posted as part of his methodology of instruction and to instruct students on curricular matters).

Mr. Lee's postings of illustrative materials on the bulletin boards inside his classroom were much more like the library books the school could not remove because of their content in *Pico*, and not the textbooks chosen for use in the classrooms in *Chiras* or the content of the materials used during the lecture in *Silano*.¹¹³ Just as Mr. Lee could use his postings to impart knowledge, so too could the teachers in *Pico* use the library resources to impart knowledge and instruct students on curricular matters.¹¹⁴ The district court should find that Mr. Lee's postings, like the library resources in *Pico*, are something that students may voluntarily view at their leisure, unlike curriculum materials required for students in class.¹¹⁵ The district court can additionally distinguish Mr. Lee's materials from the textbooks chosen to use in class instruction in *Chiras* and the content of Mr. Silano's lecture, all of which the students had to use or listen to,

¹¹³ See *Bd. of Educ. v. Pico*, 457 U.S. 853, 869 (1982) (plurality opinion) (finding that library resources are not included in the definition of curricular speech and thus are protected against censorship under the First Amendment); *Chiras v. Miller*, 432 F.3d 606, 618 (5th Cir. 2005) (concluding that the school board's selection and use of textbooks in public school classrooms is government speech and not a forum for First Amendment purposes and so a textbook author has no claim of right to access it).

¹¹⁴ See, e.g., *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967) (observing that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding").

¹¹⁵ See *Pico*, 457 U.S. at 869 (according great weight in the analysis to the nature of voluntariness inherent in school libraries and that their selection of books is entirely a matter of free choice and the opportunity from them for self-education and individual enrichment is completely optional).

under the same rationale.¹¹⁶

ii. The Materials on Mr. Lee’s Bulletin Boards Touched Upon Matters of Public Concern and Debate and Should Have Protection Under the First Amendment

Courts determine whether speech “fairly relates to a public concern or expresses a private grievance or a matter of immediate self-interest by the content, the form, and the context of the speech.”¹¹⁷ The district court incorrectly identifies Mr. Lee’s materials as pertaining only to matters of his own personal interest.¹¹⁸ However, this directly conflicts with the court’s previous conclusion that Mr. Lee posted the materials to facilitate instruction and impart knowledge. The court should instead find the true resolution of Mr. Lee’s interest to be in posting ideas for public school children to use, if they so choose, to help in connecting what they learn in Spanish class to what they may choose to do in the future. This, it seems, is in the very nature of public concern in shaping the nation’s future through educating its youth. Just as the Supreme Court stated in *Keyishian*, “[t]he Nation’s future depends upon leaders trained through wide exposure to . . . robust exchange of ideas”¹¹⁹ Accordingly, Mr. Lee’s postings are much more akin to the criticism of the Board in *Pickering* because they too touch on matters of substantial public concern, and are not the result of an employment disagreement or private grievance against the

¹¹⁶ See *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994) (asserting that since the students were required to attend math class and the purpose of the lecture was to impart knowledge of how filmmaking relates to mathematics, the lectures given by Silano were analogous to curriculum).

¹¹⁷ *Stroman v. Colleton County Sch. Dist.*, 981 F.2d 152, 156 (4th Cir. 1992).

¹¹⁸ *Lee v. York County Sch. Div.*, 418 F. Supp. 2d 816, 828 (E.D. Va. 2006).

¹¹⁹ *Keyishian*, 385 U.S. at 603.

school system.¹²⁰ Although Mr. Lee's materials do not constitute pure public debate they obviously relate to the matters of public concern, including religion, history, and the future job opportunities for high school students that apply the skills they presently learn in class.¹²¹

IV. Conclusion

The District Court for the Eastern District of Virginia erred in applying the *Pickering-Connick* standard for government employee's speech to the materials Mr. Lee posted on his classroom bulletin boards. The Supreme Court should re-analyze the standards used by the circuit courts to assess public school teachers' free speech claims and find the *Hazelwood-Tinker* standard a more favorable one to follow. This standard is much more workable for the unique position teachers hold in public schools, which differs significantly from that of other public government employees. The *Pickering-Connick* standard balances the rights and needs of government employers and employees.¹²² However, the public school setting implicates the

¹²⁰ See *Pickering v. Bd. of Educ. of Township High Sch.*, 391 U.S. 563, 571-72 (1968) (finding *Pickering's* subject matter on the Board's allocation of school funds to be a matter of legitimate public concern upon which free and open debate was vital to inform the electorate); *Stroman*, 981 F.2d at 157 (concluding that a personal grievance about the policy for paying teachers for summer work prompted the letter and that its substance seemed to be limited to this grievance against *Stroman's* employer).

¹²¹ See *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 378 (4th Cir. 1998) (Motz, J., dissenting) (rejecting the majority's conclusion that *Boring's* classroom speech did not touch on matters of public concern because the play did address family life, divorce, motherhood, and illegitimacy, all subjects of substantial public concern and debate).

¹²² See *Lee*, 418 F. Supp. 2d at 822 (reiterating that the *Pickering-Connick* standard determines

rights of two other groups as well: the students and their parents. Just as Justice Motz stated in her dissent in *Boring v. Buncombe County Bd. of Educ.*, courts should not try to force teachers' speech into the ordinary categories of employee workplace speech or common public debate.¹²³ Teachers have the unique position of standing *in loco parentis* and taking custodial control over children in order to educate, enlighten, inspire, and prepare them to take over for the next generation in the future.¹²⁴

As noted above, if the district court would instead apply the *Hazelwood-Tinker* standard to Mr. Lee's postings, it would inevitably have to find that the school created a designated public forum for the teachers to post items of interest on their classroom bulletin boards without prior approval from the principal and with very few restrictions, except on things that the teachers knew would not be appropriate in a school, such as obscene or profane subject matter. Finding this forum, the court should then characterize Mr. Lee's postings on his bulletin boards as not causing a material or substantial disruption to classroom instruction or the school's education goals. Moreover, the items Mr. Lee posted on the boards did not interfere with the rights of

whether a government employee's speech is protected under the First Amendment by balancing the interests of the employee, as a citizen in commenting on matters of public concern, against the interests of the State, as an employer in promoting the efficiency of the public services it performs through its employees).

¹²³ *Boring*, 136 F.3d at 378.

¹²⁴ See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654-55 (1995) (pointing out that when parents place minor school children in public schools for their education, the teachers and school administrators gain a degree of supervision over the children entrusted to them that is custodial and tutelary).

others because each person had the voluntary choice of whether to pay attention to the postings, or whether to just walk by them and avert his or her attention elsewhere. For these reasons, the district court erred in upholding the removal of items from Mr. Lee's bulletin boards and in doing so violated his First Amendment rights to freedom of speech within his own classroom as a public school teacher.