No. 86-836

IN THE

Supreme Court of the United States

October Term, 1986

HAZELWOOD SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

CATHY KUHLMEIER, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF AND MOTION OF AMERICAN SOCIETY OF NEWSPAPER EDITORS, NATIONAL ASSOCIATION OF BROADCASTERS, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND SIGMA DELTA CHI, *AMICI CURIAE,* IN SUPPORT OF AFFIRMANCE

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MOTION OF AMERICAN SOCIETY OF NEWSPAPER EDITORS, NATIONAL ASSOCIATION OF BROADCASTERS, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND SIGMA DELTA CHI, *AMICI CURIAE* BRIEF

Consent to the filing of this brief has been secured from counsel for the respondent but denied by counsel for the petitioners. Accordingly, we submit this motion for leave to file the brief submitted with it.

The *amici* represent the interests of private journalism. We recognize that the First Amendment safeguards applicable to members of the *amici* organizations are different than those governing the outcome of this case. Student newspapers sponsored by public educational institutions present special constitutional considerations. The general interest of *amici* in securing First Amendment protection for journalism and the particular importance attached by amici organizations to the values of student journalism lend a perspective to this

presentation that we do not believe will be forthcoming from other parties to the case and warrant the acceptance of the brief submitted with this motion.

Respectfully submitted

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INTERESTS OF *AMICI CURIAE*

The *amici* represent, in the fashions described in the paragraphs immediately following, the interests of private journalism. We recognize that the First Amendment safeguards applicable to members of the *amici* organizations are different than those governing the outcome of this case. Student newspapers sponsored by public educational institutions present special constitutional considerations. The general interest of *amici* in securing First Amendment protection for journalism and the particular importance attached by an *amici* organizations to the values of student journalism led to the submission of this brief.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States.

The National Association of Broadcasters is a non-profit, incorporated association of more than 4,800 radio stations, 950 television stations, and the major commercial broadcast networks.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working news reporters and editors, dedicated to protecting the First Amendment interests of the news media. Since its founding in 1970, the Reporters Committee has appeared in virtually every major press freedom case considered by the U.S. Supreme Court.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, non-profit organization of 21,500 members representing every branch and rank of print and broadcast journalism. It is the largest organization of journalists in the United States.

SUMMARY OF ARGUMENT

Student journalists writing for school sponsored newspapers occupy a unique set of constitutional positions. Because the teaching and administrative supervisors of student papers are state actors, supervisory censorship of student works puts into play First Amendment considerations never engaged in the private newspaper relationships among reporters and their editors and publishers.

Precisely because those who supervise the efforts of student writers are teachers and school administrators, the unusual First Amendment considerations activated by state supervision of expression take on a special aspect. Within the schoolyard, the First Amendment must be applied, "in light of the special characteristics of the school environment. . . ." *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 506 (1969). Plainly, a great deal of caution is required before importing constitutional precepts from other areas to aid in the demarcation of rights in this doubly-different factual setting.

The District Court (and the petitioners' brief here) characterized the publication (or censorship) of the articles at issue as a matter ruled by the principles of school control over curricular content. The Eighth Circuit featured the resolution of the case to be governed by the fact that the school paper had many attributes in common with state-created public forums. These two approaches suggest an exclusivity (even antipathy) between the values of state control over educational direction and freedom of expression.

Although we believe that the proper constitutional analysis of the case lies somewhere between these two approaches, it is our impression that the precise location of the appropriate constitutional

safeguards need not be charted in resolving this case. Proper application of even the relaxed constitutional standard conceded by the petitioners will result in affirmance of the result reached by the Eighth Circuit.

ARGUMENT

I. The Censorship of Spectrum was Unconstitutionally Unreasonable.

The "Brief for the Petitioners" filed for Hazelwood School District, *et al.* ("School District Brief"), seeks to characterize this case as involving a conflict between two mutually exclusive legal categories. By the analysis of the School District Brief, the characterization of Spectrum as a "curricular" undertaking precludes extension of the First Amendment protections that would otherwise be associated with a state-created "public forum." Contrarily, the logic, if not the language, of the School District Brief requires the conclusion that if one determines Spectrum to be a "public forum" the considerations of educational autonomy that would normally attach to "curricular" concerns will be lost and the constitutional values reposed in the First Amendment rather than the balance of educational interests will determine the content of the student newspaper. Such a polar construction is not legally required and clashes considerably with the factual fabric of the case.

The Eighth Circuit surely had it right in concluding that Spectrum was "something more" than a classroom exercise:

> Although, as the district court noted, *Spectrum* was produced by members of the *Journalism II* class, its staff was essentially restricted to students of that class and *Spectrum* was a part of the school adopted curriculum, it was something more. It was a forum in which the school encouraged students to express their views to the entire student body freely, and students commonly did so. *Spectrum* was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a public forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution and their state constitution.

Kuhlmeier v. Hazelwood School District, 795 F.2d 1368, 1373 (8th Cir. 1986)

It is not necessary to accept the Eighth Circuit's conclusion that the student paper was a "public forum" in order to recognize the probity of the observation that the paper was "something more" than a purely curricular offering. Were the paper solely "curricular", there would have been neither need nor purpose for the School District to incur the apparently significant expense[1] of printing and distributing the paper. The fact of distribution unequivocally indicates that, whatever the primary ambition held by the school for the newspaper, some purpose in addition to the entirely academic was served by the paper.

The School District Brief's reliance on the "curricular" quality of Spectrum to evade constitutional protections strains the facts in another way. The censorship complained of was not the product of the core curricular design of the Journalism II class. The stories that served as the basis for suppressing two pages of the paper had passed through the "teaching" stages of the creative process recited by the District Court:

> Each issue of *Spectrum* was produced according to the following procedure. Ideas for stories were collected from *Spectrum* staff members on a weekly basis. Another source of story ideas were the letters to the editor. The student editors, in consultation with Mr. Stergos, would then select from among those story ideas that they wanted to develop into articles for publication. Mr. Stergos would then assign individual staff members to work on the ideas selected and determine how long each story should be. . . .
>
> The person assigned to a story idea would then begin researching and writing the story. Initially, the precise content of the story was left to the individual writer. However, once a draft was completed it was submitted to Mr. Stergos who would review the article, make comments, and return it to the student to be rewritten or researched further. . . .
>
> A writer who used personal quotes in a story was required to obtain consent from each person quoted. The procedure for obtaining consent was to have the subject initial his quote on the draft.

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[1] *See Kuhlmeier v. Hazelwood School District*, 607 F.Supp. 1450, 1454 (E.D. Mo. 1985) (administrative concern over the cost of the paper).

> Once a final draft was completed, the story would be submitted in copy sheet form to the copy editor to be proofed, then to the layout editor to be arranged on the page. At this stage of the process, Mr. Stergos often edited the articles himself. After the proposed layouts were approved by Mr. Stergos, the copy sheets of the stories, together with the layout diagrams, were sent to Messenger Printing Company in Kirkwood, Missouri, where galley proofs were prepared. After the galley proofs were returned from the printer, the authors would each proofread their own stories and their work would be double checked by *Spectrum* staff members. Mr. Stergos also proofread all articles. Corrections would be telephoned to the printer.

Id. at 1454.

We do not mean to suggest by this recitation that involvement of the school principal in publication decisions necessarily takes judgments reached by such participation outside of the range of the "curricular". We do intend the sense that there may be constitutionally significant differences between a teacher's action in curtailing classroom discussion (or evaluating submissions for a grade or working any of a broad variety of day-to-day "censorships" of this sort) and a principal's judgment that an article approved through the regular curricular processes of a journalism class should not be run in a student newspaper. The unitary notion of curricular license advanced by the School Board Brief is not sufficiently subtle.

There is yet another flaw to the bimodal cast into which the School District Brief would force decision of the case. As the School District itself recognizes,[2] the characterization of the paper as "curricular" does not free the School District to indulge in censorship for no reason or any reason at all. Some constitutional protection is conceded to attach to the student article. As the School District Brief frames the matter (quoting *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 105 S.Ct. 3439, 3451 (1985)) the suppression of the two Spectrum articles is permissible only if "the distinctions drawn are reasonable in light of the purpose served by the forum and are view-point neutral." School District Brief at 32.

Neither of the analytic extremes posited by the School District

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[2]The District Court came to the same conclusion. *Kuhlmeier v. Hazelwood School District*, 607 F.Supp. at 1466-67.

Brief applies to this case. Spectrum unarguably does have curricular importance; but it quite as plainly has extracurricular features as well. The School District Brief concedes as much in the recognition that censorship of the paper is constrained by some level of constitutional protection. The analytic contest, then, is not in classifying the student paper as either a pure "public forum" or a purely "curricular" undertaking, but rather to balance properly the requirements of necessary educational freedom to structure curricular affairs against the constitutional guarantees of freedom of speech. In short, the case does not admit of the nicely abstract dichotomy urged by the School District Brief.

Were it necessary to determine with precision the full extent of constitutional protection to which student papers such as Spectrum are entitled, the analysis would not be fully determined by the Court's earlier rulings. Although the *Tinker* case has very instructive directives that, we believe, would finally lead to the result reached by the Eighth Circuit, no precedent from the Court directly treats with the problem of assimilating the requirements of state sovereignty over partially "curricular" undertakings with the First Amendment protection accorded speech in a forum that is at least partially "public". More particular development of the *Tinker* analysis is not necessary to the disposition of this case. This is so because even the relaxed constitutional standard conceded by the School District Brief to apply to the censorship at issue here requires affirmance of the outcome directed by the Eighth Circuit. The censorship was palpably unreasonable.

At this level of analysis, this case is an easy one. The principal of Hazelwood East did not advance any reasoned or reasonable basis for the suppression of the two articles in question. Closer attention to the facts than the School District's brief is willing to indulge makes this conclusion clear.

The District Court characterized the principal's basis for suppressing the two articles in the following terms:[3]

> However, Mr. Reynolds objected to both the three (3) personal accounts of pregnant Hazelwood East students and

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[3]The stories that moved Mr. Reynolds to suppress two pages of the May 13 paper (along with the three stories deleted incidentally) were published by the St. Louis Globe-Democrat in its weekend magazine, "Globe Weekend". St. Louis Globe-Democrat, February 9, 1985 (Magazine) at 5-10. We have reproduced the two pivotal stories as they were published in an appendix to this brief.

> Shari Gordon's story on the impact of divorce on children. With respect to the personal accounts of three (3) Hazelwood East students who were pregnant, Mr. Reynolds was concerned that the girls had been described to the point where they could be identified by their peers. In addition, he objected to their discussion of their sexual activity. With respect to Shari Gordon's story, Mr. Reynolds objected to the use of Diana Herbert's name and the inclusion of the following quotes from her:
>
> > "My father was an alcoholic and he always came home drunk and my mom really couldn't stand it any longer,". . . .[4] "My dad wasn't spending enough time with my mom, my sister and I. He was always out of town on business or out late playing cards with the guys. My parents always argued about everything."
> >
> > "In the beginning I thought I caused the problem, but now I realize it wasn't me,". . . .
>
> In addition, Mr. Reynolds objected to the above portion of Shari Gordon's story, because he thought that fairness required that her parents be notified and given an opportunity to respond. This Court credits Mr. Reynolds' testimony.

Kuhlmeier v. Hazelwood School District, 607 F.Supp. 1450 at 1460.

It is not immediately obvious why Mr. Reynolds thought that "identification" of the three young women whose stories are detailed in the pregnancy article would be injurious, or who would likely be hurt by such identification. The District Court characterized the consequences of "loss of anonymity" as "unwarranted invasions of privacy". *Id.* at 1466. The School District Brief adds the gloss that the "invasions of privacy" would result from disclosure of "the personal material in the profiles relating to the subjects' sex lives." School District Brief at 34. Even if one could impute the School District Brief's embellishment on the trial court's enlargement of the explanation actually given by Reynolds to the principal, the privacy values protected by censoring the pregnancy article are illusory.

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[4]This was an incorrect reading of the article. *See* p. 12, *infra* and Appendix at A-1.

It is most emphatically not the fact of pregnancy that suppression of the articles sought to keep private. The logic of the District Court analysis of the dangers of "identification" of the three pregnancy story subjects assumes that knowledge extrinsic to the article will place the young women quoted in the article within the population of "eight (8) to ten (10) students at Hazelwood East who were pregnant" in the spring of 1983. Inclusion within this relatively small — but not entirely relevant[5] — sub-group of the women students at the school was thought to increase the risk of "identification." There surely was a time when the fact of pre-marital pregnancy was a closely guarded and private fact, but there is no evidence that any of the three subjects of the article enjoyed or sought such privacy.

The first of the pseudonymous subjects, "Terri," was approximately seven months pregnant at the time that the article would have run in the school paper (the story recites that her child was due to be born in July of that year). The article gives the distinct impression that "Terri" planned to continue attending school through the end of the Spring term.[6] If that is so, there cannot, among her schoolmates, have been much secrecy to her pregnancy.

The third of the pregnant women, "Julie," similarly took no pains to conserve the secrecy of her condition.

> I had always planned on continuing school. There was never any doubt about that. I found that it wasn't as hard as I thought it would be. I was fairly open about it and people seemed to accept it.

Appendix at A-4.

Thus, it cannot be the public fact of pregnancy that Mr. Reynolds was interested in holding private. There is no more weight to the School District Brief's suggestion that "personal material. . . relating to the subjects' sex lives" serves as a reasonable basis for censoring the pregnancy article. There is nothing of this sort in the article.

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[5]The relevance of this group is suspect because two of the three students portrayed in the article had already given birth to their children and may well not have been part of the Spring of 1983 pregnant student populations.

[6]The trial judge read the article to say that "Terri" had dropped out of school. The piece does not say that. The reference in the "Terri" segment to the young woman's plan of not "coming back to school right away (September) because the baby will only be 2 months old" leaves with us the impression that she was in attendance for the Spring term. Appendix at A-3.

It is, of course, disclosed in the article that each of the three pregnant women had had sexual relations before becoming pregnant. This cannot have been a large revelation to the student body; as we point out immediately above, the women were known to be pregnant. There is precious little detail of the sexual practices of the three beyond the obvious fact of some sexual activity. "Julie" had this, and only this, to say about sexual intercourse:

> There was never really any pressure (to have sex), it was more of a mutual agreement. I think I was more curious than anything.

Appendix at A-4.

"Patti" says not a word about the mechanics of having become pregnant. "Terri" is the most expansively revealing of the three women on the subject of her sexual practices. She is quoted as saying:

> I had no pressures (to have sex). It was my own decision. We were going out four or five months before we had sex.

Appendix at A-3.

If there is any room for vicarious parental solicitude for the privacy of an emancipated (because married)[7] student, it surely is not reasonably engaged by consensual recitations of this sort.

Nor are there privacy rights of others violated by the article. One might briefly worry about the right of "sexual privacy"[8] of the fathers involved. The marriage of one of the young women, impending marriage of a second[9] and contemplated wedding of the third[10] give evidence that such concern ought not to persist. Anyone who knows the women and knows of their pregnancy will almost surely also know the identity of the father. Anyone who does not know the predicate

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[7]Missouri law considers marriage to constitute the emancipation of minors. *See, e.g., French v. French*, 599 S.W.2d 40, 41 (Mo. App. 1980).

[8]*See, e.g., City of North Muskegan v. Briggs*, 473 U.S. 909 (1985) (White, J. dissenting from denial of *cert.*); *Whiserhunt v. Spradline*, 464 U.S. 965 (1983) (Brennan, J. dissenting from denial of *cert.*)

[9]"[Patti:] After I graduate next year, we're getting married." Appendix at A-3.

[10]"[Julie:] We are still planning on getting married when we are financially ready." Appendix at A-4.

facts will, obviously, not know of the paternal association. The article adds nothing to this equation. Any "identification" of the three fathers will be accomplished quite without regard for anything contained in the article.

The District court (but, interestingly, not the School District Brief) also invoked disclosure of "use or non-use of birth control methods" as a private fact properly shielded from disclosure by suppression of the pregnancy article. The full scope of these disclosures is:

> ["Terri"] I was on no kind of birth control pills. I really didn't want to get them, not just so I could get pregnant. I don't think I'd feel right taking them.
>
> ["Patti"] Lastly, be careful because the pill doesn't always work. I know because it didn't work for me.

Appendix at A-3, 4.

The moral, ethical, and societal propriety of birth control are subjects that are broadly discussed throughout the nation and the world. The School District's zeal for maintaining the privacy rights of high school students who have consented to the publication of the statements set out above would disable those young people from taking a public stand on a question that might well be centrally important to them. We think it plainly unreasonable to burden free expression so expansively in the protection of unwanted privacy.

Finally, there is an intimation in both the District Court opinion and the School District Brief that publication of the pregnancy article would weaken the moral fiber of the students at Hazelwood East by giving the impression that school administration "endorses the sexual norms of the subjects of the articles", *Kuhlmeier v. Hazelwood School District,* 607 F.Supp. at 1466. Although this expression hints at the prospect of moral decay, there is nothing in the article that comes close to this tone. An observation reported by the Court more than 40 years ago aptly disposes of this contention:

> It is not so easy to believe that circulars of this kind could to any substantial degree undermine morals or induce delinquency. To some such a result would seem altogether fanciful.

Dysart v. United States, 272 U.S. 655,657 (1926).

As the Court held in *Bethel School District No. 403 v. Fraser,* 106 S. Ct. 3159 (1986), school teachers and administrators are quite properly (and reasonably) concerned with the general atmosphere of

the educational environment and may take steps, even when such action is inconsistent with untrammeled free expression, to secure the environment that they believe most conducive to efficient and effective education. But, as *Tinker* insisted, more than "undifferentiated fear or apprehension of disturbance"[11] is required as a basis for action. The *Fraser* case makes it clear that in certain circumstances[12] a special license is extended to educators to protect their charges from the exposure to lewd or indecent expression because such speech can reasonably be thought to be "disrupting" in a fashion properly committed to governmental supervision.

There is certainly nothing lewd about the divorce article. Nor is the student pregnancy article laden with sniggering innuendo of the sort contained in the *Fraser* nominating speech. Necessarily, an article concerning student pregnancy touches on the procreative process; one would be hard put to discuss pregnancy without some implication of the cause of the condition. Unless school administrators have the power to ban any discussion of student pregnancy, they are without power to suppress on the grounds of lewdness passing references, such as those in the article under examination here, to the sexual practices underlying the event.[13]

As is clear from the pregnancy article itself, the Hazelwood School District permitted pregnant unmarried women to continue their education. In doing so, the School District acknowledged the existence of pre-marital sex. If the physical presence of pregnant students on the school grounds is not thought by the School District to be impermissibly "disruptive", it is impossible for speech that does no more than to acknowledge the same facts to be viewed as inconsistent with the proper educational environment.

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[11]*Tinker v. Des Moines School District*, 319 U.S. at 640-641.

[12]The fact that Mr. Fraser's speech was imposed upon a captive audience, that Mr. Fraser had earlier been warned that his expression was "inappropriate" and, perhaps, the fact that the speech was presented orally rather than by a writing all distinguish the *Fraser* holding.

[13]The broadest formulation in favor of suppression of both articles — the conclusion that the subject matters of pregnancy and divorce are "inappropriate" for inclusion in a student newspaper — will not do as a matter of fact. Both subjects were treated in articles to which Mr. Reynolds voiced no objection. *See*, Callow *Sex and the Teenager*, St. Louis Globe-Democrat, February 9, 1985 (Magazine) at 5; Conley, *Teen Marriages: A Bleak Outlook* St. Louis Globe-Democrat, February 9, 1985 (Magazine) at 6 (discussing teenage marriages and the divorce rates resulting from them).

The District Court found the following basis for Mr. Reynolds' suppression of the divorce story:

> With respect to Shari Gordon's story, Mr. Reynolds objected to the use of Diana Herbert's name and the inclusion of the following quotes from her:
>
> > "My father was an alcoholic and he always came home drunk and my mom really couldn't stand it any longer,". . . .
> >
> > "My dad wasn't spending enough time with my mom, my sister and I. He was always out of town on business or out late playing cards with the guys. My parents always argued about everything."
> >
> > "In the beginning I thought I caused the problem, but now I realize it wasn't me."

Kuhlmeier v. Hazelwood School District, 607 F.Supp. at 1460. As the District Court correctly recognized earlier in its opinion, the first quotation set out above was not attributed in the article to "Diana Herbert", but to "a student who was identified only as a 'Junior'. . ." *Id.* at 1457. The publication of an accusation that an identified or easily identifiable individual is an alcoholic might very well caution extreme care not only because of the impact that such a charge might have on the individual against whom it was levelled, but also because the publication might give rise to a defamation action. As the story was written, however, no identification of the parent was possible and reasonable concerns of either fairness or tort liability vanish.

The statements attributed to Diana Herbert in the proof sheet provided to Mr. Reynolds — a proof that neglected to reflect the fact that an editorial judgment had already been made to remove Diana Herbert's name and identify her only by her class in school — contains no hint of actionable, embarrassing or private charges comparable to the accusation of alcoholism.

The notion, advanced as one of the not entirely consistent explanations for Mr. Reynolds' response to the divorce article, that the failure to give Ms. Herbert's parents, "especially her father. . .any opportunity to respond or rebut her allegations" raises concerns that might be thought "curricular".[14] The unfortunate confusion by which

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[14]As the District Court pointed out, there was some basis in the text book used to teach the Journalism II class for holding the position that individuals about whom allegations are printed should be given an opportunity to rejoin. See *Kuhlmeier v. Hazelwood School District*, 607 F.Supp. at 1456-57.

Mr. Reynolds was deprived of knowledge of the editorial judgment to delete Ms. Herbert's name from the piece makes it impossible to know what his "curricular" assessment of the article in its intended form would have been. We do not believe it necessary to apply constitutional judgments on the basis of either a prediction of Mr. Reynolds' response to the article as it would have run or his response to a different (by the inclusion of Ms. Herbert's name) article than was intended for print. It was necessary for the District Court to uphold the reasonableness of Mr. Reynolds' action in suppressing each of the articles in order to find that no constitutional claim had been stated. If the Court determines that censorship of the pregnancy article violated constitutional protections, it is not necessary to proceed to an adjudication of the reasonableness of Mr. Reynolds' reaction to the divorce article.

CONCLUSION

The censorious judgments overridden by the Eighth Circuit in this case were not the work of a private publisher; they were the acts of government. State control over curricular content and acts disruptive of the effiçient dissemination of it must be valued, but they must also be reasoned when they trench on constitutionally protected values of free expression. In purely academic settings the value of teacher control and the discount of that value by having to explain why it was exercised speak eloquently for the freedom from judicial second guessing.

In other, quasi-academic, settings both values change. As acts of censorship become less intimately a part of core curricular undertakings, they require greater justification. Here, the censorship came after the "teaching" phase of the Journalism II class was complete. None of the reasons advanced to explain the need for censorship will withstand even relaxed examination.

The judgment of the Eighth Circuit should be affirmed.

Respectfully Submitted

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