No. 86-836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

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

vs.

CATHY KUHLMEIER, *et al.*,
Respondents.

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

REPLY BRIEF FOR THE PETITIONERS

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I. The Policy And Practice Governing *Spectrum*

Respondents impute to the court of appeals a sweeping rejection of the district court's findings of fact. They baldly assert that the Eighth Circuit "rejected seven of the District Court's findings." Brief of Respondents 1. The accompanying citation implies that when the Eighth Circuit quoted from the district court's factual findings (App. A-5) and expressed disagreement with that court's ultimate *legal* conclusion, it was thereby dismissing all of the recited factual findings as "clearly erroneous." This interpretation is belied by the context in which the court quoted these findings, which was nothing more than a factual summary, and by the substance of the "rejected" findings, many of which were never disputed.

Respondents misapprehend the institutional role of this Court and the allocation of fact-finding authority established by Fed.R.Civ.P. 52(a). Rule 52(a) assumes an articulated determination by the appellate court as to what finding is clearly erroneous and why, *cf. Pullman-Standard v. Swint,* 456 U.S. 273, 290-91 (1982), something that did not happen here. *See* Brief for Petitioners 22 n.6. Even if the Eighth Circuit had rejected a finding of the district court, the question before this Court would not be "whether the [appellate court's] interpretation of the facts was clearly erroneous, but whether the District Court's finding was clearly erroneous." *Anderson v. Bessemer City,* 470 U.S. 564, 577 (1985). Respondents' extraordinary assertion that there is no evidence that the journalism teacher had any role in determining the content of *Spectrum* — let alone the authority the district court attributed to him — flies in the face of testimony of their own witnesses, including that of respondents themselves.[1] To the extent any statement by Robert Stergos,

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[1] Cathy Kuhlmeier, for example, testified on direct examination that Stergos determined how many pages each issue would have (Tr. 1-27 to 1-28), and assigned all the stories (Tr. 1-29). She stated that he reviewed each typewritten draft. He would "[u]sually edit it and take

the former journalism teacher, conflicted with that evidence, it presented an issue of credibility uniquely within the province of the trial court. *Id.* at 575.

In failing to accede to the findings of the district court and the implications of their own testimony, respondents seek to remake *Spectrum* as a medium wherein Journalism II students published whatever they wanted free of any control by school authorities. That it was not "by practice" an expressive forum for the "indiscriminate use," *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 47 (1983), of the Journalism II students is evident from the district court's findings. And respondents' argument that such a forum was created "by policy" relies on a strained and selective reading of school board guidelines and policies.

Respondents quote the Curriculum Guide's Journalism I and II course outlines for the unexceptionable proposition that the purpose of both courses was to teach journalistic skills. Brief for Respondents 9-11. Since journalistic skills concern the "dissemination of views and ideas," respondents maintain that

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out what they (*sic*) felt shouldn't be there, and had them rewrite it." (Tr. 1-30 to 1-31). Kuhlmeier testified that Stergos selected which letters to the editor would be printed (Tr. 1-44), and on cross-examination she stated Stergos determined the length of each article. (Tr. 1-80).

Another of respondents' trial witnesses, Mary Williams, put it succinctly.

> Q. At the time we took your deposition you were asked about how articles were going to be written, and you stated that the final decision on articles, on the content of the articles, was Mr. Stergos.
>
> Is that still your position?
>
> A. Yeah, he approved everything or disapproved everything.

(Tr. 1-125). Elizabeth Conley, a former student called by respondents, testified that she wrote a story on diabetes and Stergos made the decision that it would not be published. (Tr. 1-137).

the school board must have intended to make *Spectrum* a "public forum" for student expression. This argument ignores the Court's maxim "that the mere fact that an instrumentality is used for the communication of ideas does not make a public forum." *Perry Education Assn.*, 460 U.S. at 49 n.9. Moreover, identifying what is to be taught does not establish how it should be taught, and respondents ignore Section IV(A)(2)(c) of the Journalism II course outline, which does shed some light on the latter issue.

Section IV(A)(2)(c) was captioned "Suggested Activities: (Activities for the adviser)" and explicitly assigned certain responsibilities to the Journalism II teacher. He was to establish the budget and organize the newspaper staff "with responsibilities clearly established for each person." J.A. 17. This section included an organizational chart which listed the journalism teacher *above* the student editors. J.A. 18. The Journalism II teacher was also to establish deadlines for the staff and "check with page editors regularly to see how ideas [were] developing." J.A. 18-19. He was to "[c]arry on a dialogue with each editor continuously as to the newspaper's content" and "[h]elp the staff turn bare ideas into well-researched, written, and edited stories." J.A. 20. Finally, he was charged with a duty to discuss "newspaper ideas and content" with the principal "to know what he expect[ed]." *Id.* The school superintendent testified that "prior review of controversial or sensitive materials by a high principal was standard procedure." App. A-29. Supervision of content by the journalism teacher subject to the principal's ultimate review was, therefore, clearly recognized in the Curriculum Guide and certainly could not be construed as inconsistent with it.[2]

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[2] Even those portions of the Curriculum Guide cited by the respondents indicate that *Spectrum* was not designed to be a medium for the unfettered expression of the journalism students. The Curriculum Guide's "Writing to State an Opinion" unit of instruction for Journalism I specified as a course objective that the student would be

The first paragraph of Board Policy 348.51, entitled "School Sponsored Publications," provided:

> School sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism. School sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities.

J.A. 22. Various amici, as did the Eighth Circuit, cite only the first sentence and suggest that it prohibited the principal and journalism teacher from exercising any control over the publication. By its terms, however, this policy limited the publication *qua* publication: it did not grant a right to the journalism students vis-a-vis school officials, but rather imposed a duty upon the publication itself. Its purpose was to establish a procedure whereby nonjournalism students — students who were not part of the "publication" — could publish matters in a school-sponsored publication subject to faculty/student review and "the rules of responsible journalism." (Tr. 3-49 to 3-52). Pointedly, both the principal and journalism teacher were part of the review process.[3] The second sentence of 348.51 reiterated the principle of curricular control for the journalism students, *i.e.*, those students who were part of the publication. (Tr. 3-51).

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able to "identify the legal restrictions placed on the journalist such as copyright, libel, obscenity laws, [and] *school policies.*" Brief for Respondents 10 (emphasis added).

Respondents claim some significance for the existence of chapters entitled "Understanding Press Law" and "Handling Sensitive Issues" in the recommended text for Journalism I and Journalism II. English and Hach, Scholastic Journalism (6th ed. 1978). Even if the teacher assigned these chapters, which were not specified in the Curriculum Guide, they do not suggest an intent to create a public forum any more than a textbook chapter on the First Amendment in a civics class.

[3] J.A. 23. As a practical matter, other than letters to the editor, nonjournalism students did not seek access to *Spectrum* (Tr. 2-19 to 2-20), and a review board, as respondents concede, was apparently never established. The journalism teacher decided which letters to the editor were published. App. A-29.

The school board policy on "Controversial Issues", which is also relied on by respondents, was not addressed specifically to *Spectrum* or the journalism classes but to all classroom instruction. The policy explicitly made it "the responsibility of the teacher to see that the controversial issues discussed in the classroom are relevant to the course of study, limited to the level of understanding and age group of the student, and maintained within the bounds of objectivity commonly acceptable to the community." App. A-35. This admonition certainly did not transform the civics classroom into a public forum, and it gave no warrant for treating the journalism classroom any differently.

Finally, respondents cite an editorial captioned "Spectrum: Statement of Policy." J.A. 26. Judge Nangle found that this Statement was published in *Spectrum* on September 14, 1982 and "no documentary evidence was introduced to prove that this statement of policy was published at any other time." App. A-31 to A-32. This editorial declared that "*Spectrum,* as a student-press publication, accepts all rights implied by the First Amendment of the United States Constitution . . ." and quoted one of the variants of the substantial disruption standard articulated in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969). J.A. 26.

There was no evidence that this statement was approved by the school board or the principal. It was published prior to the pre-publication review procedure established by Principal Reynolds. As Judge Nangle noted, the editorial itself indicated it did not state an official school policy: "All non-by-lined editorials appearing in this newspaper [which included the "Statement of Policy"] reflect the opinions of the *Spectrum* staff, which are not necessarily shared by the administrators or faculty of Hazelwood East."[4] In the absence of some affir-

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[4] J.A. 26; App. A-33. People for the American Way ("PFAW") contend that the existence of this statement in an issue of *Spectrum* dispels any notion that a student reader would construe anything in

mative endorsement by the school board, this "Statement" does little to illuminate the board's intent, particularly in light of the express policy of Journalism II and the practice that developed as a result of it. "The government does not create a public forum by inaction," and this Court "will not find that a public forum has been created in the face of clear evidence of a contrary intent." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802, 803 (1985).

II. The Nature Of *Spectrum* And Its Incompatibility With Indiscriminate Expression

Respondents also argue that *Spectrum*'s status as a public forum is dictated by its inherent characteristics, *i.e.*, the "nature of the property" and its "compatibility with expression." These considerations are not, as respondents suggest, wholly independent of the school board's intent as reflected in its policies and practices. They are only additional considerations in ascertaining that intent. *Cornelius*, 473 U.S. at 802. Given the findings of the district court on the policies and practices that governed *Spectrum*, it is inconceivable that the inherent characteristics of *Spectrum* could compel any different conclusion about the board's intent.

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the pregnancy and divorce articles as being endorsed by the school. Brief for PFAW 12 n. 2. Even if the student reader happened to see this issue and read the editorial, the disclaimer only pertained to "non-by-lined editorials." It made no mention of articles or features that appear within the newspaper, despite the suggestion of the Eighth Circuit to the contrary. App. A-6 to A-7. But the notion that even a proper disclaimer removes the endorsement problem is unrealistic, as the Court has recognized in other contexts. "Query whether this same reasoning would allow the school to post a copy of the Ten Commandments on the walls of Hazelwood High School without violating the establishment clause, so long as small print at the bottom of the poster states that the poster does not necessarily reflect the views of the administration or faculty." Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 Ohio St.L.J. 1, 42 (1987) (citing *Stone v. Graham*, 449 U.S. 39 (1980)).

In considering the nature of the property and its compatibility with expression, the Court has inquired whether "the principal function of the property" would be undermined by "general," "unrestricted," *id.* at 803, 809, 811, or "indiscriminate" expressive activity, *Perry Education Assn.*, 460 U.S. at 47. As *Cornelius* demonstrates, expression is not "compatible" with a publication simply because it is amenable to the written word. *See also Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974).

Petitioners agree with respondents that the primary purpose of Journalism II and *Spectrum* was to teach journalistic skills. Yet respondents have remarkably little to say about the compatibility of *this* purpose with the publication's status as a public forum. What they do say is tautological. Teaching journalistic skills demands a definition of "journalistic skills" and a choice of teaching methodology. Respondents' "compatibility" argument is premised on the assumption that there is one dominant skill to be taught — asserting freedom from any control or direction by a school authority — and consequently only one proper way to teach "journalistic skills," what an amicus has characterized as a " 'laissez-faire' attitude": teachers and administrators may only be passive sources of advice and the final decision on content must be the students'. Brief for Dade County School Board 9.

Whatever the educational merits of a laissez-faire approach, there is no reason to conclude that it is the only appropriate way to teach "journalistic skills." Journalistic skills obviously embrace, *inter alia,* the abilities to write; to edit; to create an accurate, fair and objective article; to handle issues with sensitivity and balance; to lay out a page; to meet a deadline; and to respond to a publishing authority. In the secondary school classroom, these "basics" are certainly as important — indeed more important — than the license to publish anything the student wishes in a school-sponsored publication. Why can these skills only be taught — or even best be taught — by denying the

journalism teacher the authority to require revisions to articles, to make decisions that articles will not appear in the paper without certain changes or otherwise to be actively involved in the publication process? As with all teaching, there are matters of judgment about which individuals may disagree, but which are within the discretion inherent in the teaching function. This discretion is incompatible with a public forum. As Justice Stewart observed in his concurrence in *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 140 (1973) (Stewart, J. concurring), public forums "are inevitably drawn to the position of common carriers."

On closer analysis, public forum status is incompatible with a "laissez-faire" curricular newspaper or, for that matter, the exercise of editorial discretion by student editors. If given the inherent characteristics of a school-sponsored newspaper, a journalism teacher cannot exercise, consistent with the First Amendment, direct control over the publication absent a "compelling interest," the informal but unavoidable coercion of the journalism teacher's advice and authority to grade will not likely pass constitutional muster either. *See Bantam Books v. Sullivan,* 372 U.S. 58 (1963). Even if the school district dismantled this system of informal coercion, and clearly vested final authority over this "public forum" in a group of student editors, these students have little they can lawfully edit. For if they can lawfully prevent or forestall publication by other class members for a less-than-compelling reason, the property is by definition no longer a public forum.

If the answer to this seeming paradox is that by vesting editorial discretion in the students the State expressed its intent to create a nonpublic forum, then its intent is equally clear when it vests all or a part of that discretion in the teacher and school principal. That *Spectrum* was a vehicle for teaching and learning "journalistic skills" necessarily implies the discretion inherent not only in the teaching function, *see Ambach v. Norwick,* 441 U.S. 68, 78 (1979), but also in the editorial function,

see Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974). Such discretion is squarely incompatible with the "general" or "indiscriminate access" of a public forum.

III. Alternatives To The Public Forum Doctrine

Possibly due to this incompatibility, respondents and some amici urge approaches other than the public forum analysis employed by the Eighth Circuit to salvage that court's result.[5] PFAW and the ACLU suggest that public forum analysis concerns denials of "access" to public property, and since the staff of *Spectrum* already had "access" — at least in the sense they may have published something in *Spectrum* in the past — "public forum analysis is not helpful." Brief for PFAW at 8; *see* Brief for ACLU at 31 n.17. But "access" used in this way is a vague and unworkable concept. The demand for access to property and the character of expression are inextricably intertwined. The students who were members of Cornerstone, the religious group involved in *Widmar v. Vincent,* 454 U.S. 263 (1981), undoubtedly had access to the facilities of UMKC as students and as members of other student organizations. They

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[5] Respondents contend that *Spectrum* is part of "the press" specifically protected by the First Amendment and, therefore, constitutionally on par with the St. Louis Post-Dispatch. Brief for Respondents 17. This Court has never held that the Press Clause "confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 798 (1978) (Burger, C.J., concurring). Respondents also use the private press analogy very selectively. The First Amendment does not grant the publication's reporters or editors a right to resist the control of their publisher over access to the publication. Yet respondents' position is that regardless of the school board's intent, by creating a "newspaper" the board forfeited all the traditional prerogatives of a publishing authority. If this Court endorses that position, a high school "student" journalist writing for a class-produced, school-sponsored newspaper, for academic credit and a grade, has more legally enforceable autonomy than the most respected journalists at the nation's most prestigious newspapers.

were denied "access" to engage in a particular type of expression, religious worship and discussion. A citizen of Shaker Heights may have had access to the advertising spaces on city buses to promote his car dealership but not his candidacy for license collector. *See Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974). This Court's analysis has not turned on whether the plaintiffs had prior physical access to these facilities, and the Court has explicitly stated that public forum analysis also governs denials of access based on subject matter. *Perry Education Assn.*, 460 U.S. at 46 n.7.

The alternative analytical framework urged by respondents and supporting amici is that of *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969). But *Tinker* involved an instance of viewpoint discrimination, a point explicitly acknowledged by both the majority and dissent in *Perry Education Assn. Compare* 460 U.S. at 49-50 n. 9 *with id.* at 57-58. *Tinker* is properly understood as a reformulation of the compelling state interest standard "in light of the special characteristics of the school environment." 393 U.S. at 506. It articulates the *highest* level of scrutiny within the secondary school, not the *only* level. Respondents concede that this case does not involve viewpoint discrimination, Brief of Respondents at 29, and suggestions to the contrary by some amici are contrived and contradictory.[6]

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[6] The National Organization for Women ("NOW"), the Student Press Law Center, and the ACLU argue that petitioners engaged in viewpoint discrimination because the district court found that the removal of the pregnancy profiles was a reasonable attempt to avoid the appearance of official endorsement of the sexual norms of the pregnant students. This reasoning trivializes the concept of a "viewpoint" and suggests that all expression implicitly has one. A viewpoint has been defined as a "partisan opinion or belief" or "distinctive intellectual position," Webster's New International Dictionary 1904, 2842 (2d ed. 1959), and the fact of, or a proclivity for, sexual intercourse could not be construed as either. A better argument could be made that there was a "viewpoint" toward sexual relations implicit in

Since this case involves school-sponsored expression produced as a class exercise, it also implicates concerns beyond the problem of discipline addressed in *Tinker:* the school board's control over curriculum, its legal liability for expressive activity that occurs in a school-sponsored publication or forum, and the implicit school endorsement that accompanies school-sponsored student expression. *Tinker* involved noncurricular, privately-initiated, privately-sponsored expression and, therefore, did not attempt to accommodate these concerns.

Some amici dismiss the issue of curricular control by arguing that the decision not to publish two pages of *Spectrum* was made by the principal and not "truly necessitated by curricular concerns." Brief for PFAW 2. As a factual matter, however, the extant journalism teacher, Howard Emerson, who had substantial experience as a journalism instructor, agreed with the decision to delete pages 4 and 5. (Tr. 2-74, 2-168 to 2-173). That his predecessor might have thought that the articles were appropriate and sufficiently solicitous to the privacy interests of

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Fraser's speech "glorifying male sexuality." *Bethel School District No. 403 v. Fraser,* 106 S.Ct. 3159, 3165 (1986). "Viewpoint," however, has never had such broad connotations in this Court's cases. Fraser's speech did not make him a "partisan or enemy of any class, creed, party or faction" as those concepts are commonly understood. *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 637 (1943). *See Fraser, supra,* at 3166 (school's disciplining of Fraser "unrelated to any political viewpoint").

The absence of any discernible viewpoint in the pregnancy profiles is illustrated by the inconsonant attempts to define it. *Compare* Brief for ACLU 20 (student profiles reflect "relatively positive views on pregnancy") *with* Brief for NOW 22 (student profiles "made the crucial connection between early sexual activity, unwanted and unplanned pregnancies, and severe educational and economic hardships").

students and their families does not make the earliest judgment "curricular" and the latter something else.[7]

Nor is there any legal justification for preferring the judgment of the journalism teacher over that of his superior, the principal. The principal was the educational leader of the school, expressly charged with a role in the journalism process by the Curriculum Guide and school district policy. A constitutional standard that distinguished among the educational judgments of state actors within a secondary school system would destroy the concept of curricular control by local school boards and their appointed administrators. "Educational decisions must be made by someone; there is no reason to create a constitutional preference for the views of individual teachers over those of their employers." *East Hartford Education Assn. v. Board of Education,* 562 F.2d 838, 859 (2d Cir. 1977) (en banc).

The criticism that the principal's decision was not "pedagogical" is misplaced. Since *Spectrum* was a nonpublic forum, the issue is whether his decision was "reasonable." The criticism is also myopic. Since the teaching of journalism is concerned with balance, fairness, avoiding unwarranted invasions of privacy, and the appropriate limits of an audience's right to

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[7] A few amici make the related argument that the articles were in "final form" and had passed through the " 'teaching' phase" prior to Stergos' departure, and that nothing that occurred beyond that point could be "curricular." Brief for ACLU at 2; Brief for American Society of Newspaper Editors ("ASNE") 13. This again begs the question why Stergos' judgment that the articles were appropriate, balanced and fair was pedagogical, while the judgments of Reynolds and Emerson to the contrary were not. The educational process does not have tightly defined phases. Moreover, the articles were not in final form when Stergos left. (Tr. 2-13 to 2-14). In fact, Stergos testified he would not have allowed names to be used in the divorce article had he been the teacher when the articles were printed.(Tr. 2-53 to 2-54).

know, they are obviously proper pedagogical considerations for the teacher and the principal. Further, the decision to distribute *Spectrum* reflected not only an educational judgment that Journalism II would be most effective if the publication had an audience outside the classroom, but also that the educational experience of the general school population would be enhanced by its availability. "In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the content of communicative materials." *Widmar v. Vincent,* 454 U.S. 263, 278 (1981) (Stevens, J., concurring in judgment). There is even greater force to this observation in the more controlled environment of a secondary school. What product of a compulsory classroom exercise is appropriate to distribute to students generally, under the official aegis of the school, is as curricular or pedagogical a determination as the selection of a textbook. Given the principal's responsibility for the student body as a whole, he is uniquely positioned to make that determination. In truth, respondents' objection is not that the principal failed to make an "educational" decision, but that he failed to make a *wise* educational decision, with adjectives like curricular and pedagogical reserved for those decisions they endorse. "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." *Wood v. Strickland,* 420 U.S. 308, 326 (1975).

While criticizing the principal's actions as not being "pedagogical," some amici also argue, somewhat inconsistently, that the deleted material had extraordinary educational implications. Relying on this Court's opinions in *Bigelow v. Virginia,* 421 U.S. 809 (1975), *Carey v. Population Services International,* 431 U.S. 678 (1977), and *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60 (1983), they contend that the articles involved "reproductive health issues" and, therefore, their deletion triggers the highest level of judicial scrutiny even in the absence of viewpoint discrimination.

Bigelow, Carey and *Bolger* involved governmental restrictions limiting the ability of private publications or the U.S. mails to convey commercial speech about abortion services or contraceptives. All three cases involved privately-initiated speech — not compelled discourse on topics assigned in a secondary school classroom. In each the Court concluded that commercial speech involving abortion or contraceptives is entitled to more First Amendment protection than the normal advertisement. The Court did not conclude that such speech in noncommercial settings, let alone in the schools, is entitled to greater constitutional protection than other types of noncommercial discourse. The Court, in fact, acknowledged the State's greater latitude to regulate information on sexual matters directed to minors as opposed to adults. *Carey,* 431 U.S. at 693 n.16. Given the inculcative role of the schools, the State's authority to regulate in these areas is necessarily greatest within the primary and secondary schools generally, and with regard to school-sponsored sources of information in particular.

In the last analysis, cases like *Carey* and *Bolger* are simply beside the point. This is not a case about sex education, despite the fervent efforts of some amici to make it one. Articles on teen pregnancy have appeared in *Spectrum* in the past. App. A-28. Petitioners readily agree that teenage pregnancy is a serious problem and that school districts have an educational — as opposed to constitutional — duty to provide meaningful information about the hazards of teen pregnancy and the importance of responsible procreative choices. Likewise, there is educational merit in information dealing with divorce and its emotional impact. But that information need not and should not be conveyed at the expense of any individual student or student's family. *Cf. Bigelow v. Virginia,* 421 U.S. 820, 828 (1975) ("no possibility that appellant's activity would invade the privacy of other citizens . . . or infringe on other rights"). The reliance on *Carey* and *Bolger* is ironic because those cases demonstrate a solicitude for the privacy of minors in procreative matters. Yet they are being invoked here to dismiss privacy con-

cerns in light of an exaggerated and seemingly boundless constitutional right on the part of secondary school students to information "essential to enable these individuals to cope with their worlds." Brief of NOW 15. This is in contrast to the cavalier way in which respondents dismiss concerns about the ability of the pregnant students to cope with theirs.[8]

IV. Reasonableness

The reply of respondents and their supporting amici to the latter concerns is to deny their legitimacy. As with the Court of Appeals, it is enough that the students consented. Yet respondents concede that the legal sufficiency of a minor's consent to an invasion of her privacy is ineffective if she was "incapable of understanding or appreciating the consequences of the invasion." Brief for Respondents 24, citing Restatement (Second) of Torts §59. Respondents assume there was no problem of such incapacity here and that petitioners' only legitimate concern was legal liability.

This Court has not so readily presumed the maturity of minors or so narrowly limited a State's legitimate interest in protecting them. "[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird,* 443 U.S. 622, 635 (1979) (plurality opinion). Since "young persons frequently make unwise choices with harmful consequences; the State may properly ameliorate those consequences. . . ." *Carey v. Population Services International,* 431 U.S. 678, 714 (1977) (Stevens, concurring in part and in judgment). Only last Term, in confronting the Establishment Clause issue presented by *Edwards*

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[8] "When a teen continues in school while five months or more pregnant, she has made her sexual activity public, and being interviewed in the school paper does not invade her privacy yet it provides other students with important information." Brief of Respondents 26.

v. Aguillard, 107 S.Ct. 2573 (1987), the Court made observations about secondary schools and their students that are relevant to this case.

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. *Students in such institutions are impressionable and their attendance is involuntary.* . . . The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and *the children's susceptibility to peer pressure.*

Id. at 2577 (citations omitted) (emphasis added).

There is certainly no reason to believe students interviewed for the pregnancy and divorce articles were any less impressionable or susceptible to peer pressure than the average student. And there is certainly some element of both the State's "coercive power" and peer pressure when a student, who is compelled to attend school, is approached by another student, possibly an upperclassman, for an interview for a journalism class project that will appear in the school-sponsored newspaper. Under those circumstances school authorities have a *duty* to ensure that the privacy of individual students and their families are respected.

Respondents and various amici make tortured attempts to show that neither the students nor their families had any legitimate privacy interest in what was to be published.[9] They

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[9] Their shared methodology is to assume away any awkward facts. For example, the ASNE assumes that all three students were visibly pregnant while attending class and the fact of their pregnancy was therefore public knowledge. The article indicates, however, and the district court found, that at least one of the girls had withdrawn from school. *Compare* Brief for ASNE 8 *with* App. A-43.

choose to overlook that the students featured in the pregnancy profiles were promised, and presumably wanted, anonymity. This heightened the potential emotional harm that would result from disclosure. The principal reasonably believed, as the district court found, that there was a high risk of identification, a judgment he is probably better positioned to make than any individual student or teacher. Certainly he would be acting reasonably if he prevented the school-sponsored publication from listing the names of all pregnant students attending school, even in the absence of the biographical trappings of the articles in this case.

Respondents and their supporting amici largely ignore the minority of the profiled students and of *Spectrum*'s audience, some of whom were no more than 14 years of age. There is nothing unreasonable about the assumption that students who are "impressionable" and susceptible "to peer pressure" in matters of religion, *Edwards, supra,* are also unsophisticated and immature in matters of human sexuality and interpersonal relationships. As a result of this immaturity, there is nothing "frivolous," Brief for ACLU 43 n.25, about the principal's concerns that the parents of the students profiled in the divorce and pregnancy articles had not been consulted.[10] Families who "entrust public schools with the education of their children" with the expectation that the classroom will not be used to undermine their "private beliefs" also reasonably expect the school's solicitude to the privacy of their children and themselves. Public schools properly protect children "from their own immaturity by requiring parental consent to or involvement in important decisions by minors." *Bellotti v. Baird,* 443 U.S. 622, 637 (1979).

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[10] Respondents' assertion that the author of the divorce article obtained the consent of both the quoted students and their parents is simply wrong, as demonstrated by the district court's findings (App. A-39) and the author's testimony (Tr. 2-95 to 2-96).

Respondents contend the articles were deleted because the principal believed that divorce and teen pregnancy were *per se* inappropriate topics for the school-sponsored newspaper. The district court properly concluded that was not the case.[11] (App. A-57). What Reynolds found inappropriate was the use of personal profiles of and quotations by students within the school relating the circumstances of their pregnancies or the reasons for their parents' divorces. Certainly the determination of whether this "manner of speech" is appropriate in a class-produced, school-sponsored newspaper is within the reasonable discretion of school authorities. *Bethel School District No. 403 v. Fraser,* 106 S.Ct. 3159, 3165 (1986).

Suggestions by respondents and amici that the principal had alternatives other than deletion of the articles have a hollow ring, for their arguments also presume the principal had no authority to compel changes in the articles. In addition to highlighting their removal, excision of only the two articles would have destroyed the integrity of the two-page layout — something respondents would presumably find as objectionable as deletion. Had the controversy not arisen so late in the school year, the nonobjectionable articles and modified versions of the pregnancy and divorce articles could have run at a later time in a coherent format. The reasonableness of a decision must be gauged within its context, and the district court's conclusion is entitled to substantial weight in this Court.

Finally, respondents argue that the written regulations that governed *Spectrum* were unconstitutionally overbroad and vague. They rely on lower court cases involving privately-

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[11] The Eighth Circuit was in error — an error compounded by its use of quotation marks — when it stated that the school district believed " ' divorce is per se an inappropriate subject for high school newspapers.' " App. A-14. This is unsupported by the record, directly contradicted by the district court (App. A-56 to A-57), and further testament to the confusion created when the letter and spirit of Fed.R.Civ.P. 52(a) are ignored.

initiated, nonschool-sponsored expression. As the district court noted, the "full panoply of precise substantive and procedural regulations is not required within the context of a program that is an integral part of a high school's curriculum." App. A-57. Curricular matters demand a high degree of informality and flexibility — particularly for subject matters as broad and varied as journalism. *See Bethel School District No. 403 v. Fraser,* 106 S.Ct. 3159, 3166 (1986). Moreover, a characteristic of a nonpublic forum is that there need not be precisely defined limitations on access; a restriction is permissible so long as it is reasonable in light of the purposes of the forum.

It is striking the degree to which respondents and some amici use the language of education to justify displacing the flexibility of educational judgment with a relatively static constitutional proscription. Teaching the power and responsibility of free expression with sensitivity for the immaturity of secondary school students is best left to an educational policy that encourages as well as prohibits, and that is informed by and changes with experience. The Constitution, which does not mention education, properly inspires our educational policy; but it should seldom dictate it, lest it further aggravate the "adversarial and legalistic character" of faculty-student relationships in our secondary schools. Grant, *The Character of Education and the Education of Character,* 18 American Education 37, 41 (1982). "[A] school faculty must regulate the content as well as the style of student speech in carrying out its educational mission." *Fraser,* 106 S.Ct. at 3169 (Stevens, J., dissenting). At times educators will make decisions others believe insensitive or unwise, but that is true of all judgments. As Judge Wollman observed in his dissent, judges have no monopoly on wisdom in these matters. The price of moving these decisions from the schoolhouse to the courthouse is to deny educators the sense of involvement and responsibility they must feel to be effective and to deny students the direction and discipline they need to learn.

Respectfully submitted,

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