No. ________

In The Supreme Court of the United States

WILLIAM LEE,

Petitioner,

v.

YORK COUNTY SCHOOL DIVISION, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

James J. Knicely
Counsel of Record
John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

Gary Alvin Bryant
WILLCOX & SAVAGE
1 Commercial Place
1800 Bank of America Center
Norfolk, VA 23510-2197
(757) 628-5520

Steve Clayton Taylor
Attorney at Law
133 Mount Pleasant Road
Chesapeake, VA 23322
(757) 482-5705

Attorneys for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Amendment allows a public school to engage in viewpoint discrimination against a teacher's classroom display of noncurricular materials when a school practice or custom permits such displays?

2. Whether the Court of Appeals erred in applying the "curriculum" test set forth in *Hazelwood Sch. Dist. v. Kuhlmeier* to circumscribe constitutionally protected expression by a teacher where a public school system by practice and custom allows broader limits for such expression?

PARTIES TO THE PROCEEDINGS

Petitioner, who was Plaintiff-Appellant in the Court of Appeals, is William Lee, a public school teacher and resident of the Commonwealth of Virginia.

Respondents who were Defendants-Appellees in the court of appeals below are: (1) York County School Division; (2) Steven R. Staples, in his official capacity as Superintendent of the York County School Division; (3) York County School Board; and (4) the members of the York County School Board, including R. Page Minter, Barbara S. Haywood, Linda Meadows, Mark A. Medford, and Barrent M. Henry, each of whom is sued in his or her official capacity.

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INTRODUCTION

This case arises from the discriminatory removal of noncurricular materials posted in a public school classroom. Although schools need not necessarily permit the posting of materials of personal and public interest on classroom walls, when as a matter of practice they do, as in this case, censorship based on viewpoint is prohibited. Here, York County Principal Crispin Zanca removed newspaper clippings and other materials posted by teacher William Lee in his Tabb High School classroom ostensibly because of their religious content. However, Zanca chose not to remove a photograph of three scouts praying together, and a picture of a uniformed military member wearing a helmet with the

imperative: "Pray for America." The latter two photos were allowed to remain because of Zanca"s admitted emotional connection with the 9-11 tragedy (for which the scouts were praying) and because 47% of his school"s student population were in one way or other affiliated with the Armed Forces.

The courts below failed to overturn the discrimination reflected in Zanca's personal predilections because the applicable jurisprudence in this area of the law is beset by conflicting and varying standards that do not properly account for the special characteristics of the school environment. On the one hand, courts pay obligatory lip service to broad generalizations about First Amendment rights being "available" to teachers in light of the special characteristics of the school environment (*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). On the other hand, they allow little, if any, quarter to free speech interests, applying a variety of legal analyses that inexorably find *all* classroom speech to be unprotected by virtue of the employer-employee relationship or under the rubric of "school sponsored" speech. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). Neither do courts adequately account for the special characteristics of the school environment which requires a more specialized analysis than the cookie-cutter doctrines of traditional employment law when it comes to teacher expression. *Morse v. Frederick*, 551 U.S. ______, Dkt. No. 06-278, at 8-9 (June 25, 2007); *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

The present case presents an opportunity for this Court to clarify conflicting standards among the circuits and to address whether school administrators may engage in unrestrained viewpoint discrimination against teachers

when by practice and custom other teachers are permitted to exercise noncurricular speech in the classroom.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (by King, J., joined by Shedd, J., and Hamilton, S.J.) is reported as *Lee v. York County School Division*, 484 F.3d 687 (4th Cir. 2007), and is set forth in the Appendix beginning at A-1. The opinion of the United States District Court for the Eastern District of Virginia (by Smith, J.) is reported as *Lee v. York County School Division*, 418 F. Supp. 2d 816 (E.D. Va. 2006), and is set forth in the Appendix beginning at A-27.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fourth Circuit, which is the subject of the instant Petition, was entered on May 2, 2007 (A-1). This Court has jurisdiction to review that judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. I provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

> peaceably to assemble, and to petition the Government for a redress of grievances.
>
> U.S. Const. Amend. XIV, § 1, provides as follows:
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, Section 1983 of the United States Code provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...

STATEMENT OF THE CASE

Since the year 2000, Petitioner William Lee has been employed as a teacher by Respondents York County School

Division and York County School Board. JA 40-41.[1] In 2002, Lee was assigned to teach Spanish at Tabb High School, a public school within the York County School Division operated and controlled by the Defendant School Board. Crispin Zanca was employed by the Respondents as the principal of Tabb High School. JA 137.

Principal Zanca implemented a practice and custom at Tabb High School of permitting teachers to post on the walls or other areas within the classroom assigned to the teacher written or graphic materials that (1) related to the subject matter taught by the teacher, (2) were of personal interest or importance to the teacher, or (3) related to current events. JA 30, 258-60; (A-5). Zanca and Superintendent Stephen Staples confirmed Zanca's custom and practice of permitting posted materials that did not relate to courses taught by teachers JA 140-41, 258; (A-52, 53, 54). Specifically, Superintendent Staples, as Defendants' Fed. R. Civ. P. 30(b)(6) designee, testified as follows:

> Q. My understanding is that teachers are allowed to place things on their bulletin boards and walls that aren't necessarily curriculum related, is that correct?
>
> A. That's my understanding of the practice.
>
> * * * *

---

[1] The Fourth Circuit record includes the Joint Appendix filed by the parties in the Court of Appeals. Relevant facts set forth in the Statement of the Case are supported by citations to the Joint Appendix and denominated "JA," followed by the page number.

> Q. The practice has allowed people to post materials of personal interest on their walls and bulletin boards?
>
> A. As long as they didn't violate the law, yes.

JA 258-59. Significantly, no restrictions, standards, or guidelines were ever promulgated by the Appellees or verbally communicated to the teachers of Tabb High School. JA 21, 243, 257. It was freely admitted that family pictures, current events articles, sports figures and materials, human interest articles, and materials of personal interest were allowed for display by teachers at Tabb High School. JA 258-60. Zanca further admitted that teachers were given no guidelines, and he stated with respect to materials dealing with religion that "there are things that are allowable and things that probably cross the line and are not permissible." JA 141-42.

Zanca's practice arose from the Defendant School Board's policy of granting principals broad discretion in determining what materials could be displayed in school classrooms. JA 30, 141-42. Superintendent Staples confirmed that (1) there were no standards establishing the grounds or basis for the removal of materials from classroom walls or bulletin boards that had been posted by teachers under the aforementioned policy, and (2) the removal of materials on display in teachers' classrooms was left to the discretion of school principals like Zanca. JA 21, 243-44, 257.

Pursuant to the school's policy and practice, Lee posted in his classroom written and graphic materials that were of personal interest or importance to him or related to current events or the subject matter he taught at the school. JA 49-50.

Some of the materials posted by Lee described or depicted religious aspects of events of current or historical interest. JA 247.

Sometime in October 2004, Dr. Judy Davis-Dorsey, an employee of Defendant York County School Division, received a phone call in which the caller expressed concern that materials posted in Lee's classroom contained religious content. JA 271-72. Davis-Dorsey called Dr. Carl James, the School Division's director of school administration, who then contacted Zanca, advised him of the nature of the report, and asked Zanca to look into the matter. JA 159.

Zanca went to Lee's classroom on a day Lee was absent from school because of illness. JA 60, 160. Zanca inspected the materials and concluded that the following materials must be removed because they contained religious content:

> a) a *USA Today* news article titled "White House Staffers Gather For Bible Study" detailing then-Attorney General John Ashcroft's participation, while serving as Attorney General of the United States, in prayer meetings and Bible studies with staff members, JA 265 (A-66);
>
> b) a *Daily Press*[2] news article titled "The God Gap" describing the different life philosophies of the 2004 Presidential candidates George Bush and John Kerry and displayed by Lee in the midst of the then-

[2] The *Daily Press* is a local paper of general circulation for the Hampton Roads, Virginia, area.

> current 2004 Presidential campaign, JA 126-30 (A-67);
>
> c) a Peninsula Rescue Mission news article concerning Roni Bowers, a local girl who had been killed when the plane she was flying in was shot down mistakenly in Latin America, which was connected to a *Daily Press* news article regarding the same incident, JA 264, 266 (A-68, 69); and
>
> d) a poster concerning the Presidentially proclaimed National Day of Prayer recognized by Congress in 36 U.S.C. § 119 and depicting George Washington praying. JA 261; (A-70).

(A-4, 5). Zanca placed the removed materials on Lee's desk in an office shared with other teachers and left a note in Lee's mailbox. JA 160. Zanca testified that he did not read the entirety of any of the articles he removed. JA 162; (A-6). These items were but a few of many articles and postings and represented a minor portion of wall space in Lee's classroom.

Zanca viewed, but did not remove from display, a picture of three Boy Scouts praying in front of an American flag (A-6, n. 6; A-64), and a photograph displaying a member of the United States military with the words "Pray for America" and an American flag on his helmet (A-65). Zanca later explained in deposition testimony that he recognized the Scouts were praying, but because the caption underneath the picture mentioned 9/11, "[s]omething a little emotional for a lot of us that are still there," he decided to leave it up. JA 196. Zanca said he "did not see it as a religious poster even though they are praying." JA 198.

Zanca also viewed, but did not remove, the photograph of a military person with the message "Pray for America" on his helmet (A-65) because "I . . . knew that close to 47% of my student population in one way or other have Armed Forces ties. . . . I'm sure that had a bearing on my decision to leave it, even tough the word 'pray' is on there." JA 199. He elaborated: "I probably thought it was very nebulous whether [the photo] did or did not [violate the Establishment Clause] and in light of the population in the community that I serve, I decided to leave it up." JA 200.[3]

When Lee returned to work, he discovered the removed materials. He asked Zanca about the removal and was told that a complaint had been received and that Zanca felt certain things had to be taken down because they were inappropriate in a Spanish classroom. JA 164. Zanca indicated that he selected the removed materials because the materials contained references to religion. JA 147, 152-56. Zanca also repeatedly testified that the materials he removed were not curricular in nature. JA 146-47, 155, 162, 164, 168, 172-73, 177, 179, 182, 186; (A-41, n. 18).

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[3] Zanca also allowed other varied items to remain on the classroom wall relating to the following: the religious festival of Rinti Raymi that is celebrated in the City of Cuzco in the mountains of Peru, JA 78; a tourist poster concerning the highlands near the Peru-Bolivia border and depicting a famous building in the City of Cuzco, JA 81; a child's game for the conjugation of verbs in Spanish, JA 84-85; an advertisement for bullfights and Mexican "ho-downs," JA 85; a tapestry depicting a Tumi, a device used by the high priests of the Inca civilization, JA 87; National Geographic articles concerning Inca mummies, JA 89, 91-92; depictions of a pastoral setting in the South American highlands, JA 93; and a poster depicting Christopher Columbus' ships, JA 97.

Lee then sought guidance from legal counsel who, in a letter to School Superintendent Staples, raised objections to the removal of the materials and requested that Lee be allowed to repost the removed materials. Staples provided this letter to the Defendant School Board in early January of 2005. JA 255. In a letter from the county attorney, Lee's request to repost the materials was denied on grounds that the removed materials were "overtly religious[.]" JA 33-34. This decision not to allow the materials to be reposted was approved and ratified by the Respondent School Board. JA 256.

Lee thereafter filed suit alleging that the removal of the materials from his classroom walls and prohibition upon reposting them violated his rights to free expression under the First Amendment and his right to equal protection of the law under the Fourteenth Amendment.

On cross-motions for summary judgment, the District Court entered an order and judgment granting the Respondents' motion and denying Lee's (A-27). In its written opinion, the District Court first held that under the decision in *Boring v. Buncombe County Board of Education*, 136 F.3d 364, 368 (4th Cir.) (en banc), *cert. denied*, 525 U.S. 813 (1998), any teacher expression that is curricular is, by definition, not on a matter of public concern and thus unprotected by the First Amendment. Although recognizing that both Lee and Zanca had testified that Lee's postings were not curricular in nature, the District Court ruled that Lee's postings were nevertheless curricular because they were part of his methodology of instruction (A-41) and so, under *Boring*, the postings were wholly unprotected by the First Amendment.

The District Court also made alternative rulings that (1) none of the posted materials related to matters of "public concern" (A-46), (2) no forum for expression existed at Tabb High School with respect to teacher expression by posting materials in classrooms (A-51, 55), (3) the lack of any standards guiding Zanca in determining what materials can and cannot be posted did not violate the First Amendment (A-57), and (4) any viewpoint discrimination resulting from the removal of only materials with religious themes was irrelevant because the expression was not protected by the First Amendment (A-57, 58).

On appeal, the Court of Appeals for the Fourth Circuit affirmed on the sole basis that Lee's postings were unprotected curricular speech (A-20). While recognizing that under *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), teachers do not "shed their constitutional rights at the schoolhouse gate," the Court of Appeals ruled that the rights of Lee and other teachers are limited because of their status as public employees, relying on *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). Under that precedent, the speech of a public employee is protected by the First Amendment only if the speech relates to a matter of public concern and the employee's interest in First Amendment expression outweighs the employer's interest in the appropriate operation of the workplace (A-13).

Although the Court recognized that Lee's postings, which concerned the religious beliefs and philosophies of Presidential candidates George W. Bush and John Kerry, the activities of Attorney General John Ashcroft, and the tragic death of a local youth while on a foreign mission, normally would be considered as relating to matters of public concern

(A-14, 15), under Circuit precedent established by *Boring*, a teacher's expression that relates to school curriculum is by definition not considered to be on a matter of public concern (A-18). "[D]isputes over curriculum constitute ordinary employment disputes and do not implicate speech on a matter of public concern." (A-18).

It then found that Lee's postings were "curricular" speech using the definition of "curriculum" set forth in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), wherein if expression is "school sponsored" and designed to impart particular knowledge to students, it is unprotected (A-19, 23). The Court determined that Lee's speech was "school sponsored" and bore the imprimatur of the school because it was presented within a classroom for viewing by students (A-21, 22).

It went on to find that Lee's postings satisfied the second prong of *Kuhlmeier* because "classroom speech can readily be designed to impart particular knowledge, and yet not otherwise relate to the curricular objectives that a teacher must follow." (A-23). The Court ruled that curricular "has a broader meaning than the name of a particular course of study, or the designation of materials used to achieve specific curricular objectives." *Id.* Lee's postings were thus deemed to be curricular because Lee was responsible for the emotional and moral well-being of students and the postings were intended by Lee to show students political figures who have hopeful social and religious values. The Court found that "[t]hrough these postings, Lee sought to impart the particular knowledge of these figures and their values to his students in order to expose the students to social and moral values he deemed beneficial to their emotional growth." (A-24). In a footnote, the Court dismissed the fact that both Lee

and Zanca had testified that the postings did ***not*** relate to the curriculum on grounds it was "irrelevant . . . because the *Kuhlmeier* definition encompasses more than a subjective view of curriculum." (A-19, n. 15). It also noted that because Lee's expression was wholly unprotected, it did not matter if Zanca's removal of material constituted viewpoint discrimination or if he acted with unfettered discretion in removing the materials (A-25, n. 17).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL REGARDING THE PROPER STANDARDS TO BE APPLIED IN DETERMINING THE RIGHTS OF PUBLIC SCHOOL TEACHERS TO EXPRESSION ON SCHOOL PROPERTY.

In *Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503, (1969), this Court declared that "[i]t can hardly be argued that either students **or teachers** shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Accord, Morse v. Frederick*, 551 U.S. ___, Dkt. No. 06-278, at 8-9 (June 25, 2007). While student speech has been the subject of no less than four decisions by this Court, no cases concerning the First Amendment protections afforded public school teachers within the confines of the classroom have been decided by this Court.[4]

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[4] In *Givhan v. Western Line Consolidated School District et al.*, 439 U.S. 410 (1979), this Court remanded for further consideration a case involving a teacher who was fired because of several private encounters

The standards applied by lower courts in cases involving teacher speech are conflicting and muddled, producing decisions in the various courts of appeals that are vexingly inconsistent, both as to the scope of the ostensible free speech rights accorded to teachers and the legal analysis of claims of improper censorship of teacher speech. *See California Teachers Assoc. v. State Board of* Education, 271 F.3d 1141, 1148-49 n. 6 (9th Cir. 1999) (Supreme Court has not resolved the protection afforded teacher speech, and the circuit courts have adopted three different tests to analyze the free speech rights of teachers). In addition, the courts have failed to recognize that school divisions have discretion to allow teachers, by policy and practice (as with students and others within the school environment), to exercise free speech rights. Ordinarily, viewpoint discrimination in the application of such governmental policies or practices would be impermissible.

The disparate legal doctrines and confusion in this area of the law result not only from the lack of any definitive Supreme Court precedent but from the fact that public school teachers are public employees. Thus, the Third, Fifth, Sixth, and Ninth Circuit Courts of Appeals have employed the standard analysis for public employee speech set forth in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) and *Connick*

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with the school principal in which she complained about practices and policies she conceived to be racially discriminatory. This Court ruled that a teacher does not forfeit "his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly." *Id.* at 414. It went on to say: "Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." *Id.* at 415-16.

v. Myers, 461 U.S. 138 (1983). *See Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (teacher's manner of conveying the curriculum constituted an ordinary employment dispute and did not involve expression on a matter of public concern protected by the First Amendment); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) (teacher's choice of reading list for world history class was not speech on a matter of public concern under *Pickering*); *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1050-51 (6th Cir. 2001), *cert. denied*, 537 U.S. 813 (2002) (*Pickering-Connick* analysis applied in determining whether teacher's presentation of speakers on an issue of public concern to class was constitutionally protected speech); and *Nicholson v. Bd. of Educ.*, 682 F.2d 858, 865 (9th Cir. 1982) (the question whether a school teacher's speech is constitutionally protected requires the balancing of interests set forth in *Pickering*).

The First, Second, Seventh, Eighth, and Tenth Circuits employ the "school-sponsored speech" analysis developed in the context of student speech in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1987) in determining a teacher's right of expression. *See Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993) (teacher's in-class discussion of abortion in connection with biology instruction was subject to regulation in order to further school's legitimate pedagogical interests); *Silano v. Sag Harbor Union Free Sch. Dist.*, 42 F.3d 719, 723 (2d Cir. 1994), *cert. denied*, 515 U.S. 1160 (1995) (applying *Kuhlmeier*'s "school-sponsored speech" test to claim by guest lecturer that his speech was improperly restricted and censured by school district); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990) (teacher's claim of a First Amendment right to determine the curriculum

content of his junior high class rejected under the *Kuhlmeier* decision);[5] *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 724 (8th Cir. 1998), *rehearing en banc den.*, 154 F.3d 904 (8th Cir. 1998), *cert. denied*, 526 U.S. 1012 (1999), (school could punish and reprimand teacher for persistent use of reading texts containing profanity; classroom exercises constituted school-sponsored activities subject to regulation for legitimate pedagogical interests); and *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 777 (10th Cir. 1991) (rejecting application of *Pickering* test to teacher's First Amendment claim because *Pickering* only addresses the school's interest as an employer, not its interest as an educator).

The Fourth Circuit has established a different mode of analysis as shown by the decision in this case and its previous decision in *Boring*. Here and in *Boring*, the Fourth Circuit held that a teacher's First Amendment claim is judged under the *Pickering-Connick* test. However, the Fourth Circuit considers (as a matter of law) that any First Amendment claim involving "curricular" speech is not speech on a matter of public concern. (A-13, 18). In determining what is "curricular," the Fourth Circuit chooses not to look to the actual curriculum policy, practice, or custom implemented by the school, but as a matter of law to the definition set forth in this Court's *Kuhlmeier* decision (A-17, 19). If the speech fits within the *Kuhlmeier* definition, it is unprotected and subject to viewpoint discrimination.[6]

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[5] Without overruling *Webster*, the Seventh Circuit recently analyzed a teacher's free speech claim under the decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006). *See Mayer v. Monroe Cnty. Cmt. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007).

[6] In the *Cockrel* case, *supra*, 270 F.3d at 1051-52, the Sixth Circuit specifically criticized the Fourth Circuit's *Boring* decision, holding that it extends "the holding of *Connick* beyond what the Supreme Court

Finally, this Court's standards relating to access to school property, though rejected in this case by the Court of Appeals, are nonetheless directly relevant in view of the school's practice of allowing items to be displayed by teachers. *See Perry Education Assn v. Perry Local Educators Assn*, 460 U.S. 37, 46, n. 7 (1983) (use of teacher mailboxes subject to Free Speech forum analysis); *City of Madison Joint School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (teacher expression on school board business is protected speech).[7] In *Perry*, 460 U.S. at 44, this Court made it clear that:

> The First Amendment's guarantee of free speech applies to teacher's mailboxes as surely as it does elsewhere within the school, *Tinker v. Des Moines School District, supra,* and on sidewalks outside. *Police Department of Chicago v. Mosely*, 408 U.S. 92 (1972). . . . The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.

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intended," resulting in "no freedom of speech for teachers when teaching students in the classroom."

[7] S*ee also*, *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001) (denial of access for after-hours student Bible Club constituted viewpoint discrimination); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995) (denial of funding of student magazine constituted viewpoint discrimination); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (denial of display of family matters film with religious viewpoint unconstitutional); *Widmar v. Vincent*, 454 U.S. 263 (1981) (denial of access for student Bible study group violated Free Speech rights).

In the Fourth Circuit's *Boring* case, Judge Luttig noted that there may be differences in the protection afforded different types of speech uttered in the classroom. Identifying problems with application of the *Kulhmeier* "curriculum" test to teacher speech, he observed that it:

> fails to recognize the elementary difference between teacher in-class speech which is curricular, and teacher in-class speech which is noncurricular, because it assumes that every word uttered by a teacher in a classroom is curriculum. In the latter context of teacher in-class noncurricular speech, the teacher assuredly enjoys some First Amendment protection. In the former context of teacher in-class curricular speech, the teacher equally assuredly does not.

Boring, 136 F.3d at 373 (Luttig, J. concurring).

In the present case, where the school has a practice of permitting certain types of noncurricular speech in the classroom, it is fundamental First Amendment jurisprudence that there can be no viewpoint discrimination. *Perry Education Assn v. Perry Local Educators Assn*, 460 U.S. 37 (1983); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). Moreover, the standards applied in censoring that speech must be reasonable and not based on the unbridled discretion of officials. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759, 763 (1988)). This Court has also recognized the value of academic freedom (*see Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1962 (2006)), and lower courts have properly viewed academic freedom as extending to

teachers at the high school level. *Kingsville Independent Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980); *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976). It is axiomatic that if schools have granted rights of expression to teachers on noncurricular matters, the light of academic freedom is extinguished if such expression is arbitrarily restricted according to a teacher's viewpoint.

This case presents a clear opportunity for this Court not only to resolve the conflict and uncertainty among the circuits and the unequal application of law to these types of constitutional disputes, but to provide guidance in an area of law in need of clarification.

II. THIS CASE PRESENTS UNRESOLVED QUESTIONS RECOGNIZED IN *TINKER V. DES MOINES SCHOOL DISTRICT*, *CONNICK V. MYERS* AND *GARCETTI V. CEBALLOS* SUGGESTING THAT PUBLIC EMPLOYEE SPEECH ON MATTERS OF OTHER THAN PUBLIC CONCERN ARE NEVERTHELESS PROTECTED BY THE FIRST AMENDMENT IN THE PUBLIC SCHOOL ENVIRONMENT.

As recently as this year, this Court explicitly reaffirmed its pronouncement in *Tinker* that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to **teachers**," and further, that *Tinker* "implicat[es] concerns at the heart of the First Amendment." *Morse v. Frederick*, 551 U.S. ____, Dkt. No. 06-278, at 8-9 (June 25, 2007). When, as in this case, the speech of a public school teacher is made subject to arbitrary viewpoint discrimination and treated differently than the speech of other teachers -- especially where, as here, school

practice and custom permits noncurricular expression by teachers -- a substantial question is presented as to the scope of First Amendment rights for teacher speech in light of the special characteristics of the school environment.

Similarly, in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), this Court held that although a public employee's duties may determine the scope of an employee's First Amendment rights, there may also be additional Free Speech interests involving the rights of teachers in the educational environment.

> There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

126 S. Ct. at 1962. In the present case, some of Lee's materials related to classroom instruction. Other materials were solely of personal interest. But all of the displayed materials were within the scope of the school's practice and custom allowing teachers to display materials of interest, personal or otherwise. And yet, some of Lee's materials were subjected to indiscriminate censorship based on a policy that permitted the exercise of standardless discretion and failed to restrict the Principal's personal predilections. The special characteristics of the school environment suggest that when the practice of the school is to permit teachers to display items of personal interest, the First Amendment does not

permit administrators to discriminate against teachers based on viewpoint if the speech is otherwise lawful.

In *Connick v. Myers*, this Court clearly confirmed that an employee may have free speech rights in an employment setting that are independent of the employer-employee relationship. It said: "[w]e do not suggest . . . that Myers' speech, *even if not touching upon a matter of public concern*, is totally beyond the protection of the First Amendment. 'The First Amendment does not protect speech and assembly only to the extent that it can be characterized as political.' Great secular causes, with smaller ones, are guarded." *Connick*, 461 U.S. at 147 (*citing United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217, 223 (1967), *quoting Thomas v. Collins,* 323 U.S. 516, 531 (1945)). In the present case, the practice and custom of the York County Schools permitted teachers to display materials of current or personal interest, as well as materials related to the course being taught. However, the indiscriminate application of a hybrid *Pickering-Connick-Kuhlmeier* test ignores *Connick*'s clear indication that employee speech on matters of "other than public concern" may still have protection under the First Amendment.

In light of this Court's several expressed reservations in the *Tinker*, *Morse*, *Garcetti,* and *Connick* cases, this case presents a unique record of impermissible viewpoint discrimination under a governmental policy and practice applicable to all teachers. The critical importance of speech in this educational setting requires close scrutiny and fair and equitable treatment as among teachers in the application of school policies. By granting the instant petition, this Court can address and provide guidance on the questions left open in *Tinker*, *Morse*, *Garcetti,* and *Connick.* By reversing the opinion below, it can remedy the discrimination arising from

the standardless discretion exercised by Principal Zanca and confirm that the oft-repeated mantra that "teachers do not shed their First Amendment rights at the schoolhouse door" has substance and is not mere platitude.

III. THE RATIONALE ADOPTED BY THE COURT OF APPEALS LEGITIMIZES VIEWPOINT DISCRIMINATION AND COMPLETELY EVISCERATES ALL FIRST AMENDMENT PROTECTION FOR TEACHERS IN THE CLASSROOM.

The decisions below failed to distinguish between and among the content of the materials that were removed and, instead, painted Petitioner's postings as "curricular" in nature and, therefore, unrelated to matters of public concern and unprotected within the employer-employee relationship (A-20; A-41, n. 18). The Court reasoned:

> [W]hen a First Amendment free speech dispute involves a teacher-employee who is speaking within the classroom, the determination of whether her speech involves a matter of public concern is dependent on whether or not the speech is curricular. This determination— whether the contested speech is curricular in nature — is a question of law for the court.

(A-18, 19). In other words, if Lee's speech is "curricular" in nature, it is by definition not a "matter of public concern" and is, therefore, unprotected. According to the reasoning of the Court of Appeals, the determination of

"curricular" is not decided by reference to any actual school policy or practice defining instruction as "curricular" or "noncurricular," but instead by a strictly judicial definition of "curricular." Thus, unconstrained by the school system's actual policy and practice, the Court determined "curricular" by reference to the definition employed in a student speech case, *Hazlewood v. Kuhlmeier,* which includes any "activities . . . designed to impart particular knowledge or skills to student participants and audiences." *Kuhlmeier*, 484 U.S. at 271.[8] This approach generates a hypothetical construct for "curricular" divorced from any adopted by York County and implemented by Principal Zanca,[9] thereby minimizing (1) the significance of contrary testimony by school officials about the school system's view of curricular and noncurricular and its actual practice of permitting teachers to engage in *noncurricular* speech,[10] and (2) the record evidence that

[8] The Court of Appeals also reasoned that *Kuhlmeier's* requirement for "faculty supervision" of expressive activities was satisfied because "the classroom bulletin boards and their contents were supervised by the teachers, who were the only persons in the school authorized to post items on the bulletin boards, and by Principal Zanca, who oversaw and monitored all such postings." (A-23). This analysis stretches *Kuhlmeier* beyond its intended limit to only student speech. The *Kuhlmeier* decision was clearly referring to faculty supervision of the activities of third parties, such as students, and not the actions of a teacher in deciding to engage in expression. Teacher expression, as in the case of the Petitioner's postings, is usually not supervised by faculty but is subject only to faculty self-governance.

[9] Under *Kuhlmeier*'s concept of "school-sponsored" expression, the Court of Appeals also avoided traditional understandings of curriculum in the sense of centrally planned, structured standards of learning and courses of instruction that teachers are expected to teach in the course of their assigned duties.

[10] The undisputed and uncontradicted testimony in this case shows that

Lee's expression did *not* in Principal Zanca's view relate to the curriculum.[11] Thus, using *Kuhlmeier's* sweeping definition of curriculum, Petitioner's postings -- which were not done pursuant to a school board prescribed mission or goal, but as expression allowed by school practice -- could instead be characterized by the Court of Appeals as "curricular" and therefore unprotected. Since Lee's speech was unprotected, the Court could then conclude, also "as a matter of law," that the school was not prevented from engaging in unrestrained viewpoint discrimination. (A-25, n. 17). *Quod erat demonstrandum* by a series of "matter of law" determinations that do not admit to any First Amendment rights for teachers in the classroom (or square with a disparate factual record to the contrary).

The syllogistic analysis of the Court of Appeals is reminiscent of another era when judicial constructs

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the school had a policy, custom, and practice of allowing teachers to post in their classrooms materials that were not only related to coursework and current events, but also of *personal interest* to them and not related to the courses taught by teachers. JA 30, 140-41, 258; (A-5, 7, 52-54).

[11] The overwhelming evidence below was that the materials posted by the Petitioner did *not* relate to the curriculum. As the District Court pointed out, Zanca repeatedly testified at his deposition that the postings did *not* relate to the teaching of Spanish by Lee (A-41, n. 18). Lee testified that the materials he posted did *not* relate to the curriculum and that he had put the materials up because he found them interesting, uplifting, or expressive of something he believed was important. He also testified that the removed materials were not related to any Spanish curricular objective (A-7). Nothing in the record supports the view that the materials were posted as a part of Lee's curricular responsibilities. To the contrary, they were his personal expression posted under a policy that allowed teachers to express themselves within the classroom in this manner.

eviscerated the fundamental law of the land. *See Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J. dissenting).[12] It renders new meaning to the term "summary" judgment and makes hollow the representation that "[t]he facts underlying this appeal are presented in the light most favorable to Lee, as he is the non-moving party with respect to the School Board's summary judgment motion." A-3, n. 1. It is also inconsistent with the approach taken in this Court's recent decision in a school speech case, *Morse*, where the issue of whether an Olympic torch rally was "school sponsored" was presented and resolved by reference to the record testimony of, *inter alia*, the school's principal and superintendent. For example, the *Morse* decision made specific reference to the principal's testimony that the rally was "an approved social event or class trip." *Morse*, 551 U.S. at ___, slip op. at 6.

Perhaps the most disturbing aspect of the panel decision below is the extension of *Kuhlmeier*'s concept of curricular literally to all in-school teacher expression, curricular or not, permitting standardless censorship at the mere whim of school officials. Indeed, the Fourth Circuit's decision made this clear when it wrote as follows:

> Classroom speech can impart particular knowledge if its purpose is to convey a specific

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[12] An example of the distortion created by the Fourth Circuit's approach is a critical observation relegating a significant issue in the case to a footnote. The court dismisses as "irrelevant" both Lee's and Zanca's testimony that Lee's postings did ***not*** relate to the curriculum "because the [*Kuhlmeier*] definition encompasses more than a subjective view of curriculum." (A-19, n. 15). Subjectivity is turned on its head, however, when the undisputed first-hand testimony of both parties is, in effect, expunged by a new reality created by application of a judicially-devised legal construct.

> message or information to students. That specific message need not relate to, for example, Spanish instruction, but could instead constitute information on social or moral values that the teacher believes the students should learn or be exposed to.

(A-23, 24). Thus, all that is necessary for teacher expression to be subject to suppression under *Kuhlmeier* is that it "convey a specific message or information to students." This test renders any communicative or expressive activity by a teacher in the classroom, even on matters of personal or public interest, "curricular" speech and without First Amendment protection. If allowed to stand, the decision below gives school officials *carte blanche* power to engage in viewpoint discrimination against teacher expression, even when speech is by practice otherwise permitted. Today it involves items with religious content; tomorrow it may be politics, sports, current events, or inquiry into certain subject matter. For example, schools would be free to allow teachers to post campaign materials favoring a particular candidate during an election cycle, while forbidding similar materials presenting the views of an opposing candidate. It would allow with impunity the promotion of one side of the public debate on abortion or other controversial topics and the censorship of teachers expressing views on opposing sides of that debate. So long as the speech is "curricular," it is fair game for prescription and censorship, notwithstanding any school policies and/or practices or customs to the contrary.

This Court has made clear that viewpoint discrimination is an egregious form of content discrimination that is fundamentally inconsistent with the First Amendment. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); a*ccord, Good News Club v. Milford*

Cent. Sch., 533 U.S. 98, 112 (2001).[13] The Fourth Circuit's ruling legitimizes viewpoint discrimination even when the school permits speech on noncurricular matters. It should, therefore, be reversed.[14]

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[13] A policy excluding religion as a category of speech is not viewpoint neutral if the policy permits the presentation of other views dealing with the same subject but excludes those presenting the issue from a religious standpoint. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). The court below recognized that Zanca removed selected materials posted by the Petitioner because Zanca deemed the removed materials "overly religious." (A-6). It did not explain how the three scouts praying, or the admonition to "Pray for America," were also not equally religious, or how the other materials pertaining to a South American religious festival and an Inca priestly tapestry were not also similarly proscribed.

[14] Petitioner also contends that the removed materials constituted speech about "matters of public concern" and were therefore protected expression under *Pickering* and *Connick*. The panel below admitted as much, agreeing that the argument that these materials were protected speech "might normally be persuasive, and they could well lead a court to conclude that contested speech was made by a private citizen on a matter of public concern." (A-15). However, it dispatched the argument with the remarkably unqualified and summary statement that "disputes over curriculum constitute ordinary employment disputes and do not implicate speech on a matter of public concern." (A-18). The record, however, is to the contrary. The *Daily Press* news article titled "The God Gap" concerned the religious and philosophical views of the 2004 candidates for President and was displayed *while the 2004 Presidential campaign was in progress*. It is difficult to imagine a subject of more "social, political, or other interest to a community" or that "the community is likely to be truly concerned with or interested in" than a current Presidential election and candidates. As pointed out by this Court in *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004), even private remarks concerning the President are on matters of public concern. The same is true of the *USA Today* news article titled "White House Staffers Gather For Bible Study," which concerned the conduct of the President's then-Attorney General. Moreover, the poster depicting George Washington promoting the National Day of Prayer and a *Daily Press* news article regarding a local girl who had been killed when the plane she was flying

CONCLUSION

For the reasons stated, this Court should grant the petition for writ of certiorari.

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Respectfully submitted,

James J. Knicely
Counsel of Record
John W. Whitehead
Douglas R. McKusick
The Rutherford Institute
1440 Sachem Place
Charlottesville, Virginia 22901
(804) 978-3888

Gary Alvin Bryant
WILLCOX & SAVAGE
1 Commercial Place
1800 Bank of America Center
Norfolk, Virginia 23150-2197
(757) 628-5520

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in was shot down mistakenly also qualify as matters of public concern for First Amendment protection. The National Day of Prayer is a Congressionally recognized event that by law is the subject of a Presidential proclamation. 36 U.S.C. § 119. The story concerning the local girl shot down while on a religious mission was quite obviously an issue of interest to the community because it drew attention from national media outlets, not to mention extensive coverage in the major newspaper in the Tidewater, Virginia area. Absent any evidence of disruption or interference with the operation of Tabb High School, the censorship of the Petitioner's speech cannot be justified under *Pickering* and *Connick.*

Steve Clayton Taylor
133 Mount Pleasant Road
Chesapeake, Virginia 23322
(757) 482-5705
Attorneys for Petitioner