No. 06-1993

In the United States Court of Appeals For the Seventh Circuit

DEBORAH A. MAYER, PLAINTIFF-APPELLANT

v.

MONROE COUNTY COMMUNITY SCHOOL CORPORATION, ET AL.,
DEFENDANTS-APPELLEES

On Appeal from the United States District Court for the Southern District of Indiana, No. 1:04-cv-1695
The Honorable Sarah Evans Barker, District Judge

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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Short Caption: Deborah A. Mayer v. Monroe County Community Sch. Corp., et al.

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The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Deborah A. Mayer

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Parr Richey Obremskey & Morton

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: _____ Date: February 5, 2007

Attorney's Printed Name: Michael L. Schultz

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Plaintiff-Appellant, Deborah A. Mayer, hereby respectfully submits her Petition for Rehearing En Banc. For the reasons explained below, this Court should grant this petition to correct a mistake made by the panel about a critical fact.

STATEMENT PURSUANT TO F.R.A.P. 35(b)(1)

This proceeding involves a question of exceptional importance: whether a teacher in an elementary school classroom may be punished or terminated for giving an honest answer to a student's question about a matter of great public concern where, as here, the teacher is: (1) engaged in presenting approved curriculum to the class; and (2) is not violating any instructions or policies regarding that curriculum.

In this case, Mayer gave an honest answer to a student's question (inspired by reading an article about peace marches in *Time For Kids*, a nationally-distributed "Weekly Reader"-type magazine) about whether she would march in a peace march. Mayer answered this "legitimate, altogether appropriate question from a student"[1] by stating that when she drove past protesters holding "Honk for Peace" signs she honked her horn because she believed that peaceful solutions to problems should always be fully explored before going to war. (App. 251, Mayer Dep., pp. 62-64). After Mayer made this peace comment the school principal adopted a new policy about personal opinions and Mayer was punished and then terminated because of her speech. (App. 252; App. 109; App. 9, ¶ 28; 17; 25, ¶ 28; 253-254; Entry, p. 6; Mayer Dep., pp. 88-89; Opinion, p. 2). The question is whether Mayer's peace comment is entitled to constitutional protection under the circumstances of this case. Rehearing is sought because the panel misunderstood a critical part of these factual circumstances.

[1] *See* Entry Granting Defendants' Motion for Summary Judgment, Short Appendix, Ex. A, p. 26.

ARGUMENT

Mayer is compelled to seek rehearing en banc in this appeal because a panel of this Court misapprehended a critical fact.

The panel's opinion said:

> Mayer was told that she could teach the controversy about policy toward Iraq, drawing out arguments from all perspectives, as long as she kept her opinions to herself. The Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials.

(Opinion, p. 4) (emphasis added). The problem with the panel's opinion – the fundamental flaw revealed by the preceding passage – is that it assumes Mayer was disobedient and that she gave her opinion (contained in her answer to her student's question about peace marches) "against the instructions" of elected officials. The panel has the chronology of this case wrong.

It is undisputed that Mayer never said anything against the instructions or policies of the school defendants. It also is undisputed that the school had no policy in place regarding presentation of personal opinions by teachers until after Mayer answered the peace question in her classroom. The panel mistakenly believed that Mayer claimed the right to make curriculum choices and that she disregarded the curriculum choices made by the school defendants. This mistaken belief is evident in the panel's reliance on *Webster v. New Lenox School District No. 122*, 917 F.2d 1004 (7th Cir. 1990). In *Webster*, the issue was whether a teacher "has a first amendment right to determine the curriculum content" of his or her class. *Id.*, at 1007 (emphasis added). That is not the issue in Mayer's appeal. Mayer does not claim the right to control curriculum, and Mayer did not arrogate control of the curriculum in her class. In this case, Mayer was punished and then terminated because of a single comment she made about peace in response to a student's question. The facts of *Webster* simply cannot be compared to the facts here and, consequently, *Webster* cannot provide a basis for the panel's decision.

The panel's opinion assumed that Mayer had been instructed *before* her peace comment to "draw out arguments from all perspectives" and to keep her opinions to herself. Based on this incorrect assumption about the facts, the Court went on to hold that "the first amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system" (Opinion, p. 5) (emphasis added). Again, Mayer never departed from any approved curriculum.[2] She was never told to keep her opinions to herself until after the fact, and she fully complied with that directive. (App. 252, Mayer Dep., p. 76).

To the extent that the panel's opinion is based on a misperception of this critical fact, the Court should grant this petition for rehearing and render a new opinion. Not only does the panel's holding give credit to the school for something it did not do (*i.e.,* give advance notice to Mayer not to answer questions which might reveal her opinions about her preference for peace), but it makes Mayer appear to be the kind of teacher who would blatantly disregard the instructions of a school board regarding curriculum – something she has never done.

Mayer's in-class speech on a matter of public concern was professional, responsible, and did not violate any curriculum choice ever made by the school defendants or any instruction regarding curriculum ever given to Mayer prior to the date in question. Given these facts, the district court should have proceeded to balance Mayer's interest in her speech (honestly answering a student's direct question) against the school's right or need to punish or regulate that

[2] It is undisputed that the *Time For Kids* publication itself was approved curriculum. (App. 226, Rogers Dep., p. 57; App. 180-181, Defendants' Answers to Plaintiff's Interrogatories; App. 249-250, Mayer Dep., pp. 57-60).

speech. This *Pickering* balancing was not conducted by the district court (despite the panel's apparent belief that it was).[3] That balance, if it were to be examined, clearly favors Mayer.

For all of the foregoing reasons, the Court should grant this petition for rehearing and issue a new opinion reversing the decision of the district court and remanding this case for further proceedings.

Date: February 5, 2007

Respectfully submitted,

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[3] To the extent the Court's opinion suggests on page 2 that the district court engaged in *Pickering* balancing, this is incorrect. The district court specifically declined to reach that issue. (*See* Entry Granting Defendants' Motion for Summary Judgment, Short Appendix, Ex. A, p. 28: ". . . we do not need to undertake the kind of balancing called for in Pickering.").

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the below named person by first class United States Mail, postage pre-paid, on this 5th day of February, 2007:

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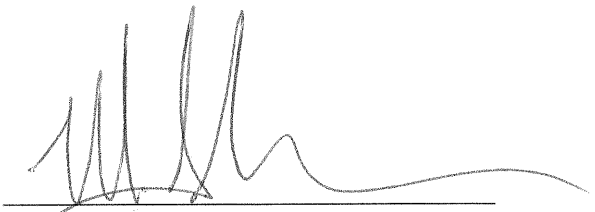

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