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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF SANTER,

Respondent,

-against-

No. 51

BOE OF THE EAST MEADOW UNION
FREE SCHOOL DISTRICT

Appellant.

MATTER OF LUCIA,

Respondent,

-against-

No. 52

BOE OF THE EAST MEADOW UNION
FREE SCHOOL DISTRICT

Appellant.

20 Eagle Street
Albany, New York 12207
February 19, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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Appearances :

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1 CHIEF JUDGE LIPPMAN: Number 51 and 52.

2 Would you like any rebuttal time,

3 counselor?

4 MR. PAUTA: Please, two minutes, Your

5 Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure, go

7 ahead.

8 MR. PAUTA: Okay. Good afternoon, Your

9 Honors, may it please the court, my name is George

10 Pauta, Littler Mendelson, attorneys for the

11 respondent/appellant, Board of Education of the East

12 Meadow Union Free School District. Your Honors - - -

13 CHIEF JUDGE LIPPMAN: Counsel, why was the

14 risk here so great where - - - where - - - to justify

15 discipline where the casualty is - - - is really free

16 speech?

17 MR. PAUTA: Okay, Your Honor, the - - -

18 this - - - the Appellate Division - - -

19 CHIEF JUDGE LIPPMAN: I mean, it's got to

20 be - - - that's got to be a pretty serious harm, no?

21 MR. PAUTA: Well, the burden - - - the

22 burden on the - - - the public employer here, as we

23 know from Pickering and its progeny, is that an

24 employer has a burden of showing likely interference

25 with the employer's operations or actual disruption.

1 And if you have a showing of actual disruption, that
2 acts as a persuasive argument that the - - - that the
3 government has made in - - -

4 CHIEF JUDGE LIPPMAN: Yeah, but - - - but
5 again, when you - - - when you look at the facts of
6 this particular case in the broadest - - -

7 MR. PAUTA: Well - - -

8 CHIEF JUDGE LIPPMAN: - - - in the broadest
9 strokes, they're - - - they're demonstrating or they
10 have the cars out there with signs or not signs,
11 whatever it is; they're out of there before the time
12 when school actually starts. There is some
13 disruption. They - - - some of the kids are
14 affected. They have to go in the middle of the
15 block, or whatever it is.

16 I say again, why is the disruption here of
17 such a scale that - - - that - - - that you would
18 curtail free speech? I mean, this is a pretty
19 important right that's involved. How does it size up
20 from a policy perspective?

21 MR. PAUTA: Okay. So - - - so what - - -
22 what - - - exactly, why are we here? Why is this so
23 - - -

24 CHIEF JUDGE LIPPMAN: Why are we here?
25 That's what we want to know.

1 MR. PAUTA: Okay, so in terms of looking at
2 the disruption that was caused, the Appellate
3 Division really overlooked a disruption that - - -
4 that was caused that day that created another safety
5 - - - created another safety - - -

6 CHIEF JUDGE LIPPMAN: What was the great
7 disruption? It wasn't such a disruption that you
8 came out and had to deal with it. Your people just
9 watched, right?

10 MR. PAUTA: All right. So there was
11 disruption one, the parking activity caused the
12 children to be dropped off in the middle of the
13 street. All right. So we - - -

14 CHIEF JUDGE LIPPMAN: Agreed, keep going.

15 MR. PAUTA: Okay, the second disruption is
16 that due to the con - - - due to the parking activity
17 and the traffic - - - the congested traffic that it
18 created, it created traffic around the school, and it
19 caused sixteen teachers to report late to school that
20 day. And - - -

21 JUDGE PIGOTT: What was the - - - what was
22 the effect of that? What - - -

23 MR. PAUTA: Okay, so six - - - so after the
24 event, the principal checks the teacher sign-in sheet
25 at 8:05, and sees that nineteen teachers haven't

1 signed in. That's ten minutes beyond the teaching
2 reporting time.

3 JUDGE PIGOTT: What was the effect of that?

4 MR. PAUTA: The effect of that is homeroom
5 classes go unsupervised. So we have students in
6 classrooms without teacher supervision and the
7 principal and his administration scrambling.

8 JUDGE GRAFFEO: And then did - - -

9 CHIEF JUDGE LIPPMAN: Did you - - - did you
10 do anything while this was happening, if this was
11 such a great threat? Did you - - - anybody go out
12 and say, gee, you know, the kids are going to be
13 coming here, and maybe some teachers will be late.
14 You really ought to - - -

15 MR. PAUTA: Well - - -

16 CHIEF JUDGE LIPPMAN: - - - or did the
17 administrators just watch?

18 MR. PAUTA: Well, what - - - what we have
19 to keep in mind here is everything - - -

20 CHIEF JUDGE LIPPMAN: No, no, but what's
21 the answer to that question?

22 MR. PAUTA: The answer is that the - - -
23 the principal, in order to take care of what was
24 going outside, contacted the police. And I think
25 having never seen an activity like this before - - -

1 let's keep in mind that the teachers were - - - were
2 picketing twice a week for almost three years - - -

3 JUDGE GRAFFEO: If I under - - -

4 MR. PAUTA: - - - and never engaged in this
5 activity before.

6 JUDGE GRAFFEO: - - - if I understand the
7 record, this was twenty - - - we're talking about
8 twenty minutes of picketing here, right? So we have
9 sixteen teachers who are late because of twenty
10 minutes of picketing?

11 MR. PAUTA: Twenty minutes of picketing
12 that imm - - -

13 JUDGE GRAFFEO: And we got seven years this
14 case has been contested?

15 MR. PAUTA: Well, twenty - - - twenty
16 minutes - - - I'll address your first issue - - -
17 your first point first. The twenty minutes of
18 picketing immediately preceding the beginning of the
19 school day. Right?

20 So, and - - - and to address your second
21 point, the reason why this is important, it's - - -
22 it's - - - and we - - - we have been successful in
23 every stage of litigation except at the Appellate
24 Division for these two particular teachers. So much
25 of it has been us having to respond. But why this is

1 important, it's - - - is it seems that the Appellate
2 Division has heightened the standard by which an
3 employer must demonstrate burden. Here we - - -

4 JUDGE SMITH: But do you even get there? I
5 mean, do you admit that this is speech?

6 MR. PAUTA: Well, for purposes of this oral
7 argument, I - - - I would say let's focus on the
8 Pickering balancing test, because ultimately if the
9 court finds that this was - - -

10 JUDGE SMITH: But don't you - - - don't you
11 have findings from both hearing examiners that the
12 purpose of this activity was to cause the disruption?

13 MR. PAUTA: Yes, yes. So that the charge
14 that was - - - that was preferred against the teacher
15 was that they engaged in this activity with the
16 intent to create a health and safety hazard. And
17 that was proven at the hearing stage, and that should
18 not be relitigated. So the intent on that particular
19 day, our argument is, is - - - was not to communicate
20 the message - - -

21 CHIEF JUDGE LIPPMAN: So you contest the
22 fact that it was free speech?

23 MR. PAUTA: Well, for - - - like I was
24 saying earlier, for purposes of oral argument, I
25 don't think that matters, because ultimately if the

1 court finds that it is protected speech, we
2 ultimately get - - -

3 JUDGE SMITH: What is - - - what do you
4 take - - -

5 MR. PAUTA: - - - we ultimately get to the
6 second level.

7 JUDGE SMITH: What do you take to be the
8 message, the particularized message, that this - - -
9 this conduct was communicating?

10 MR. PAUTA: I'm sorry, Your Honor. I
11 missed the beginning of your question.

12 JUDGE SMITH: Well, as I understand it, a
13 conduct can be speech or can take on elements of
14 speech when it communicates a particularized message.
15 What's their message?

16 MR. PAUTA: Your Honor, that's something
17 that - - - that I - - - to this day, I don't know.
18 During the hearing, they - - -

19 CHIEF JUDGE LIPPMAN: You don't have a clue
20 what their message is?

21 MR. PAUTA: Well, I believe it was a
22 protest - - -

23 CHIEF JUDGE LIPPMAN: You've been doing it
24 for how many years, and you don't know what their
25 message is?

1 MR. PAUTA: I - - - I believe it was in
2 protest of the collective bargaining, but nowhere in
3 either record - - -

4 CHIEF JUDGE LIPPMAN: I believe you're
5 probably right.

6 MR. PAUTA: Right, but nowhere in either
7 record does it say what the sign said they allegedly
8 hung, and in fact in one record, it's completely
9 silent on it.

10 CHIEF JUDGE LIPPMAN: Yeah, yeah, but the -
11 - - but the net - - - but they understand what
12 they're - - - what they're protesting.

13 MR. PAUTA: No, I - - - I understand that's
14 what it was. And it - - - it's not the message that
15 is - - -

16 JUDGE SMITH: Well, the message - - - the
17 message, I suppose, is we - - - we've been working
18 without a contract for a long time.

19 MR. PAUTA: Right.

20 JUDGE GRAFFEO: They want - - - they want a
21 contract.

22 MR. PAUTA: Well, right.

23 JUDGE GRAFFEO: It's not difficult to
24 figure that out.

25 MR. PAUTA: That's - - - that's right.

1 JUDGE RIVERA: They're picketing - - - you
2 said they've been doing it on these Fridays for three
3 years - - -

4 MR. PAUTA: Right, no, I don't think it
5 takes a genius - - -

6 JUDGE RIVERA: - - - it - - - the message -
7 - - it would have changed their messaging?

8 MR. PAUTA: Right, I don't think it takes a
9 genius to figure to try to - - -

10 JUDGE RIVERA: Did - - - did the AD
11 supplant findings of fact? Did it make its own
12 independent findings of fact in this case?

13 MR. PAUTA: No. Their - - - their review
14 was an arbitrary, capricious and irrational basis.
15 And they - - - you know, prove - - -

16 JUDGE ABDUS-SALAAM: Is that the correct
17 standard?

18 MR. PAUTA: That is the correct standard in
19 terms of reviewing - - - reviewing what the hearing
20 officer - - -

21 JUDGE SMITH: In First Amendment cases,
22 aren't you supposed to review the facts de novo?

23 MR. PAUTA: First, so the Appellate
24 Division reviewed - - - may have reviewed the facts
25 de novo, but not the hearing officer's decision and

1 award. That they reviewed on a rational basis
2 arbitrary and capricious, and found that the hearing
3 officer's decision had a rational basis and his award
4 was not arbitrary and capricious, but found that
5 there was there was a violation of the First
6 Amendment. And so - - -

7 JUDGE SMITH: I mean, you - - - I mean,
8 obviously there is - - - I guess we agreed eventually
9 there is a particularized message and you - - - you
10 know what it is, having had seven years. Does the -
11 - - how does the ordinary citizen going by in a car
12 or on foot figure out what the message is?

13 MR. PAUTA: That's the thing, Your Honor.
14 It really depends on - - - on whether they have
15 notice of what the teachers are doing and what the
16 sign said, which the record doesn't reflect. But - -
17 -

18 JUDGE SMITH: Is there any evidence that
19 anybody ever read - - - anybody read one of these
20 signs that morning?

21 MR. PAUTA: No, Your Honor, no.

22 JUDGE PIGOTT: On the Pickering balancing,
23 what - - - what's your point with that? I mean, the
24 Appellate Division said that they balanced, and the
25 balance falls in favor of the teachers.

1 MR. PAUTA: Right, so there - - - there are
2 two interests that the District have here. One is
3 the safe arrival of its students, okay. And - - -
4 and I'd like to address these separately. One is the
5 safe arrival of its students, and one is a timely
6 arrival of its staff to supervise and educate those
7 students. And here, the union's interest is merely
8 to - - - it is to communicate a message, but they're
9 communicating a message in a particular way. We - -
10 - we did not pursue discipline against the union
11 based on the message - - -

12 JUDGE RIVERA: Well, they believe - - -
13 they believe it's - - -

14 MR. PAUTA: - - - but the way in they
15 delivered it.

16 JUDGE RIVERA: They may believe it's more
17 effective.

18 MR. PAUTA: They may, but there is evidence
19 to the contrary. So - - -

20 JUDGE SMITH: Well, is this - - -

21 JUDGE RIVERA: But - - -

22 JUDGE SMITH: Go ahead.

23 JUDGE RIVERA: No, no, no. I mean, is it -
24 - - when you say "evidence to the contrary" - - - is
25 it your position you actually have to hear the speech

1 that's communicated?

2 MR. PAUTA: I don't quite follow your
3 question, Your Honor.

4 JUDGE RIVERA: Well, I wasn't sure what you
5 meant by it's not as effective - - -

6 MR. PAUTA: Well, there was - - - no, I
7 said there was evidence to the contrary in that a few
8 days prior to the parking activity, the union had
9 met, and took a vote that they would park on both
10 sides of the street, one after another, end to end,
11 and create a blocking of the student - - -

12 JUDGE SMITH: Were - - - were they
13 communicating a message by blocking the street, or by
14 putting signs in their windows?

15 MR. PAUTA: Most likely, by putting signs
16 in their windows, Your Honor.

17 JUDGE SMITH: So they - - - so you're - - -
18 so you don't think the disruption itself was designed
19 to communicate the message?

20 MR. PAUTA: No, Your Honor, and I don't
21 think that's - - -

22 JUDGE GRAFFEO: You don't think - - -

23 MR. PAUTA: - - - and I think the Pickering
24 balancing test would fall in favor - - -

25 JUDGE GRAFFEO: So why - - - so why would

1 they - - -

2 MR. PAUTA: - - - of the District in that
3 regard.

4 JUDGE GRAFFEO: Why would they do this
5 blocked parking if not to draw more attention to - -
6 - to whatever was on the placards?

7 MR. PAUTA: I believe, you know, in terms
8 of the collective bargaining, they were - - - they
9 were probably trying to create a disruption so that
10 parents complain to the school - - -

11 JUDGE SMITH: Is there a First Amendment
12 right to do that - - - to create a disruption so that
13 you could get attention?

14 MR. PAUTA: No, Your Honor. Pickering and
15 its progeny would say that there isn't. Here - - -
16 here you have a disruption - - - you have - - - you
17 have students being dropped off in the middle of the
18 street, right. The - - - what - - - the primary goal
19 of the school - - -

20 JUDGE SMITH: I guess I mean - - - you keep
21 talking about Pickering, but I guess I'm more
22 concerned - - - suppose these people weren't even
23 employ - - - suppose the local - - - the municipality
24 wanted to punish people who were not even employees
25 who did this, could they do it?

1 MR. PAUTA: No, Your Honor. But - - -

2 JUDGE SMITH: Why not?

3 MR. PAUTA: I think - - - I think we would
4 like to hold teachers to a higher regard. The
5 Commissioner of Education has already stated - - -

6 JUDGE SMITH: Okay, but are you - - - are
7 you saying that if - - - if forty-five citizens who
8 were against the Iraq war block a street, and - - -
9 and keep kids from being dropped off at school that
10 the - - - that the municipality is powerless to do
11 anything about it?

12 MR. PAUTA: No, I think they would contact
13 the police, and - - - and ask for that the protest
14 which is being disruptive, which cause - - -

15 JUDGE SMITH: I guess, I guess what I'm
16 saying - - -

17 MR. PAUTA: - - - would cause the same
18 disruption it would cause - - -

19 JUDGE SMITH: I guess what I'm saying is
20 doesn't it follow from that that you don't have
21 protected speech here? That we never get to
22 Pickering?

23 MR. PAUTA: No, I think - - - I think - - -

24 CHIEF JUDGE LIPPMAN: You - - -

25 MR. PAUTA: - - - we may or may not get to

1 Pickering, but I think for purposes of today, we - -
2 - we talk about the Pickering balancing test.

3 CHIEF JUDGE LIPPMAN: Counsel, you're
4 admitting it's free speech for today's argument?

5 MR. PAUTA: For to - - - I don't think we
6 concede the point, but I - - -

7 CHIEF JUDGE LIPPMAN: And - - - and once
8 you do that, don't you think that it's the same
9 message that they've been delivering for years, that
10 everyone in the - - - in the school community
11 understood this message, whether they see the sign or
12 not? They're calling attention to their problem. Is
13 that so hard to - - - to understand?

14 MR. PAUTA: No, Your Honor. I - - - I - -
15 -

16 CHIEF JUDGE LIPPMAN: You acknowledge that?

17 MR. PAUTA: To the extent that they have
18 signs, and the signs say - - - related to collective
19 bargaining, it's likely protected speech, in that
20 regard.

21 JUDGE PIGOTT: Well, the point is - - -

22 MR. PAUTA: Except - - - except their
23 intent that day wasn't to communicate the speech, it
24 was to - - -

25 JUDGE PIGOTT: But when you're doing this -

1 - - I mean, the balancing test for - - - when you're
2 doing this balancing test - - - I'll stop talking now
3 - - -

4 JUDGE RIVERA: But aren't you really saying
5 that if they get to speak, they can't do it this way.

6 MR. PAUTA: I'm sorry.

7 JUDGE RIVERA: No, go ahead. He's - - -
8 no, no.

9 MR. PAUTA: I - - -

10 CHIEF JUDGE LIPPMAN: Go ahead, counsel.
11 What did you want to say?

12 MR. PAUTA: Okay.

13 JUDGE RIVERA: All right, then I'll ask - -
14 - I'll ask my question. So, I take your - - - your
15 argument to be that you're conceding that they are
16 trying to communicate something to whoever's going by
17 that day, ostensibly the parents, that nevertheless
18 they can't do it this way, when it causes this
19 disruption?

20 MR. PAUTA: Right, that - - -

21 JUDGE RIVERA: That's where the line is
22 drawn - - -

23 MR. PAUTA: Right.

24 JUDGE RIVERA: - - - in the sand.

25 MR. PAUTA: Right, that - - - that the

1 Pickering balancing test still falls in favor of the
2 District, because - - -

3 JUDGE RIVERA: So - - -

4 MR. PAUTA: - - - of the safety of - - -
5 because of the safety of school - - - the safety of
6 students is paramount to the District's operations,
7 and - - - and there was a hazard situation created
8 for students, not only by students being dropped off
9 in the middle of the street, during a rainstorm, in
10 traffic congestion, when - - - when visibility is low
11 and roads are slippery, but also children being
12 unsupervised inside the school.

13 JUDGE RIVERA: And if I can go back to a
14 prior question. Then it's your position that the
15 Appellate Division did not make separate independent
16 findings of fact about the events of that day.

17 MR. PAUTA: No, they did not. They - - -
18 they - - - which interestingly they call - - - they
19 ruled that the hearing officer's decision - - - and
20 findings of fact had a rational basis, but they did
21 not separately go through this Pickering balancing
22 test and weigh really the interests of the District
23 and the di - - - - and the disruption that it caused
24 that day against the teachers' interests in
25 communicating this message, but communicating it in

1 this particular manner.

2 JUDGE ABDUS-SALAAM: Do we know what
3 standard the Appellate Division used in rendering its
4 decision?

5 MR. PAUTA: It - - - rational basis,
6 arbitrary, capricious.

7 JUDGE ABDUS-SALAAM: Did - - - did they say
8 that?

9 MR. PAUTA: Yes, they did.

10 JUDGE ABDUS-SALAAM: Or did they say ar - -
11 - under Article 75 something?

12 MR. PAUTA: Well, because this is a
13 voluntary arbitration, while - - - while you appeal
14 through Article 75, the standard is different than if
15 it was a mandatory arbitration.

16 JUDGE GRAFFEO: Counsel, does the record
17 tell us why there's a distinction between the two
18 fines between the two teachers? One is twice the
19 size of the other.

20 MR. PAUTA: Right, Your Honor. That was
21 the under the hearing officer's discretion, and it's
22 not in the decision as to why that - - - that
23 occurred.

24 CHIEF JUDGE LIPPMAN: Okay. Thanks,
25 counsel.

1 MR. PAUTA: Thank you.

2 MS. BOKSER: Good afternoon, Your Honors.
3 May it please the court, my name is Sherry Bokser and
4 I'm here representing Mr. Santer and Ms. Lucia.

5 CHIEF JUDGE LIPPMAN: Do we reach the free
6 speech question, counsel?

7 MS. BOKSER: Well, I think that the
8 District has conceded that this is a matter of
9 traditional protected speech from the beginning.
10 There is - - -

11 JUDGE SMITH: Is that - - - is that
12 concession right? I mean, is it - - - did - - - is
13 there a free speech right to - - - to block traffic?

14 MS. BOKSER: There was no - - - the free
15 speech right is to the message that the teachers were
16 displaying at - - -

17 JUDGE SMITH: Okay, but I mean, can you - -
18 - can you essentially park up a street as a way of -
19 - - as a way of communicating your message?

20 MS. BOKSER: Absolutely. When you're
21 parked legally on your own time - - -

22 JUDGE SMITH: What - - - what says that?
23 What case says that's protected speech?

24 MS. BOKSER: Well, Your Honor, there is the
25 NLRB v. Teamsters case from the Second Circuit in

1 1963, that dealt with parked-car picketing and found
2 that where the placards were outside the car, but the
3 picketers were in the car, that was protected speech.
4 Thornhill - - - so for about seventy-five years,
5 we've known that speech relating to collective
6 bargaining and labor disputes is protected.

7 JUDGE SMITH: I - - - I have - - - I have
8 no doubt that the placards are protected speech. I
9 guess, I'd have to look at NLRB v. Teamsters, but do
10 they say that there's a protect - - - that - - - you
11 have a findings here that both hearing examiners said
12 the purpose was to disrupt. The purpose was to
13 prevent kids from being dropped off.

14 MS. BOKSER: That's not what the - - - what
15 the arbitrator said. Both arbitrators very - - -
16 very delicately danced around whether or not this was
17 free speech and did not apply any actual analysis - -
18 -

19 JUDGE SMITH: Well, they - - - they didn't
20 find - - - they didn't talk about free speech, but
21 they did talk about the purpose of the - - - of the
22 activity.

23 MS. BOKSER: They took to be a matter of
24 circumstantial evidence the fact that because the
25 teachers were legally parked in front of the school,

1 that there was a result of some disruption to - - -

2 CHIEF JUDGE LIPPMAN: What was the
3 significance of the fact that teachers were late?
4 How did that affect this whole equation that we're
5 looking at?

6 MS. BOKSER: District's counsel was
7 incorrect with respect to whether or not there was
8 disruption, and I'd like to direct - - -

9 CHIEF JUDGE LIPPMAN: Was there - - - there
10 was no disruption?

11 MS. BOKSER: There was minimal disruption.

12 JUDGE PIGOTT: Well, were they late?

13 MS. BOKSER: There were teachers who were
14 late, however - - - and this is very important - - -
15 there were fifty teachers who had homeroom classes,
16 three of those homeroom teachers were identified as
17 not signing in by 8:05. Three of those teachers were
18 questioned by the principal.

19 JUDGE PIGOTT: Well, they were late. The -
20 - - the point - - - we don't have to get into, you
21 know, splitting hairs here, but I want to ask you
22 about Pickering, because it seems to me that the
23 balancing test, you think ought to be applied here as
24 well, like - - - like everybody seems to. Doesn't
25 the balance have to be more than the ten or twenty

1 minutes that morning?

2 In other words, if your free speech rights
3 have been going on for a very long time, every - - -
4 every day I guess, and every - - - so this small
5 decision, which said, you know, this - - - at this
6 time in this place, your speech would - - - could
7 have been properly curbed because you were
8 endangering kids and you're - - - and you're
9 disrupting the school. A hearing officer could make
10 those determinations, and that would not so unbalance
11 the free speech issue as to be improper disciplining
12 as to these two teachers, wouldn't you agree?

13 MS. BOKSER: Well, I think that in order
14 for discipline to be justified under Pickering, you'd
15 need to have more than speculative disruption or
16 injury.

17 JUDGE PIGOTT: I was talking about balance.
18 I was talking about balance. In other words, the - -
19 - the Appellate Division said that it was out of
20 balance, because they had a free speech right and
21 apparently no kid got ran - - - run over and whatever
22 - - -

23 MS. BOKSER: Well - - -

24 JUDGE PIGOTT: - - - but, no, I'm almost
25 done. So - - - so what I'm suggesting to you is,

1 that your free speech right went over four years. It
2 - - - it was uninterrupted. It was - - - you know,
3 you could do everything you wanted.

4 At this point, because of what the teachers
5 did and the balance at that point, being the safety
6 of kids and disruption of the school, that you have
7 to balance all of the free speech that you've been
8 given all of this time without interruption, and then
9 say, one ten-minute or twenty-minute disruption, of
10 whatever you want to do in terms of - - - of
11 picketing, cannot - - - you know, cannot justify kids
12 being endangered and the school being disrupted.
13 Would that be an appropriate balance?

14 MS. BOKSER: I - - - no, I don't think it
15 would be an appropriate balance. I think that you're
16 looking at the free speech that was being
17 communicated on that morning, and you have to look at
18 whether or not there was an actual safety issue.
19 Here - - -

20 JUDGE ABDUS-SALAAM: Well, are you saying
21 that a child had to be hit by a car or fall in the
22 rain and get hurt before the teachers could be
23 determined to have disrupted the school processes or
24 caused a safety hazard?

25 MS. BOKSER: No, I'm not saying that. I'm

1 saying that you're looking at a school that has 1,200
2 students. The record shows that five - - - five
3 students were seen being dropped off in the middle of
4 the road.

5 JUDGE PIGOTT: Yeah, but we don't look at
6 it that way. Let me - - -

7 JUDGE GRAFFEO: But the arb - - - the
8 arbitrator found that there was a health and safety
9 hazard.

10 MS. BOKSER: The - - - both arbitrators did
11 - - -

12 JUDGE GRAFFEO: I mean, I'm looking at page
13 8, and he says "the action resulted in children being
14 dropped off in the middle in the street, which
15 resulted in an otherwise avoidable and unnecessary
16 health and safety hazard."

17 MS. BOKSER: That's correct, but - - -

18 JUDGE GRAFFEO: Do we accept that finding?

19 MS. BOKSER: Well, that is a conclusion. I
20 don't believe that that's a finding of fact. I think
21 you look at the facts that were - - - were
22 established that were pretty much uncontroverted.

23 JUDGE PIGOTT: Well, at record 35, the
24 other one says, "at the very least to slow down and
25 inconvenience the drop-off process. That no injury

1 occurred was fortunate, but that does not cancel out
2 inappropriate creation of a potentially hazardous
3 circumstance."

4 MS. BOKSER: You have to look at what was
5 happening in its totality. You have to - - -

6 JUDGE PIGOTT: No, I think what we have to
7 do is look at what the arbitrator said, and they said
8 that, and we're stuck with - - - with those facts,
9 are we not?

10 MS. BOKSER: But I don't believe that those
11 are findings of fact. I think that those are
12 conclusions. So the arbitrator decided that that was
13 the conclusion based on the fact that there teachers
14 parked on either side.

15 JUDGE SMITH: Although it's at least - - -
16 it's at least an inference of fact. I mean, it's not
17 a proposition of law that there was a safety hazard.

18 MS. BOKSER: It's an inference of fact;
19 that's correct, but you - - - you - - -

20 JUDGE SMITH: Are we - - - are we - - - do
21 we review those de novo in a free speech case?

22 MS. BOKSER: I think that in this
23 situation, the Appellate Division did the correct
24 thing. And what the Appellate Division did was it
25 looked at the - - - the arbitrators' - - - both

1 arbitrators' findings of fact and then applied the
2 balancing test appropriately.

3 JUDGE SMITH: They didn't - - - they didn't
4 say there was no safety hazard, did they? The
5 Appellate Division didn't say that. But they - - - I
6 - - - I thought they said there was a reasonable
7 basis for finding otherwise.

8 MS. BOKSER: What the - - - what the
9 Appellate Division said was that in light of the
10 administrator's inaction and passivity and doing
11 nothing to address what's considered a safety hazard,
12 in light of the fact that there were a minimal number
13 of students - - -

14 JUDGE ABDUS-SALAAM: Was there an
15 obligation for the - - - the principal and the dean
16 to do something? They did call the police. Why - -
17 - why were they required to go out and have a
18 confrontation with the teachers?

19 MS. BOKSER: I'm not saying that they were
20 required to have a confrontation with the teachers,
21 but the administrators - - -

22 JUDGE ABDUS-SALAAM: Well, they called the
23 police. You said they did nothing.

24 MS. BOKSER: The administrators have the
25 same responsibility to the students that the District

1 has posited to the teachers. It's the students'
2 safety - - -

3 JUDGE RIVERA: Can I - - -

4 JUDGE PIGOTT: Well, how far - - - how far
5 - - -

6 MS. BOKSER: - - - so - - -

7 JUDGE RIVERA: Can I - - - I want to ask
8 the same question I was asking a minute - - - I'm not
9 sure where you come out on this, based on what you've
10 been arguing. Is it your position the AD - - - the
11 Appellate Division did make its own findings of fact?

12 MS. BOKSER: No, I don't believe the
13 Appellate Division - - -

14 JUDGE RIVERA: No.

15 MS. BOKSER: - - - did make its own
16 findings of fact. It took the findings of the
17 arbitrators and applied the - - - those findings to
18 the Pickering balance, and correctly decided that the
19 free speech rights of the teachers outweighed the
20 alleged disruption. And I note again - - -

21 CHIEF JUDGE LIPPMAN: On this particular -
22 - -

23 MS. BOKSER: - - - for the court, there was
24 no disruption.

25 CHIEF JUDGE LIPPMAN: On this particular

1 day, with these particular facts? That's what they
2 found?

3 MS. BOKSER: Yes.

4 CHIEF JUDGE LIPPMAN: And the - - - and
5 what about the business about the teachers being
6 late?

7 MS. BOKSER: Well - - -

8 CHIEF JUDGE LIPPMAN: Is that factored into
9 this?

10 MS. BOKSER: I - - - again, I think it's
11 important to note that what the District was arguing
12 was that there were students who were unsupervised in
13 their homeroom classes. The fact of the matter is
14 that the record clearly demonstrates that there was
15 no evidence that there were students unsupervised.

16 The principal testified he spoke to three
17 of the homeroom teachers. Those teacher - - -
18 homeroom starts at 8:12. The teachers, who were
19 parked, moved their cars at 7:50. There's no
20 evidence that the permanent substitutes on staff in
21 the school were assigned to cover any classes.
22 There's no evidence that instruction did not occur on
23 time. There's no evidence that the three teachers
24 who were spoken to didn't actually - - -

25 CHIEF JUDGE LIPPMAN: So your - - -

1 MS. BOKSER: - - - make it to their classes
2 on time.

3 CHIEF JUDGE LIPPMAN: Your basic argument
4 is that - - - that - - - and this is what the ADA - -
5 - the AD went on - - - is that the disruption was
6 really minimal as compared to the free speech - - -

7 MS. BOKSER: Absolutely.

8 JUDGE ABDUS-SALAAM: Were there complaints
9 - - -

10 CHIEF JUDGE LIPPMAN: - - - the balance?

11 JUDGE ABDUS-SALAAM: I'm sorry.

12 JUDGE SMITH: Even assuming there is a
13 balancing test going on, I mean, how can - - - how
14 can free spee - - - this - - - this kind of free
15 speech of this nature at this time outweigh a danger
16 to the safety of children?

17 MS. BOKSER: I'm not - - - I'm not willing
18 to acknowledge, as you are, Judge, that there is a
19 safety issue here. I think that - - -

20 JUDGE SMITH: Okay, but suppose - - - yeah,
21 I don't acknowledge anything. I just ask questions.

22 MS. BOKSER: Okay.

23 JUDGE SMITH: But my - - - but my question
24 for the moment is assume we were to - - - we were to
25 conclude that on this record there is a safety issue,

1 then wouldn't that outweigh some inter - - - some
2 interference with these people's right to park their
3 car where they parked them?

4 MS. BOKSER: I think that conclusion would
5 not be founded given the actions of the
6 administrators, given the events of that day. I - -
7 - the administrators - - -

8 JUDGE GRAFFEO: If - - - of one of the
9 children had been hit by a car, your posture would be
10 the same here? No public safety risk?

11 MS. BOKSER: If one of the children had
12 been hit by a car, I would look sort of foolish
13 standing here and saying that. However, I don't - -
14 - there are a couple of things that I'd like to - - -
15 to highlight to the court.

16 CHIEF JUDGE LIPPMAN: Your argument is no
17 significant safety issue?

18 MS. BOKSER: No significant safety issue
19 given the fact - - -

20 CHIEF JUDGE LIPPMAN: And therefore free
21 speech prevails?

22 MS. BOKSER: Free speech does prevail on
23 that.

24 JUDGE ABDUS-SALAAM: Before we get to that
25 - - -

1 JUDGE RIVERA: Well, it is true, and the
2 record does show that the children do cross the
3 street, because they get off on the other side, too?

4 MS. BOKSER: As they do on every other day
5 when they're dropped off.

6 JUDGE RIVERA: Do they do that on the
7 corner, or in the middle of the street?

8 MS. BOKSER: The record is - - - is
9 unclear. However, I will note - - -

10 JUDGE ABDUS-SALAAM: Does the record have
11 complaints from parents and the teachers who were
12 made late - - -

13 MS. BOKSER: There are - - -

14 JUDGE ABDUS-SALAAM: - - - who had to sign
15 in late because of the picketing?

16 MS. BOKSER: Principal Lethbridge testified
17 that there were five parents who called the school,
18 and when asked about the reasons for the parents
19 calling the school, he said it was so that their
20 students would not be marked late.

21 JUDGE PIGOTT: We don't go beyond what
22 arbitrators find, usually. We don't - - - we don't
23 go into the weeds here about what - - - what - - -
24 who said what and what they meant and all of that.
25 And - - - and we do have an Appellate Division that

1 found this both rational and not arbitrary and
2 capricious, right?

3 MS. BOKSER: Yes.

4 JUDGE PIGOTT: So we have to accept what
5 the arbitrator found and - - - and as did the
6 Appellate Division that there was a rational basis
7 for what they did, and - - - and it was not
8 arbitrary. So all we're left with is whether or not
9 this free speech thing is - - - is - - - overcomes
10 that.

11 MS. BOKSER: Well, notably the Appellate
12 Division was the first tribunal to review these cases
13 that actually applied Pickering.

14 JUDGE PIGOTT: Well, that's what I mean.
15 So - - - so what do you think of my suggestion that
16 when you look at free speech, you got to look at it,
17 not in the twenty minutes that occurred there, but in
18 the four years or however long this thing was going
19 on, when free speech was absolutely unfettered; and
20 in fact, you know, the only time they were trying to
21 do something was trying to limit you when you were
22 picketing the school board, I guess, or something.

23 But in any event, you had a free access to
24 whatever you wanted to do, and for this twenty
25 minutes, when kids are being dropped off, and the

1 road was essentially blocked, they want to make the
2 argument that that free speech balances out of
3 balance, because that's a small thing compared to
4 your total free speech.

5 MS. BOKSER: Perhap - - - I understand the
6 logic of your argument. The problem with it, Your
7 Honor, is that the chilling effect if you allow the
8 District to say you're not allowed to do this - - -

9 JUDGE PIGOTT: You're not allowed to block
10 kids?

11 MS. BOKSER: You're not allowed to park
12 legally and put your placards in - - -

13 JUDGE SMITH: There was - - -

14 JUDGE PIGOTT: But that's not what the
15 arbitrator found, though. That's my point.

16 JUDGE ABDUS-SALAAM: But did the teachers
17 stop picketing after this?

18 MS. BOKSER: No, they didn't.

19 JUDGE ABDUS-SALAAM: They continued?

20 MS. BOKSER: They continued to picket, and
21 they also continued to park their cars - - -

22 JUDGE SMITH: Was the - - -

23 MS. BOKSER: - - - or some of them did - -

24 -

25 JUDGE SMITH: Was - - - there was evidence

1 that they had - - - that in this case, they had
2 deliberately parked their cars as close as possible
3 to each other to leave no gaps between, from which
4 you could infer they were trying to - - - to make it
5 harder for kids to get to the sidewalk. Is that a
6 legitimate exercise of free speech?

7 MS. BOKSER: I think that the evidence in
8 both records show that there were approximately five
9 to six cars parked on either side of the street, but
10 the curb cuts were open.

11 JUDGE SMITH: The curb cuts were open
12 because the - - - because Mr. Santer told the
13 teachers they couldn't park in the curb cuts. He - -
14 - his testimony was they wanted to block the curb
15 cuts too, but I told them that would be illegal.

16 MS. BOKSER: And what they did was
17 perfectly legal.

18 JUDGE SMITH: Does that suggest something
19 about their purpose? That they wanted to block even
20 the curb cuts?

21 MS. BOKSER: No, I don't think that it
22 does.

23 JUDGE SMITH: Why did they want to block
24 the curb cuts?

25 MS. BOKSER: I don't know that they wanted

1 to. I think Mr. Santer's testimony was not that the
2 teachers wanted to. It was that he advised them that
3 they would have to - - - in order to be legally
4 parked, they would have to keep the curb cuts open.
5 I believe that that's the record, Your Honor.

6 CHIEF JUDGE LIPPMAN: You would - - - you
7 would - - -

8 JUDGE RIVERA: They - - - they chose to
9 park legally is - - - is your argument, right?

10 MS. BOKSER: They chose to park legally and
11 to - - - to continue - - - we have to also look at -
12 - - I know that you don't want to get into the weeds,
13 Your Honor, but - - - but we have to look at the
14 context at - - - during which this activity occurred.

15 So for three weeks or so before, inclement
16 weather had stopped the teachers from doing their
17 usual picketing. After three weeks, and I think
18 everybody involved in this case would say that - - -
19 that the labor dispute was acrimonious. It was a
20 nasty labor dispute. The teachers had been without a
21 contract for many years. They didn't want a month to
22 go by without the public knowing that this was an
23 ongoing thing.

24 And so they decided that since it was going
25 to be a very stormy day, again, they would park their

1 cars and show their placards.

2 CHIEF JUDGE LIPPMAN: You - - - you would
3 argue that - - - that if they had left after 8
4 o'clock that would be a different situation?

5 MS. BOKSER: I think that the District
6 would have a better argument, and I also think that
7 you'd have the police involved. I mean, the police
8 were called - - -

9 CHIEF JUDGE LIPPMAN: That would be a - - -

10 MS. BOKSER: - - - but they didn't get
11 involved.

12 CHIEF JUDGE LIPPMAN: - - - an illegal
13 parking and it - - -

14 MS. BOKSER: Right.

15 CHIEF JUDGE LIPPMAN: It changes the
16 dynamics.

17 JUDGE SMITH: Let me - - -

18 MS. BOKSER: It changes the dynamic a bit.

19 JUDGE SMITH: Let me get into the weeds
20 with you for a moment if I can. On page 838 of the
21 Santer record. This is Mr. Santer's testimony: "The
22 original vote" - - - referring to the vote of the
23 teachers - - - "was to park completely along the curb
24 and leave no space, and I objected to that." Doesn't
25 that tell you something about what their purpose was?

1 MS. BOKSER: It doesn't tell me a whole
2 lot, Your Honor. I mean, I think - - - I think that
3 if they wanted to do that, the teachers would have
4 done that. I think that the - - - the goal was to
5 get the message out.

6 JUDGE SMITH: Well, he said - - - he said
7 that they didn't because he told them it would be
8 illegal.

9 MS. BOKSER: And they followed what he
10 said. So I think that the - - - the inference - - -
11 the fair inference there - - -

12 JUDGE SMITH: Wasn't - - - wasn't the - - -
13 isn't the inference that they're trying to make it as
14 hard as they possibly can for kids to get to the
15 curb?

16 MS. BOKSER: I think the inference is that
17 they didn't know it would be illegal. That they
18 wanted to do everything that was legal.

19 JUDGE SMITH: I - - - okay, I'll change it.
20 They wanted to make it as hard as they legally could
21 for the kids to get to the curb?

22 MS. BOKSER: I don't know - - - I don't
23 know that that's a fair inference, Your Honor. I'm -
24 - - I'm not willing to concede that.

25 JUDGE PIGOTT: Well, why would - - - I

1 mean, why would you go bumper-to-bumper?

2 MS. BOKSER: I don't know that they did.

3 JUDGE PIGOTT: Really?

4 MS. BOKSER: I don't think that - - - that
5 the evidence was that they went bumper-to-bumper. If
6 they were bumper-to-bumper, there would have been
7 more cars - - - may I - - -

8 CHIEF JUDGE LIPPMAN: Finish your answer,
9 sure, counsel.

10 MS. BOKSER: - - - there would have been
11 more cars parked on Wen - - - on Wenwood Drive than
12 there were. There were five or six cars. That's
13 been the testimony. The - - - the area in front of
14 the school is significantly longer, so I'm not - - -
15 I'm not conceding that that was the - - - the goal.

16 JUDGE RIVERA: They could - - -

17 CHIEF JUDGE LIPPMAN: So your - - - your
18 argument, counsel, essentially boils down to, no big
19 deal; and free speech is a big deal?

20 MS. BOKSER: I think free speech is a big
21 deal. I think that all of the circumstances
22 surrounding that morning's activity indicates that
23 there was not a hazard and that there was not a
24 disruption, and to find otherwise in the District's -
25 - - is somewhat disingenuous in arguing that there

1 was.

2 CHIEF JUDGE LIPPMAN: Okay.

3 JUDGE SMITH: Well, let me - - - let me - -

4 -

5 CHIEF JUDGE LIPPMAN: Judge Smith, go

6 ahead.

7 JUDGE SMITH: - - - once again, page 467 of

8 the record. This is - - - this is Leth - - -

9 Lethbridge, the principal.

10 "Q. How were the cars parked?

11 "A. Very close together. What I mean by that is the

12 front is very close up to the back of the car in front of

13 it, and very succinctly" - - - Don't ask what succinctly

14 means - - - "placed - - - strategically placed" - - -

15 And then Mr. - - - yeah, the rest isn't

16 relevant. But doesn't - - - is there - - - is there

17 something that contradicts that in the record?

18 MS. BOKSER: Very close together doesn't

19 mean that there's no space for students to pass. And

20 there's no evidence that the students had to walk one

21 way or the other to get to the curb cuts to get

22 across the street.

23 CHIEF JUDGE LIPPMAN: Okay, counsel.

24 Thanks.

25 MS. BOKSER: Thank you, Your Honor.

1 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

2 MR. PAUTA: All right, Your Honor. Just to
3 quickly address my adversary's argument. The record
4 reflects that there were sixteen teachers involved,
5 sixteen cars involved, eight on each side, and - - -
6 and did - - - did cover the entire street in front of
7 the middle school.

8 But, you know, the interesting thing is
9 with the hazard is that, you know, neutral finders of
10 fact found that there was a hazard that day, and not
11 only these two, but every single teacher that was
12 charged with creating a hazardous situation. And
13 that's in the charge. You intentionally created a
14 hazardous situation by parking your car - - -

15 CHIEF JUDGE LIPPMAN: Where do you draw the
16 line? How much of a hazard does there have to be?
17 Any hazard?

18 MR. PAUTA: Well, I think - - -

19 CHIEF JUDGE LIPPMAN: If there was one
20 person in their car with a sign in a window, okay?

21 MR. PAUTA: I think it's a good question.
22 I think - - -

23 CHIEF JUDGE LIPPMAN: What's the answer?

24 MR. PAUTA: I think you treat it on a case-
25 by-case basis. But when you get - - - when you get

1 to the question of children and their safety - - -
2 adolescent children who are normally not dropped off
3 - - -

4 CHIEF JUDGE LIPPMAN: One car - - - one car
5 parked in front with a placard - - -

6 MR. PAUTA: Probably one car parked
7 wouldn't be enough.

8 CHIEF JUDGE LIPPMAN: Is enough or isn't
9 enough?

10 MR. PAUTA: Probably wouldn't - - - would
11 not be enough - - -

12 JUDGE RIVERA: Is it - - - is it - - -

13 CHIEF JUDGE LIPPMAN: Two - - - two - - -

14 MR. PAUTA: - - - to create a hazard. It's
15 - - -

16 JUDGE SMITH: Two cars?

17 MR. PAUTA: I don't think it's the number
18 of cars. I think it's a consequence of the cars
19 parking.

20 JUDGE RIVERA: Well, is - - - is it a
21 hazard if the driver could have found a way to avoid
22 the hazard? Go to the curb cut.

23 MR. PAUTA: Okay, the evidence - - -

24 JUDGE RIVERA: Why is it still a hazard if
25 you can go to the curb cut?

1 MR. PAUTA: The testimony is that because
2 of the way the cars are parked, in order to access a
3 curb cut, a parent would have had to parallel park,
4 which would have been impossible that day, because of
5 all the traffic, all the parents having to stop in
6 the middle of the street, and cars behind them also
7 looking to drop off their kids.

8 CHIEF JUDGE LIPPMAN: But the bottom line
9 is your argument is there was enough of a center of
10 gravity here - - - enough cars - - - hazard.

11 MR. PAUTA: Right, and if you want to look
12 at - - - at - - - if you want to look at the question
13 of hazard, you need to look no further than Mr.
14 Santer's testimony, who he himself, when they took
15 the vote about engaging in this activity, said, I am
16 nervous about a kid getting hit by a car. That's a
17 teacher himself saying - - -

18 CHIEF JUDGE LIPPMAN: But what I'm saying
19 is some - - - sometimes there's a reasonable concern
20 and sometimes there are other - - - there isn't. For
21 instance, apropos the question I'm just asking you.
22 If there were three cars on either side of the
23 street, and there was room to get around, them making
24 their point, you're seeing the placard, that's okay
25 with you.

1 MR. PAUTA: Yes.

2 CHIEF JUDGE LIPPMAN: Your argument is, it
3 was more than that, and it created a hazard - - -

4 MR. PAUTA: Right.

5 CHIEF JUDGE LIPPMAN: - - - a real hazard.

6 MR. PAUTA: Under normal circumstances,
7 parents are able to access the curb - - -

8 CHIEF JUDGE LIPPMAN: Okay.

9 MR. PAUTA: - - - drop off their kids
10 safely. On that particular day, they weren't. And
11 they didn't have an option, but to drop them off in
12 the middle of the street.

13 JUDGE ABDUS-SALAAM: Does it make a
14 difference about how wide the street is? I don't
15 know Wenwood Drive. Is it a two-lane highway or - -
16 -

17 MR. PAUTA: The testimony was that it's
18 fits about - - - it fit about four - - - four cars
19 wide, without the doors opening, so it - - - it just
20 fits the four.

21 JUDGE RIVERA: Does it matter that students
22 regularly crossed the street from the other side?

23 MR. PAUTA: It's - - - it's the fact that
24 children - - -

25 JUDGE RIVERA: Isn't that hazardous?

1 MR. PAUTA: It's the fact that children are
2 normally dropped off on the curb, and they get to
3 look both ways and decide when to cross. On that
4 particular day, they were dropped off in the street,
5 and either scurried to the curb or got hit.

6 JUDGE RIVERA: They can, but they could
7 have been dropped off at the curb.

8 MR. PAUTA: Not on that particular day,
9 because - - -

10 JUDGE RIVERA: At all? It was a completely
11 unavoidable hazard?

12 MR. PAUTA: Yes. You know, and I would
13 just direct the court's attention to, you know, Judge
14 - - - Judge Roman's decision, the concurrence on
15 restraint below, where she says, "The mandate of the
16 school district is to provide for the safety of the
17 children and to ensure the proper function of the
18 school is paramount and overrides any manifestation
19 of First Amendment rights that were embodied in this
20 protest by the teachers."

21 CHIEF JUDGE LIPPMAN: Okay.

22 MR. PAUTA: I think that captures it all.

23 CHIEF JUDGE LIPPMAN: Thanks, thanks,
24 counsel.

25 MR. PAUTA: Okay, thank you, Your Honors.

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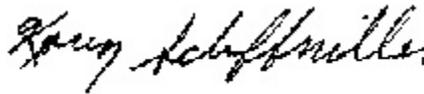
CHIEF JUDGE LIPPMAN: Thank you both.
Appreciate it.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Santer v. BOE of the East Meadow Union Free School District, No. 51, and of Matter of Lucia v. BOE of the East Meadow Union Free School District, No. 52, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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