NO. 01-4155

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARGARET HOSTY, JENI PORCHE and STEVEN P. BARBA, individually and d/b/a INNOVATOR, Plaintiffs-Appellees, v. PATRICIA CARTER, Defendant-Appellant, and GOVERNORS STATE UNIVERSITY; BOARD OF TRUSTEES OF GOVERNORS STATE UNIVERSITY; DONALD BELL; TOMMY DASCENZO; STUART FAGAN; PAUL KEYS; JANE WELLS; DEBRA CONWAY; PEGGY WOODARD; FRANCIS BRADLEY; PETER GUNTHER; ED KAMMER; DOROTHY FERGUSON; JUDY YOUNG; CLAUDE HILL IV; and PAUL SCHWELLENBACH, Defendants.	)	On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 01 C 0500 The Honorable SUZANNE B. CONLON, Judge Presiding

BRIEF *AMICI CURIAE* OF STUDENT PRESS LAW CENTER AND *AMICI* LISTED ON REVERSE SIDE IN SUPPORT OF PLAINTIFFS-APPELLEES MARGARET HOSTY, JENI PORCHE, STEVEN P. BARBA, INDIVIDUALLY AND D/B/A INNOVATOR

Richard M. Goehler (0009160)
FROST BROWN TODD LLC
2200 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202-4182
(513) 651-6800

Counsel for *Amici Curiae*

OF COUNSEL:

S. Mark Goodman
Michael C. Hiestand
STUDENT PRESS LAW CENTER
1815 N. Fort Myer Drive, Suite 900
Arlington, VA 22209
(703) 807-1904

STUDENT PRESS LAW CENTER,
AMERICAN SOCIETY OF NEWSPAPER EDITORS,
ASSOCIATED COLLEGIATE PRESS,
ASSOCIATED PRESS MANAGING EDITORS,
ASSOCIATION FOR EDUCATION IN JOURNALISM AND MASS COMMUNICATION,
ASSOCIATION OF SCHOOLS OF JOURNALISM AND MASS COMMUNICATION,
BALL STATE UNIVERSITY DEPARTMENT OF JOURNALISM,
COLLEGE NEWSPAPER BUSINESS AND ADVERTISING MANAGERS,
COLLEGE MEDIA ADVISERS,
COMMUNITY COLLEGE JOURNALISM ASSOCIATION,
EASTERN ILLINOIS UNIVERSITY DEPARTMENT OF JOURNALISM,
FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION,
HOOSIER STATE PRESS ASSOCIATION,

ILLINOIS COLLEGE PRESS ASSOCIATION,
ILLINOIS PRESS ASSOCIATION,
INDIANA COLLEGIATE PRESS ASSOCIATION,
INDIANA UNIVERSITY SCHOOL OF JOURNALISM,
NORTHWESTERN UNIVERSITY MEDILL SCHOOL OF JOURNALISM,
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
SOCIETY FOR COLLEGIATE JOURNALISTS,
SOCIETY OF PROFESSIONAL JOURNALISTS,
THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION,
UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN COLLEGE OF COMMUNICATIONS,
UNIVERSITY OF SOUTHERN INDIANA DEPARTMENT OF COMMUNICATIONS,
UNIVERSITY OF WISCONSIN- EAU CLAIRE
DEPARTMENT OF COMMUNICATION AND JOURNALISM

NO. 01-4155

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARGARET HOSTY, JENI PORCHE and STEVEN P. BARBA, individually and d/b/a INNOVATOR, Plaintiffs-Appellees, v. PATRICIA CARTER, Defendant-Appellant, and GOVERNORS STATE UNIVERSITY; BOARD OF TRUSTEES OF GOVERNORS STATE UNIVERSITY; DONALD BELL; TOMMY DASCENZO; STUART FAGAN; PAUL KEYS; JANE WELLS; DEBRA CONWAY; PEGGY WOODARD; FRANCIS BRADLEY; PETER GUNTHER; ED KAMMER; DOROTHY FERGUSON; JUDY YOUNG; CLAUDE HILL IV; and PAUL SCHWELLENBACH, Defendants.	)	On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 01 C 0500 The Honorable SUZANNE B. CONLON, Judge Presiding

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 7th Cir. R. 26.1, *amici curiae* Student Press Law Center, American Society of Newspaper Editors, Associated Collegiate Press, Associated Press Managing Editors, Association for Education in Journalism and Mass Communication, Association of Schools of Journalism and Mass Communication, Ball State University Department of Journalism, College Newspaper Business and Advertising Managers, College Media Advisers, Community College Journalism Association, Eastern Illinois University Department of Journalism, Foundation for

Individual Rights in Education, Hoosier State Press Association, Illinois College Press Association, Illinois Press Association, Indiana Collegiate Press Association, Indiana University School of Journalism, Northwestern University Medill School of Journalism, Reporters Committee for Freedom of the Press, Society for Collegiate Journalists, Society of Professional Journalists, Thomas Jefferson Center for the Protection of Free Expression, University of Illinois at Urbana-Champaign College of Communications, University of Southern Indiana Department of Communications, and University of Wisconsin- Eau Claire Department of Communication and Journalism make the following disclosure:

1. Are said parties a subsidiary or affiliate of a publicly-owned corporation?

   No.

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   No.

Respectfully submitted,

Richard M. Goehler (0009160)
FROST BROWN TODD LLC
2200 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202-4182
(513) 651-6800

Counsel for *Amici Curiae*

OF COUNSEL:

S. Mark Goodman
Michael C. Hiestand
STUDENT PRESS LAW CENTER
1815 N. Fort Myer Drive, Suite 900
Arlington, VA 22209
(703) 807-1904

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPPLEMENTAL AUTHORITIES

NO. 01-4155

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARGARET HOSTY, JENI PORCHE and STEVEN P. BARBA, individually and d/b/a INNOVATOR, Plaintiffs-Appellees, v. PATRICIA CARTER, Defendant-Appellant, and GOVERNORS STATE UNIVERSITY; BOARD OF TRUSTEES OF GOVERNORS STATE UNIVERSITY; DONALD BELL; TOMMY DASCENZO; STUART FAGAN; PAUL KEYS; JANE WELLS; DEBRA CONWAY; PEGGY WOODARD; FRANCIS BRADLEY; PETER GUNTHER; ED KAMMER; DOROTHY FERGUSON; JUDY YOUNG; CLAUDE HILL IV; and PAUL SCHWELLENBACH, Defendants.	)	On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 01 C 0500 The Honorable SUZANNE B. CONLON, Judge Presiding

BRIEF *AMICI CURIAE* OF STUDENT PRESS LAW CENTER AND *AMICI* IN SUPPORT OF PLAINTIFFS-APPELLEES MARGARET HOSTY, ET AL.

This brief is respectfully submitted on behalf of *amici curiae* in support of the appeal of Plaintiff-Appellees. The undersigned counsel of record are providing legal services in connection with the preparation of the *amicus* brief on a pro bono basis.

INTEREST OF THE AMICI CURIAE

The *amici* are:

1. The Student Press Law Center is a national, non-profit, non-partisan organization established in 1974 to perform legal research and provide information and advocacy for the purpose of promoting and preserving the free expression rights of student journalists. As the only national organization in the country devoted exclusively to defending the legal rights of the student press, the Center has collected information on student press cases nationwide and has submitted various amicus briefs, including to the United States Supreme Court and many federal courts of appeal.

2. The American Society of Newspaper Editors is a nonprofit organization founded in 1922. It has a nationwide membership of approximately 850 persons who hold positions as directing editors of daily newspapers throughout the United States, with members recently being added in Canada and other countries in the Americas. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

3. The Associated Collegiate Press is a division of the National Scholastic Press Association, a 501 (c) (3) non-profit association of student media groups at colleges, universities and secondary schools throughout the United States and in several other countries. Founded in 1921, the college/university division represents about 700 media organizations and more than 20,000 student journalists. The associations provide journalism education and recognition opportunities for their members, including reporting competitions and programs on press law and ethics.

4. Associated Press Managing Editors was formed in 1933 as a national association for editors in the United States and Canada whose newspapers subscribe to the Associated Press. The organization provides oversight of AP's news coverage. It also provides guidance and

counsel to editors and advocates on behalf of First Amendment principles. The latter is the source of our interest in this case.

5. The Association for Education in Journalism and Mass Communication has a membership of about 3,400. Of these, more than 3,000 teach and conduct research at United States universities and colleges. Freedom of expression at university and college student publications is important to AEJMC members because many work with student journalists in classrooms and as advisers to student publications. Furthermore, the AEJMC Constitution states that the association will improve education in journalism and mass communication by "supporting freedom of communication consonant with the ideal expressed in the First Amendment to the U.S. Constitution."

6. The Association of Schools of Journalism and Mass Communication is a national organization of nearly 200 leaders - deans, directors, chairs - of departments, schools and colleges that graduate the majority of new journalists in the United States from their professional degree programs. The association supports freedom of expression for everyone and especially for student journalists at college and university newspapers, yearbooks and magazines at all institutions throughout the nation.

7. The Department of Journalism at Ball State University is comprised of 1,048 journalism majors, minors and graduate students. Accredited by ACEJMC, the program has 27 full-time faculty members and numerous adjunct faculty members. Four degrees are offered including majors in advertising, journalism and public relations as well as a journalism teaching major. The department’s mission is to produce graduates who have the theoretical, professional, and critical thinking skills necessary to compete and succeed in a changing workplace. The department values its long history of supporting an excellent program of student media.

8. College Newspaper Business and Advertising Managers is a national organization of college newspaper business staffs. Founded in 1972, CNBAM represents over 120 student newspapers with a circulation of over 1.4 million and over $50 million in annual sales. Their annual conference brings together students, professional staff members and industry experts to discuss advertising trends and exchange ideas. The organization also provides educational opportunities and recognition to student sales staffs through their annual advertising contest.

9. College Media Advisers, with more than 750 members, has a 48-year history of representing the people who advise the nation's collegiate newspapers, yearbooks, magazines and electronic media. This organization endorses student press freedom as guaranteed by the First Amendment of the U.S. Constitution and has long held that a free and unencumbered student press serves the learning environment of an academic community far better than a student press which is restrained by prior review and censorship.

10. The Community College Journalism Association is an international organization that fosters the improvement of journalism instruction in higher education, especially in two-year institutions. Founded in 1968, CCJA is dedicated to the precept that community college journalism education must seek high standards in the preparation of men and women for effective careers in the mass media.

11. Established in 1975, the Eastern Illinois University Department of Journalism offers of Bachelor of Arts degree, which effectively integrates professional training with a liberal arts education to provide flexibility, breath and depth of educational experience. Through classroom work and hands-on experience with student media and internships, Eastern journalism students prepare themselves for a variety of careers. Eastern's 13 full-time journalism faculty members have a wide variety of professional and academic backgrounds. Augmented by several

visiting journalists and professionals who serve as adjunct faculty each year, some 160 majors are served by the journalism department.

12. The Foundation for Individual Rights in Education is a non-profit, tax-exempt educational and civil liberties organization, interested in promoting and protecting academic freedom and First Amendment rights at American institutions of higher education. FIRE receives dozens of complaints each year concerning violations of academic freedom arising from the attempted censorship of school journalists and newspapers by administrators or other student groups. The issue of the freedom of student journalists to exercise the liberties of the press is a hotly contested one, and FIRE believes that the proper resolution of that dispute, and of the dispute in this case, in favor of the First Amendment, is essential to the health of academic freedom in higher education.

13. The Hoosier State Press Association is a for-profit association that represents 170 newspapers located in Indiana. The Association dedicates its efforts to encouraging a climate in which journalism can be practiced freely, fully and in the public interest. The Association has an important interest in the level of journalistic freedom afforded collegiate newspapers because those publications serve as a training ground for newspapers' future editors and reporters.

14. The Illinois College Press Association is an association of student newspapers from four-year public and private colleges in Illinois. Founded in 1982, ICPA represents more than 30 colleges and universities, including the *Innovator* at Governors State University. ICPA activities include an annual convention for college journalists and advisers that includes training, a career fair and a contest honoring excellent student work in more than 30 categories.

15. The Illinois Press Association represents nearly all of Illinois 600-plus daily and non-daily newspapers, making it the largest state newspaper association in the country. The IPA is involved in safeguarding freedom of the press and the public s right to know.

16. The Indiana Collegiate Press Association exists to serve the needs of students, faculty and staff involved in student publications work. The organization offers contests to encourage the betterment of college journalism and stages workshops designed to improve students' skills and widen their perspectives. ICPA also advocates student press freedom among the state's colleges and universities, public and private.

17. The Indiana University School of Journalism on the Bloomington and Indianapolis campuses has about 650 undergraduate majors and 50 graduate students preparing for careers in print and broadcast journalism, photojournalism, graphic communications, public relations and advertising and in scholarship and teaching. The school has 26 full-time faculty members. Affiliated with the School at Bloomington is *the Indiana Daily Student* and at Indianapolis *The Sagamore*, the student newspapers for each campus. Both papers have complete news-editorial independence, a freedom of speech and press that the School advocates and cherishes. IU's School of Journalism agrees with the 6th Circuit in *Kincaid* that *Hazelwood* does not apply to college media

18. Since its founding in 1921, the Northwestern University Medill School of Journalism has brought national recognition to the University. Medill s students and alumni for years have earned the most prestigious awards in print and broadcast journalism, advertising and public relations; 21 Pulitzer Prize winners are among Medill s alumni. Medill has 150 graduate students in journalism, 85 graduate students studying integrated marketing communications, which consists of promotion, advertising, database and e-commerce marketing, and public

relations and 610 undergraduate journalism students. Medill has 46 full-time faculty, teaching facilities in Evanston, Chicago and Washington, and a global program that trains 40 graduate journalism students a year abroad.

19. The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

20. The Society for Collegiate Journalists is the nation's oldest journalism honorary for college students, founded in 1909 at Syracuse University. We subscribe to the Code of Ethics for the Society of Professional Journalists and encourage the free expression of editors and managers of collegiate media. Over the years SCJ and its predecessor organizations have represented more than 200 colleges and universities and tens of thousands of student and honorary members.

21. The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

22. The Thomas Jefferson Center for the Protection of Free Expression, located in Charlottesville, Virginia, is a nonprofit, nonpartisan institution dedicated solely to the protection of the First Amendment rights of free speech and free press. For over ten years the Center has

participated actively in the litigation of First Amendment issues and has filed briefs *amicus curiae* in federal and state courts, including this Court. Many of those cases involved questions of academic freedom and free speech within the academic community.

23. The University of Illinois at Urbana-Champaign College of Communications has more than 500 students in three academic areas: journalism, advertising, and media studies. Journalism instruction began in 1902 at the University of Illinois and its graduates have gone on to work at virtually every media institution in the country, winning nine Pulitzer Prizes. Two Pulitzer-Prize winners are on the faculty, which engages in interdisciplinary research and public service. The mission of the Department of Journalism is to prepare students for careers in public affairs journalism with an appreciation for the functioning of a free press in a representative democracy.

24. The University of Southern Indiana Department of Communications, which has been in existence since 1988, has 600 students and 14 faculty in four academic majors. We are part of a university of almost 10,000 students. We offer advertising, journalism, broadcasting, Internet and graphic design, public relations, and speech communications. Our campus media enjoy First Amendment rights and we educate our graduates to function in a society that champions freedom of expression. We believe that First Amendment rights should not stop at the schoolhouse door. It is difficult to teach our young people the precious meaning of liberty if we do not allow nay encourage them to practice and experience the profundity of their rights at an early age.

25. The University of Wisconsin - Eau Claire Department of Communication and Journalism has nearly 600 majors and 75 minors. It has 19 full-time faculty members, one of whom serves as the adviser to the school's independent twice-weekly newspaper, *The Spectator*.

The department's faculty members are concerned about the potential negative impact of this case on freedom of the press and expression on this and other university and college campuses, and on portions of its educational mission. Part of the learning experience for print journalism and advertising majors is to work on *The Spectator*, which is supported by advertising revenues and student fees. Staff members at the paper at times seek guidance from their adviser and other faculty members, but an important part of their education is having to make independent decisions and bear the ultimate responsibility for those decisions. By doing so, they also help to preserve a free forum for the debate of campus issues, which has benefited the entire university community.

STATEMENT OF FACTS

The essential facts relevant to the issue before this court are not in dispute. In the spring of 2000, plaintiffs Jeni Porche and Margaret Hosty were appointed by the Student Communications Media Board of Governors State University as editor in chief and managing editor respectively of the *Innovator* student newspaper (Porche Dep. at 11, Hosty Dep. at 9-10.) Plaintiff Steven Barba served as a staff reporter for the *Innovator*. (Barba Dep. at 6.) During their tenure, plaintiffs occasionally published articles and letters to the editor critical of school faculty members and the school administration. (Porche Dep. Exhibit 3.)

At the time plaintiffs took their positions at the *Innovator* and during all times relevant to this lawsuit, the policy of the Student Communications Media Board of Governors State University was that the student staff of the *Innovator* will determine content and format of their respective publications *without censorship or advance approval*. (Exhibit 1, at 29.) (Emphasis added.) Although the newspaper s adviser often read stories intended for publication at the

request of the student editors, the adviser did not make any content decisions but simply offered advice to the student editors. (Hosty Dep. at 24-25, 29-30.)

In the fall of 2000, defendant Dean Patricia Carter twice called Charles Richards, president of Regional Publishing Company, which held the contract for printing the *Innovator*. In those calls, Dean Carter told Richards that some school official must review the *Innovator* s content before it could be printed and instructed Richards to call when future issues were received. (Carter Dep. at 4-9.)

In a memo dated November 14, 2000, delivered to the *Innovator* editors, Charles Richards relayed the substance of his conversations with Dean Carter and said that Carter told him his company was not to publish any more issues of the *Innovator* without prior approval by a university official. He noted that his understanding of the law was that prior approval by school officials was prohibited. However, he noted that he was no attorney, so that the final decision of the handling of this matter should not be left to me. (Porche Exhibit No. 2.) Plaintiffs understood Richards comments to mean that his company would not print additional editions of the paper until the issue of Dean Carter s prior approval requirement was settled. (Hosty Dep. at 42.) A representative of the company confirmed that the company did not want to risk printing the newspaper and not getting paid by the university. (Beedie Aff. at 4-5.)

Plaintiffs filed this claim in January 2001, and on November 13, 2001, the U.S. District Court for the Northern District of Illinois refused to grant summary judgment for Dean Carter, stating that she was not constitutionally permitted to take adverse action against the newspaper because of its content and was not entitled to qualified immunity.

SUMMARY OF ARGUMENT

The Illinois Attorney General, on behalf of the Defendant-Appellant, is asking this court to reject well over three decades of established law regarding the First Amendment rights of college student journalists. He is asking this court to use the Supreme Court s 1988 decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), to endorse the unprecedented notion that public college and university students have no stronger free expression protection than teenagers in high school. Only one court, reversed on appeal,[1] has ever adopted this argument, and the Supreme Court s own precedents make clear that such a holding is in direct conflict with the First Amendment protections afforded expressive activity on America s college and university campuses.

Amici, which include university journalism departments from the states that will be affected by this decision as well as major state and national organizations of professional journalists, journalism educators and First Amendment advocates are gravely concerned over the defendant-appellant s attempt to apply the demonstrably broad and amorphous high school-based censorship standard to expressive activity on the college and university campuses of this Circuit.

Amici urge this Court to uphold the decision of the District Court, refrain from extending *Hazelwood* beyond its scope and find defendant Carter s actions unconstitutional. Applying a First Amendment standard that was carefully crafted for the limitation of high school journalists and their audience to those at the university level would be contrary to the freedom of expression long recognized to be the essence of the university campus.

[1] *Kincaid v. Gibson*, CIV 95-98 (W.D. Ky. Nov. 14, 1997), rev d, 236 F.3d 342 (6th Cir. 2001)(en banc).

ARGUMENT

I. Dean Carter Is Not Entitled to Qualified Immunity Because Her Request to Review and Approve the *Innovator* Prior to Printing Violates the First Amendment.

Defendant Dean Patricia Carter argues that she is entitled to qualified immunity because her actions failed to violate clearly established law. Qualified immunity applies to government officials performing discretionary functions only when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 456 U.S. 800, 818 (1982). When the law has been well-established, this Court has held that it should look to the case law because it permits us to conclude that reasonably diligent government officials would have known of the case law, related it to the situation at hand, and molded their conduct accordingly. *Kernats v. O Sullivan,* 35 F.3d 1171, 1176 (7th Cir. 1994) (*citing Lojuk v. Johnson,* 770 F. 2d 619, 628 (7th Cir. 1985)). When there is no case law on point, one need not cite a case at all if the constitutional violation is obvious. *Id.* The law establishing First Amendment protections for college media could not be more clear.

For well over three decades, courts have consistently held that student media at public colleges and universities are entitled to strong First Amendment protections. These courts have held that school administrators can only censor student media if they can show that the speech in question is legally unprotected or if they can demonstrate that some significant and imminent physical disruption of the campus will result from the publication s content. Attempts by school officials such as Dean Carter to censor or control constitutionally protected expression in student-edited media have in decisions handed down by dozens of state and federal courts consistently been held to violate the First Amendment. See, e.g., *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995)(university officials constitutionally

prohibited from denying funding to student religious magazine based on content) ; *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001)(en banc) (confiscation of college student yearbook by administrators unhappy with content violates First Amendment). The prohibition on such administrative censorship has extended to cases where school officials required mandatory prior review of student media, *Antonelli v. Hammond*, 308 F.Supp. 1329 (D.Mass. 1970); *Mazart v. State*, 441 N.Y.S.2d 600 (N.Y.Ct.Cl. 1981); *Milliner v. Turner*, 436 So.2d 1300 (La. Ct. App. 1983); *Trujillo v. Love*, 322 F.Supp. 1266 (D.Colo. 1971), and other indirect forms of censorship, when undertaken to affect content. See, e.g., *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983)(striking down university s attempt to restructure funding to student newspaper because of controversial issue); *Dickey v. Alabama State Board of Education*, 273 F.Supp. 613 (M.D.Ala. 1967), *vacated as moot sub. nom. Troy State University v. Dickey, 402 F.2d 515 (5th Cir. 1968)* (suspension of student newspaper editor for content-related reasons held unconstitutional); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975)(reinstating student editors who had been removed because of administrators objections to poor grammar, spelling and syntax).

As one federal court of appeals noted in 1973:

> Censorship of constitutionally-protected expression cannot be imposed at a college or university by suspending editors of student newspapers, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorship oversight based on an institution s power of the purse.

Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973).

An *en banc* panel for the Fifth Circuit Court of Appeals expressed similar sentiments in ruling that University of Mississippi officials had acted illegally by prohibiting the publication of a school-sponsored student literary magazine because it contained earthy language :

> The University here is clearly an arm of the state and this single fact will always distinguish it from the purely private publisher as far as censorship rights are concerned. It seems a well-established rule that once a university recognizes a student activity that has elements of free expression, it can act to censor that expression only if it acts consistent with First Amendment constitutional guarantees.

Bazaar v. Fortune, 489 F.2d 225 (5th Cir. 1973); *affirming en banc* with modification, 476 F.2d 570, 574 (5th Cir. 1973), *cert. denied,* 416 U.S. 1995 (1974).

Dean Carter s contention that she could not reasonably have known that it was illegal to order the *Innovator* s printer to halt further publication of the student newspaper or to require prior approval of the newspaper s content defies existing, well-established law. Because her actions violated clear constitutional rights of which she should have been aware, qualified immunity is not appropriate in this case.

II. The *Hazelwood* Standard was Created Specifically for High School Student Expression and is Inappropriate for College and University Students.

The differences between a college or university and a high school are far greater than the obvious differences in curriculum and extracurricular activities. The missions of each type of institution are distinct, reflecting the unique needs of students of differing ages and maturity levels. Intellectual maturity requires a lessening degree of supervision as students progress through the educational process. Indeed, this Court has recognized that rights afforded students can vary by age and grade level. *Muller v. Jefferson Lighthouse School.,* 98 F.3d 1530, 1538 (7th Cir. 1996) (stating that the Court has not suggested that fourth-graders have the free expression rights of high school students.) (Citations omitted). The Supreme Court s decision in *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260 (1988), established a restrictive standard for student First Amendment rights applicable only in the high school context and specifically for

the protection of the students in the range of age and maturity of high school students. As adults,[2] however, college and university students are entitled to the protection afforded other adults under the First Amendment. Accordingly, the Defendant s reliance on the *Hazelwood* standard is misplaced.

A. This country s intellectual legacy exemplifies the fundamental role the First Amendment has played in preserving the marketplace of ideas in our college campuses.

The University is the paradigmatic marketplace of ideas, rendering the vigilant protection of constitutional freedoms nowhere more vital than in the community of American schools. *Healy v. James,* 408 U.S. 169, 180 (1972) (citation omitted). The Supreme Court has specifically recognized that there is no doubt that the First Amendment rights of speech and association extend to the campuses of state universities. *Widmar v. Vincent,* 454 U.S. 263, 268-69.

The Supreme Court s restrictive First Amendment standard in *Hazelwood* sprung from the Court s premise that the special circumstances of the secondary school environment permit school authorities to exercise greater control over expression by students than the First Amendment would otherwise permit. However, the judicial deference the Supreme Court found necessary in the high school setting — and in the factual context of *Hazelwood* — is inappropriate for a university setting. A high school is an entirely different environment from a university. This difference was fully acknowledged by the *Hazelwood* Court when it explicitly reserved the question of whether the same level of deference expressed in *Hazelwood* would be appropriate with respect to school-sponsored expressive activity at the college and university level.

---

[2] According to a U.S. Census Bureau survey, only 1 percent of those enrolled in American colleges or universities during the Fall of 2000 were under the age of 18. 55 percent of those enrolled were 22 years of age or older. The full survey is available at: http://chronicle.com/weekly/almanac/2001/nation/0102001.htm (last viewed July 3, 2002).

Hazelwood, Id. at 273, n.7. In fact, to this day, every effort to justify censorship of college student media under *Hazelwood* has been rejected. As at least one Supreme Court justice has noted, the cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, whose students and their school s relation to them are different and at least arguably distinguishable from their counterparts in college education. *Board of Regents of the Univ. of Wisconsin System v. Southworth,* 529 U.S. 217 (2000) (Souter, J., concurring in the judgement) (citations omitted).

The Supreme Court has explicitly recognized that where the vital principles of the First Amendment are at stake, the first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. *Rosenberger v. Rectors and Visitors of the University of Virginia,* 515 U.S. 819, 835-36 (1995). These dangers are especially threatening in the university setting, where [t]he quality and creative power of student intellectual life to this day remains a vital measure of a school s influence and attainment. *Id.*

While younger students in the high school setting may be entitled to fewer liberties than those afforded to the public at large, such restrictions have no place at a college or university. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation s intellectual life. *Id.* Court decisions have remained consistent in their application of robust protection of expression at the postsecondary level. See discussion at 12-14, supra. *See also, Mississippi Gay Alliance v. Goudelock,* 536 F.2d 1073 (5th Cir. 1973), *cert. denied,* 430 U.S. 982 (1977) (holding that the editor of a college newspaper could choose not to publish

certain advertisements); *Lueth v. St. Clair County Community College,* 732 F. Supp. 1410 (E.D. Mich. 1990) (granting summary judgment to an editor in chief who sought damages after being ordered to stop publishing advertisements for a nightclub); *Sinn v. Daily Nebraskan,* 638 F.Supp. 143, 148 (D. Neb. 1986) *aff d,* 829 F.2d 662 (6th Cir. 1987) (noting that the school s publications board could not force advertising decisions on a student editor)*; Panarella v. Biernbaum,* 32 N.Y. 2d 108, 343 N.Y.S. 2d 333 (N.Y. 1973) (holding that school could not punish student newspaper over objections to religious-themed articles). In fact, two appellate courts have explicitly refused to apply *Hazelwood* to college student media. *Student Government Association v. Board of Trustees of the University of Massachusetts,* 868 F. 2d 473, 480 n. 6 (1st Cir. 1989); *Kincaid v. Gibson,* 236 F. 3d 342, 346 n. 4-5 (6th Cir. 2001)(en banc).

College student expression should be subject to no greater restrictions than those applicable to the public at large. *Healy,* 408 U.S. at 180. The driving force prompting the enactment of the First Amendment was the founders unwavering commitment to the freedom of the mind. Nowhere is the mind more provoked, more nurtured, more challenged to new levels of enlightenment than on the university campus. The First Amendment enables the university setting to be permeated with a force that carries with it the weight of our own history as a Republic. *Hazelwood* did not, and should not be interpreted to have taken these fundamental precepts of college education into account when it diluted high school students First Amendment rights for the benefit of deferring to the State s educational mission. Nothing in *Hazelwood* or its progeny affects the presumption favoring university students speech rights vis--vis university censorship.

B. Extension of *Hazelwood s* standard to college media would have disastrous consequences.

1. Hazelwood is vague and difficult to apply outside the specific factual context in which it arose.

Hazelwood is *sui generis.* In *Hazelwood,* the Supreme Court upheld the decision of a high school principal to censor a high school student newspaper because: (1) the paper was produced by a journalism class and had not been opened by the school as a public forum for student expression; (2) as a nonpublic forum, the standard enunciated in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1996) (holding that school officials can only censor student expression when they can reasonably forecast a material and substantial disruption of school activities or an invasion of the rights of others) was inapplicable; and (3) the principal s decision to prevent the publication of the articles was reasonably related to legitimate pedagogical concerns. Until the Court s decision in *Hazelwood,* the *Tinker* standard had uniformly been applied to censorship of student expression at high schools. *See, e.g., Nicholson v. Board of Education*, 682 F.2d 858, 863 n.3 (9th Cir. 1982)*; Gambino v. Fairfax County School Board,* 479 F. Supp. 731, 736 *aff d,* 564 F.2d 157 (4th Cir. 1977) (citing 4th Cir. decisions that rely explicitly on *Tinker*); *Trachtman v. Anker,* 563 F.2d 512, 516 (2nd Cir. 1977), *cert. denied,* 435 U.S. 925 (1978); *Zucker v. Panitz,* 299 F. Supp. 102, 105 (S.D.N.Y. 1969). The *Tinker* standard, which weighed students First Amendment rights against the need of educators to ensure a productive learning environment, required school officials to reasonably forecast material and substantial disruption of school activities or invasion of the rights of others before their censorship would be allowed. *Tinker*, 393 U.S. at 513.

Hazelwood drastically shifted the balance. In *Hazelwood*, the Court found it controlling that the student speech at issue occurred in a school-sponsored student newspaper that was produced as part of a journalism class and that contained material that could be viewed as being

endorsed by the school. Such factors, the Court found, permitted high school officials to exercise greater control over student expression than would be permitted under the more protective *Tinker* standard, which the Court concluded applied only to non-school-sponsored, independent student speech or speech that took place in a recognized public forum. Under *Hazelwood*, the Court said that school officials could censor student expression simply by showing that their actions were reasonably related to legitimate pedagogical concerns. *Hazelwood* at 273. This, the Court said, would permit high school officials to censor high school student speech, for example, that officials unilaterally deemed poorly written, biased or prejudiced, or that advocated conduct otherwise inconsistent with the shared values of a civilized social order. *Hazelwood* at 271-272.

By any measure, the *Hazelwood* Court has given high school officials far greater authority to censor the otherwise lawful speech of private citizens than it has extended to any other group of government officials, except perhaps prison wardens. *See e.g.*, *In re Williams*, 205 Cal. Rptr. 903 (Cal. App. 1984)(state may censor prison newspapers where prison officials can demonstrate actions achieve legitimate penological objective.)

The extension of such a far-reaching, ironhanded censorship standard to universities and colleges throughout Illinois, Indiana and Wisconsin as the Illinois Attorney General now asks this court to do poses grave dangers.

While some have argued that *Hazelwood* is best explained in terms of the school s power to control its communicative resources [when these resources are a part of the official school curriculum], rather than as a power to regulate students speech, William G. Buss, *School Newspapers, Public Forum, and the First Amendment,* 74 Iowa L. Rev. 505, 513 (1989), fourteen years of living with *Hazelwood* have shown that school officials and other state actors

have not read the decision so narrowly, using it to justify the regulation of virtually any form of teacher and student speech.

The courts, too, have had great difficulty determining what, exactly, the *Hazelwood* standard is and how to apply it. This difficulty is exemplified by the New Jersey Supreme Court s decision in *Desilets v. Clearview Regional board of Education,* 647 A.2d 150, 154 (N.J. 1994). In that case, the trial court summarily held that a junior high school principal s censorship of two movie reviews from a student newspaper was reasonably related to a legitimate pedagogical concern under *Hazelwood*. The appellate court reversed this portion of the trial court s holding, and the New Jersey Supreme Court affirmed the appellate court. Although the high court agreed that the movie reviews [did] not appear to raise educational concerns that call for the kinds of editorial control exemplified by the Supreme Court in *Hazelwood,* it was unsure what exactly the *Hazelwood* standard meant. *Id. at 154.* The Court noted the inherent complexity surrounding the nature and scope of educational policy affecting expressional activity and wished for guidance from the state educational agency. *Id. See also*, Martha M. McCarthy, *Post Hazelwood Developments: A Threat To Free Inquiry In Public Schools,* 81 Ed. Law. Rep. 3, 689 (June 1993) and cases cited therein.

2. There has been an increase in arbitrary censorship of high school journalism programs after *Hazelwood*.

One predictable result of the *Hazelwood* decision has been a sharp rise in high school censorship incidents reported to the Student Press Law Center (SPLC), a nonprofit group that provides help and information to American high school and college student media. By the end of 2000, for example, calls to the SPLC from student journalists and their advisers seeking legal

help had risen 289 percent since the court s 1988 ruling.[3] Although *Hazelwood* requires that school officials who choose to censor must provide a valid educational reason for their censorship, calls to the SPLC show that some administrators have apparently interpreted the decision as providing them with an unlimited license to censor anything they choose. For example:

¥ In New York, a principal censored an accurate story from the student newspaper after it reported that there were only two working bathrooms in a high school of 3,600 students.[4]

¥ In Indiana, a principal censored a story that painstakingly detailed how the girls tennis coach had improperly pocketed more than $1,000 that team members had paid for court time. All agreed the story was accurate.[5]

Examples such as these, and many others like them,[6] reveal that many state high school officials have relied on *Hazelwood* to censor student speech with relative impunity. In such cases, student media ceases to be an educational resource and becomes merely a public relations tool of the administration. When censorship can be justified by public school officials simply by their claiming that a story is poorly written, biased, inconsitent with the shared values of a civilized social order or that they have some other weakly defined legitimate pedagogical concern, the shield of the First Amendment becomes nothing but a sieve. Indeed, the devastating impact of *Hazelwood* on America s high school student media has led one commentator to describe the case as as a censorship tsunami. Richard J. Peltz, Censorship

---

[3] 548 legal request calls were received by the Student Press Law Center legal staff in 1988. 2,129 calls were received in 2000.
[4] *High School Confidential*, Brills Content, June 2001, p. 118-119.
[5] *See Death by Cheeseburger: High School Journalism in the 1990 s and Beyond,* Freedom Forum (Arlington, Va.), 1994, pp. 113-15.
[6] *See, e.g.,* Kaplan, J., *Hazelwood decision continues to haunt high school journalists,* Editor and Publisher, May 7, 1994, p. 48. See also, the Student Press Center Web site (http://www.splc.org), which includes hundreds of examples of student media censorship occurring at schools across the country.

Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the College Hazelwood Case, 68 Tenn. L. Rev. 481 (2001).

These results reveal the necessity to limit *Hazelwood* to its own facts, and certainly to prevent the dangerous extension of it to the university setting. As one court has stated: because *Hazelwood* opens the door to significant curtailment of cherished first amendment rights, this court declines to read the decision with the breadth its dictum invites. Because educators may limit student expression in the name of pedagogy, courts must avoid enlarging the venues within which that rationale may legitimately obtain without a clear and precise directive. *Romano v. Harrington,* 725 F. Supp. 687, 689 (E.D.N.Y. 1989).

C. Extension of the *Hazelwood* standard to the college and university setting poses a threat not only to students but also to the academic freedom of college and university educators.

The danger resulting from the extension of *Hazelwood* to American colleges and universities extends beyond the First Amendment rights of student journalists. Any school-sponsored student expression could be limited under the arguments the defendant makes here. University administrators, for example, would have the right to demand prior review of all speakers and films student groups bring to campus and reject those they found inappropriate. A college official could prohibit student government officers from debating certain topics.

Moreover, *Hazelwood* has been interpreted by courts across the country, including this one, to apply to both student and *teacher* speech, providing high school administrators with

sweeping[7] and as at least one court [8] has determined unlimited authority in dictating both curriculum and the presentation of material in classrooms.

While most courts have seemed willing to give substantial deference to administrators when making curriculum decisions for high school students, whom they frequently refer to as young, impressionable or immature, such justifications have no validity in the university setting. Indeed, at least one other court, recognizing the implications of allowing a *Hazelwood*-based standard to breach the secondary school/college wall, refused to decide definitively whether [*Hazelwood*] does in fact govern a public college or university s control over the classroom speech of a professor or other instructor. *Vanderhurst v. Colorado Mountain College District*, 208 F.3d 908 (10th Cir. 2000). The adoption of a *Hazlewood*-based standard could effectively annihilate the concept of academic freedom and provide government administrators unprecedented authority in determining how and what college professors teach students in their classrooms something that should give this court great pause.

D. To the Extent that the Public Forum Analysis Applies to College Media, They are Clearly Public Fora for Student Expression.

1. Because *Hazelwood* should not apply, there is no need for this Court to engage in public forum analysis.

Because *Hazelwood* is not applicable to the college student press, an extended application of the public forum doctrine is unnecessary and improper. Forum analysis presumes that the

---

[7] See *Webster v. New Lenox School Dist. No. 122,* 917 F.2d 1004 (7th Cir. 1990)(rejecting a high school teacher s claim that he should be permitted to teach a non-evolutionary theory of creation in his high school social studies class); *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993); *Kirkland v. Northside Indep. School Dist.*, 890 F.2d 794 (5th Cir. 1989); *Miles v. Denver Public Schools,* 944 F.2d 773 (10th Cir. 1991); *Virgil v. School Board of Columbia County,* 862 F.2d 1517 (11th Cir. 1989); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Ed.*, 42 F.3d 719 (2nd Cir. 1994), cert. denied, 515 U.S. 1160 (1995).

[8] *Boring v. Buncombe County Board of Education,* 136 F.3d 364 (4th Cir. 1998) (*en banc*)(rejecting nationally recognized high school drama teacher s First Amendment claim that her transfer to junior high school was in retaliation for her selection of controversial play. In dicta, court found that administrative regulation of curriculum is by definition a legitimate pedagogical concern and teacher had *no* First Amendment right to insist on the makeup of her curriculum.)

government may, simply because of its geographic proximity or financial relationship to the expressive venue, have a special right to control otherwise lawful and constitutionally protected speech. Such a presumption is both misguided and dangerous in the context of college student media. In fact, few courts have even taken the time to address the forum status of public college and university student publications. While the language of some court decisions suggests something akin to forum analysis, it appears most courts simply assumed that it went without saying that when college students were named as editors of a student publication, they were being given the freedom and authority to determine its content (as well as agreeing to accept responsibility for any abuse of that freedom). *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973) (It may well be that a college need not establish a campus newspaper [b]ut if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial content.)

As one court noted, [t]he university setting of college-aged students being exposed to a wide range of intellectual experience creates a relatively mature marketplace for the interchange of ideas, so the underlying assumption that there is positive social value in an open forum seems particularly appropriate. *Antonelli v. Hammond,* 308 F. Supp. 1329, 1336 (D. Mass. 1970).

Certainly no court has ever found a student-edited, college newspaper such as the *Innovator* to be a non-public or closed forum.

Ultimately, public forum analysis simply does not fit in the context of student-edited publications at public colleges and universities. Many public college or university student newspapers are completely or largely financially independent of their school;[9] almost all exist

[9] See, Kopenhaver, Campus Media Operations, *College Media Review* (Winter 2002), at 6 (2001 survey finding that nearly three-fourths (70.7 percent) of the newspapers at four-year public colleges received more than 50 percent of their revenue from advertising. Almost one-fifth of all college student newspapers generate 90 percent or more of their own funds through their own advertising efforts).

apart from the school s curriculum and are editorially independent. In fact, a 1997 study found that only one of the 101 daily college student newspapers surveyed could be classified as strongly curriculum based, and even that newspaper proclaimed itself to be entirely student-run and produced.[10]

Students that produce a non-curriculum-based publication that receives most of its operating revenue from their efforts to sell advertising and a tiny fraction of their support from the university itself (as is common with most college student media[11]) should not be subject to a complicated and ill-fitting public forum analysis that would allow an administrator unhappy with news coverage the opportunity to establish restrictive policies regulating the content of the entire publication and simply declare the publication a non-public forum. Such tenuous First Amendment protection is tantamount to no protection at all.

The unique nature of American college student media demands that this court not engage in a knee-jerk application of public forum analysis, but rather requires a careful measure of the special nature and context of the speech at issue. See, e.g, *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 672-73 (1998) (stating that the public forum analysis should not be extended in a mechanical way to the very different context of public television broadcasting); *Cornelius v. NAACP Legal Defense Fund and Educational Fund, Inc.*, 473 U.S. 788, 802 (1985) (stating that Court will not ignore the special nature and function of the federal workplace in evaluating the limits that may be imposed on an organization s right to participate in fundraising forum).

[10] Bodle, The Instructional Independence of Daily Student Newspapers, *Journalism and Mass Communication Educator* (Winter 1997), at 16.
[11] See Kopenhaver, supra note 9.

In a recent decision, the Sixth Circuit recognized this very problem. While it determined that forum analysis was appropriate in its finding that state college officials had unconstitutionally censored copies of a student yearbook, it acknowledged the students argument that forum analysis may not always be appropriate, particularly in cases involving student newspapers, which even more than some yearbooks function as a quintessential marketplace of student news and ideas. *Kincaid v. Gibson*, 236 F.3d 342, 348 n. 6 (6th Cir. 2001)(en banc) (Our decision to apply the forum doctrine to the student yearbook at issue in this case has no bearing on the question of whether and the extent to which a public university may alter the content of a student newspaper . Likewise we note that a college yearbook with features akin to a university student newspaper might be analyzed under a framework other than the forum framework.) (Citing *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973); *Antonelli v. Hammond*, 308 F.Supp. 1329 (D.Mass. 1970). [12]

2. Assuming arguendo, that forum analysis is appropriate, college media in general, and the *Innovator* specifically, are public fora.

Even if this Court were to determine that public forum analysis were necessary, the *Innovator* is a public forum. Under the controlling standards set forth by the United States Supreme Court, including its analysis in *Hazelwood*, a college student publication such as *Innovator* would unquestionably qualify as a designated public forum. Indeed, this case presents

[12] Defendants have attempted to use the *Kincaid* court s reluctance to apply a forum analysis to college newspapers to support its view that the law in this area is unsettled and that it is unclear whether the censorship undertaken by defendant Carter was illegal. Nothing could be further from the truth. As the cases cited by the court in its opinion some of which date back more than 30 years make clear, the law protecting college student media is firmly established. The only question answered by the *Kincaid* court (at the request of students and amici) was whether it should disturb the well-settled First Amendment protections enjoyed by college newspapers by introducing a public forum analysis to the jurisprudence, something that the court ultimately declined to do.

the Court with a prime example of the precise kind of unconstitutional censorship in a public forum that the First Amendment was meant to protect.

A long line of cases establishes the public forum doctrine and the applicable standards for reviewing government censorship of speech, depending upon what type of government forum is involved.

If a state does not open the forum to public communication, it is deemed a non-public forum and the state may maintain it "for its intended purposes, communication or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educational Assn. v. Perry Local Educational Assn.*, 460 U.S. 37, (1983).

If, however, by tradition or by designation, a forum is open to public communication, any content-based prohibitions imposed "must be narrowly drawn to effectuate a compelling state interest." *Id*. Such a so-called limited or "designated" public forum may be created by the government for use by the general public or may be limited to certain speakers (such as student editors of a student publication) or to the discussion of certain subjects. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985). Regardless of the purpose, speech in a designated public forum is afforded the same extensive protection given to speakers in a traditional public forum. *United States v. Kokinda*, 497 U.S. 720 (1990). Any regulation of speech must be narrowly tailored to serve a significant government interest and must leave open ample alternative channels of communication . Even a legitimate government interest cannot justify a restriction if the restriction accomplishes that goal at an inordinate cost to speech. *Hays County Guardian v. Supple,* 969 F.2d 111, 118 (5th Cir. 1992) (internal citations omitted).

Governors State University, by express policy and by practice, placed exclusive editorial control of the newspaper with the student editors. *Hosty v. Governors State University*, No. 01 C 500, slip op. at 2, 12 (N.D. Ill. Nov. 13, 2001). Although the newspaper s adviser may have read students stories to offer advice, he did not dictate content decisions to the student editors.

Therefore, should this court deem forum analysis appropriate, it should find, based upon GSU's demonstrated intent, that the *Innovator* is a designated public forum for student expression and that Dean Carter unconstitutionally restricted the students' First Amendment rights by requiring prior review and engaging in prior restraint.

The Sixth Circuit s recent application of forum analysis to a public college s student yearbook in *Kincaid v. Gibson,* 236 F.3d 342 (6th Cir. 2001)(en banc), mentioned above, may provide guidance. In determining that the yearbook was a limited public forum, the court looked at four factors. The first was the written policy of the University, which gave the student editors control of the yearbook. The students had a faculty adviser, but the changes that the adviser was allowed to make were limited by the policy. *Id. at 350.* Second, the court considered the university s actual practice, and found that the body in control of student media, the Student Publication Board, followed the stated policy. *Id. at 351.* The third factor was an examination of the nature of the forum at issue and its compatibility with expressive activity. Such examination showed that a student publication by its very nature, exists for the purpose of expressive activity. *Id.* Also relevant was the fact that the yearbook was not a classroom activity; it was not a production that was graded or even edited by an instructor or administrator. *Id. at 352.* Finally, the court considered the context of the case, including the fact that the audience of the book was young adults. *Id. at 353.*

Each of these factors allowed the court to distinguish the case from *Hazelwood,* where the paper was under the control of the school, both in policy and practice, and grades were handed out. In *Hazelwood*, the Court determined that the newspaper was not a public forum because school officials did not obviate any intent to create a public forum by allowing such extensive control by student editors. *Hazelwood* at 270. Instead, the school maintained extensive control over the publication, including its classroom structure and guidelines, and the teacher's control of the editors, publication and review. *Id*. at 268-70.

Factors similar to *Kincaid* exist in this case. First, The *Innovator* is an independent publication organized and published by students on their own time. The publication is not part of an academic program, but an extracurricular activity prized by those students who dedicate their personal time to capturing and writing about the issues facing the GSU community. *Hosty*, slip op. at 12. Second, while the students are provided with an adviser for general guidance, the publication is not a class taught by a faculty member. In fact, it is not part of the classroom at all. *Id.* Third, the editor is a GSU student who enjoys full control within the broad guidelines established by GSU. *Id.*

The reporting in The *Innovator* was expression by the student editors deserving of the full First Amendment protection given to speech in a public forum. The *Innovator* was created and maintained for open student expression on issues chosen by the students. Thus, GSU's acts of censorship were an unconstitutional violation of the First Amendment rights of the students.

III. Carter s Actions Were Unconstitutional Prior Restraints.

Defendant Carter s admitted act of calling the printer to stop publication of the *Innovator* and her demand that a school official review the content of the *Innovator* before it went to press are unconstitutional prior restraints and must be rejected.

Prior restraints are repugnant to the basic values of an open society. The Supreme Court has made clear that any prior restraint on expression is presumptively unconstitutional. *Near v. Minnesota*, 238 U.S. 697, 713 (1931)(holding that "it has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's free press] guaranty to prevent previous restraints upon publication."); *Bantom Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *New York Times Co. v. United States*, 403 U.S. 713 (1971)(per curiam); *Press Association v. Stuart*, 427 U.S. 539, 559 (1976) (noting that prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.) It is for this reason that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971) (citations omitted).

Systems of state-mandated prepublication or prior review and approval of speech have been long equated and analyzed by this Court and others as prior restraints. *Fujishima v. Board of Education***,** 460 F.2d 1355 (7th Cir. 1972) (rule prohibiting any student from distributing on school premises any books, tracts or other publications unless first approved by the general superintendent of schools was unconstitutional as a prior restraint in violation of the First Amendment); *Horton v. City of St. Augustine, Fla.*, 272 F.3d 1318, 1332 (11th Cir. 2001)(classifying permitting or licensing scheme or other prior review as types of prior restraints on speech); *Burch v. Barker,* 861 F.2d 1149, 1155-1157 (9th Cir.1988) (policy requiring prior review of non-school-sponsored student expression at public high school is unconstitutional prior restraint); *Johnston- Loehner v. O'Brien,* 859 F.Supp. 575, 580 (M.D.Fla.1994) (holding unconstitutional as prior restraint school district policy requiring elementary school students to obtain prior review and approval before distributing literature).

Courts have consistently rejected prior approval of college student publications. *See, e.g.*, *Antonelli*, 308 F. Supp. at 1335-36, *Mazart*, 441 N.Y.S.2d at 605, *Milliner*, 436 So.2d at 1302-03, *Trujillo*, 322 F. Supp. at 1270-71, *Joyner*, 477 F.2d at 460, and related discussion, supra, page 13.

Dean Carter s insistence that she or some other Governor s State University official be given the authority to determine what material is or is not appropriate prior to its publication is a classic prior restraint that this court must not allow to stand unless it is to abandon the high barriers to prior restraint that the law has long recognized. See *Nebraska Press Ass n. v. Stuart*, 427 U.S. 539, 561 (1976)(stating it is clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it.)

CONCLUSION

The *amici* urge this Honorable Court, for the reasons set forth above, to uphold the decision of the District Court, refrain from extending *Hazelwood* beyond its scope and find defendant Carter s actions unconstitutional.

Respectfully submitted,

Richard M. Goehler (0009160)
FROST BROWN TODD LLC
2200 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202-4182
(513) 651-6800

Counsel for *Amici Curiae*

OF COUNSEL:

S. Mark Goodman
Michael C. Hiestand
STUDENT PRESS LAW CENTER
1815 N. Fort Myer Drive, Suite 900
Arlington, VA 22209
(703) 807-1904

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief of *Amici Curiae* has been sent on this _____ day of August, 2002, by ordinary United States mail, postage prepaid to:

James E. Ryan
Attorney General of Illinois
Counsel for Defendant-Appellant Patricia Carter
100 West Randolph Street
12th Floor
Chicago, Illinois 60601

Joel D. Bertocchi
Solicitor General of Illinois
Counsel for Defendant-Appellant Patricia Carter
100 West Randolph Street
12th Floor
Chicago, Illinois 60601

Mary E. Welsh
Assistant Attorney General of Illinois
Counsel for Defendant-Appellant Patricia Carter
100 West Randolph Street
12th Floor
Chicago, Illinois 60601

Margaret Hosty
9746 South 53rd Avenue
Oak Lawn, IL 60453

Jeni Porche
257 Juniper Street
Park Forest, IL 60466

Stephen P. Barba
4700 West 97th Place
Oak Lawn, IL 60453

Brian Mack
Ancel, Glink, Diamond, Bush, DiCianni & Rolek, P.C.
140 South Dearborn
Sixth Floor
Chicago, IL 60603

_____

CINlibrary/1197781.2