

No.

In the
Supreme Court of the United States

MARGARET L. HOSTY, JENI S. PORCHE,
AND STEVEN P. BARBA,

Petitioners,

v.

PATRICIA CARTER,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an official of a public university violate the First and Fourteenth Amendments when she imposes a viewpoint-based system of prior restraint on the publication of a newspaper produced by adult students outside the university's educational curriculum?

2. Is an official of a public university entitled to qualified immunity from liability pursuant to 42 U.S.C. § 1983 when she imposes a viewpoint-based system of prior restraint on the publication of a newspaper produced by adult students outside the university's educational curriculum?

3. Does this Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), either authorize an official of a public university to impose a viewpoint-based system of prior restraint on a newspaper produced by adult students outside the university's educational curriculum, or limit the otherwise clearly established right of adult university students to be free from such a system of prior restraint in the publication of such a newspaper?

PARTIES TO THE PROCEEDING

All parties to this proceeding appear in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Margaret L. Hosty, Jeni S. Porche and Steven P. Barba respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit sitting *en banc* is reported at 412 F.3d 731 and is reprinted in the Appendix. The earlier decision of a panel of the Seventh Circuit is reported at 325 F.3d 945 and is reprinted in the Appendix. The opinions of the United States District Court for the Northern District of Illinois are reported at 174 F. Supp. 2d 782 and 2001 WL 1465621 and are reprinted in the Appendix.

JURISDICTION

The decision of a panel of the Court of Appeals was rendered on April 10, 2003. The Court of Appeals granted Respondent's petition for rehearing *en banc* on June 25, 2003. The judgment of the Court of Appeals, sitting *en banc*, was entered on June 20, 2005. This petition is timely filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 are reproduced in the Appendix at 60a-62a.

STATEMENT OF THE CASE

1. Statement of Facts

Petitioners Jeni S. Porche, Margaret L. Hosty and Steven P. Barba served, respectively, as editor-in-chief, managing editor, and staff reporter of the *Innovator*, a student-operated newspaper at Governors State University (the “University”) in University Park, Illinois. App. 26a; *see also* App. 2a-3a.¹ The University is a publicly funded institution of higher education chartered by the Illinois General Assembly. Its Board of Trustees is appointed by the Governor, with the exception of one student member, who is elected by the student body. App. 50a; *see also* App. 3a. The University offers undergraduate courses leading to completion of a baccalaureate degree and graduate level courses leading to a master’s degree. *See Governors State University, Facts & Figures*, www.govst.edu/aboutgsu/t_aboutgsu.asp?id=204 (last visited Sept. 9, 2005) (“*Governors State University, Facts & Figures*”).

The University admits only students who are, in effect, in their junior or senior years of undergraduate study. For admission to the University, a prospective student must

¹ References to the Appendix to this Petition are denoted as “App.” The decision below was rendered in the context of Respondent’s motion for summary judgment, in which she argued that she was entitled to qualified immunity from liability pursuant to 42 U.S.C. § 1983. Accordingly, “[b]ecause this case arises in the posture of a motion for summary judgment, [this Court is] required to view all facts and draw all reasonable inferences in favor of the nonmoving party.” *Brosseau v. Haugen*, 125 S. Ct. 596, 597 n.2 (2004). *See also, e.g., Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) (“the court looks to the evidence before it (in the light most favorable to the plaintiff) when conducting the [qualified immunity] inquiry”); *Harlow v. Fitzgerald*, 457 U.S. 800, 816 n.26 (1982) (“a court ordinarily must look at the record in the light most favorable to the party opposing [qualified immunity], drawing all inferences favorable to that party”).

possess at least an associate's degree from another institution of higher education or, alternatively, must have earned at least sixty semester hours of academic credit at another such institution. See *Governors State University, Undergraduate Admissions Requirements*, www.govst.edu/apply/undergrad.htm (last visited Sept. 9, 2005). In total, the University offers some forty-seven degree programs at the undergraduate and graduate level. See *Governors State University, Facts & Figures*. Student enrollment is approximately 6,000. See *id.* The average age of students at the University, which describes itself as a "campus for working adults," is thirty-three. *Governors State University, About GSU*, www.govst.edu/aboutgsu/t_aboutgsu.asp?id=191 (last visited Sept. 9, 2005); *Governors State University, Facts & Figures*. All three Petitioners were older than twenty-one at all times relevant to this proceeding, see Dep. of M. Hosty, Aug. 2, 2001, at 5:15-18; Dep. of J. Porche, Aug. 2, 2001, at 5:15-18; Dep. of S. Barba, Aug. 8, 2001, at 5:20-21.

Petitioners were appointed to their respective editorial positions at the *Innovator* by the University's Student Communications Media Board (the "SCMB") in May 2000. App. 26a; see also App. 11a. The SCMB, the members of which were selected by the Student Senate, also approved the *Innovator's* budget. App. 11a. The costs incurred in publishing the *Innovator* are funded by an "activity fee" paid by all University students as well as advertising revenues generated by the newspaper. See App. 11a; see also App. 26a.² Pursuant to a contract with a private printing company,

² In the university context, student activity fees are typically mandatory student assessments and the money collected "goes to a special fund from which any group of students with [university recognition] can draw for purposes consistent with the University's educational mission; and to the extent the student is interested in speech, withdrawal is permitted to cover the whole spectrum of speech." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841 (1995); see also *id.* at 851 (O'Connor, J.,

the *Innovator* was to be published on a bi-monthly basis. App. 36a; *see also* App. 2a, 27a.

Pursuant to the University's established practices and policies, the student staff of the *Innovator* and other student-operated publications retained unfettered authority to "determine [the] content and format of their respective publications *without censorship or advance approval.*" App. 26a (citation omitted); *see also* App. 11a, 35a. Participation on the *Innovator*'s staff was a voluntary, extracurricular activity unconnected to any particular course of study or classroom activity. App. 8a; *see also* App. 24a, 47a. Although the newspaper had an adviser who also served on the University's faculty, he "did not make content decisions" but instead reviewed stories intended for publication at the request of the *Innovator*'s editors to advise them "on issues of journalistic standards and ethics." App. 27a, 35a. Thus, "the student editors and writers [were] given complete editorial control over the newspaper, including its subject matter and content." App. 35a. Indeed, as the University president acknowledged, "the newspaper would be reviewed, looked at by the faculty advisor but in no sense would the faculty advisor have a right to approve." Dep. of S. Fagan, Aug. 9, 2001, at 58:11-14; *see also id.* at 59:4-8 ("There may be some process of review where the faculty

concurring in judgment) ("Unlike moneys dispensed from state or federal treasuries, the Student Activities Fund is collected from students who themselves administer the fund and select qualifying recipients only from among those who originally paid the fee."); *see generally Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) (upholding constitutionality of student activity fee mechanism against First Amendment challenge where funds are disbursed to campus organizations on viewpoint-neutral basis and distinguishing circumstances in which "the challenged speech . . . [is] financed by tuition dollars and the University and its officials [are] responsible for its content" such that "the case might be evaluated on the premise that the government itself is the speaker").

advisor works with the students to make suggestions, but I don't think the advisor has a right to approve in the sense of preventing the newspaper from being printed.”). The *Innovator* itself proclaims on its masthead that it “is edited and published by the students” and that the “views expressed in” the newspaper “may not reflect the views . . . of Governors State University, and should not be regarded as such.” Dep. of J. Porche, Exh. 3, at 3.

Between July and November 2000, the *Innovator* published four issues, Dep. of J. Porche, Aug. 2, 2001, at 31:21-32:17, all of which included articles that addressed controversial issues of importance to the University community, *see* App. 20a. One such article singled out the dean of the University's College of Arts and Sciences for particular criticism in the wake of the University's decision not to renew the teaching contract of the *Innovator*'s adviser. App. 2a. A column published in the newspaper rebuked the University's financial aid office, *see* Dep. of J. Porche, Exh. 3, at 4, which is supervised by Respondent Patricia Carter, the University's Dean of Student Affairs and Services, *see* Dep. of P. Carter, Aug. 9, 2001, at 25:7. Another article reported student complaints lodged against the coordinator of the University's English Department, including a lack of varied course offerings, the hiring of unqualified instructors and racial bias in grading. *See* App. 2a.

In the wake of the publication of such articles, the University's president and the dean of the College issued public statements “accusing the *Innovator* of irresponsible and defamatory journalism.” App. 2a. The University's president complained that the newspaper had “excoriated some members of the university faculty and administration (myself included).” Dep. of S. Fagan, Exh. 2. The president further alleged that the newspaper's reporting, which he characterized as “one-sided,” “inaccurate,” and “insulting,”

had “sullied” the reputation “of the university and its faculty.” *Id.*

In late October and again in early November 2000, Dean Carter placed telephone calls to the company that printed the *Innovator* “on behalf of the [University] administration and ordered [it] not to print the *Innovator* without prior approval of the newspaper’s content by a [University] administrator.” App. 37a; *see also* App. 2a, 27a. Although the owner of the printing company expressly admonished Dean Carter that such an order was “probably unconstitutional,” she insisted that he “call her personally before printing the next issue of the newspaper and reminded him that [the University] paid” the *Innovator*’s printing bill. App. 37a.

Upon learning of Dean Carter’s demand, Petitioners refused to submit the *Innovator* to the University administration for its review and approval prior to publication. App. 2a. For its part, the printing company was unwilling to publish future issues that had not been approved as Dean Carter had required because it “was not willing to take the risk that it would not be paid.” App. 2a. As a result, publication of the *Innovator* ceased in November 2000. App. 2a-3a.

2. Proceedings Below

In January 2001, Petitioners filed this civil action in the United States District Court for the Northern District of Illinois seeking declaratory and injunctive relief and damages pursuant to 42 U.S.C. § 1983. *See* App. 49a. Petitioners alleged that the University, its trustees, Dean Carter and other administrators had violated their First and Fourteenth Amendment rights by, *inter alia*, imposing an unconstitutional system of prior restraint on the newspaper’s publication. App. 49a. In April 2001, the district court granted the University’s motion to dismiss the complaint on

the ground that, as a state agency, it was immune from suit by operation of the Eleventh Amendment. App. 52a.

The remaining defendants ultimately moved for summary judgment on various grounds. In November 2001, the district court granted summary judgment to each of the remaining defendants, with the exception of Dean Carter. App. 48a. With respect to her, the district court held that there was “a disputed issue of material fact as to whether Dean Carter’s asserted conduct violated plaintiffs’ clearly established First Amendment rights” so as to preclude summary judgment. App. 47a. Relying on, *inter alia*, the Fourth Circuit’s decision in *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973), the district court concluded that Dean Carter “was not constitutionally permitted to take adverse action against the newspaper because of its content.” App. 47a.

In so holding, the district court rejected Dean Carter’s contention that this Court’s decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), permitted University officials to insist upon prior approval of the *Innovator’s* content as a condition precedent to its dissemination on campus. App. 47a. The district court also rejected Dean Carter’s related argument that this Court’s decision in *Hazelwood* could reasonably be construed as “cast[ing] doubt” on the scope of First Amendment protection afforded to student journalists in the university context such that, even if Dean Carter had imposed a system of prior restraint in violation of the First Amendment, she was nonetheless entitled to qualified immunity because the unconstitutionality of her conduct was not “clearly established” at the time. App. 47a. According to the district court, *Hazelwood* was inapplicable because it involved “a high school newspaper that was part of a journalism class. . . . Here, however, all editorial decisions were made by

student editors and the Innovator was not part of a class, but an autonomous student organization.” App. 47a.

Dean Carter thereafter pursued an interlocutory appeal. App. 26a. Framing the question before it as “whether the principles of *Hazelwood* apply to public college and university students” so as to excuse Dean Carter’s conduct, a three-judge panel of the Seventh Circuit affirmed the district court’s decision. App. 26a.³ “While *Hazelwood* teaches that younger students in a high school setting must endure First Amendment restrictions,” the panel concluded, “we see nothing in that case that should be interpreted to change the general view favoring broad First Amendment rights for students at the university level.” App. 32a. The panel observed that:

[f]or several decades, courts have consistently held that student media at public colleges and universities are entitled to strong First Amendment protections. . . . Attempts by school officials, like Dean Carter here, to censor or control constitutionally protected expression in student-edited media have consistently been viewed as suspect under the First Amendment.

App. 28a (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (*en banc*)).

Dean Carter petitioned the Court of Appeals for rehearing *en banc*. See App. 59a. The full Court of Appeals granted the petition, vacated the panel’s decision and, in an opinion by Judge Easterbrook on behalf of seven of that court’s eleven judges, held that “*Hazelwood*’s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools.” App. 7a. In so holding,

³ Petitioners appeared *pro se* in the Court of Appeals.

Disputes about both law and fact make it inappropriate to say that any reasonable person in Dean Carter's position in November 2000 had to know that the demand for review before the University would pay the *Innovator's* printing bill violated the first amendment.

App. 14a-15a.

Four judges dissented and joined in a single opinion by Judge Evans. App. 15a. In their view, the majority had improperly extended the holding of *Hazelwood* to a university setting and, in so doing, had "applie[d] limitations on speech that the Supreme Court created for use in the *narrow* circumstances of elementary and secondary education." App. 15a. The dissenting judges rejected the majority's conclusion that anything in this Court's decision in *Hazelwood* either altered the pre-existing constitutional law that governed Dean Carter's conduct or rendered that law sufficiently "cloudy" to entitle her to qualified immunity:

The *Innovator*, as opposed to writing merely about football games, actually chose to publish hard-hitting stories. And these articles were critical of the school administration. In response, rather than applauding the young journalists, the University decided to prohibit publication unless a school official reviewed the paper's content before it was printed. Few restrictions on speech seem to run more afoul of basic First Amendment values.

App. 20a.

REASONS FOR GRANTING THE WRIT

More than thirty years ago, this Court held that officials at a public university must operate within the confines of the First and Fourteenth Amendments and are precluded, as are all public officials who act “as the instrumentality of the State,” from infringing the fundamental rights of college and university students to freedom of speech and of the press. *Healy v. James*, 408 U.S. 169, 187-88 (1972). Since then, both this Court and the courts of appeals have consistently reaffirmed this well-settled law. *See, e.g., Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) (university’s expulsion of student for disseminating student newspaper it deemed indecent violated First and Fourteenth Amendments); *Joyner v. Whiting*, 477 F.2d 456, 462 (4th Cir. 1973) (university may not withdraw support for student newspaper because it disagrees with views expressed therein); *Bazaar v. Fortune*, 476 F.2d 570, 572, 580 (5th Cir. 1973) (university may not prevent publication and distribution of student publication on grounds that it contained language that was “inappropriate” or “in bad taste”).

In this case, however, the Seventh Circuit embraced the contention of a university official that this Court’s decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), altered this well-established constitutional calculus and excused her decision to impose a system of prior restraint on the publication of a student-operated newspaper produced by and for adult students outside the University’s educational curriculum. That decision conflicts with *Healy* and its progeny in this Court as well as with the holdings of several courts of appeals that the First and Fourteenth Amendments preclude university officials from censoring student newspapers in this manner. Moreover, the Seventh Circuit’s

decision has exacerbated the recent palpable confusion in the lower courts concerning the reach of this Court's holding in *Hazelwood* in a manner that threatens to restrict substantially the freedom of expression on college and university campuses throughout the nation.

**I. THE DECISION BELOW CONFLICTS WITH
*HEALY v. JAMES AND ITS PROGENY***

In *Healy v. James*, 408 U.S. at 187-88, this Court held that a public university, "acting . . . as the instrumentality of the State," is obliged to respect the First and Fourteenth Amendment rights of the students who attend such institutions. Rejecting the contention of a college president that he could deny recognition to a campus chapter of a controversial political group, the Court held that the president's decision, which rested on his assessment of the views that the group espoused, "was a form of prior restraint" forbidden by the First Amendment. *Id.* at 184. In so holding, the Court emphasized that it was applying "well-established First Amendment principles." *Id.* at 170. All nine justices joined in the Court's judgment and eight of them joined in Justice Powell's opinion, which explained that:

[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The college classroom with its surrounding environs is peculiarly the "marketplace of ideas," and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.

Id. at 180-81 (citations omitted).

The following term, in *Papish v. Board of Curators*, 410 U.S. at 667, the Court extended the First Amendment rights articulated in *Healy* to student-operated newspapers published on college campuses. In *Papish*, a university student challenged her expulsion from school for distributing a newspaper that administrators deemed “indecent.” *Id.* at 668. Holding that the expulsion violated the First and Fourteenth Amendments, this Court explained in a *per curiam* opinion that “the mere dissemination of ideas – no matter how offensive to good taste – on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” *Id.* at 670 (citation omitted). The Court reiterated its admonition to university officials in *Healy* that “the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech.” *Id.* at 671.

In the more than three decades following *Healy* and *Papish*, this Court has never deviated from this view of the First Amendment’s proper application in the college and university setting. Thus, in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court held that the First Amendment precludes university administrators from denying funding to student-operated publications, produced as extracurricular activities, based on the views expressed in those publications. In *Rosenberger*, a group of students at the University of Virginia published a newspaper, *Wide Awake*, which espoused Christian views. *Id.* at 825-26. The University had established a student activities fund into which all students paid a mandatory fee. *See id.* at 824-25. Pursuant to certain guidelines, the student council was then authorized to disburse monies from the fund to student organizations, including organizations disseminating student publications. *See id.* When the

students who published *Wide Awake* sought permission to tap the student activities fund to reimburse a printer for the cost of producing their newspaper, the student council and, subsequently, the university's dean of students, denied their request because the newspaper promoted a particular religious viewpoint in violation of university guidelines. *Id.* at 827. This Court concluded that, “[h]aving offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints.” *Id.* at 835. As the Court explained:

Vital First Amendment speech principles are at stake here. 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. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.

Id. at 835 (citing, *inter alia*, *Healy*, 408 U.S. at 180-81).

The Seventh Circuit's decision in this case cannot be reconciled with *Healy* and its progeny.⁴ The court's opinion

⁴ In this regard, it cannot reasonably be disputed that Dean Carter's conduct – *i.e.*, her imposition, in the wake of the newspaper's published criticism of the University's administration, of a requirement that she review and approve each issue of the *Innovator* prior to its publication – constitutes “the most serious and the least tolerable infringement on First Amendment rights” known to our law. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). See also *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (“[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where

fails to address or even cite either *Healy* or *Papish* and references *Rosenberger* only in passing. App. 6a, 11a. Instead, the Court of Appeals relies entirely on this Court's decision in *Hazelwood* and expressly "hold[s]" that "*Hazelwood's* framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools." App. 7a. As a result, the Seventh Circuit accepted Dean Carter's contention that *Hazelwood* excused her decision to impose a system of prior restraint on the publication of a student-operated newspaper at a public university because it had previously published articles critical of the university's administration and the decisions it had made.

Indeed, the Seventh Circuit's reliance on *Hazelwood* came at the invitation of Dean Carter, who invoked that decision both to justify her conduct as constitutionally permissible and to support her contention that, even if she had violated the Petitioners' First Amendment rights, those rights were not "clearly established" at the time she acted. See App. 47a. Nothing this Court held or wrote in *Hazelwood*, however, detracts from its holdings in *Healy* and *Papish* or even arguably operates to excuse the otherwise unconstitutional conduct in which Dean Carter engaged in this case for three fundamental reasons.

First, the Court in *Hazelwood* addressed only the constitutional limitations imposed by the First and Fourteenth Amendments in public high schools, not in the college or university setting before the Court in *Healy*, *Papish* and *Rosenberger*. Thus, while the Court emphasized in *Healy*

officials have unbridled discretion over a forum's use"); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938) (ordinance requiring license to distribute written materials of any kind within city limits "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship").

that First Amendment protections apply with no “less force on college campuses than in the community at large,” 408 U.S. at 180, in *Hazelwood*, the Court retrenched from that view not at all, but rather reached the distinct conclusion that educators *in the secondary school context* “must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics.” 484 U.S. at 272. As a result, the Court held in *Hazelwood* only that *high school educators* “do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 273.⁵

The distinction that this Court has drawn between the First Amendment rights enjoyed by high school students, on the one hand, and university students, on the other, flows from the fact that the vast majority of high school students are minors, while virtually all college and university students are adults.⁶ In no small part because, “during the formative

⁵ That said, while the First Amendment may permit high school administrators to impose some restrictions on certain expressive activities, secondary school students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). In *Tinker*, for example, this Court held that “the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible,” even in a public high school. *Id.* at 511.

⁶ Only one percent of those enrolled in American colleges or universities are under the age of 18, while 55 percent are 22 years of age or older. App. 31a. See *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) (“[u]niversity students are, of course, young adults” and “are less impressionable than younger students”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 429-30 (1992) (Stevens, J., concurring in judgment) (“the

years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,” *Bellotti v. Baird*, 443 U.S. 622, 635 (1979), secondary school educators have very different roles and responsibilities than their college and university counterparts. Thus, while the university campus is intended to be a caldron of “speculation, experiment and creation,” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (citation omitted), “[t]he role and purpose of the American public school system” is, in contrast, to “inculcate the habits and manners of civility as values in themselves . . . and as indispensable to the practice of self-government in the community and the nation,” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (citation omitted).

Second, the Court’s decisions in *Healy* and its progeny all involved expressive activity that, though subsidized or authorized in some manner by a public university, was not undertaken as part of the educational curriculum. *See Healy*, 408 U.S. at 176 (use of campus meeting rooms and bulletin boards by extracurricular student group that espoused controversial views); *Papish*, 410 U.S. at 667 (distribution of student newspaper on campus with university permission); *Rosenberger*, 515 U.S. at 826-27 (student activity fee subsidy

distinctive character of a university environment, or a secondary school environment, influences our First Amendment analysis”) (citations omitted); *Thompson v. Oklahoma*, 487 U.S. 815, 853 (1988) (O’Connor, J., concurring in judgment) (“[l]egislatures recognize the relative immaturity of adolescents, and we have often permitted them to define age-based classes that take account of this qualitative difference between juveniles and adults”); *Bd. of Regents of the Univ. of Wis. Sys.*, 529 U.S. at 238 n.4 (Souter, J., concurring in judgment) (this Court’s “cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, whose students and their schools’ relation to them are different and at least arguably distinguishable from their counterparts in college education”) (citations omitted).

for student-produced publication espousing religious views).⁷ In *Hazelwood*, in contrast, the newspaper at issue was written and edited by students in the context of a high school journalism class. 484 U.S. at 262-63. The journalism class “was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course” and the teacher ““was the final authority with respect to almost every aspect of the production and publication of [the newspaper], including its content.”” *Id.* at 268 (citation omitted).

⁷ As this case illustrates, those college and university newspapers published separate and apart from the educational curriculum as an *extra-curricular* activity are, even when funded by student activity fees, operated as limited public fora in which the educational institutions themselves, both formally and through historical practice, have relinquished any right to act as a traditional “publisher” and control the newspaper’s editorial content. See, e.g., Mark J. Fiore, *Trampling The “Marketplace of Ideas”: The Case Against Extending Hazelwood To College Campuses*, 150 U. Pa. L. Rev. 1915, 1962 (2002) (“most college publications are under the primary control of students, with little or no oversight from college officials”). This is hardly surprising since, except in those instances in which a newspaper is produced as part of a journalism curriculum, its very purpose is to afford students the opportunity to act as *journalists* and the university community the ability to receive news and information about the university uncensored by the institution itself. Accordingly, the Seventh Circuit’s conclusion that an official in Dean Carter’s position could reasonably be surprised to learn that a student newspaper such as the *Innovator* constituted a limited public forum immune from University interference with its editorial content is refuted both by the *Innovator*’s undisputed status as a student activity operated apart from the educational curriculum and the undisputed record in this case. See, e.g., Dep. of S. Fagan, at 59:4-8 (University President acknowledges that no administrator, including the newspaper’s adviser, “has a right to approve [the *Innovator*’s content] in the sense of preventing the newspaper from being printed”).

Emphasizing these facts, this Court in *Hazelwood* concluded that the high school newspaper at issue in that case was a curricular activity, “a supervised learning experience for journalism students.” *Id.* at 270. For that reason as well, the Court concluded that high school administrators “were entitled to regulate the contents of [the newspaper] in any reasonable manner.” *Id.* Indeed, in *Hazelwood*, the Court explicitly stated that the only question it confronted in that case was “the extent to which educators may exercise editorial control over the contents of a *high school newspaper produced as a part of the school’s journalism curriculum*” and it expressly disclaimed any intention of deciding “whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.” *Id.* at 262, 273 n.7 (emphasis added).

Third, although the Seventh Circuit purports to rest its decision on the power invested in school officials to regulate student expression by this Court’s decision in *Hazelwood*, as Dean Carter had urged, *see* App. 3a (asserting that *Hazelwood* “holds that faculty may supervise and determine the content of a student newspaper”), in the end, it did no such thing. Rather, following its express holding that “*Hazelwood*’s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools,” App. 7a, the Court of Appeals proceeded to conclude, as it was obliged to do given the procedural posture of the case and the record evidence, *see* note 1 *supra*, that – as an extracurricular activity operated separate and apart from the University’s educational curriculum – the *Innovator* constituted a “public forum” and Dean Carter was therefore constitutionally prohibited from subjecting it to a system of prior restraint, *see* App. 10a (conceding that reasonable trier of fact could conclude that “the *Innovator* operated in a public forum and thus was beyond the control

of the University's administration"). In the wake of this necessary concession, there is simply no principled basis on which to distinguish this case from *Healy*, *Papish* or *Rosenberger* or to conclude that this Court's decision in *Hazelwood* somehow excused Dean Carter's actions in violation of the law on this subject "clearly established" in *Healy* and its progeny.

In the last analysis, therefore, the Seventh Circuit's decision in this case cannot be reconciled with *Healy* or with the litany of subsequent cases in which this Court has held that the First and Fourteenth Amendments protect students at public colleges and universities from official interference with the exercise of their rights of free expression when undertaken separate and apart from the educational curriculum itself.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL APPELLATE COURTS

For the same reasons discussed *supra*, the Seventh Circuit's decision conflicts with the holdings of the several courts of appeals that have faithfully applied this Court's decisions in *Healy* and its progeny for the last three decades. As Judge Evans noted in his dissenting opinion below, "[p]rior to *Hazelwood*, courts were consistently clear that university administrators could not require prior review of student media or otherwise censor student newspapers. *Hazelwood* did not change this well-established rule." App. 21a (citations omitted).

Thus, for example, in *Joyner v. Whiting*, 477 F.2d at 460, the Fourth Circuit held unconstitutional the decision of a university president to withdraw financial support from the school's official student newspaper in the wake of its publication of a controversial editorial. The Fourth Circuit explained that:

It may well be that a college need not establish a campus newspaper, or, if a paper has been established, the college may permanently discontinue publication for reasons wholly unrelated to the First Amendment. But if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment.

Id. See also *id.* (“Censorship of constitutionally protected expression cannot be imposed [at a college or university] by suspending the editors [of student newspapers], suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorial oversight based on the institution’s power of the purse.”).

Similarly, in *Bazaar v. Fortune*, 476 F.2d 570, 574 (5th Cir. 1973),⁸ the Fifth Circuit held that officials at the University of Mississippi violated its students’ First Amendment rights when they prohibited the publication of a student literary magazine. In so ruling, the court reiterated the “well-established rule that once a University recognizes a student activity which has elements of free expression, it can act to censor that expression only if it acts consistent with First Amendment constitutional guarantees.” *Id.* at 574. See also, e.g., *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (*en banc*) (holding that university officials violated First Amendment by confiscating student yearbooks); *Student Gov’t Ass’n v. Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (*Hazelwood* “is not applicable to college newspapers”); *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983) (“A public university may not constitutionally

⁸ The opinion was affirmed *en banc* with minor modification. *Bazaar v. Fortune*, 489 F.2d 225 (5th Cir. 1973).

take adverse action against a student newspaper, such as withdrawing or reducing the paper's funding, because it disapproves of the content of the paper"); *Schiff v. Williams*, 519 F.2d 257, 260-61 (5th Cir. 1975) (university's firing of student editors because of university's objections to the newspaper's "poor grammar, spelling and language expression" violated First Amendment).⁹

The panel below was, therefore, certainly correct when it noted that, "[f]or several decades, courts have consistently held that student media at public colleges and universities are entitled to strong First Amendment protections" and that "school administrators can only censor student media if they 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." App. 28a. The Seventh Circuit's decision in this case, in contrast, stands in direct conflict with this body of precedent.

⁹ *Cf. Sinn v. The Daily Nebraskan*, 829 F.2d 662, 663 (8th Cir. 1987) ("where student publications of state-supported universities are concerned, editorial freedom of expression has consistently triumphed over attempts at censorship"). The lower federal courts are in accord. *See, e.g., Am. Civil Liberties Union of Va., Inc. v. Radford College*, 315 F. Supp. 893, 896-97 (W.D. Va. 1970) ("[A] state university [may not] support a campus newspaper and then try to restrict arbitrarily what it may publish, even if only to require that material be submitted to a faculty board to determine whether it complies with 'responsible freedom of press.'"); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970) ("[I]n cases concerning school-supported publications . . . the courts have refused to recognize as permissible any regulations infringing free speech when not shown to be necessarily related to the maintenance of order and discipline within the educational process").

III. THE DECISION BELOW COMPOUNDS THE CONFUSION IN THE LOWER COURTS FOLLOWING *HAZELWOOD* v. *KUHLMEIR* AND BROADLY THREATENS FREE EXPRESSION AT PUBLIC COLLEGES AND UNIVERSITIES

Following *Hazelwood*, the courts of appeals have struggled mightily to assess its impact in a variety of contexts. These cases have spawned a host of conflicting analyses, multiple dissenting opinions in individual cases, and *en banc* rehearing in two circuits, including the Seventh Circuit's decision in this case. At this juncture, therefore, this Court's further guidance is both appropriate and necessary.

In *Kincaid v. Gibson*, 236 F.3d 342, 345 (6th Cir. 2001), for example, the Sixth Circuit, sitting *en banc*, assessed the constitutionality of Kentucky State University's decision to confiscate and withhold distribution of its student yearbook because university officials determined that it was "of poor quality and 'inappropriate.'" *Id.* A divided panel of that court affirmed the district court's determination that, under *Hazelwood*, the propriety of the university officials' conduct turned on whether such conduct was "reasonable." *Id.* at 346 (citing *Hazelwood*). The full court, however, granted *en banc* review "to determine whether the panel and the district court erred in applying *Hazelwood* – a case that deals exclusively with the First Amendment rights of students in a high school setting – to the university setting." *Id.* Ultimately, the Sixth Circuit concluded that the university's conduct in confiscating the yearbook was unconstitutional because it was neither a reasonable time, place or manner regulation nor a "narrowly crafted regulation designed to preserve a compelling state interest." *Id.* at 354. In so holding, the Sixth Circuit explained:

The parties essentially agree that *Hazelwood* applies only marginally to this case. [The students] argue that *Hazelwood* is factually inapposite to the case at hand; the KSU officials argue that the district court relied upon *Hazelwood* only for guidance in applying forum analysis to student publications. Because we find that a forum analysis requires that the yearbook be analyzed as a limited public forum – rather than a nonpublic forum – we agree with the parties that *Hazelwood* has little application to this case.

Id. at 346 n.5. Thus, the *en banc* court rejected the panel’s decision that, under *Hazelwood*, the propriety of withholding the yearbook turned on whether such conduct was “reasonable.” *See id.* at 347 (analyzing whether university’s conduct was constitutional as either a time, place or manner regulation or a regulation narrowly crafted to serve a compelling state interest).

Similarly, in *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002), a panel of the Ninth Circuit divided sharply over the application of this Court’s decision in *Hazelwood* to a student’s claim that the University of California at Santa Barbara (“UCSB”) violated his First Amendment rights by refusing to approve his graduate thesis and file it in the school library. The district court granted summary judgment in favor of the defendants. *Id.* at 946. Announcing the panel’s decision affirming that judgment, Judge Graber observed that “courts addressing the extent to which a public college or university, consistent with the First Amendment, can regulate student speech in the context of *extracurricular* activities, such as yearbooks and newspapers, have held that *Hazelwood* deference does not apply.” *Id.* at 949 (citing *Kincaid*, 236 F.3d at 346 & nn. 4 & 5; *Student Gov’t Ass’n*, 868 F.2d at 480 n.6). By the same token, Judge Graber

concluded that, where “core *curricular* speech” is at issue, *id.* at 950, “*Hazelwood* articulates the standard for reviewing a university’s assessment of a student’s academic work,” *id.* at 949.¹⁰ According university officials the deference contemplated by *Hazelwood*, Judge Graber determined that UCSB did not violate the student’s First Amendment rights when it decided not to approve the thesis. *Id.*

Concurring in the affirmance, Judge Ferguson concluded that the case did not implicate the First Amendment at all because, in his view, the university sought to punish the plaintiff for his lack of academic integrity, not for the content of his speech. *Id.* at 956. Accordingly, Judge Ferguson concluded that, “[j]ust as the university could punish the plaintiff for plagiarism or cheating, so could it refuse to approve his dishonest” conduct in connection with the preparation of his thesis. *Id.*

Judge Reinhardt dissented in part, emphasizing that “there is no agreement between my colleagues in the

¹⁰ *Accord Bishop v. Aranov*, 926 F.2d 1066, 1074 (11th Cir. 1991) (holding that, under *Hazelwood*, a university may attempt to control a professor’s speech during classroom instruction because “educators do not offend the First Amendment by exercising editorial control over the style and content of student [or professor] speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns”); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1287 n.6, 1289 (10th Cir. 2004) (although “some circuits have cast doubt on the application of *Hazelwood* in the context of university *extracurricular* activities,” *Hazelwood* is nevertheless “applicable in a university setting for speech that occurs in a classroom as part of a class curriculum”). Unlike this case, *Bishop* and *Axson-Flynn* both involved actions by university officials to control the content of speech in connection with the educational curriculum. Indeed, the Tenth Circuit expressly limited its holding in *Axson-Flynn* to “speech that occurs within a classroom.” 356 F.3d at 1289. The decision below, therefore, stands alone in applying *Hazelwood* to a college newspaper operated as an extracurricular activity separate and apart from the university’s educational curriculum.

majority as to the legal standard applicable to [plaintiff's] First Amendment claims. Thus, there is no majority opinion and no binding precedent with respect to any First Amendment principles.” *Id.* at 956-57. For his part, Judge Reinhardt would have reversed the district court’s grant of summary judgment and took pains to assert that:

I vehemently disagree with Judge Graber’s conclusion that *Hazelwood* provides the appropriate First Amendment standard for college and graduate student speech and begin this section by emphasizing that her opinion on this point is hers alone and is not joined by any other judge on this panel.

Id. at 960.

Especially in the wake of this uncertainty in the lower courts, the Seventh Circuit’s decision to extend *Hazelwood* to the public colleges and universities of this nation, a decision rendered in the context of a case in which the student expression at issue constituted an extracurricular activity engaged in by adult students separate and apart from the university’s educational curriculum, raises an important issue of federal law that, if left unaddressed by this Court, threatens to have profound implications for freedom of expression in higher education. As this Court explained in *Keyishian v. Board of Regents of the University of New York*, 385 U.S. 589, 603 (1967):

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

See also Healy, 408 U.S. at 180-81 (“[t]he college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas,’ and we break no new constitutional ground in reaffirming this Nation’s dedication to safeguarding academic freedom”).

This Court’s traditional dedication to preserving academic freedom has extended to all members of the academic community, students and faculty alike, and the Court’s vigilance has been at its zenith in the context of public colleges and universities. As Justice Kennedy emphasized in his opinion for the Court in *Rosenberger*, 515 U.S. at 835-36:

[T]he chilling of individual thought and expression . . . is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. . . . [U]niversities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. The quality and creative power of student intellectual life to this day remains a vital measure of a school’s influence and attainment. 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, its college and university campuses.

Indeed, although a university’s unique role as the quintessential marketplace of ideas makes it an ideal setting for the free exchange of competing views, that role likewise renders it particularly susceptible to efforts to suppress them. In recent years, for example, many colleges and universities

have experimented with so-called campus “speech codes” which, although ostensibly designed to combat harassment on the basis of race, sex, disability and other classifications, have often swept within their ambit a substantial amount of protected speech. *See, e.g., Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182-84 (6th Cir. 1995) (university speech code that, among other things, prohibited the use of “symbols, [epithets] or slogans that infer negative connotations about an individual’s racial or ethnic affiliation” void as overbroad and vague); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370 (M.D. Pa. 2003) (campus speech code unconstitutionally overbroad where, *inter alia*, it directed students to “communicate their beliefs ‘in a manner that does not provoke, harass, intimidate, or harm another’”).¹¹ Similarly in recent years, several colleges and universities have undertaken to limit student protests and demonstrations to designated areas on public campuses, arguing that such “free speech zones” constitute nothing more than reasonable time, place and manner restrictions.¹²

¹¹ In 2003, the Foundation for Individual Rights in Education reported that, of the 176 colleges it surveyed, 76 restricted speech that otherwise would be protected off campus. *Political correctness squelching campus speech, group says*, Associated Press, Oct. 30, 2003.

¹² *See* Thomas J. Davis, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 Ind. L.J. 267, 267-68 (2004):

In September 2000, a student at New Mexico State University was arrested after disobeying a police officer’s request to stop leafleting outside the student union because it was not an “open forum area.” At the University of Mississippi in the same year, a student was arrested for protesting the student newspaper outside the school’s only designated speech area. In November 2001, police ejected a West Virginia University student from a Disney on-campus recruiting seminar because the student had previously handed out anti-Disney flyers outside of the designated

Absent review by this Court, the Seventh Circuit's decision in this case, which extends the deference from First Amendment scrutiny articulated in *Hazelwood* broadly to student expression at public colleges and universities, will surely accelerate the promulgation of such regulations across the nation. As Judge Reinhardt observed in his dissenting opinion in *Brown v. Li*, 308 F.3d at 962, the "suggestion that we import the *Hazelwood* standard into the college and university context is particularly unfortunate, because the standard is a deferential one that courts often use to justify highly questionable actions by high school educators that restrict controversial speech."¹³ Accordingly, this Court should grant the petition and provide meaningful guidance to the lower courts as they continue to grapple with the appropriate reach of *Hazelwood* across a broad spectrum of issues at the core of our historic commitment to free expression on college campuses.

zone. And in 2002, twelve Florida State University students were arrested for trespassing after refusing to move their protest from in front of the administration building to a less visible "demonstration zone."

¹³ See also, e.g., Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the "College Hazelwood" Case*, 68 Tenn. L. Rev. 481, 498-99 (2001) (citing examples of post-*Hazelwood* censorship of high school press including one school's refusal to publish an article concerning the arrest of the school superintendent for drunk driving because, the school contended, the student newspaper should not be used as a forum for criticism).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Petition for a Writ of Certiorari be granted.

September 16, 2005

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