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PROOF OF SERVICE

The undersigned Plaintiff, Margaret L. Hosty, affirms that two (2) copies of the foregoing Plaintiffs-Appellees' Response to Defendant-Appellant's Petition for Rehearing With Suggestions for Rehearing En Banc were served upon the below-named party by depositing them in the United States mail at 10300 S. Cicero Avenue, Oak Lawn, Illinois 60453, in an envelope bearing sufficient postage, on May 13, 2003, before 5:00 p.m.

Margaret L. Hosty,
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REASONS FOR DENYING A REHEARING EN BANC

According to F.R.A.P. (Rule 35)¹, there are only three instances wherein an en banc hearing may be warranted: (1) if the panel's decision creates intra-circuit confusion; (2) if the panel's decision creates inter-circuit confusion; or (3) if the panel's decision addresses a matter of exceptional importance, therefore requiring affirmation by the entire bench to determine the binding authority of the ruling. Defense alleges that the panel's ruling in this matter meets all conditions for rehearing en banc, although Plaintiffs contend that nothing could be further from the truth: to substantiate its argument regarding intra-circuit conflict created by the panel's decision, Defense cites case law which involve minors and non-public forums (none of which are applicable to adult students or student-run university presses); to substantiate its argument regarding inter-circuit conflict created by the panel's decision, Defense relies wholly on two other circuit cases, one of which was specifically limited to curricular speech in a non-public forum, and the other of which dealt with a student yearbook having required a public forum analysis (not required for extra-curricular, student newspapers), and which was ultimately overturned in favor of protecting the student plaintiffs' rights. The only possible remaining argument Defense may raise, therefore, is the "question of exceptional importance" one; whereas Plaintiffs concur that there is issue of relative significance herein, they also contend that the panel's decision should stand because it evidences this Court's consideration of the potentially broad consequences of its ruling, and substantiates its decision in light of these considerations. As the panel's decision created no intra- or inter-circuit confusion, and as the panel's decision demonstrates that it was neither arbitrarily reached nor deficient in explication of its broadly-applied opinion, it stands to reason that no en banc rehearing is required.

¹ Defense's petition admonishes this Court in alleging that this Court has violated Circuit Rule 40; the remonstrance is, however, erroneous and presumptive: Defense's footnoted criticism of this Court stems from an assertion that the panel's decision overrode prior decisions of this Court and created inter-circuit conflict, when, in fact, that is precisely the argument Defense is attempting; it only stands to reason that this Court cannot rightly be admonished for an act which has not yet been established as having been violative, and Defense, therefore, is putting the proverbial cart before the horse.

ARGUMENT

I. The Panel's Decision Creates No Intra-Circuit Conflicts

Defense argues that the panel's decision conflicts with *this* Court's prior decisions having considered Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) a patently false allegation. Under "Section II" of Defendant's petition for rehearing (p. 6), Defense cites but *one* prior case of this Circuit which considered Hazelwood, that of Baxter by Baxter v. Vigo County School Corp., 26 F.3d 728, 737-38 (7th Cir. 1994). Baxter involved a minor in a non-public forum; this Court had established a year earlier, in Hedges v. Wauconda Comm. Unif. School Dist. No 118, 9 F.3d 1295 (7th Cir. 1993), that grade schools are not public forums; in Muller by Muller v. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir. 1996), this Court resolved that school officials having jurisdiction over minors act in loco parentis. Plaintiffs' case, unlike Baxter, does not involve in loco parentis or a non-public forum, therefore no conflict arises from the panel's decision.

The only other cases cited under Defense's argument (Section II.) which allege *intra*-circuit conflict, curiously enough, are *not* of this Circuit; they are the 1999 Kincaid v. Gibson decision (6th Cir.), the 2002 Brown v. Li decision (9th Cir.), and the United States Supreme Court (USSC) Rosenberger v. Rector and Visitors of Univ. of Va. decision; as these three cases are not of this Circuit, one can only guess as to why they have been cited to substantiate *intra*-circuit conflict. Defense cites Rosenberger here, noting that it held "when State is speaker, it may make content-based choices," Id. at 833. *Yet the State was not the speaker in this case*; Governors State University (GSU) apportioned zero money out of its annual budget to fund The INNOVATOR, and so the publication was funded exclusively by student activity fees: The panel rightly noted that, as in this case, Bazaar v. Fortune held: "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." Slip. op. at 5. Moreover, in Trujillo v. Love, 322 F. Supp. 1266 (D. Colo. 1971), which relied on Antonelli v. Hammond, 308 F. Supp 1329 (D. Mass 1970), it was determined that a state university could not compel

students to submit material intended for publication to their faculty advisor for prior approval. Trujillo wrote: “The state is not necessarily the unfettered master of all it creates. Having established a particular forum for expression, officials may not then place limitations upon the use of that forum which interfere with protected speech and are not unjustified [sic] by an overriding state interest” (at 1270). Defendant Carter’s actions are not justified by any overriding state interest, and so her petition for qualified immunity must fail.

Courts have also held that maintaining the order necessary for educational activities is the only legitimate justification of censorship of student expression otherwise protected by the First Amendment’s guarantees; censorship is not justified even when such speech might be considered obscene or offensive (Antonelli v. Hammond), is of questionable or poor written quality² (Schiff v. Williams), or might be

² Plaintiffs wish to address, once and for all, the accusations made against the quality of their publication’s contents. Defense has gone out of its way, *twice*, to list what it perceives to be errors in Plaintiffs’ copy of their October 31, 2000 issue. For the record, despite Defense’s assertion that Plaintiffs inappropriately substituted the terms “imply” and “infer,” they are considered synonyms (See, e.g., The Synonym Finder, by J.I. Rodale, 1978, Rodale Press, p. 568-9.) Also, the misspelling of one letter in the word “complementary” (which lists as “complimentary”) hardly constitutes a grievous error, especially considering that Plaintiffs’ average publication consisted of 28-32 pages of 11 x 17 inch copy, i.e., roughly 112-128 pages of double-spaced text on standard 8.5 x 11 inch paper, which contain approximately 2,400 characters per page (each letter is one character). Plaintiff Hosty was the only copy editor, and therefore was singularly responsible for amending copy roughly about 268,800 – 307,200 characters per issue; as she had writing and managerial responsibilities as well, she had only a week to amend the issue in question, so a missed correction of a single letter is pathetic condemnation of her performance, indeed. Written discovery was concluded in August 2002, and Defense’s brief noting Plaintiff’s errors in copy was completed in September 2003, which means that Defense had in excess of a full year to scout for errors in copy – a luxury of time Plaintiffs never were afforded. Defense’s own copy is not devoid of errors, as it: used a possessive case for the word “Governors” in its motion to withdraw the appellate record; incorrectly employed semi-colons in its list of Defendants on the petition’s cover (when the list was not preceded by a colon); listed its heading for the “Table of Authorities” as “Table of Contents” on page (ii) of its petition; seemingly has inverted its cases for intra- and inter-circuit arguments; and lacked subject-verb agreement on page 13 of its petition, where it writes “authorities is” instead of “authorities are”: Such errors are, indeed, as trivial as Plaintiffs’, and are included simply to demonstrate that, until God is one’s editor, one is always prone to errors in copy, and that suppression of copy on such slim grounds is unreasonable. By Defense’s own argument, its own work would not qualify for public consumption, and may be classified as

libelous in nature (Mazart v. State). The courts have also ruled that a university may not exercise control over the purse string of a student publication simply because it is in disagreement with the press staff as to what constitutes propriety within the paper's contents (Stanley v. McGrath), and that a public university may not seek to regulate content in alleged attempts to assure compliance of printed material with "responsible freedom of the press" (Antonelli v. Hammond).

Defense's citation of Muller as an example of circuit confusion caused by the recent panel's decision is an apt demonstration of just how ludicrous and far-stretched Defendants Carter's petition is; Muller involved a fourth-grader's actions at what this Court declared to be a nonpublic forum³, in which the school administration was identified as having acted in loco parentis for the sake of protecting children, whom it determined are not yet possessed of the maturity to readily distinguish the speech of the school from the speech of individuals acting and speaking independently of the school. As should be plenty obvious in Plaintiffs' case, unlike the grade school involved in the Muller suit, the state university and student-edited, extracurricular newspaper meet the definition for limited public forums (See, e.g., Perry Educ. Ass'n. v. Perry Local Educators Ass'n, 460 U.S. 37 (1983); a limited public forum is that "which the state has opened for use by the public as a place for expressive activity—even if the place has not been traditionally been used for such purpose.") Moreover, not a single student at GSU

² being of poor quality. Also, Plaintiffs wish to stress, as indicated in their original appellate brief, punctuation and grammar are not limited to matters of content, but also speak to viewpoint; Plaintiffs herein provide an example which has assumed apocryphal status in English and journalism studies everywhere: In an English survey conducted with several hundred individuals of both sexes, the following phrase was offered to both sexes to punctuate: "Woman without her man is nothing"; the men, overwhelmingly, punctuated the phrase "Woman, without her man, is nothing." (This clearly places women in a subordinate and dependent position.) The women, however, overwhelmingly punctuated the phrase as follows: "Woman: without her, Man is nothing." (This clearly places men in a subordinate and dependent position.) As should be evident, by altering two commas, the entire meaning of the content is altered, thereby altering significantly the viewpoint expressed.

³ This Court acknowledged the non-public forum aspect of Muller in its footnote (5), stating: "[W]e can take Hazelwood's non-public forum analysis at its face value."

is subject to in loco parentis jurisdiction; the post-hoc remedies which Defense cites that this Court found to be possibly inadequate stem from this Court's consideration of the relative immaturity of the student population at the elementary school-level.

In fact, Defense seems to conveniently ignore Muller's emphatically salient observation of what should constitute the primary factor or concern in determining the rights of the student population involved in said dispute, as it wrote: "The first question to explore is what speech rights elementary school children possess"; this is a fundamental declaration of the intended scope of the Muller case, by which it is clearly established that this Court's decision in that matter would be consciously limited to grade school students, and therefore Defense's arguments about any circuit conflict arising from comparison of these two cases must fail, as Muller admittedly never sought or intended application to anything higher than elementary school conditions and in loco parentis situations. This Circuit's decision in Muller cited Tinker v. Des Moines Independent School Dist., 393 U.S. 503, 515 (1969) as a basis for its determination in the Muller ruling, determining that prior review of grade school students is permissible wherein such students are not yet "possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees"; this deficiency is clearly not applicable to college-age and university-level individuals such as to be found across the nation, and especially at GSU, whose particular demographics boast a student median age of 34 years, being, as it is, the self-acknowledged only upper-level public university in the State of Illinois.

As indicated by the fairly recent survey cited in what the panel identified as being a "superb" amicus brief, less than one percent of this nation's university students are under the age of 18, and university-level students have developed said capacity to such fullness by the age of 18 that they are free to marry, smoke, drive, and enlist without unreasonable fear of government impediment⁴; if the laws of this land

⁴ Relative maturity was also addressed in Judge Reinhardt's dissent in Brown, as he noted: "Because college and graduate school students are typically more mature and independent, they have been afforded greater First Amendment rights...just as they have been afforded greater legal rights in general."

acknowledge freedom to exercise choices of such magnitude to 18-year-olds, it is unreasonable for the State to argue that college-aged students are deficient of said capacity enough to warrant administrative approval of their speech.

Of course, perhaps the consistency of this Court's decisions may be evidenced in another previous ruling of this Circuit, that of Cf. Zykan v. Warsaw Com. Sch. Corp., 631, F.2d 1300, 1304 (7th Cir. 1980), which determined: "A high school student's lack of the intellectual skills necessary for taking full advantage of the marketplace of ideas engenders a correspondingly greater need for direction and guidance from those better equipped by experience and reflection to make critical educational choices." Crucial to the matter now before this Court in determining a lack of inter-circuit conflict by the panel's decision in this case is this Circuit's consistent consideration of the age and relative maturity of the affected demographic; it stands to reason that if a lack of intellectual skills engenders *correspondingly* greater need for supervision, then, conversely speaking, populations exhibiting and possessed of more developed intellectual skills *correspondingly* would require less supervision, and therefore such populations should be, proportionately considered, even more protected: It would be a very foolish university, indeed, to publicly profess that its students were not yet possessed of that intellectual capacity to reason autonomously and exercise such skills, for to do so would be accomplishing nothing less than disavowing the university's reputation as an institution of higher learning; how reputable an academic institution can any such school be regarded in alleging a student population of immaturity-developed intellects, as GSU does here?

Moreover, in Muller, this Court cited an earlier decision of this Circuit, attesting: "Age is a critical factor in student speech cases, as the Supreme Court has indicated and as we noted in Baxter, 26 F.3d at 737-38." (citing Baxter by Baxter v. Vigo County School Corp., 7th Cir. 1994). As indicated in Plaintiffs' original amicus brief, more than 99% of all college students in United States are legal adults, and as Plaintiffs' brief points out, *all* students at GSU are such—a critical factor the panel weighed and considered in reaching its decision, a decision which in no way conflicts with any other circuit or

USSC ruling, given the fact that Tinker established that students' rights must be evaluated, "in light of the special characteristics of the school environment" (Tinker at 393, U.S. at 506) - a standard even Hazelwood does not disregard, as it cites this very passage from Tinker (in 484 U.S. at 266).

So too, this Court's remarks in Cf. Zykan about conditions wherein supervision and guidance should be permitted speak to direction and guidance being obtained from those better equipped by experience, of which none of the named Defendants are, in comparison to Plaintiffs' journalistic experiences; each of the administrators deposed affirmed that they had no prior journalism experience, including Defendant Carter, who testified that, inter alia, she was a drama major; her utter lack of journalism experience should convince this Court, resoundingly, of the implausibility of any such claims made on Defense's part that Carter's actions taken against the Plaintiffs were either warranted or pedagogical in nature, as it stands to reason that Carter may not teach Plaintiffs what she has never learned herself.

Muller cites Tinker again in affirmation of the USSC determination that: "[A student may express his opinions...if he does so without materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." Id at 513 (citation omitted)."; Tinker clearly established this precedent in 1969, and it has applied almost uniformly to the rights of college-aged and university-level individuals ever since. As noted by this Court in Muller, regarding Plaintiffs' speech, "the record contain[s] no finding that the speech caused any meaningful disruption, and no one claimed the speech invaded the rights of others - the two criteria under Tinker for suppression of student speech" - criteria established, ironically enough, the very same year that GSU first opened its doors to the public.

Again in Muller is witnessed evidence of this Court's circuit consistency in terms of considering if Hazelwood restrictions should unilaterally apply at public universities with the same force as they do at high schools, as it wrote:

“Key to the holding of Hazelwood, and ultimately to our holding here ... was an initial determination of the type of forum at issue. When is a school a public forum? The Court answered that ‘school facilities may be deemed to be public forums only if school authorities have ‘by policy or by practice’ opened those facilities ‘for indiscriminate use by the general public,’ or by some segment of the public, such as student organizations.’ ” (citing Perry at 267.)

By these standards, not only is GSU itself a limited public forum, but, by extension, so is the student organization of the campus press at GSU, i.e., The INNOVATOR. As the issue of public forum was clearly established at the time of Carter’s actions against Plaintiffs, the Defendant was possessed of the “fair warning” Defense bemoans Carter was entitled to per Hope v. Pelzer, 536 U.S. 730 (2002)⁵. In Muller, this Circuit relied on previous rulings: “The Court’s test is now whether the restrictions are ‘reasonably related to some pedagogical concerns.’ Hazelwood, 484 U.S. at 273.” Plaintiffs contend that, as Carter is admittedly possessed of no journalism experience, and had no tutelary jurisdiction over Plaintiffs (since the publication was created as an extracurricular activity), there was no pedagogical benefit gained in suppression of Plaintiffs’ speech⁶: Carter should have reasonably known that her

⁵ Curiously enough, Defense takes issue with this Court for considering the Kincaid decision of 2002 since it was not in effect at the time of Carter’s alleged actions in 2000; Plaintiffs herein point out that neither was the “fair warning” requirement Defense cites on Carter’s behalf, as Hope’s parameters were not in effect until 2002. Moreover, the USSC, in Hope, affirmed: “This Court’s opinion in United States v. Lanier, 520 U.S. 259 ...makes clear that officials can be on notice that their conduct violates clearly established law even in novel factual situations. Indeed, the Court expressly rejected a requirement that previous cases be ‘fundamentally similar.’ ” Hope v. Pelzer et. al, U.S. 240 F.3d 975, rev.

⁶ Indeed, pedagogical concerns emphatically imply that tutelary supervision and curricular speech are involved. Copy editing is a strenuously taxing endeavor for a single individual wherein publications the size of Plaintiffs’ issues are involved; Plaintiff Hosty required no less than 35 hours to copy edit the October 31, 2000 issue, and therefore Carter’s demands to preview and approve copy based on a false claim of checking for spelling and punctuation errors (when she admittedly has no experience in journalism) demonstrates all the more how unreasonable her claims are and demands were; it is simply not feasible that Carter, whose education and experience are considerably lesser than Hosty’s per these regards, would have ⁶devoted almost a full work week to proofing Plaintiffs’ copy for trivial errors involving misspellings by one letter; Plaintiffs maintain that the sheer *logistic impossibility* of Defense’s claims regarding Carter’s intent to only proofread for typographical errors (of several-hundred-

actions were in violation of clearly-established law, especially as *all* legal precedents involving free speech of students at public schools stipulate that the age, relative maturity, and special characteristics of the environment of the students must be taken into consideration. Since Carter's actions were unreasonable, she fails to make qualified immunity, in accordance with the objective test established by Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), as Carter should have reasonably known that other officials in her position would frown on such action as she took (involving adults on an extracurricular publication at a public university), and should have known of pre-existing, clearly-established law prohibiting such infringement of Plaintiffs' rights, as Harlow determined that a competent government official *should* know the parameters and responsibilities of his/her position. In fact, in Hope, the USSC has ruled that action taken by defendants which could be carried out, "with impunity, provides equally strong support that they were fully aware of their wrongful conduct."

In Fujishima v. Board of Education, 460 F.2d 1335 (7th Cir. 1971), this Court held that a Chicago Board of Education prior review rule was an impermissible infringement of First Amendment guarantees, noting: "Because [the policy] requires prior approval of publications, it is unconstitutional as a prior restraint in violation of the First Amendment"; the Fujishima ruling also implicitly applies to college newspapers, since it noted that Antonelli was "[in] harmony with the cases cited" 308 F. Supp. 1329 at 1359. As all of the Seventh Circuit cases cited by Defense dealt specifically with in loco parentis and non-public forums, and as this Circuit has consistently, *without exception*, considered the age, relative maturity, forum analysis, and special characteristics of the environment involved in each previous rulings, no lack of continuity exists in this Circuit's decisions, and the panel's decision creates no intra-circuit conflicts.

II. The Panel's Decision Creates No Inter-Circuit Conflicts

As for inter-circuit confusion, Defense relies on two cases to substantiate its argument, both of which must see this contention fail. Defense insists that The

⁶ thousand characters per issue) emphatically speaks to the fact that the demand for prior review was content-related, and that the demand for prior approval was viewpoint-related.

INNOVATOR was not a public forum, although it resoundingly meets the definition of one as established by Perry (at 267). Also, per inter-circuit consonance, in Bazaar, the Fifth Circuit found that *any* student-edited university publication is an open forum, and such publications could only be restricted when they “would or could lead to significant disruption” 476 F.2d 570. Defense’s argument rests wholly on the Ninth Circuit’s recent ruling in Brown v. Li, 308 F.3d 939 (9th Cir. 2002), cert. denied, ___U.S.___, 124 S. Ct. 1448 (2003), and the Sixth Circuit’s self-overturned ruling in the matter of Kincaid v. Gibson, 191 F.3d 719 (6th Cir. 1999), rev’d, 236 F.3d 342 (6th Cir. 2001) (en banc).

In Brown, as Defense notes (but minimizes), the decision involved there specifically addressed *curricular* speech in what that circuit determined to be a non-public forum, i.e., a student’s academic paper, which *clearly* is not a forum available to the public for indiscriminate use. Furthermore, that court determined that subterfuge was involved in the attempted speech and a factor in its ruling, and it seems trite but necessary to point out that the student involved, in agreeing to his program’s terms (which gave joint authority to his committee members in determining propriety) helped establish an implied-in-fact contract, whereby the student reasonably should have known that his curricular speech could be restricted so as to comply with university-determined standards; this is *not* the case at all in the matter now before this court. The INNOVATOR has never been part of a journalism course at GSU (it has no formal journalism department), and the Plaintiffs had no curricular requirements in serving on their campus press, as it was and remains an extracurricular organization; Brown causes no inter-circuit conflict because it specifically limited itself to curricular speech in a non-public forum; certainly these papers are not forums of public debate, and can in no light, therefore, be compared to campus presses. Moreover, university policy in Brown established university approval as being permissible; in this matter, precisely the opposite is true, as all university-published materials and policy at GSU aver that the Plaintiffs’ extracurricular publication was to be “totally student run” and “without

ensorship or advance approval,” another demonstration of how Brown⁷ differs vastly from this matter, and why no inter-circuit conflicts arise from the panel’s decision.

As for the decision cited by Defense in Kincaid, it too must fail in its allegations of inter-circuit conflict; that circuit ultimately reversed in favor of the student plaintiffs, no doubt in part because it may have realized that *its* initial decision was an aberration which would cause such conflict. More to the point, however, is the fact that Kincaid dealt specifically with a yearbook, which required a public forum analysis, and no such analysis is requisite to Plaintiffs’ case before this Court, as the public forum characteristic of the extracurricular student press was clearly delineated in Bazaar, and later emphasized in Perry, which even cited Hazelwood⁸ : Plaintiffs’ case involves a student newspaper, not a yearbook, and as Plaintiffs’ publication required no public forum analysis (which was the crux of the 1999 Kincaid decision cited by Defense), therefore no inter-circuit conflict arises from the panel’s decision.

At least one federal circuit decision discounts the Defendant’s allegations that no strong opinion has ever been offered in terms of the rights of university-level students, as Louisiana Appellate Judge Jim Garrison’s concurrence opines: “Even college students may speak, write and publish freely” Milliner v. Turner , 436 So.2d 1300 (La. Ct. App. 1983). The Fifth Circuit, in Bazaar, enunciated what are now the well-established rules concerning censorship of the college press. The court found: (1) that

⁷ Defense points only to Judge Graber’s position in the Brown opinion; Judge Reinhardt, however, takes great pains to point out in his dissent that there was “no majority opinion and no binding precedent,” referring to Graber’s opinion as being “erroneous”: The dissent includes, under the heading, “Hazelwood’s standard does not apply to college and graduate school student speech,” the statement: “ I vehemently disagree with Judge Graber’s conclusion...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. Thus, her desire to import the Hazelwood standard into the university context does not constitute binding precedent.” Hazelwood, like Brown, dealt *specifically* with curricular speech in a non-public forum, unlike the case at hand.

⁸ In fact, it is Hazelwood itself which clearly establishes that the preview and censorship permitted in said case was directly the result of the speech involved being curricular, and therefore not part of a public forum: Carter, therefore, fails to qualify for immunity *even by Hazelwood’s standards*, as both she (and Defense) have always known that The INNOVATOR did not involve curricular speech; her appeal and petition, therefore, are frivolous and dilatory.

the fact that a state university provided funding, faculty, or departmental advice, or campus facilities did not authorize university officials to censor the content of a student publication; (2) that individual four-letter words were insufficient reason to censor⁹; (3) that the state university could not be considered the same as a private publisher with absolute arbitrary power to control content; and (4) that the university could not be held liable for the content of student publications. (*Media Law Committee*, 1992, p.9)

Defense has argued that Kincaid is applicable only so far as it muddled First Amendment law enough to protect Carter from liability, although it can cite *only two* circuit cases in an attempt to substantiate its claims (out of thirty-plus years of rulings on students' rights), and, as should be evident, *neither* of these cases apply to the matter now before this Court

III. The Panel Did Not Misapprehend Either the Legal Landscape or Evidence Which Defense Alleges is Undisputed

In its petition (p.6), Defense alleges that a mandate of prior review does not constitute prior restraint, yet this Circuit established in Fujishima: " Because [the policy] requires prior approval of publications, it is unconstitutional as a prior restraint in violation of the First Amendment"; the Fujishima ruling also implicitly applies to college newspapers, since it noted that Antonelli was "[in] harmony with the cases cited" 308 F. Supp. 1329 at 1359. Antonelli specifically dealt with a college president who, "through his power over the purse [was] censoring the material for publication by subjecting it to the prior review of a faculty advisory committee" 308 F. Supp. 1329 at 1331. Defense then alleges that Plaintiffs should have been required to submit evidence of censored material for the record (per Harless by Harless v. Darr, 937 F. Supp 1351, 1353-54 (S.D. Ind. 1996); however, Plaintiffs' complaint specifically requested declaratory and injunctive relief, as they hoped to be able to resume presses: To require Plaintiffs to submit copy not yet published to Defendants' counsel would accomplish precisely the same effect as providing pre-published access to Plaintiffs' copy to the

⁹ If individual *words* do not constitute sufficient grounds for censorship, how much less, then, are claims to censor Plaintiffs' copy based on mistakes consisting of individual *letters*.

Defendants, which is what Plaintiffs' complaint specifically sought to prohibit. Moreover, the Antonelli court upheld students were entitled to "the right to be free from the burden of submitting future issues of [the student paper] to the advisory board for its prior approval" Id. at 1334.

Defense's petition also alleges that the panel misapprehended a dissent in Bazaar's decision (p.9) regarding a right of not being compelled to sponsor speech, yet Plaintiffs remind this Court that the Defendants contributed no money to Plaintiffs' publication, which was funded exclusively by student activity fees. Defense's petition then alleges that Plaintiffs failed to provide evidence from which a jury could find improper intent (which seems, at least on the surface, to counter the objective test established in Harlow, as intent implies motive, i.e., a subjective measure). Yet Plaintiffs point to their October 31, 2000 issue, which is included in the record, and which, alone, includes no fewer than two (lengthy) articles, three columns, and four letters to the editor which harshly criticize the university administration (with an entire column focused on Defendant Carter's performance, as well as a poll included for students to provide Plaintiffs with a follow-up of it) – as well as a notice that more of such criticism was intended for Plaintiffs' following issue, evidenced in a "Blasting Zone" notice on page 9 of said publication; certainly a jury could find that censorship was attempted to curtail further criticism of the university and its administration, Carter included, *especially* as she was lambasted in previous issues.

Defense's petition alleges (p.10) that Defendant Carter's testimony is undisputed, which is intentionally misleading argument on Defense's part. Plaintiff Hosty has testified that she specifically asked Charles Richards (the owner of the printing agency which held the contract to print Plaintiffs' newspaper) to recount his conversation with the Defendant, which Richards did in a letter in 2000, and which he affirmed in an affidavit in 2001: Richards' affidavit includes no mention of Carter's claims, which means that, viewed in the light most favorable to Plaintiffs, Carter is lying about having informed Richards that she was calling simply to establish if there were an advisor in place to review for spelling, punctuation, and grammar; Richards could not possibly

recount what never had been said, and so the evidence at least infers that Carter's testimony is in dispute.

IV. The Broad Application of the Panel's Decision is Both Warranted and Sound

Defense points to Kincaid and other and higher courts consistently declining to apply Hazelwood restrictions to the college press as *evidence* of its applicability, and a deficiency of the "fair warning" policy as indicated by Hope; this is a little like asking courts to compare apples to oranges when they are only permitted to rule on the matters directly before them, and only such issues as apply may be included in their decisions. That the 1999 Sixth Circuit's panel footnoted that its decision in Kincaid "had no bearing" on student newspapers is *not* an affirmation (or even an inference) that Hazelwood restrictions could apply to the college press, but represents merely an acknowledgment that the issue before them did not involve a student newspaper and Hazelwood parameters; said Kincaid panel simply declined to compare apples (student yearbooks) to oranges (student newspapers). USSC rulings which decline to cite Hazelwood in their decisions are simply affirming that Hazelwood was not a determinate factor in such decisions, owing to its inapplicability of the cases immediately before them; an explicit refrain from citing Hazelwood in such decisions does not constitute an explicit consent that such restrictions are permissible, which Defense seems to argue are one and the same. This Court's having addressed the applicability of Hazelwood to Plaintiffs' publication was positively unavoidable since Defense raised it as the primary factor for qualified immunity; there was simply no way for the panel to avoid addressing a matter which constituted the bulk of a Defendant's argument, and so the panel was expressly obligated to consider Hazelwood in reaching its decision, which it did. The panel wisely noted the distinctions between high school and college environments, and cited the U.S. Census Bureau statistics which affirmed the comparatively increased maturity of college and university students across the nation: Plaintiffs' brief points out that GSU professes the median age of its students to be 34 years, an age reckoned of such maturity that it renders one eligible to campaign

for office of the U.S. President, as one need only be 35 years old to assume said position; it stands to reason that students who are old enough to run for the highest office in the nation are mature enough to be guaranteed full and unfettered restriction of their constitutional freedoms of speech and self-expression.

CONCLUSION

Defense's claims of intra-circuit and inter-circuit conflict must fail, as they all involve cases involving in loco parentis, non-public forums, curricular speech, or those having required public forum analysis. Defense's claims that the panel's decision is of exceptional significance constitutes the only reasonable exception by which a rehearing might be warranted: Plaintiffs contend that the panel's decision, which explicitly frowns on granting Hazelwood restrictions sway over adult students at public universities, is both reasonable and sound, and should stand. Plaintiffs do not object, however, to this Court's amending its decision so as to include expounded address of the issues raised more strenuously in this response to Defense's petition, or to its revising its opinion so as to include more, previous decisions of this Circuit, in order to establish more binding authority of the panel's decision, a deficiency which only Defense laments. For the reasons stated above, Plaintiffs-Appellees respectfully request that this Court either deny Defendant-Appellant's petition for rehearing (en banc or otherwise), or, if not, that it reaffirm on Plaintiffs' behalf.

Respectfully submitted,

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