

UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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

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**ANSWER *AMICI CURIAE* OF STUDENT PRESS LAW CENTER  
AND *AMICI* LISTED ON REVERSE SIDE  
IN RESPONSE TO DEFENDANT-APPELLANT PATRICIA CARTER'S  
PETITION FOR REHEARING WITH SUGGESTIONS FOR REHEARING *EN BANC***

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NO. 01-4155

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Defendants.	)	

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**DISCLOSURE OF CORPORATE  
AFFILIATIONS AND FINANCIAL INTEREST**

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

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

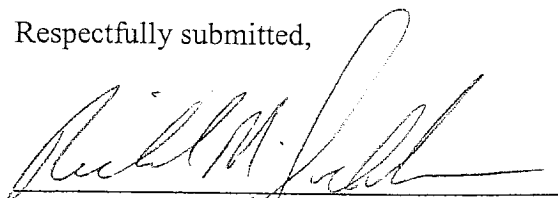
1. Are said parties a subsidiary or affiliate of a publicly-owned corporation?

No.

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

No.

Respectfully submitted,



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## SUMMARY OF ARGUMENT IN RESPONSE TO PETITION FOR REHEARING

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

*Amici*, which include university journalism departments from the states that will be affected by the decision in this case as well as major state and national organizations of professional journalists, journalism educators and First Amendment advocates strongly support the Panel's opinion and are gravely concerned over the Defendant-Appellant's continued attempts to apply the demonstrably broad and amorphous high school-based censorship standard to expressive activity on the college and university campuses of this Circuit.

*Amici* urge here that the Panel's opinion be upheld and that this Court affirm the decision of the District Court, refrain from extending *Hazelwood* beyond its scope and find Dean Carter's actions unconstitutional. Applying a First Amendment standard, as urged by Defendant-Appellant, that was carefully crafted for the limitation of high school journalists and their audience to those at the university level would be contrary to the freedom of expression long recognized to be the essence of the university campus.

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<sup>1</sup> *Kincaid v. Gibson*, CIV 95-98 (W.D.Ky. Nov. 14, 1977), rev'd. 236 F.3d 342 (6<sup>th</sup> Cir. 2001) (en banc).

## ARGUMENT

### I. The Panel's Opinion Is Consistent With Supreme Court Precedent And Properly Reaffirms Over Three Decades Of Federal Court Decisions.

For well over three decades, courts have consistently held that student media at public colleges and universities are entitled to strong First Amendment protections. These courts have held that school administrators can only censor student media if they can show that the speech in question is legally unprotected or if they can demonstrate that some significant and imminent physical disruption of the campus will result from the publication's content. Attempts by school officials such as Dean Carter to censor or control constitutionally protected expression in student-edited media have — in decisions handed down by dozens of state and federal courts — consistently been held to violate the First Amendment. See, e.g., *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995)(university officials constitutionally prohibited from denying funding to student religious magazine based on content) ; *Kincaid v. Gibson*, 236 F.3d 342 (6<sup>th</sup> Cir. 2001)(en banc) (confiscation of college student yearbook by administrators unhappy with content violates First Amendment). The prohibition on such administrative censorship has extended to cases where school officials required mandatory prior review of student media, *Antonelli v. Hammond*, 308 F.Supp. 1329 (D.Mass. 1970); *Mazart v. State*, 441 N.Y.S.2d 600 (N.Y.Ct.Cl. 1981); *Milliner v. Turner*, 436 So.2d 1300 (La. Ct. App. 1983); *Trujillo v. Love*, 322 F.Supp. 1266 (D.Colo. 1971), and other indirect forms of censorship, when undertaken to affect content. See, e.g., *Stanley v. Magrath*, 719 F.2d 279 (8<sup>th</sup> Cir. 1983)(striking down university's attempt to restructure funding to student newspaper because of controversial issue); *Dickey v. Alabama State Board of Education*, 273 F.Supp. 613 (M.D.Ala. 1967), *vacated as moot sub. nom. Troy State University v. Dickey*, 402 F.2d 515 (5<sup>th</sup> Cir. 1968) (suspension of student newspaper editor for content-related reasons held unconstitutional); *Schiff*

*v. Williams*, 519 F.2d 257 (5<sup>th</sup> Cir. 1975)(reinstating student editors who had been removed because of administrators’ objections to poor grammar, spelling and syntax).

As one federal court of appeals noted in 1973:

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

*Joyner v. Whiting*, 477 F.2d 456, 460 (4<sup>th</sup> Cir. 1973).

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

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

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

The Panel’s opinion is consistent with this well-established law and properly reaffirms over three decades of these First Amendment decisions. The arguments to the contrary of Defendant-Appellant, set forth in the petition for rehearing, are without merit. In that regard, Dean Carter’s reliance on the Ninth Circuit’s decision in *Brown v. Li*, 308 F.3d 939, 9<sup>th</sup> Cir. 2002, *cert denied*, 124 S.Ct. 1488 (2003), is completely misguided. In fact, only one judge in *Brown v. Li* approved of the application of *Hazelwood*, and even that judge approved of the application of *Hazelwood* only in the context of a student’s masters thesis included in the

school's curriculum. Here, as the Court is well aware, the *Innovator* was clearly not part of the curriculum of Governors State. Moreover, the fact that one Ninth Circuit judge reached such a conclusion in 2002 hardly justifies Dean Carter's unconstitutional acts of prior restraint two years earlier.

Moreover, the effort by Dean Carter to distinguish *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) is without merit. Dean Carter asserts that the student magazine at issue in *Rosenberger* was "private," not school-sponsored. In fact, however, that was precisely the central issue in *Rosenberger* – whether a public university could deny sponsorship, i.e. funding, to a student publication based on its content and viewpoint. At Governors State, Dean Carter simply attempted to censor the newspaper directly rather than indirectly. Clearly, if the indirect (funding) censorship is prohibited, as it was in *Rosenberger*, then certainly direct forms of censorship and prior restraint must be prohibited as well. Dean Carter's argument here would require one to believe that the United State Supreme Court held in *Rosenberger* that funding could not be denied to the student magazine, but that once the publication received funding from the school (and thus became "sponsored") the university could have then demanded prior approval and censorship of the content of that magazine.

Finally, Dean Carter's reliance on the initial panel decision in *Kincaid v. Gibson* is clearly misplaced. That panel decision had already been vacated by the Sixth Circuit in November of 1999 when Dean Carter censored the *Innovator* at Governors State in October of 2000.

## **II. The Panel Properly Concluded That Dean Carter's Actions Were Unconstitutional Prior Restraints.**

The Panel properly concluded that Defendant Carter's admitted act of calling the printer to stop publication of the *Innovator* and her demand that a school official review the content of

the *Innovator* before it went to press were unconstitutional prior restraints which must be rejected.

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

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

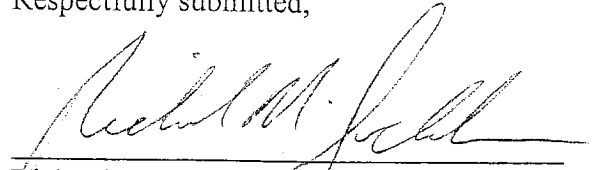
(M.D.Fla.1994) (holding unconstitutional as prior restraint school district policy requiring elementary school students to obtain prior review and approval before distributing literature). Courts have consistently rejected prior approval of college student publications. *See, e.g., Antonelli*, 308 F. Supp. at 1335-36, *Mazart*, 441 N.Y.S.2d at 605, *Milliner*, 436 So.2d at 1302-03, *Trujillo*, 322 F. Supp. at 1270-71, *Joyner*, 477 F.2d at 460, and related discussion, *supra*, page 13.

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

CONCLUSION

The *amici* urge that the Panel's opinion, for the reasons set forth above, be upheld and that the Defendant-Appellant's Petition for Rehearing with suggestions for rehearing *en banc* be denied.

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Answer *Amici Curiae* in Response to Defendant-Appellant Patricia Carter's Petition for Rehearing with Suggestions for Rehearing *En Banc* has been sent on this 12<sup>th</sup> day of May, 2003, by ordinary United States mail, postage prepaid to:

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