

No. 01-4155

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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MARGARET HOSTY, JENI PORCHE, and ) On Appeal from the United  
STEVEN P. BARON, individually and d/b/a ) States District Court for the  
INNOVATOR, ) Northern District of Illinois,  
Plaintiffs-Appellees ) Eastern Division.

v. )

PATRICIA CARTER, )  
Defendant-Appellant, )

and )

GOVERNORS STATE UNIVERSITY, BOARD )  
OF TRUSTEES OF GOVERNORS STATE )  
UNIVERSITY, DONALD BELL, TOMMY ) No. 01 C 500  
DASCENZO, STUART FAGAN, PAUL KEYS, )  
JANE WELLS, DEBRA CONWAY, PEGGY )  
WOODARD, FRANCIS BRADLEY, PETER )  
GUNTHER, ED KAMMER, DOROTHY ) The Honorable  
FERGUSON, JUDY YOUNG, CLAUDE ) SUZANNE B. CONLON,  
HILL IV, and PAUL SCHWELLENBACH, ) Judge Presiding  
Defendants. )

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**RESPONSE BRIEF OF PLAINTIFFS-APPELLEES MARGARET HOSTY,  
JENI PORCHE, STEVEN P. BARBA, and INNOVATOR**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
JURISDICTIONAL STATEMENT.....	1
ISSUES PRESENTED.....	2
STATEMENT OF THE CASE.....	3
STATEMENT OF FACTS.....	4
Background.....	4
SUMMARY OF ARGUMENT.....	8
ARGUMENT.....	11
I. Defendant Carter’s Demand for Prior Review and Approval of the <u>INNOVATOR</u> for Publication Was in Violation of First Amendment Freedoms of the Press and Speech.....	11
A. The District Court’s Decision Regarding Deference Under the <u>De Novo</u> Standard of Review.....	15
B. Viewpoint Discrimination Attempted by Defendants Violates First Amendment Freedoms of Speech and the Press.....	15
C. Prior Restraint of the <u>INNOVATOR</u> Exercised by Defendants Violates the First Amendment Freedom of the Press .....	20
D. Non-Recognition and Abrogation of Editorial Discretion on the Part of Defendants is a Violation of the First Amendment Guarantees of Freedom of Association and the Press.....	31
E. No Public Forum Analysis is Required for the Collegiate Press.....	34

F. College Students’ First Amendment Rights Are Not and Have Never Been Limited By Hazelwood v.Kuhlmeier.....	37
G. Defendants’ Actions Were in Violation of the Fourteenth Amendment’s Protections Against Arbitrary Deprivations of Liberty, in Denial of Procedural Due Process, and a Deprivation of Education as a Property Interest.....	40
II. Defendant Carter is <u>Not</u> Entitled to Qualified Immunity.....	46
A. The Law Was Clearly Established That Both Administrative and Governmental Trespass of Collegiate Students’ Constitutional Rights is Emphatically Prohibited .....	46
B. Defendants Were Aware at All Times That They Were State Officials and Therefore Culpable to Preservation of Plaintiff’s Constitutional Rights.....	47
C. Claims of Ignorance on the Part of Defendants is an Implausible and Inexcusable Plea Before the Court.....	49
D. Defendants’ Authorities Are Entirely Inapplicable to the Complaint Now Before This Court.....	51
CONCLUSION.....	53

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<u>Antonelli v. Hammond,</u> 308 F. Supp. 1329, 1336 (Dist. Mass. 1970) .....	passim
<u>Baldwin v. Hale,</u> 1 Wall. 223, 233 (1864).....	44
<u>Bazaar v. Fortune,</u> 476 F. 2d 570, aff'd en banc with modif., 489 F. 2d 225 (5 <sup>th</sup> Cir. 1973) (per curiam), cert. denied, 416 U.S. 995 (1974).....	12, 35, 37
<u>Board of Regents of the Univ. of Wisconsin Sys. V. Southworth,</u> 529 U.S. 217 (2000) .....	14, 15, 38, 39
<u>Brown v. Board of Regents of University of Nebraska,</u> 640 F. Supp. 674 (Dist. Neb 1986), 669 F. Supp. 297 (Dist. Neb 1986).....	25
<u>CBS Inc. v. Davis,</u> 114 U.S. 912 (1994).....	22
<u>Dixon v. Alabama State Board of Education,</u> 294 F.2d 150 (5 <sup>th</sup> Cir. 1961).....	44
<u>Doe v. University of Michigan,</u> 721 F. Supp. 852 (E.D. Mich. 1989) .....	17
<u>Freedman v. Maryland,</u> 380 U.S. 51, 57 (1965).....	23
<u>Fujishima v. Board of Education,</u> 460 F. 2d 1355 (7 <sup>th</sup> Cir. 1971).....	27-28
<u>Gay Activist Alliance v. Board of Regents of University of Oklahoma,</u> 638 F. 2d 1116 (Okla. 1981) .....	18-19
<u>Gay and Lesbian Student Association v. Gohn,</u> 850 F.2d 361 (8 <sup>th</sup> Cir. 1988) .....	25
<u>Gay Student Services v. Texas A. &amp; M. University,</u> 737 F.2d 1317 (5 <sup>th</sup> Cir. 1984).....	32, 43

<u>Gitlow v. New York,</u> 268 U.S. 652 (1925).....	47
<u>Goss v. Lopez,</u> 419 U.S. 565 (1975).....	41, 42, 50
<u>Hazelwood School District v. Kuhlmeier,</u> 484 U.S. 260 (1988).....	passim
<u>Healy v. James,</u> 408 U.S. 169 (1972) .....	passim
<u>Hobson v. Bailey,</u> 309 F. Supp. 1393, D.C. Tenn. (1970).....	44
<u>Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University,</u> 773 F. Supp. 792 (E.D. Va. 1991), 993 F.2d 386 (4 <sup>th</sup> Cir. 1993).....	21, 43
<u>Joyner v. Whiting,</u> 477 F. 2d 456 (4 <sup>th</sup> Cir. 1973).....	11
<u>Kania v. Fordham,</u> 702 F.2d 475 (4 <sup>th</sup> Cir. 1983).....	18, 23, 32, 40
<u>Keyishian v. Board of Regents,</u> 385 U.S. 589, 603 (1967).....	37, 38
<u>Kincaid v. Gibson,</u> 236 F. 3d 342, 346 (6 <sup>th</sup> Cir. 2001).....	passim
<u>Korn v. Elkins,</u> 317 F. Supp. 138 (Dist. Md. 1970).....	11
<u>Lansdale v. Tyler Junior College,</u> 318 F. Supp. 529 (1970), aff' d. 470 F. 2d 659 (5 <sup>th</sup> Cir. 1972).....	39
<u>Lee v. Macon County Board of Education,</u> 490 F.2d 458 (5 <sup>th</sup> Cir. 1974).....	45
<u>Linnemeir v. Purdue,</u> 260 F. 3d 757, 760 (7 <sup>th</sup> Cir. 2001).....	35

<u>Lueth v. St. Clair County Community College,</u> 732 F. Supp. 1410 (E.D. Mich. 1990) .....	11, 17
<u>Mazart v. State,</u> 441 N.Y. S. 2d 600, 605 (N.Y. Ct. Cl. 1981).....	11, 23, 29
<u>Meyer v. Nebraska,</u> 262 U.S. 340 (1923) .....	41, 43
<u>Milliner v. Turner,</u> 436 So. 2d 1300 (La. Ct. App. 1983), cert. Denied, 442 So. 2d 453 (La. 1983) .....	11
<u>Mississippi Gay Alliance v. Goudelock,</u> 536 F. 2d 1073 (5 <sup>th</sup> Cir. 1975), cert. denied, 420 U.S. 982 (1977) .....	11
<u>Mullane v. Central Hanover Trust Co.,</u> 339 U.S. 306 (1950).....	44
<u>Near v. Minnesota,</u> 283 U.S. 697, 713-716 (1931).....	20, 23, 37
<u>New York Times v. United States,</u> 403 U.S. 713 (1971).....	20, 21
<u>Organization for a Better Austin v. Keefe,</u> 402 U.S. 415, 419 (1971).....	21, 23
<u>Panarella v. Birenbaum,</u> 32 N.Y. 2d 108, 343 N.Y. S.2d 333 (N.Y. 1973) .....	11
<u>Parker v. Downing,</u> 547 So. 2d 1180 (Ala. Civ. App. 1988).....	49
<u>Patterson v. Colorado,</u> 205 U.S. 454, 462 (1907).....	20
<u>People v. Leonard,</u> 447 N.Y.S. 2d 111 (N.Y. 1984) .....	32, 43, 45
<u>Perry Education Association v. Perry Local Educators' Association,</u> 460 U.S. 37, 46 (1983).....	29

<u>Romano v. Harrington</u> , 725 F. Supp. 687 (E.D. N.Y. 1989).....	11
<u>Rosenberger v. Rectors and Visitors of the Univ. of Virginia</u> , 515 U.S. 819, 844 (1995).....	passim
<u>Schiff v. Williams</u> , 519 F. 2d 257 (5 <sup>th</sup> Cir. 1975).....	11, 28
<u>Sinn v. Daily Nebraskan</u> , 638 F. Supp. 143 (Dist. Neb. 1986), aff'd, 829 F. 2d 662 (8 <sup>th</sup> Cir. 1987).....	12, 24
<u>Stanley v. Magrath</u> , 719 F. 2d 279 (8 <sup>th</sup> Cir. 1983).....	12
<u>State v. McMechan</u> , 594 N.E. 2d 211 (Ohio Ct. App. 1988).....	12, 45
<u>State Board for Community Colleges v. Olson</u> , 687 P. 2d 429 (Colo. 1984), app. aft. remand, 759 P. 2d 829 (Colo. Ct. App. 1988).....	11
<u>Student Government Association v. Univ. of Massachusetts</u> , 868 F. 2d 473, 480, fn. 6 (1 <sup>st</sup> Cir. 2001).....	37
<u>Students Against Apartheid Coalition v. O'Neil</u> , 660 F. Supp. 33 (W.D. Va. 1987).....	17
<u>Texas v. Johnson</u> , 491 U.S. 397 (1989).....	20
<u>Tinker v. Des Moines Independent School District</u> , 393 U.S. 503, 506 (1969).....	12, 19, 30-31, 47
<u>United States v. Associated Press</u> , 52 F. Supp. 362, 372 (SDNY 1943), aff'd. 326 U.S. 1, 65 U.S. 1416 (1945)...	38
<u>West Virginia Board of Education v. Barnette</u> , 319 U.S. 624 (1943).....	46-47, 52-53

Widmar v. Vincent,  
454 U.S. 263, 268-69 (1981).....13, 37, 39, 47

Wilson v. Layne,  
526 U.S. 603 (1999) .....52

Wood v. Strickland,.....47, 49-50  
420 U.S. 308 (1975)

Zanders v. Louisiana State Board of Education,  
281 F. Supp. 747, D.C. La. (1968).....44

**Constitutional Provisions, Statutes, Rules, Regulations**

U.S. Constitution Amend. I.....passim

U.S. Constitution Amend. XIV.....passim

42 U.S. C. § 1983.....49

## **JURISDICTIONAL STATEMENT**

Defendants' jurisdictional statement is, to Plaintiffs' best knowledge, accurate and complete.

## ISSUES PRESENTED

1. Whether the law was clearly established prohibiting Defendants' actions as being in violation of Plaintiffs' First and Fourteenth Amendment rights at the time said actions occurred.
2. Whether Defendant Carter should be entitled to qualified immunity for: demanding that the university newspaper be reviewed and approved by the administration prior to publication; threatening to withholding funds if those mandates were not met; attempting to superimpose administrative viewpoint of content on Plaintiffs; abrogating Plaintiffs' vested editorial powers; denying Plaintiffs official recognition, and therefore, freedom of association; and for having taken action against Plaintiffs in denial of their due process guarantees, as well as denying Plaintiffs property interests in the educational process.

## STATEMENT OF THE CASE

Plaintiffs are in agreement with the statement provided in Defendants' opening brief (with one exception), and do not reiterate it herein so as to avoid repetitious perusal on this Court's part. The only exception is that Defendants state that Plaintiffs filed for violation of First Amendment offenses, whereas Plaintiffs affirm that the original complaint included Fourteenth Amendment offenses as well.

## STATEMENT OF FACTS

### Background

Defendant Carter was aware that Plaintiffs' advisor of choice was both in place and actively proofreading The INNOVATOR, as she testified herself to no fewer than three individuals (Dascenzo, Hosty, and Porche) having informed her of as much prior to her contacting Charles Richards, owner of Regional Publishing, the paper's printing agency. Doc. 44 at Carter dep. at 7-8, 16-19. Also, Plaintiffs' publication bears their selected advisor's name and Hosty's as copy editor in "the credentials box." Doc. 44 at Fagan dep. ex. at 3 (the paper). Carter testified that her calling the printer was prompted by the October 31, 2000 issue, yet, testified her concerns per it were "None whatsoever." Doc. 44 at Carter dep. at 10.

Carter placed two calls to Richards; the first attempted to halt publication of the Oct. 31, 2000 issue, and the second to prevent publication of future issues without her administrative approval. Doc. 43 at Richards aff. Carter's instructions to Richards were an attempt to covertly compel prior review and administrative approval of Plaintiffs' publication. Doc. 43 at Richards aff. Richards advised Carter about the dubious legality of such demands, to no avail. Doc. 43 at Richards aff. Carter threatened non-payment if Richards refused to comply with her demands. Doc. 43 at Richards aff. No contact was ever made to Richards by Defendants (after Carter's calls) to lift the demand for prior review

and approval or threat of non-payment having resulted in prior restraint. Doc. 43 at Richards. aff.

Defendant Carter covertly fired Plaintiffs' advisor of choice (de Laforcade), and appointed another individual, with approval by GSU's publishing body for student media, the Student Communications Media Board (SCMB), to which Plaintiffs objected. Doc. 44 at Hosty dep. at 150, 152-53. No policy existed granting either Carter or the SCMB the right to select for and force on Plaintiffs an advisor not chosen by their editorial discretion. Doc. 44 at Bell dep. at 59-60. Plaintiffs' publication, The INNOVATOR, however, per university-published materials (SCMB flyers) is intended to be a "totally student run" newspaper. Doc. 44 at Hosty dep. at 151. The SCMB policy grants Defendants only the privilege of appointing student media heads and approving student staff members recommended by the media heads appointed. Doc. 44 at Bell dep. ex. at 1 (SCMB policy). SCMB policy also specifically guarantees due process to Plaintiffs, and states the body's intention is to preserve freedom of the press. Doc. 44 at Bell dep. ex. at 1.

Defendant Fagan testified he was satisfied with Keys' "investigation" that Plaintiffs' rights had not been violated, based solely on Carter's having been questioned about the allegations. Doc. 44 at Fagan dep. at 52-54, 72. Defendant Keys did not bother to contact Richards, de Laforcade, or Plaintiffs in order to determine if Carter had committed constitutional violations. Doc. 44 at Keys dep. at 14-17. Keys questioned no one but Carter as he felt no students' rights had

been violated, simply because Carter denied the allegations made against her and he thought Richards letter to be inaccurate. Doc. 44 at Keys dep. at 14-17.

Richards' letter does not state he wouldn't print The INNOVATOR because Hosty asked him to record the details of his conversation with Carter, not with her. Doc. 44 at Hosty dep. at 33-34. Hosty had previously discovered that Bell had previously misappropriated state funds under Carter's auspices, funds which affected Plaintiffs' budget. Doc. 44 at Bell dep. ex. at 4 (Hosty's letter to SCMB). Bell called university police to swoop down on Hosty when he discovered she was investigating files under his and Carter's auspices; Bell could not cite any law or university regulation which Hosty had violated as reason for his call, but that he felt she had been "uncivil" to him. Doc. 44 at Bell dep. at 90-91. (1) Plaintiffs suspected Defendants knew they were being investigated, based on information and materials Plaintiffs sought and requested. Doc. 44 at Hosty dep. at 45.

Plaintiffs published no issues after the October 31, 2000, one due primarily to the prior restraint imposed by Carter's threat of non-payment to their printer. Doc. 44 at Hosty dep. at 21. Regional Publishing "feared the administration would not pay [them] without allowing prior review and approval." Doc. 43 at Beady aff.

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(1) The files which Hosty had been accessing do not meet the definition of restricted files per university-published policy. In State v. McMechan, 594 N.E. 2d 211 (Ohio Ct. App. 1988), a university student charged with trespass of a

campus area was exonerated as no restrictive signs were in the area. This depicts precisely the conditions in which Hosty was arbitrarily charged with trespass of files, for which a hearing was conducted in violation of constitutionally-mandated procedural and substantive due process guarantees. The physical acts taken against Plaintiffs in violation of due process are not addressed herein, per this Court's denial to Plaintiffs to submit an oversized brief.

Of Plaintiffs' publication, Dr. de Laforcade would "review it and give his opinion, but he could not make decisions" or "corrections" to copy. Doc. 44 at Hosty dep. at 24-25, 29-30. Dr. de Laforcade would sign off on INNOVATOR paperwork first, followed by an administrator from Student Life. Doc. 44 at Porche dep. at 59. Plaintiffs suffered grievous errors in copy due to equipment failures. Doc. 44 at Hosty dep. at 29-30. Plaintiffs continued to work towards publication until the close of their editorial tenures. Doc. 44 at Hosty dep. at 47, 50-51, 86-87.

## Summary of Argument

Plaintiffs provide sufficient evidence to justify a jury verdict on the violation of their First and Fourteenth Amendment rights. It was clearly established that the First Amendment prohibited Defendants from demanding prior review and approval, attempting viewpoint discrimination, abrogating Plaintiffs' editorial powers, denying Plaintiffs freedom of association, and imposing prior restraint, and that Plaintiffs were entitled to Fourteenth Amendment guarantees of due process and the property interest of education as established by the United States Supreme Court. Although Plaintiffs voluntarily permitted their advisor to review the newspaper (to make use of his journalism experience as a resource at their disposal), this in no way entitles Defendants to compel prior review *and* approval of the newspaper; Plaintiffs' selected advisor never even attempted as much.

Additionally, decisions regarding grammar, spelling, and punctuation are content-related, and in ceding absolute editorial control to Plaintiffs, Defendants are without justification in attempting to superimpose their viewpoint as to what constitutes acceptable content-related aspects for publication; Defendants' insistence that Plaintiffs adhere to the vague and non-existent "university standards" (published nowhere and decidedly nebulous) to which Defendants refer is arbitrary, unsupported, and discriminatory, and therefore also constitutionally violative of Plaintiffs freedom of expression and due process guarantees; it is also an abrogation of editorial discretion.

Also, the courts have consistently recognized that the First Amendment prohibits trespass of editorial control, even in instances where publications are funded by the state. Defendants' non-recognition of Plaintiffs' editor-appointed advisor resulted in a violation of Plaintiffs' First Amendment guarantee of freedom of association, and an abrogation of Plaintiffs' university-guaranteed and constitutionally-protected editorial powers as members of the student press.

Education has been declared a constitutionally-protected property interest under the Fourteenth Amendment; the educational process is not limited narrowly, exclusively, or specifically to curricular activities wherein students receive grades for their participation and production endeavors. Defendants' actions, therefore, in abrogating editorial control and attempting to prescribe restrictive language usage, and in depriving Plaintiffs' of their freedom of association with other members of the academic community per the prior restraint imposed against the student press, deprived Plaintiffs of enjoying the liberties associated with the educational process as students and student journalists.

Additionally, the actions taken against Plaintiffs by Defendants is in violation of the Fourteenth Amendment's substantive due process requisites, as the measures taken by Defendants neither met the valid objective nor the achievement by reasonable means conditions of that particular constitutional guarantee, and were, in fact, in violation of the prohibition against arbitrary

deprivations of liberty. Defendants also failed to afford Plaintiffs procedural due process in consonance with constitutional mandates.

Moreover, the prior restraint imposed by Defendant Carter, which continued throughout Plaintiffs' editorial tenure and well beyond it, cannot be justified under *any* public forum or other analysis: The primary case cited by Defendants has *never* applied to college students, and *all* legal precedents indicate that Defendants' actions were in violation of the Plaintiffs' clearly-established First and Fourteenth Amendment rights.

Lastly, it is both implausible and impermissible for Defendants to allege ignorance in terms of their actions being violative of Plaintiffs' constitutional rights; Defendants neither sought less extreme measures to achieve their alleged motives, and a jury could easily determine that Defendants should have reasonably known, at the very least, their *own* published policies which prohibit such actions. Moreover, a jury could also find that Defendants failed to conduct even minimal inquiry or research by utilizing any of the means at their ready disposal to determine if their actions would be considered illegal prior to committing said actions, which, according to the standard of conduct established by the U.S. Supreme Court, should find Defendants guilty of gross and willful negligence, which is no more admissible a plea before the courts than is either malice or ignorance, whether that ignorance is alleged (as is the case here) or actual.

## ARGUMENT

### J. Defendant Carter's Demand for Prior Review and Approval of the INNOVATOR for Publication Was in Violation of First Amendment Freedoms of the Press and Speech.

Any reasonable jury could conclude that Defendant Carter's demand to review *and* approve the student newspaper prior to printing violated Plaintiffs' First Amendment rights. Lower courts have consistently held that censorship of college and university-sponsored publications is almost never permissible. See, e.g., Lueth v. St. Clair County Community College, 732 F. Supp. 1410 (E.D. Mich. 1990); Mazart v. State, 441 N.Y.S.2d 600, 605 (N.Y. Ct. Cl. 1981); Milliner v. Turner, 436 So. 2d 1300 (La. Ct. App. 1983), cert. denied, 442 So.2d 453 (La. 1983); Panarella v. Birenbaum, 32 N.Y.2d 108, 343 N.Y.S.2d 333 (N.Y. 1973); State Board for Community Colleges v. Olson, 687 P.2d 429 (Colo. 1984), appeal after remand, 759 P.2d 829 (Colo. Ct. App. 1988). Antonelli v. Hammond, 308 F. Supp. 1329 (Dist. Mass. 1970); Romano v. Harrington, 725 F. Supp. 687 (E.D. N.Y. 1989); Korn v. Elkins, 317 F. Supp. 138 (D. Md. 1970).

Other circuit courts have unanimously endorsed the right of student expression to be free from university control: Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975), (a university could not dismiss student newspaper editors because the university disapproved of the paper's content); Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973), (a university withdrawing funds from the student newspaper

violated students' rights to freedom of expression); Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1973), cert. denied, 430 U.S. 982 (1977), (college newspaper can refuse advertisement because it is not state actor); Bazaar v. Fortune, 476 F.2d 570, aff'd *en banc* with modification, 489 F.2d 225 (5th Cir. 1973) (per curiam), cert. denied, 416 U.S. 995 (1974) (students' rights to free speech were violated when a university censored a student literary publication); Stanley v. Magrath, 719 F.2d 279 (8th Cir. 1983), (prohibiting a university from cutting the student newspaper's funding because the university disapproved of its content); Sinn v. Daily Nebraskan, 638 F. Supp. 143 (D. Neb. 1986) aff'd, 829 F.2d 662 (8th Cir. 1987), (college newspaper can legitimately refuse to include content to which the editors are opposed); Kincaid v. Gibson, 236 F.3d 342, 346 (6<sup>th</sup> Cir. 2001), ( a college yearbook may not be censored by administrators).

The Supreme Court has consistently ruled public colleges may not censor student expression, particularly in the form of newspapers. In Healy v. James, 408 U.S. 169 (1972), the Court declared:

“At the onset, we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment. ‘It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’ Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (1969). Of course... First Amendment rights must always be applied ‘in light of the special characteristics of the...environment’ in the particular case. *Ibid.* And, where state-operated educational institutions are involved, this Court has long realized ...[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools... The college...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 [408 U.S. 169, 181] freedom. ” (citations omitted).

In Healy, the Supreme Court found it unconstitutional that a student organization was "limited by denial of access to the customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial." Id. at 181-2. If restricting a student organization from access to the college newspaper creates a serious constitutional violation, censoring the student newspaper itself is far more threatening to the free exchange of ideas on a college campus.

Under Healy, a college administration could not insist on prior review of all materials distributed by a student organization, even for purposes of correcting spelling errors: "It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action." Id. at 184.

A college newspaper is analogous to college facilities like those in Widmar v. Vincent, 454 U.S. 263, 268-69 (1981): Just as multiple groups cannot occupy a particular room simultaneously, multiple groups cannot simultaneously edit the student newspaper. Someone, therefore, must be chosen to occupy the room or to edit the newspaper; however, once a choice is made, the university may not

demand prior approval of what is said in the room or printed in the newspaper. A mechanism for choosing a student editor gives the university no more authority to censor the newspaper than a mechanism for allocating the room gives the university authority to censor what is said in the facility.

In Rosenberger v. Rectors and Visitors of the Univ. of Virginia, 515 U.S. 819, 844 (1995), the Supreme Court ruled that a student magazine at a public university is “a publication involved in a pure forum for the expression of ideas, ideas that would be both incomplete and chilled were the Constitution to be interpreted to require that state officials and courts scan the publication to ferret out views”; this “chilling effect” occurs anytime state officials engage in prior review, whether they are ferreting out religious views, criticism of the administration, or alleged grammatical mistakes.

The facts in the case now before this Court are the same as in Rosenberger; the Defendants have refused to authorize payment to a printer until the administration examined a student publication and approved its content.

The Court in Rosenberger struck down “a sweeping restriction on student thought and student inquiry in the context of University sponsored publications.” Id. at 836. The Supreme Court noted, “In this case, ‘the government has not fostered or encouraged’ any mistaken impression that the student newspapers speak for the University.” Id. at 840-1. GSU has made it abundantly clear that the student newspaper does not speak for the administration, most ostensibly in a November 3, 2000 letter sent to the entire

campus from President Stuart Fagan, condemning The INNOVATOR. As in Rosenberger, “The distinction between the University's own favored message and the private speech of students is evident in the case before us.” Id. at 834.

The Supreme Court, in Board of Regents of the Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217 (2000) noted: “If the challenged speech here were financed by tuition dollars *and* the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker. That is not the case before us.” at 205-206. At GSU, student fees supported the newspaper (in addition to Plaintiffs’ advertising revenue), and university officials were not responsible for its content. Southworth and other precedents establish that universities are not the speakers in college newspapers. The Supreme Court’s rulings to protect academic freedom and freedom of the press point unmistakably to the conclusion that government officials and university administrators may not censor or review student newspapers at public colleges.

**A. The District Court’s Decision Regarding Deference Under the De Novo Standard of Review**

Plaintiffs contend that the documents provided by parties not named in this suit, as well as prior issues of the INNOVATOR published under their editorial tenure, are sufficient to demonstrate more than a “mere scintilla” of evidence in support of Plaintiffs’ claims. Of these documents specifically

included in the public record are the letter and affidavit of the printing agency owner, the affidavit of the printing agency employee, and the October 31, 2000 issue of the INNOVATOR.

**B. Viewpoint Discrimination Attempted by Defendants Violates First Amendment Freedoms of Speech and the Press.**

Defendants claim Defendant Carter's demand for prior review and approval was made to ensure that the INNOVATOR was in "compliance with the University's standards for grammar, punctuation, and composition as well as with journalistic standards. Doc. 44 at Carter dep. at 9, 4-5. In his memo to the GSU community, Defendant Fagan wrote, "With few exceptions, the October 31<sup>st</sup> edition of the INNOVATOR just did not measure up to accepted journalistic standards." Doc. 44 at Fagan dep. at ex. 2. It is reasonable, therefore, for a jury to conclude that the GSU administration, if it had only acted quickly enough to reach the printer, intended to censor most of the Oct. 31, 2000 issue of the INNOVATOR for allegedly violating "journalistic standards."

Defendants *did*, in fact, attempt to censor the issue, as Carter made the first call to the printing agency to block publication of the October 31, 2000 issue, and upon learning that it had, indeed, already been published and delivered to the university, made the second call to prohibit publication of future issues. Doc. 43 at Richards aff.

Fagan's condemnation, however, despite being inaccurate and hence untrue, springs from a man with admittedly zero journalism experience. Doc. 44 at Fagan dep. at 24. Despite this acknowledged ignorance, Defendants intended to hold Plaintiffs culpable to a journalism code to which Plaintiffs are not beholden; Fagan's memo attached a copy of the code espoused by the "Society of Professional Journalists." Doc. 44 at Fagan dep. at ex. 4. Plaintiffs clearly, in their capacity as merely student newspaper editors and writers, are not professional journalists. (This accomplishes nothing less than accusing, for example, a Christian of being a poor Buddhist.) The right to choose affiliation, whether ethical, educational, professional, or religious, ever remains the individual's; Fagan's action constitutes indirect denial of Plaintiffs' First Amendment guarantees of freedom of association.

Moreover, "journalistic standards" is entirely too vague and nebulous a criterion to be supportable; the fact that every paper creates its own editorial policy deflates the notion of a singular model. Since every paper creates its own criteria, and there are *many* press codes, it defies the existence of the singular set of "journalistic standards" Fagan would have this Court and the GSU community believe to exist.

In Lueth, a former editor-in-chief of a student-run newspaper at a community college challenged prohibited publication of content per criteria established outside the discretion of the paper's editorial board; the college was found to have violated the First Amendment rights of the editor-in-chief, as the

college's regulations were not narrow enough to identify a state or institutional interest. 732 F. Supp. 1410. A district court ruled in favor of a student who challenged the constitutionality of the university's policy on discrimination, finding the terms of the policy were "too vague," which violated the due process clause and resulted in a restriction against free speech. Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989).

The courts have also held that vague university regulations are too broad to satisfy a university's legitimate interests in maintaining propriety or aesthetics. Students Against Apartheid Coalition v. O'Neil, 660 F. Supp. 33 (W.D. VA 1987). The Court in Rosenberger ruled that the Constitution "forbid[s] the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation." 515 U.S. 819 at 829.

Moreover, grammar, punctuation, and spelling are all content-related matters, and therefore subject to editorial discretion, not administrative approval or compliance with unspecified, unpublished, and unsubstantiated university mandates: Add to this the fact that language is in a constant state of flux; "slang" usage cannot not possibly be accurately predicted or justifiably prohibited; and journalism, like any other profession, has its own special forms and jargon. Such considerations evidence just how ludicrous, implausible, and extremely restrictive Defendants' allegations are in suggesting that such "university standards" either exist, or, in fact, that mandated adherence to any such regulations would be desirable.

In Healy, the Court ruled that only with “evidential basis to support the conclusion” that students’ actions substantially and materially disrupt the educational process can the administration’s actions be affirmed as permissible. 408 U.S. 169 . Defendants make no allegations that Plaintiffs’ publication either caused such disruption or were likely to do so, based on the mere possibility of disputation of comma usage or speculative misplaced periods appearing in subsequent issues.

The Fourth Circuit has ruled that it could not force newspapers to print content to which the editors were opposed. Kania v. Fordham, 702 F. 2d 475 (4th Cir. 1983): Grammar, spelling, and punctuation are all content-related issues, and subject to editorial discretion

The Supreme Court of Oklahoma ruled First Amendment rights had been violated in a university’s refusal to officially recognize a student organization. Failing to show written documents or evidence the activity was illegal, the state could not rely on the mere suspicion that some members would violate state laws (i.e., fail to meet “university standards”). The key issue noted by the court was whether the state could deny recognition based on the content espoused by the organization—it could not, and thus the plaintiffs’ First Amendment rights had been violated on the grounds of mere suspicion of non-compliance, as is the case here. Gay Activist Alliance v. Board of Regents of Univ. of Oklahoma, 638 F 2d. 1116 (Okla. 1981)

In Tinker, the Supreme Court upheld:

“But in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk... In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint...In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.” (citations omitted) 393 U.S. 503.

As such, Plaintiffs were not obligated to adhere to administrative-designated and “officially approved” use of language, as Defendants’ enforced proscriptive usage indisputably would interfere with Plaintiffs’ freedom of expression; Plaintiffs’ departure from administratively-proscribed language does not guarantee material and substantial disruption of the educational process or university environment, and Defendants, therefore, have failed to meet the “heavy burden” required of them to substantiate their trespass of Plaintiffs’ rights.

### **C. Prior Restraint of the INNOVATOR Exercised by Defendants Violates the First Amendment Freedom of the Press.**

The Supreme Court has upheld that the primary purpose of the First Amendment is "to prevent all such previous restraints upon publications as had

been practiced by other governments." Patterson v. Colorado, 205 U.S. 454, 462 (1907).

In Near v. Minnesota, 283 U.S. 697, 713 (1931), the Supreme Court declared: "[I]t has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's] guaranty to prevent prior restraints upon publication." The exemption to the ban on prior restraint would *only* apply if Plaintiffs published movement of troops during wartime, which Defendants neither allege, nor did Plaintiffs attempt. In New York Times v. United States 403 U.S. 713 (1971), the Supreme Court ruled that the government had not met the "heavy burden" of proving that national security claims outweighed the First Amendment: If the Court found that even national security claims did not warrant disregard of First Amendment freedoms, how much less, then, should mere allegations of grammatical errors?

In Texas v. Johnson 491 U.S. 397 (1989), the Supreme Court ruled that "We do not consecrate the flag by punishing its desecration, for in doing so, we dilute the freedom that this cherished symbol represents." The following year, the Court rejected a congressional act to punish flag burners: If the Supreme Court did not find even flag burning to be sufficient cause for denial of First Amendment rights, then alleged grammatical mistakes in newspaper copy are nowhere near to being a legitimate excuse to strip Plaintiffs of their identical, constitutional guarantees.

If GSU intends to use prior review merely to correct trivial errors, then it does not rise to any educationally justifiable purpose. Grammar, punctuation, and spelling are content-related issues, subject to viewpoint variation: A university should accomplish its educational goals in some fashion other than silencing speech on the basis of its viewpoint or content. Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University, 773 F.Supp. 792 (E.D. VA 1991), 993 F. 2d 386 (4th Cir. 1993) .

Defendants have offered no written guidelines or laws which grant license to them to trespass Plaintiffs' rights either as collegiate administrators or government officials: Considering that Defendant Carter's invocation of prior review powers was in violation even of university-published policy, a reasonable jury would be likely to question the credibility of the Defendant on this point.

The Supreme Court upheld, in New York Times, that "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." 403 U.S. 713 The government "thus carries a heavy burden of showing justification for the imposition of such a restraint." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971): Defendants have neither offered nor can provide such justification.

In New York Times , it was determined that "Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or

prior restraints.” 403 U.S. 713 at 717. It was also declared by that Court that “[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.” Id. at 725-6. Also, prior restraint is permitted only when “the evil that would result is both great and certain and cannot be militated by less intrusive measures.” CBS Inc. v. Davis, 114 U.S. 912 (1994); this most certainly cannot be reasonably believed to be the result of questionable punctuation and spelling in newspaper copy.

It is the unique legal position of GSU to be a publisher legally prohibited from prior review, but capable of using its financial position to illegally demand it from a printer: Regional Publishing held the contract to print The INNOVATOR with Defendants, and Plaintiffs did not have the means or fiscal authority to have The INNOVATOR printed on their own. Plaintiffs are not constitutionally compelled to waste their time attempting to produce a newspaper which the administration will not allow to appear without prior review and approval; Plaintiffs, in fact, did continue to attempt production. Doc. 44 at Hosty dep. at 47, 50-51, 86-87.

Nor are Plaintiffs obligated to risk the danger of having their newspaper bowdlerized by state officials without their knowledge. In Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988), which the Defendants wrongly assert is guiding this case, the principal was exonerated of having deleted two pages from the high school newspaper before having it printed due to the

“immaturity” of the student population under his auspices. At GSU, the student population is comprised of adult students, and Plaintiffs have encountered classmates who are grandmothers, career teachers, military veterans, law enforcement officials, and retirees, some of whom have even been previous contributors to The INNOVATOR under Plaintiffs’ tenure as editors.

If Defendants wish to argue they question the maturity of the student population at GSU, and therefore should be granted unfettered license to screen and determine reading materials for such a population, their argument is not merely ludicrous, but insulting as well. The “special environment” of the GSU community bespeaks, therefore, of a student population comprised of individuals having demonstrated maturity enough to hold jobs, raise families, and serve their country; the situation of Hazelwood does not reflect even remotely the situation of this case, and therefore has no rightful application to it.

Legal precedence establishes clearly that college student journalists are free to publish whatever they want without prior review or restraint. Requiring college students to submit a publication for prior review has been deemed an unconstitutional attempt by the administration to control content. See, e.g., Antonelli, 308 F. Supp. at 1335. In Mazart, the court ruled: “censorship or prior restraint of constitutionally protected expression in student publications at State-supported institutions has been *uniformly* proscribed by the courts.” 441 N.Y.S. 2d 600 at 605.

Plaintiffs are entitled to have the threat of censorship lifted before they proceed with publication. No court has ruled that a journalist must publish a newspaper under the threat of an unconstitutional prior restraint in order to have a legal claim. See Near v. Minnesota, 283 U.S. 697, 713-716 (1931); Organization for a Better Austin v. Keefe, 402 U.S. 415, 418 (1971); Freedman v. Maryland, 380 U.S. 51, 57 (1965). In Kania, the court ruled that neither the school nor the courts could force a student newspaper to print content to which the editors were opposed. 702 F. 2d 475.

Plaintiffs, in fact, desired to proceed with publication of future issues (and originally filed for declaratory and injunctive relief to do so), but were precluded from completion and publication of any further issues due Defendants' violative actions. In Sinn, the court found that determination of content is a constitutionally-protected editorial discretion, which is to be upheld even if a paper is subsidized with state money. 638 F. Supp. 143.

The fact that plaintiffs voluntarily chose (in editorial capacity) to have their faculty advisor review the newspaper does not in any way compel them to accept prior review and approval by an administratively-designated individual. Defendants claim that advisor review being "common practice" made its imposition by the GSU administration acceptable; such an argument is not plausible.

The advisor's mandated signature for release of the paper was due to university-established procedure, as all advisors to GSU student clubs and

organizations are required to sign off on paperwork generated for processing of requests and expenditures; the forms are neither mentioned in nor mandated by SCMB bylaws or university media policy, and primarily serve the university's fiscal and plant operations' departments instead of the student newspaper. As such, it exists not to confirm the "common practice" of advisor review, but merely the "common practice" mandated of all student clubs and organizations, the campus press included, in order to process internal requests of all natures or remit payment to vendors such as the printing agency.

Defendant Carter demanded prior review and approval and threatened non-payment in order to censor viewpoints disapproved of by the administration, which is an unconstitutional act of viewpoint discrimination and prior restraint. The Eighth Circuit Court ruled in favor of a student association having brought suit against public university officials for violating the group's First Amendment rights, the result of it's having been denied funding by the school. State action was present since the university official had final determination of funding, as did Defendants, and specifically, Carter. The denial of funding was found to be content-motivated, and a violation of the group's First Amendment rights resulted. Gay & Lesbian Student Association v. Gohn, 850 F. 2d 361 (8th Cir. 1988)

The Sixth Circuit upheld that a state-operated theater's cancellation of a controversial film at the request of a state senator was a state action, and therefore an unconstitutional deprivation of students' First Amendment rights to

receive information and ideas. Brown v. Board of Regents of University of Nebraska, 640 F. Supp. 674 (D. Neb. 1986), 669 F. Supp. 297 (D. Neb. 1986).

Carter's calls to Richards meets identical standards of interference in terms of withholding funds, and accomplished nothing less than an identical student deprivation of receipt of ideas and information.

The motives of the Defendant are disputed facts which a jury must determine, and are not reserved for summary judgment. Defendants' true motives must be called into question because they allege that the calls were made to the printing agency to ensure that an advisor was in place, in order to proofread for spelling and grammar errors. Plaintiffs' advisor's name and Hosty's as copy editor, however, appeared in every issue published, and Defendant Carter *herself* testified in three places that no less than three individuals had informed her Plaintiffs, indeed, had an active advisor in place; had Carter no knowledge of such, it would have been *impossible* for her to have debated with Plaintiffs about having someone other than him review the paper.

Also, Carter's signature was the last required before Plaintiffs' paperwork for The INNOVATOR could be successfully processed; university policy mandated that the advisor and an administrator directly under her auspices (such as Defendant Dascenzo) sign off on all paperwork prior to it being advanced to her office; Carter's claims of ignorance are just that – claims. (Carter testified she had no concerns whatsoever with Plaintiffs' October 31, 2000 issue, which would

include grammar and journalism standards; contradictions such as this abound in Defendant testimony.)

Moreover, Defendant Carter's firing of the advisor prevented Plaintiffs from submitting any further issues for publication because university policy mandated that all paperwork for student clubs and organizations bear advisory signatures; the firing of Plaintiffs' advisor, in addition to being an abrogation of Plaintiffs' editorial rights, also effectively precluded payment to the printing agency, as it accomplished nothing less than the implicit threat of withholding payment made by Defendant Carter to Richards.

Defendants have failed to show a jury verdict against Dean Carter could not be justified. Since courts justifying a summary judgment must view evidence in a manner most favorable to the plaintiff, summary judgment must be rejected. Any reasonable jury could conclude that an order for prior review and prior restraint issued almost *exactly* at the same time administrators were being investigated and denouncing a student newspaper having severely criticized them was an unconstitutional attempt to restrain freedom of the press based on content and viewpoint. See Doc. 44 at Fagan dep. ex. at 3.

Even if the evidence is viewed in the manner most favorable to the Defendants, Dean Carter's confessed reason for prior review and restraint (to correct grammatical errors and uphold journalistic standards) is *still* illegitimate under the precedents established for the college press, and summary judgment must be rejected. The act of prior restraint, once established, continues to exist

until it is specifically lifted; as evidenced by Richards' affidavit, the university had never contacted him to lift the ban imposed by Carter well beyond Plaintiffs' editorial tenure, as his affidavit is dated September 26, 2001. Doc. 43 at Richards' aff.

Antonelli dealt with a college president who "through his power over the purse is censoring the material for publication by subjecting it to the prior approval of a faculty advisory committee." 308 F. Supp. 1329 at 1331. The Antonelli court upheld "the right to be free from the burden of submitting future issues of The Cycle to the advisory board for its prior approval." Id. at 1334. Grammar, punctuation, and spelling all constitute content, and if language were indeed static, inflexible, limited, and not subject to individual interpretation, then there would be only one, perpetual dictionary of the English language.

In Fujishima v. Board of Education, 460 F.2d 1355 (7<sup>th</sup> Cir. 1971), this very Court struck down a Chicago Board of Education prior review rule as violative: "Because section 6-19 requires prior approval of publications, it is unconstitutional as a prior restraint in violation of the First Amendment." The Fujishima ruling also applied to distributing college newspapers, since it noted that Antonelli was "[i]n harmony with the cases cited." 308 F. Supp. 1329 at 1359.

Nor is the excuse claimed by Dean Carter, which Plaintiffs challenge, sufficient to justify prior review or restraint. In Schiff, a college president claimed that the student newspaper "currently reflects a standard of grammar, of spelling and of language expression unacceptable in any publication, certainly

unacceptable and deplorable in a publication of an upper level graduate university." 519 F.2d 257. The Fifth Circuit held in Schiff that "[A]ny regulation or action infringing on free speech, when not shown to be necessarily related to the maintenance of order and discipline within the educational process, must fail." 519 F.2d 257.

Schiff added: "In the case at bar, the 'special circumstances' relied on by the university -- poor grammar, spelling and language expression -- could embarrass and perhaps bring some element of disrepute to the school; but assuming the president's assessment was correct, these faults are clearly not the sort which would lead to significant disruption of the university campus or within its educational process." Id. at 261. Prior review and prior restraint for alleged grammatical errors is prohibited precisely because a state official or university administrator could use copyediting as cover for viewpoint discrimination.

Defendant Carter's instructions to Richards that she be called after the newspaper's copy had been delivered to him is problematic and troubling, as it represents a serious departure of conduct permissible even in instances wherein prior review is *not* specifically prohibited. Her instructions are problematic also because Defendant Carter did not specify anyone other than herself as to whom she would entitle to have access to the paper in order to determine its acceptability for publication, or what qualifications she or they might possess to ably do so: Defendant Carter admitted to having no journalism experience

herself, and did not specify a time-frame for when the prior review and approval might be carried out per her orders: Indefinite delay in publication could seriously and adversely affect the contents and integrity of the paper.

Moreover, Plaintiffs could have no guarantee that even future submissions of the modified issue would not be subjected to the same kind of censorship, and Plaintiffs, therefore, could be required to work on an issue *ad infinitum* without ever making it to publication, as the university administration could hold off publication of an intended issue repeatedly and indefinitely, all in the name of alleged copy editing concerns.

Prior restraint is not a narrowly crafted regulation designed to preserve a compelling state interest. (See, e.g., Perry Education Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37,46 (1983) at 46.) The desire to stop alleged grammatical errors is not compelling because Defendants did not cite *any* mistakes in The INNOVATOR, and all newspapers make mistakes. Prior restraint is not narrowly crafted because the Defendants never sought less extreme measures to improve the paper.

As Defendants have demanded the right to stop publication until they have examined The INNOVATOR and made changes to *their* satisfaction (and not the Plaintiff editors'), prior review amounts to a form of prior restraint. This unrestricted prior review is especially dangerous because it enables the administration to indefinitely delay publication of potentially important articles,

in order to reduce their impact, including, it should be noted, articles about the administration and the other Defendants.

The SCMB bylaws demonstrate that its body is intentionally comprised of students, civil servant staff, and faculty, and administrators of even the lowest level of university employment are and have been prohibited from serving on that body; the clear intention of precluding administrative involvement in the decisions of the campus media are not by accident but by design, and therefore Carter's claims to having discretionary powers over the student press, whether in appointing an advisor or demanding prior review, are in flagrant opposition to even university-published policies, and are, therefore to be called into question and decided by a jury.

Moreover, of all the student clubs and organizations at GSU, the student media is the only extra-curricular body of which the administration has taken upon itself to designate an advisor; this undoubtedly bespeaks of the administration's attempt to exercise influence or control over the paper's contents, clearly in violation of viewpoint discrimination prohibitions: Defendants offer no explanation as to why they have singled out the student media for administrative interference.

In Tinker, the Supreme Court held:

"Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained...In our system, state-operated schools may not be enclaves of totalitarianism. School officials

do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." 393 U.S. 503.

The Supreme Court and lower courts have especially prohibited the state action of prior review and restraint in the context of a university where the free exchange of ideas is essential, *universally* wherein the schools fail to meet the "heavy burden" of proving that imminent "material and substantial" disruption would result from student comportment or speech.

**D. Non-Recognition and Abrogation of Editorial Discretion on the Part of Defendants is a Violation of the First Amendment Guarantees of Freedom of Association and the Press.**

In Healy, the Supreme Court held that an unsubstantiated fear or apprehension that a group would produce an undesirable or illegal result is not enough for a university to deny them recognition; that university's refusal to recognize a group as an active, campus organization denied the plaintiffs their First Amendment rights. 408 U.S. 169. As such, Defendants' alleged apprehension that Plaintiffs *might* fail to meet "university standards" (whether real, or as is the case here, imagined) is insufficiently justifiable to deny Plaintiffs official recognition and hence, their First Amendment rights; Plaintiffs' departure from administratively-prescribed language cannot reasonably be argued as being likely to incite imminent lawless action, and therefore Defendants argument is considerably weaker even than the school's having been involved in the Healy decision.

The Court of Appeals of New York ruled that administrative power to exclude is not absolute, and may *not* be used to exclude or restrict persons from exercising their First Amendment rights. People v. Leonard, 447 N.Y.S. 2d 111 (N.Y. 1984): Defendants have failed to produce legitimate evidence or valid reasons which entitle them to restrict Plaintiffs' use of language to the standards which Defendants allege exist at their university.

In Gay Student Services v. Texas A. & M. University, 737 F2d 1317 (5th Cir. 1984), failing to show written documents or evidence that students' activities were illegal, the state could not rely on the mere suspicion that some members would violate state regulations ( i.e. "university standards," which, it must be remembered herein, simply do not exist as specific or published policy). That court, citing Healy, ruled that without significant substantive, evidentiary, and supported reasons for denial of recognition, non-recognition results in an infringement of First Amendment rights.

In Kania, the court ruled it could not force newspaper editors to publish in opposition to their editorial powers, as compelled adherence violates freedom of the press guarantees. 702 F. 2d 475. Plaintiffs' being permitted to render decisions which pertained solely to content and format (a limitation which Defense infers in its' brief) would, logically, be restrictive: Defendants, in denying Plaintiffs the right to have selected their own advisor or language preferences for publication of a "totally student run" newspaper, violated

university-published policy and therefore present false limitation of Plaintiffs' editorial discretion to this Court; "totally" does not mean "partially."

Defendants denied Plaintiffs an officially-recognized advisor for in excess of two months, which effectively established prior restraint, as university policy mandates an officially-recognized advisor be in place for all student clubs and organizations affiliated with Student Life, as was the student newspaper. Dr. de Laforcade was fired by Defendants in the first week of December 2000, and Defendants failed to appoint an officially-recognized advisor to Plaintiffs' publication until mid-February 2001; denial of recognition to Plaintiffs' advisor of choice, in addition to being an abrogation of Plaintiffs' constitutionally-protected editorial discretion, effectively prevented Plaintiffs from going to press because no payment could or would be remitted to the printing agency without an administratively-approved advisor's signature.

The Supreme Court , in Healy, ruled :

"Among the rights protected by the First Amendment is the right of individuals to associate their personal beliefs. While freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition . . . There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes...Petitioners' associational interests also were circumscribed by the denial of the use of campus bulletin boards and the school newspaper. If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited

by the denial of access to the customary media for communicating with the administration, [408 U.S. 169, 182] faculty members, and other students. Such impediments cannot be viewed as insubstantial... We may concede, as did Mr. Justice Harlan in his opinion for a unanimous Court in NAACP v. Alabama ex rel. Patterson, 357 U.S., at 461, that the administration 'has taken no direct action...to restrict the rights of [petitioners] to associate freely'... But the Constitution's protection is not limited to direct interference with fundamental rights. The requirement in Patterson that the NAACP...was found to be an impermissible, though indirect, infringement of the member's associational rights. Likewise, the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the [administrator's] action. We are not free to disregard the practical realities...Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference.'" (citations omitted). 408 U.S. 169.

Plaintiffs rightly testified that concerns of advisor interference in instances wherein Defendants install the individual are speculative. Doc. 44 at Hosty dep. at 30, 26, 28, 124. In fact, *any* future action on the part of Defendants, regardless of whether it would be beneficial or detrimental to Plaintiffs, as Plaintiffs are not mind-readers, must necessarily be "absolutely" speculation: the belief that Plaintiffs could accurately predict with any certainty the future actions of individuals is no more credible than the likelihood of this Court's being able to do so. While Defendants may not have known if Plaintiffs were looking for anything specifically, Defendants arguably knew Plaintiffs were specifically looking for something; Plaintiffs, therefore, while not knowing exactly what Defendants might have known, contend that they suspected Defendants knew, at the very least, by the nature of questions and requests made of them by Plaintiffs,

that they were under investigation by Plaintiffs; it is, therefore, only the *exactness* to which Plaintiffs testified they could not know the minds of Defendants.

#### **E. No Public Forum Analysis is Required for the Collegiate Press.**

Defendants argue that the INNOVATOR is a non-public forum. Although they fail to show justification for prior restraint even of a non-public forum, the courts have, *without exception*, ruled that no censorship of a college newspaper can be justified on public forum grounds.

The public forum analysis does not apply to college newspapers: This Court itself has established the public forum question is irrelevant at public colleges. Linnemeir v. Purdue, 260 F.3d 757, 760 (7<sup>th</sup> Cir. 2001): Just as a play cannot be stopped in a college theater, regardless of its forum status, so too is any demand for prior review and approval of a student newspaper's content prohibited.

In Bazaar, the Court of Appeals for 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 any significant disruption." 476 F.2d 570.

According to the Defendants, the Kincaid court declined to state whether it would apply the same analytical framework in the context of the student press. Defendants refer to a footnote in Kincaid: "Our decision to apply the forum doctrine to the student yearbook at issue in this case has no bearing on the

question of whether and the extent to which a public university may alter the content of a student newspaper.” 191 F.3d 719 at 348 n.6.

The court in Kincaid (which dealt exclusively with a yearbook) clearly intended this footnote to mean a newspaper is a public forum, and no forum analysis is needed for a college newspaper case because *all* legal precedents show that censorship of a college newspaper is not allowed under any kind of forum; a yearbook, which does not resemble a newspaper, therefore required a public forum analysis. Yet the ruling in Kincaid held ultimately that the constraints on a limited public forum could *not* apply even to a yearbook. 236 F.3d 342.

Alternately, even if the public forum issue were relevant to a college newspaper, GSU created a limited public forum by ceding editorial control to the student editors. GSU gave up any right or responsibility to control its content by declaring the INNOVATOR “totally student-run.” Doc. 44 at Hosty dep. at 151. A college newspaper is a limited public forum where anyone is invited to submit letters and articles for publication; Plaintiffs declared their editorial decision to be a limited public forum at the onset of their tenures in their premiere publication, and all subsequent issues contained invitations to the public to respond and contribute to The INNOVATOR. Doc. 44 at Fagan dep. ex. at 3.

The Supreme Court noted in Widmar that the campus of a public university, at least for its students, may be reckoned a public forum. 454 U.S. 263.

In Bazaar, college administrators argued that the magazine was a nonpublic forum because it was published with the advice of the English

Department and received student funds. 476 F.2d 570. The Fifth Circuit rejected this argument: "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 580 (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)). The court in Bazaar ruled that publications could be censored only when the publication "would or could lead to any significant disruption on the University campus." Id. at 575-76. Defendants make no such allegation about The INNOVATOR, and have failed to meet the "heavy burden" which would entitle them to prior restraint as established by the Near v. Minnesota court's parameters. 283 U.S. 697.

As student newspapers at public colleges are protected from state censorship or prior restraint, no forum analysis is necessary to conclude that Defendants' actions were unconstitutional. Even if analysis were required, a student newspaper is necessarily a limited public forum protected from prior review and restraint.

**F. College Students' First Amendment Rights Are Not And Have Never Been Limited By Hazelwood v. Kuhlmeier.**

Defendants claim that Hazelwood entitles state officials at public colleges to control any student newspaper. This claim has been repeatedly rejected, and *no* court whatsoever has ever recognized that state officials or university administrators have this power over adult college students unless substantial

and material disruption is proven to reasonably occur as a result of student speech or compartment .

The only two federal appellate courts to directly address the question have rejected the application of Hazelwood to college newspapers. As the First Circuit noted, the public forum issue of a student newspaper “is not applicable to college newspapers.” (citations omitted). Student Government Association v. University of Massachusetts, 868 F.2d 473, 480, fn. 6 (1<sup>st</sup> Cir. 1989) Citing that case, in Kincaid, , the Sixth Circuit noted that “Hazelwood has little application to this case,” as it dealt with a yearbook, and not a student newspaper. 236 F.3d 342.

As the Supreme Court has never addressed the application of Hazelwood to college students, *all* of the college press precedents readily dismissed by Defendants are still valid law, and *all* of the high school press precedents cited by Defendant are inapplicable to the unique status awarded by the courts to the college press and students.

The Supreme Court has had numerous opportunities to apply Hazelwood restrictions to college students, and it refused in the Rosenberger and Southworth cases to even mention Hazelwood. To the contrary, Rosenberger and Southworth reinforce the Supreme Court’s doctrine that colleges are constitutionally different from high schools because of the nature of the institutions and the maturity of the students.

The Supreme Court has noted the unique legal importance and status of colleges and universities. The Court wrote in Keyishian, "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' United States v. Associated Press, 52 F.Supp. 362, 372,(SDNY 1943), aff'd. 326 U.S. 1, 65 U.S. 1416 (1945). By attempting to make an authoritative selection of language or journalistic practices and content, Defendants threaten the robust exchange of ideas. In Healy the Court noted: "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." (citations omitted). 408 U.S. 169 at 180-181. The student newspaper is an essential part of the university's "surrounding environs," and critical in promoting the exchange of ideas.

In Widmar, the Supreme Court ruled: "University students are, of course, young adults. They are less impressionable than younger students." 454 U.S. at 274 n. 14.

The Supreme Court in Rosenberger specified colleges as uniquely free, noting that the danger "from the 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." 515 U.S. 819 at 835.

In Southworth, the Supreme Court wrote : “[C]ases 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.” (Souter, J., concurring) 529 U.S. 217.

Lower courts have *unanimously* recognized the difference between colleges and high schools. As the Fifth Circuit concluded, in Lansdale v. Tyler Junior College, 318 F. Supp. 529 (1970), *affd.*, 470 F.2nd 659 (5th Cir. 1972), “[A]s a matter of law the college campus marks the appropriate boundary where the public institution can no longer assert that the regulation of this liberty is reasonably related to the fostering or encouragement of education.”

The court in Mazart noted, “It is clear from a reading of the published cases dealing with the rights of college students that the courts uniformly regard them as young adults and not children.” 441 N.Y.S. 2d 600 at 606-7.

The court in Antonelli noted, “The university setting of college-aged students being exposed to a wide range of intellectual experience creates a relatively mature marketplace for the interchange of ideas, so the underlying assumption that there is positive social value in an open forum seems particularly appropriate.” 308 F. Supp. 1329.

The Sixth Circuit called Hazelwood “a case that deals *exclusively* with the First Amendment rights of students in a high school setting” at 346. It also noted: “The university is a special place for purposes of First Amendment

jurisprudence....In addition to the nature of the university setting, we find it relevant that the editors of The Thorobred and its readers are likely to be young adults....” Id. at 352

The application of Hazelwood to higher education would threaten the freedom of the college press, and overturn hundreds of rulings which established the liberty of college newspapers and the unique status of higher education. Defendants’ argument that this Court should create a new power for the government to infringe upon the constitutional rights of adult college students is both unpersuasive and unconscionable, and is in diametric opposition to the freedoms precisely established by the First Amendment.

**G. Defendants’ Actions Were: in Violation of the Fourteenth Amendment’s Protections Against Arbitrary Deprivations of Liberty; in Denial of Procedural Due Process; and a Deprivation of Education as a Property Interest.**

The Court in Rosenberger upheld that “[S]tudent expression is an integral part of the University's educational mission.” 515 U.S. 819. In Kania, the Fourth Circuit ruled that the newspaper served valuable functions, both in pursuit of communication within the university and the open exchange of ideas. 702 F. 2d 475. The Supreme Court, in Goss v. Lopez, 419 U.S. 565 (1975) wrote: “It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society.”

In Goss, the Supreme Court has ruled that students at a public school have property and liberty interests which qualify for protection under the Due Process

Clause of the Fourteenth Amendment. 419 U.S. 565. Moreover, Goss also declared:

“Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary...The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student’s legitimate entitlement to a public education as a property interest.” 419 U.S. 565 at 575-576.

In Meyer v. Nebraska, 262 U.S. 340 (1923), the Supreme Court ruled :

“No state shall...deprive any person of life, liberty, or property without due process of law. While this Court has not attempted to define with exactness the liberty thus guaranteed...Without doubt, it denotes ... the right of the individual to...engage in any of the common occupations of life, to acquire useful knowledge... and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men...The established doctrine that this liberty may not be interfered with, *under the guise of protecting the public interest*, by legislative action which is arbitrary or without some reasonable purpose within the competency of the State to effect.”

Defendants’ guise of protecting the university’s reputation is, therefore, inadmissible before this Court.

The Court also declared in Goss that “[T]he State’s claimed right to determine unilaterally and without process whether that misconduct has occurred immediately collides with the Due Process Clause’s prohibition against arbitrary deprivations of liberty.” 419 U.S. 565

The Court in Goss also ruled that arbitrary deprivations of liberty are violative of the due process , as it upheld: “ ‘Where a person’s good name,

reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied." (citations omitted) 419 U.S. 565. Fagan 's university-wide, defamatory November 3, 2000 memo was distributed without any notice, inquiry, or hearing having been afforded to Plaintiffs; it *significantly* damaged Plaintiffs' reputation, especially problematic because Fagan could not cite *any* specific errors in the condemned issue, and university-published policy mandates all media concerns be addressed to the SCMB.

Goss, upholding the sentiments espoused by the Court in Brown v. Board of Education, 347 U.S. 483 (1954), ruled: "[E]ducation is perhaps the most important function of state and local governments...and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event." 419 U.S. 565. The Court in Goss also upheld that, in determining whether due process requirements apply in the first place, severity of deprivation was not to be decisive of a basic right. 419 U.S. 565.

Goss also established that "The Court's view has been that as long as a property deprivation is not *de minimus*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause...A ten-day suspension from school is not *de minimus* in our view and may not be imposed in complete disregard of the Due Process Clause." (citations omitted), and that even temporary suspensions require due process. 419 U.S. 565. Plaintiffs have been deprived by Defendants of liberty and property interests for in excess of 21

months, and counting; there has been no publication of The INNOVATOR since the prior restraint went into effect.

The Supreme Court, in Meyer, ruled that in order to satisfy the constitutional requirements of substantive due process, if a state is going to deprive a person of his life, liberty, or property, the state must have a valid objective and the means used must be reasonably calculated to achieve the objective, and that the substantive due process requirements applied to education as a property interest under the Fourteenth Amendment. 262 U.S. 340.

The Antonelli court upheld " Having fostered a campus newspaper, the state may not impose arbitrary restrictions on the matter to be communicated." 308 F.Supp. 1329. In Leonard, a university restriction was deemed violative because the school could not support the ban with valid reasons. 447 N.Y.S. 2d 111. In Iota Xi, it was held that a university should accomplish its educational goals in some fashion other than silencing speech on the basis of its viewpoint or content. 993 F. 2d 386.

As in the case with Gay Student Services , failure on the part of Defendants to show written documents or evidence that Plaintiffs *might* violate "university standards," (or even that such standards exist) is an arbitrary deprivation of liberty based on mere suspicion of non-compliance. 737 F2d. 1317. Gay Student Services, citing Healy, ruled that restricting student speech or activity without significant substantive, evidentiary, and supported reasons results in constitutional violation. 737 F2d 1317.

“Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must *first* be notified.” Baldwin v. Hale, 1 Wall. 223, 233 (1864) At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing. Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950). The courts have declared that due process must be afforded to individuals by administrative and government officials equally when the loss of a fundamental right is at stake. See., e.g., Hobson v. Bailey, 309 F. Supp. 1393, D.C. Tenn. (1970) ; Zanders v. Louisiana State Board of Educ., 281 F. Supp. 747, D.C. La (1968).

Defendants' suppression of Plaintiffs' freedom of expression, association, and the press by means of prescribing and mandating adherence to *non-existent* language constraints cannot reasonably be considered a valid objective; covertly halting publication by threat of non-payment to the printer and covertly firing Plaintiffs' advisor cannot be considered reasonable means to achieve Defendants' alleged objective of guarding against errors in copy.

Also, in Dixon v. Alabama State Board of Educ., 294 F. 2d 150 (5<sup>th</sup> Cir. 1961), cert. denied 368 U.S. 930 (1961), the court ruled:

“Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law. In the disciplining of college students, there are no considerations of immediate danger to the public, or of peril to the national security, which should prevent the Board from exercising at least the fundamental principles of fairness...Indeed, the example set by the Board in failing to

do so, if not corrected by the courts, can... do inestimable harm to their education."

In Leonard, an appellate court upheld that administrative powers are not absolute, and may *not* be used to exclude or restrict the exercise of First Amendment rights; a university restriction was deemed illegitimate since there were no valid reasons to support the imposition. 447 N.Y.S. 2d 111.

In McMechan, an appellate court determined that an institution has an obligation to clarify those standards which it considers essential to its educational mission and its community life, and that disciplinary action should be instituted only for violations of standards of conduct published in advance. 594 N.E. 2d 211. Defendants have not and cannot point to any such published and decidedly vague "university standards" to which Defendants allege exist and are intended to be regulatory, which is violative of substantive due process. Defendants' "disciplining" of the student press, in initiating prior restraint, an action taken against Plaintiffs without notice or opportunity afforded to Plaintiffs to defend their editorial discretion, is a violation of procedural due process guarantees.

The Fifth Circuit upheld that a school board's action was constitutionally deficient in terms of due process where the board simply confirmed the school principal's judgment in a dismissal proceeding without independently evaluating and weighing evidence on its own Lee v. Macon County Board of Educ., 490 F. 2d 458, (5<sup>h</sup> Cir. 1974). Defendants exercised *no* care in preservation

of Plaintiffs' rights in failing to contact Plaintiffs or Richards, and in relying *exclusively* on Carter's claims of innocence, denied Plaintiffs' procedural due process guarantees.

## II. Defendant Carter is Not Entitled to Qualified Immunity.

### A. The Law Was Clearly Established That Both Administrative and Governmental Trespass of Collegiate Students' Constitutional Rights is Emphatically Prohibited.

In order to qualify for protection under the doctrine of qualified immunity, Defendants must show that there was no clearly established law prohibiting their conduct at the time it occurred. Since the prior restraint continued throughout the editorial term of the Plaintiffs, the question is whether First Amendment jurisprudence through April 30, 2001 demonstrated that college newspapers and students cannot be subjected to prior review, viewpoint discrimination, abrogation of editorial powers, non-recognition resulting in freedom of association, arbitrary deprivations of liberty, procedural due process, prior restraint, or denial of education benefits as a property interest. As qualified immunity in a summary judgment requires viewing the disputed facts in the manner most favorable to Plaintiffs, the Defendants must show that the law entitled them to commit the above-mentioned offenses against college students and media; it *emphatically* does not. The courts have consistently and clearly established that the U.S. Constitution prohibited Dean Carter from demanding

review and approval of the newspaper prior to printing for *any* reason, and on this point alone, therefore, Carter must be denied summary judgment.

In West Virginia Board of Education. v. Barnette., 319 U.S. 624 (1943) , the Supreme Court ruled:

“ But small and local authority may feel less sense of responsibility to the Constitution... but none who acts under color of law is beyond the reach of the Constitution... Freedoms of speech and of the press... may not be infringed upon such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the law may legally protect... Compulsory unification of opinion achieves only the unanimity of the graveyard... We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.”

The Supreme Court, in Tinker, citing Barnette, upheld that “The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures, Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.” 393 U.S. 503 In Widmar, the Supreme Court ruled that there can be "*no doubt* that the First Amendment rights of speech and association extend to the campuses of state universities." 454 U.S. 263.

**B. Defendants Were Aware That They Were State Officials and Therefore Culpable to Preservation of Plaintiffs’ Constitutional Rights.**

The Supreme Court has ruled that “the Fourteenth Amendment guarantee of ‘liberty’ for all citizens protected freedom of speech and press ‘from

impairment by the state'." Gitlow v. New York, 268 U.S. 652 (1925). Also, in Wood v. Strickland, 420 U.S. 308 (1975), the Court determined that it need only be established that the Defendants did not, "in light of all the circumstances, act in good faith. The test is an objective rather than a subjective one."

Defendants were obligated to afford Plaintiffs the civil rights guaranteed to them as outlined in Defendants' own, university-published materials; a jury could easily ascertain that Defendants should have reasonably known, *at the very least*, their own published policies which guarantee preservation of constitutional liberties. Also, Defendants also sought immunity from liability by petitioning as agents and officials of the government, which the lower court has recognized them as being in having granted them Eleventh Amendment immunity. Defense now argues that Defendant Carter should not be held culpable before the law because she would have had no way of knowing for certain that the law had clearly established the parameters of administrative interference regarding the press, and cites the argument that even the courts have been divided in their stances of such matters.

This argument is summarily incredible, and even works against Defense's pleadings; the lower courts were divided on the Kincaid case on which Defense itself attempts to base part of its argument, and if unanimity were achievable for every matter before a court, our judicial system would not exist as it does.

Defense's argument requests that Defendants not be culpable before the law because the judicial system does not operate in absolute consonance; were

absolute consonance even possible, there would be no need, then, for either appellate courts or the Supreme Court.

In addition to the implausibility of Defendants not being aware of policies they themselves published, Defendants were aware at all times that they were agents and officials of the state, and bound to uphold the Illinois Constitution, which specifies like guarantees to Plaintiffs. When it was convenient for Defendants, they petitioned the court that Defendant Carter should be immune on the basis her of being a government official; now that they are attempting to refute her being held culpable as an individual having acted under color of law, they petition the court to consider her merely an administrator. Despite the fact that her original request for Eleventh Amendment immunity evidences that she acknowledged herself to be an agent of the state, Defense now petitions the court to simply forget that it had confirmed her in that capacity.

C.

**D. Claims of Ignorance on the Part of Defendants is an Implausible and Inexcusable Plea Before the Court.**

In Wood, the Supreme Court ruled:

“[A]n act violating a student’s constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students’ daily lives than by the presence of actual malice...a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic unquestioned constitutional rights of his charges.” 420 U.S. 308.

Negligence is no more acceptable or justifiable a defense than is ignorance; A public officer is not immune from suit when negligence results in injury to another. Parker v. Downing, 547 So. 2d 1180 (Ala. Civ. App. 1988)

The alleged ignorance of settled law by the Defendants is no defense of qualified immunity. Wood also established: "Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under section 1983 if he knew or reasonably should have known that the action he took would violate the constitutional rights of the student affected," and that legal action is permissible against the school agent "if the member has acted with such an impermissible motivation or with such disregard of the student's clearly-established constitutional rights that his action cannot reasonably be characterized as being in good faith ... Public ... school students do have substantive and procedural rights while at school." 420 U.S. 308.

In terms of Defendants having "reasonably known" their acts were violative,, Plaintiffs offer the following information for this Court's consideration. Almost all of the legal citation in this document was obtained utilizing university computers (via Internet) and university library materials. Defendants retain full-time university counsel, accessible free of charge. Defendants also have unrestricted and paid access to the university's telecommunication system, library offerings, internal mail, email, and the Internet.

Defendants, however, either failed or refused to utilize any of these means at their disposal prior to committing the violative acts against Plaintiffs, as they did not call, mail, email, or write Plaintiffs to simply ask if Plaintiffs, indeed, had an advisor and a copy editor reviewing The INNOVATOR prior to publication. Defendants do not admit to having taken advantage of contacting the university-employed attorney by any of these modes either. There was no open dialogue between Defendants and Plaintiffs. Doc. 44 at Porche dep. at 54. In Goss, the Court declared :

“[I]t would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done. Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights...Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness.” 419 U.S. 565.

Defendants make no statements of having accessed their own library materials, asking to be put in contact with Plaintiffs’ press affiliations (state or national), or conducting even a nominal search on the Internet to determine if their actions were illegal. They offer no explanation as to how they admittedly read, criticized, or could be concerned about possible “university standards” being met in Plaintiffs’ published issues without noting also that Plaintiffs published – in every issue – a copy editor and advisor as being in place. Defendants, therefore, had access to all the information provided by Plaintiffs in this brief, yet failed to conduct even minimal research or inquiry as to the legitimacy of the actions they took against Plaintiffs.

**E. Defendants' Authorities Are Entirely Inapplicable to the Complaint Before This Court.**

Defendant Carter was even informed by Richards that he believed her action was unconstitutional, but she insisted upon it. Defendants cannot cite Kincaid because it was under *en banc* review at the time prior restraint began, and ultimately decided in opposition to Defendants' arguments about Hazelwood while the prior restraint continued. If Defendants had relied upon Kincaid for their actions, the Jan. 5, 2001 Sixth Circuit decision would have compelled them to repudiate their demands for prior review. The District Court decision in Kincaid, which Defense cites, decided in the university's favor only because there was no prior review: "[A]lthough Antonelli does stand for the proposition that prior review, without proper guidelines, is unconstitutional, and thus prior review can constitute injury, the plaintiffs have failed to show such prior review in this case." 191 F.3d 719. The decisive and binding Sixth Circuit decision, however, which Plaintiffs cite, ruled in Kincaid *against* the university; Defense's citation is only included, therefore, to further the unfeasible defense based on lack of absolute consonance within the judicial system. 236 F.3d 342.

Defendants rely on Wilson v. Layne, 526 U.S. 603 (1999) as the standard for qualified immunity. Wilson held that a "media ride along" during a police search violated the Fourth Amendment, but granted qualified immunity because "there were no judicial opinions holding that this practice became unlawful when it entered a home." Id. at 617. The three previous lower court cases related

to the matter upheld the conduct as reasonable, and after the conduct occurred, circuit courts were divided on the issue until the Supreme Court ruling. Defense, therefore, attempts to rely on a case in which there was no judicial consonance, while at the same time petitions the court to dismiss Plaintiffs' complaint due to that same lack of consonance.

By contrast, censorship of college student newspapers is well established to be unconstitutional. The viewpoint discrimination alleged by Plaintiff as the question for trial is clearly banned by Rosenberger, Southworth, Antonelli, and numerous other cases. Wilson established that in order to receive qualified immunity, Defendants must cite numerous legal precedents on their behalf and have no contrary precedents which prohibit their actions. *In this case, the precise opposite is true: all of the precedents prohibit a public college's control over a student newspaper, and Defendants do not cite a single valid case where a college was permitted to exercise prior restraint over the student newspaper.*

The Court, in Barnette, declared:

“[U]nity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement...Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or contrary will disintegrate the social organization...We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes... But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom...If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox.” 319 U.S. 624.

The Court in Barnette also found, in compelling adherence to administratively-prescribed standards of conduct, the university trespassed the constitutional limitations of power and "invaded the sphere of intellect and spirit which the First Amendment is intended to reserve from all official control." 319 U.S. 624.

## CONCLUSION

Defendants' arbitrary and unsubstantiated attempts to subjugate Plaintiffs to language restrictions and abrogation of their editorial powers is trespass of Plaintiffs' freedom of expression, denial of substantive due process, trespass of freedom of association, and deprivation of the property interest of the educational process; if students are not permitted to express themselves in the manner which they see fit, to engage others freely in the exchange of ideas crucial to the development of the mind, conscience, and character, and imposed upon by administrative regulations which are both arbitrary and unsubstantiated, then students are also constrained in their academic, intellectual, social, and professional development.

Defendants' abrogation of Plaintiffs' editorial powers seriously curtailed the students' learning experiences involved in being student journalists. The deprivation of Plaintiffs' liberty and property interests were implemented by Defendants in gross violation of procedural due process requisites, as action was

taken to preclude publication without Plaintiffs' being notified and afforded opportunity to address Defendants' alleged concerns against Plaintiffs.

Defendant Carter is not merely an administrator, as Defense would ask the court to now believe; she was at all times a self-acknowledged public official of the state. A jury could very well render a verdict in favor of Plaintiffs in finding that Defendants reasonably should have known, *minimally*, their own university-published policies which mandate preservation of Plaintiffs' constitutional rights, as well as the Illinois Constitution's identical guarantees, which Defendants are sworn to uphold as state officials.

A jury could also find Defendants neither sought nor enacted less extreme measures to accomplish their alleged goals, and that Defendants either failed to exercise even the minimal standards of precaution in preserving Plaintiffs' rights by failing to utilize any of the means at their ready disposal. There is considerable disputation as to the constitutionally-mandated precaution and true motives on the part of Defendants; it remains for a jury, therefore to determine if Defendants' actions were both "reasonable" and taken "in good faith."

Moreover, a verdict in favor of Defendants would establish the right of state officials to screen and approve reading materials for the voting, tax-paying, mature, adult citizens of the states within this Court's jurisdiction, and would be in diametric opposition to the "Sunshine Acts" created specifically for the purposes of disallowing government officials the right to act covertly and

squelch public awareness of their acts; it also would be a ruling in direct contrast to the guarantees of the First Amendment to preclude government trespass of freedoms of speech, association, and the media, as well as the protections established by the Fourteenth Amendment to prevent arbitrary, unsubstantiated punitive measures and deprivations of personal liberty as enacted by government officials.

Yet even if Carter *is* to be regarded as merely an administrator, the Supreme Court has consistently, emphatically prohibited administrative trespass and interference (whether overt or covert) of the clearly-established, constitutionally-guaranteed rights of university students and the college press. For the reasons stated above, Plaintiffs respectfully request that this Court affirm the denial of Defendant Carter's motion for summary judgment, and remand this case with clarification of the legal rights of college students and editors.