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Best Brief

No. 04-0103

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2004

KERRYWOOD UNIVERSITY,

Petitioner,

V.

MARTIN PRINCE, BARTHOLEMEW SIMPSON,
AND MILHOUSE VAN HOUTEN,

Respondents.

On Writ of Certiorari to the United States Supreme Court

BRIEF FOR THE RESPONDENT

September 17, 2004

Counsel for Respondent
Number 120

QUESTION PRESENTED

Did Kerrywood University's censorship of a *Kerrywood Gazette* editorial violate First Amendment Free Speech guarantees?

TABLE OF CONTENTS

QUESTION PRESENTED _____	ii
TABLE OF CONTENTS _____	iii
TABLE OF AUTHORITIES _____	v
STATEMENT OF THE CASE _____	1
SUMMARY OF THE ARGUMENT _____	3
ARGUMENT _____	4
I. <i>Hazelwood</i> does not apply to colleges and universities _____	4
A. <i>Hazelwood</i> does not apply to university level extracurricular speech _____	4
B. The courts have traditionally accorded different levels of First Amendment protection to high school and university level speech _____	6
C. The usual justification for imposing speech restrictions on primary and secondary-school-age populations does not exist at the university level, and censorship of university students' speech both runs counter to the mission of the university and risks a dangerous chilling of free expression _____	8
II. <i>Tinker</i> and <i>Healy</i> provide the correct standard for administrative deference _____	9
III. If <i>Hazelwood</i> does apply to the universities, it requires that the administrators' speech restrictions are reasonably related to a legitimate pedagogical purpose and that administrators apply speech restrictions in a viewpoint neutral manner _____	11
A. Viewpoint neutrality is a cornerstone principle of First Amendment law _____	11
B. The Student Editors' column does not qualify for the government speech exception to the principle of viewpoint neutrality _____	13

C. The Administration of Kerrywood University violated the Student Editors' First Amendment free speech rights when it failed to apply speech restrictions in a viewpoint neutral manner_____ 15

D. The Administration of Kerrywood University violated the Student Editors' First Amendment free speech rights when it censored the Editors' column for reasons not reasonably related to a legitimate pedagogical purpose_____ 16

CONCLUSION_____ 18

TABLE OF AUTHORITIES

<i>Ambach v. Norwick</i> , 441 U.S. 68 (1979)	8
<i>Axson-Flynn v. Johnson</i> , 356 F.3d 1277 (10th Cir. 2004)	5-7, 17
<i>Baugh v. Judicial Inquiry & Review Commission</i> , 907 F.2d 440 (4th Cir. 1990)	12
<i>Bazaar v. Fortune</i> , 476 F.2d 570 (5th Cir. 1973)	14, 17
<i>Bethel School District No. 403 v. Fraser</i> , 478 U.S. 675 (1986)	8, 10
<i>Board of Education v. Pico</i> , 457 U.S. 853 (1982)	8
<i>Board of Regents of the University of Wisconsin System v. Southworth</i> , 529 U.S. 217 (2000)	7
<i>Brandenburg v. Ohio</i> , 95 U.S. 444 (1969)	10
<i>Brown v. Li</i> , 308 F.3d 939 (9th Cir. 2002)	5, 8
<i>Canady v. Bossier Parish School Board</i> , 240 F.3d 437 (5th Cir. 2001)	10
<i>C.H. v. Olivia</i> , 195 F.3d 167 (3d Cir. 1999)	13
<i>Cornelius v. NAACP Legal Defense & Education Fund, Inc.</i> , 473 U.S. 788 (1985)	12
<i>Fleming v. Jefferson County School District R-1</i> , 298 F.3d 918 (10th Cir. 2002)	13
<i>Fowler v. Rhode Island</i> , 345 U.S. 67 (1953)	12
<i>Good News Club v. Milford Central School</i> , 533 U.S. 98 (2001)	15
<i>Hazelwood School District v. Kuhlmeier</i> , 484 U.S. 260 (1988)	4, 11
<i>Healy v. James</i> , 408 U.S. 169 (1972)	10
<i>Hedges v. Wauconda Community United School District No. 118</i> , 9 F.3d 1295 (7th Cir. 1993)	14
<i>Hosty v. Carter</i> , 325 F.3d 945 (7th Cir. 2003)	6, 9
<i>Kincaid v. Gibson</i> , 236 F.3d 342 (6th Cir. 2001)	4
<i>Members of City Council v. Taxpayers for Vincent</i> , 466 U.S. 789 (1984)	12
<i>Muller v. Jefferson Lighthouse School</i> , 98 F.3d 1530 (7th Cir. 1996)	7
<i>Nicholson v. Board of Education of Torrance Unified School District</i> , 682 F.2d 858 (9th Cir. 1982)	4
<i>Niemotko v. Maryland</i> , 340 U.S. 268 (1951)	12
<i>Papish v. Board of Curators</i> , 410 U.S. 667 (1973)	7, 10
<i>Planned Parenthood of Southern Nevada, Inc. v. Clark County School District</i> , 941 F.2d 817 (9th Cir. 1991)	13
<i>Perry Education Association v. Perry Local Educators' Association</i> , 460 U.S. 37 (1983)	12
<i>Prince v. Kerrywood Univ.</i> , 4 D. 419 (14th Cir. 2004)	1, 6, 16-17
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992)	11
<i>Rosenberger v. Rector and Visitors of the University of Virginia</i> , 515 U.S. 819 (1995)	11, 15
<i>Saxe v. State College Area School District</i> , 240 F.3d 200 (3d Cir. 2001)	14-15
<i>Searcy v. Harris</i> , 888 F.2d 1314 (11th Cir. 1989)	13
<i>Student Government Association v. Board of Trustees of the University of Massachusetts</i> , 868 F.2d 473 (1st Cir. 1989)	4
<i>Student Coalition for Peace v. Lower Merion School District</i> , 776 F.2d 431 (3d Cir. 1985)	12

<i>Tinker v. Des Moines Independent School District</i> , 393 U.S. 503 (1969)	9
<i>Ward v. Hickey</i> , 996 F.2d 448, 452 (1st Cir. 1993)	7, 13
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981)	7

STATEMENT OF THE CASE

This case concerns a public university's effort to block publication of an editorial column written by a panel of undergraduate students. *Prince v. Kerrywood Univ.*, 4 D. 419 (14th Cir. 2004). The students were all members of the editorial staff of the *Kerrywood Gazette*, a university-funded publication "run by student editors as part of a class called 'Journalism VI.'" *Prince*, 4 D. at 419. The *Gazette* is joined on campus by several other university-financed student-run publications. *Id.* Some of these publications have run articles featuring debate upon the issue of the Iraq war. *Id.*

Students working on the *Gazette* receive a grade for their efforts, which are loosely supervised by Professor of Journalism, Elia Brooker. *Id.* The students running the paper possess a "fair amount" of editorial independence. *Id.* Indeed, Prof. Brooker gives them advice, which they usually follow, with some exceptions. *Id.*

Prof. Brooker actively espouses high journalistic standards, and has required some modification of past articles specifically for this reason. *Id.* Additionally, the *Gazette* is submitted to the Dean of the College of Arts and Sciences, George Boomhauer, for final pre-publication review. *Id.* Traditionally, this review process is "nothing more than a rubber stamp." *Id.* at 419-20. In the past three years, the Dean has not attempted to block publication of any opinion piece and has requested that changes be made in only two news articles. *Id.* at 420.

In January of 2004, during the midst of an active, though non-disruptive and almost entirely non-violent campus-wide debate on the merits of the Iraq war, the *Gazette* ran an editorial authored by a staff columnist, Chip Muir. *Id.* at 419-20. This column addressed topics of current political interest, both local and national. *Id.* at 420. Further, it enthusiastically

endorsed Representative Richard Cunningham, the district's incumbent member of the United States House of Representatives and a supporter of President Bush's Iraq policy. *Id.*

The Gazette received several dozen student comments in response to Mr. Muir's column. *Id.* Approximately two-thirds of the comments addressed Rep. Cunningham's support for President Bush's Iraq policy, and most propounded the view that the Rep. deserved to be defeated for this reason. *Id.* All of the student comments were cleared for publishing, "[p]ursuant to *Kerywood Gazette* policies." *Id.*

The editorial staff of the Gazette determined to weigh in on the issues addressed in Mr. Muir's editorial and the received student comments. *Id.* The staff, believing that their views deserved a forum as well, "decided to run an editorial on the front page of the April issue expressing their opposition" to a redistricting plan which would facilitate Rep. Cunningham's re-election "because of their disapproval of Rep. Cunningham's support of the President." *Id.* The column would have run under the heading, "Staff Editorial." *Id.*

The editorial did not use profanity or obscenities, although it did contain some heated language in the context of an appraisal of the President's character and intelligence. *Id.* Further, the column presented two controversial view points concerning the President's motivation for the initiating the Iraqi War and his degree of responsibility for the casualties the war had produced. *Id.* The Editors did attest to the fact that the movie, *Celsius 488*, may have caused them to be slightly "less hesitant to draw these conclusions" than they had previously been. *Id.* at 420-21. Although several respected news organizations have questioned the movie's presentation of certain facts, they have also concluded "that some of her points have validity." *Id.* at 421. Additionally, the Editors were aware of the movie's controversial content, and an entire month passed between their viewing of it and the submission of the editorial to Professor Broozcr. *Id.*

Upon learning of the Student Editorial, Dean Boomhauer exploded in anger. *Id.* His words denying publication of the piece were, "We can't print garbage like this. This editorial is outrageous and I'm not going to let this kind of garbage come out while I'm Dean." *Id.* Both Prof. Broozer, who brought the column to the Dean's attention, and the Dean "are well-known fundraisers for Republican political causes." *Id.* The Dean and Prof. Boozer, without independent consultation, forbade the Editors from publishing the column. *Id.*

After exhausting the university's administrative remedies, "three members of the editorial board, all juniors," filed suit in United States District Court for the Northern District of Kerrywood, contending that Kerrywood University violated their First Amendment right of free speech when it blocked publication of the article. *Id.* at 422. The suit was filed on April 24, 2004, and the District Court ruled in the University's favor. *Id.* The students appealed the judgment to the United States Court of Appeals for the Fourteenth Circuit. *Id.* On July 10, 2004, the Circuit Court overturned the judgment of the District Court. *Id.* at 419. This appeal results.

SUMMARY OF THE ARGUMENT

The *Hazelwood* holding should not be extended beyond the secondary schools. The courts have traditionally granted different level of First Amendment protection to high school and university groups, and no circuit court has yet applied *Hazelwood* to university level extracurricular speech. An extension of *Hazelwood* to the universities is unjustifiable under *Hazelwood's* rationale. Additionally, it would violate the university's mission and present a troubling opportunity for the chilling of free speech and expression.

Tinker's "material and substantial" interference standard is appropriate at the university level. Under *Tinker*, as applied in *Healy* and *Papish*, the Kerrywood administration did not carry its burden for imposing a speech restriction.

In the alternative, if *Hazelwood* does apply to the universities, it requires both that the administrators' speech restrictions are reasonably related to a legitimate pedagogical purpose and that administrators apply speech restrictions in a viewpoint neutral manner. Dean Boomhauer and Professor Broozer, therefore, violated the Student Editors' First Amendment free speech rights when they censored the Editors' column on the basis of ideological disagreement and in a manner not reasonably related to a legitimate pedagogical purpose.

ARGUMENT

I. *Hazelwood* does not apply to colleges and universities.

A. *Hazelwood* does not apply to university level extracurricular speech.

The *Hazelwood* holding does not apply to colleges and universities. The decision itself declined to address the issue of the appropriate degree of deference due to college and university administrators. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273, n. 7 (1988) ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."). At the outset, the Court recognized that *Hazelwood* need not apply outside of the primary and secondary school context.

Three circuit courts faced with this issue have declined to extend *Hazelwood's* level of administrative deference beyond the secondary school level. *Kincaid v. Gibson*, 236 F.3d 342, 346 nn. 4 & 5 (6th Cir. 2001) (en banc) (holding that the *Hazelwood* standard did not apply in a challenge to Kentucky State University's regulation of the student yearbook); *Student Gov't Ass'n v. Bd. of Trs. of Univ. of Mass.*, 868 F.2d 473, 480 n. 6 (1st Cir. 1989) (concluding that *Hazelwood* "is not applicable to college newspapers"); *Nicholson v. Bd. of Educ. Torrance Unified School Dist.*, 682 F.2d 858, 863 n. 4 (9th Cir. 1982) (holding that a high school could require pre-publication review of newspaper articles without violating students' First

Amendment rights and stating that "[d]ifferent considerations govern application of the first amendment on the college campus and at lower level educational institutions" and that "activities of high school students" may be reviewed more stringently than those of college students because "the former are in a much more adolescent and immature stage of life and less able to screen fact from propaganda."). A minority of circuits have extended *Hazelwood* to the universities but only in the context of curricular speech. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004) ("Accordingly, we hold that the *Hazelwood* framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum.); *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002).

In *Brown*, the Court of Appeals for the Ninth Circuit held that the University of California had the right to fail a graduate student thesis on the basis of its vulgar "Disacknowledgements" section, which was clearly not in conformity with established academic and professional standards. *Brown*, 299 F.3d 1092, 1096. Adopting the *Hazelwood* decisional framework, the court held that educators may constitutionally restrict students' curricular speech, provided that the limitation is reasonably related to a legitimate pedagogical purpose. *Id.* at 1100-01, 1105.

The *Brown* court itself conceded that the case law was less well developed on the question of whether the deferential *Hazelwood* standard ought to apply to extracurricular speech at the university level. Indeed, no court has yet granted *Hazelwood* deference to educators' or administrators' regulation of university level extracurricular speech. The *Brown* court noted with apparent approval decisions from other courts holding that the deferential *Hazelwood* standard ought not to apply when dealing with student speech in the context of extracurricular activities, such as yearbooks and newspapers. *Id.* at 1102-03. Thus, in the present case, even the expansive

Brown court would most likely have withheld *Hazelwood* deference. Likewise, the Tenth Circuit in *Axson-Flynn* considered only standards of governmental deference for curricular speech. *Axson-Flynn*, 356 F.3d at 1286 ("Where learning is the focus, as in the classroom, student speech may be . . . more circumscribed than in the school newspaper.").

The Student Editorial is best characterized as extracurricular speech and had much in common with the "Rants and Raves," which were obviously extracurricular in character. The Student Editors possessed a high degree of independence in all of their activities. Prof. Brooker was termed a faculty "advisor," a word which hardly connotes close administrative monitoring of student activities. Further, the administration acted historically as a "rubber stamp." *Prince v. Kerrywood Univ.*, 4 D. 419, 419-420 (14th Cir. 2004). During Dean Boomhauer's term, it had never attempted to block the publication of an opinion piece, and it did not seem to require the editors to accept the advice of the faculty advisor. *Prince*, 4D. 419 at 419-20. Even if some portion of the Editors' work on the *Gazette* may correctly be called curricular, the Student Editors produced this opinion piece in their extracurricular capacity. Much like the "Rant and Rave" authors, the Editors simply believed that their views deserved a forum, just as any other student's views. *Id.* at 420.

B. The courts have traditionally accorded different levels of First Amendment protection to high school and university level speech.

High school and university level populations are objectively different, and some account should be made for the groups' correspondingly different levels of intellectual and emotional maturity. "According to U.S. Census Bureau statistics, . . . only 1 percent of those enrolled in American colleges or universities are under the age of 18, and 55 percent are 22 years of age or older." *Hosty v. Carter*, 325 F.3d 945, 948-49 (7th Cir. 2003). The courts have long recognized

these facts by extending an amount of First Amendment protection tailored to a student's age and educational level. *See Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993) ("[I]n this circuit, we have determined the propriety of school regulations by considering circumstances such as age and sophistication of students. . . ."). The Tenth Circuit in *Axson-Flynn* recognized as much even while partially extending *Hazelwood* to the university level. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004) ("[W]e are not unmindful of the differences in maturity between university and high school students. Age, maturity, and sophistication level of the students will be factored in determining whether the restriction is 'reasonably related to legitimate pedagogical concerns.'). *Axson-Flynn* echoed both *Widmar v. Vincent*, 454 U.S. 263, 274 n. 14 (1981), in its presumption that university students are adults and Justice Souter's concurrence in *Board of Regents of the Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217 (2000) (Souter, J., concurring) ("[Our] cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, whose students and their school's relation to them are different and at least arguably distinguishable from their counterparts in college education." (citations omitted)).

An age-based distinction is also reflected in comparison of *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996) with *Papish v. Board of Curators*, 410 U.S. 667 (1973) (per curiam). In *Muller*, the court held that an elementary school could require a student to secure administrative pre-approval before distributing flyers at an elementary school, that the principal could screen the material for offensive content, and that the school could print a disclaimer on it stating that it was not endorsed by the district. The court specifically pointed to the age of elementary school students as an especially important factor in its grant of deference to administrators. *Muller*, 98 F.3d at 1535.

In *Papish*, the Court ordered the readmission of a graduate student who had been expelled for circulating a newspaper distributed on campus that, in the view of the dean, included indecent speech. The paper, like the flyers which the student wished to distribute in *Muller*, was not school sponsored, and the factual settings of *Muller* and *Papish* are identical in every material respect, save the age of the students involved. Thus, in application of the First Amendment to student speech, age and emotional maturity are not just a consideration, but, potentially, the determinative factor.

C. The usual justification for imposing speech restrictions on primary and secondary school populations does not exist at the university level, and censorship of university students' speech both runs counter to the mission of the university and risks a dangerous chilling of free expression.

Primary and secondary schools play an important role as inculcator of community and civic values, and courts commonly advance the inculcation concept when seeking justification for the permission of tighter governmental control over student speech. See, eg., *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979); *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986). But adult college students are no longer quite so susceptible to inculcation, and, traditionally, the university's role is not inculcator of civic values, but "marketplace of ideas." See Mark J. Fiore, Comment, *Trampling the "Marketplace of Ideas": The Case against Extending Hazelwood to College Campuses*, 150 U. Pa. L. Rev. 1915 (2002). Thus, *Hazelwood's* deference to school officials is inappropriate "in the adult world of college and graduate students, an arena in which academic freedom and vigorous debate are supposed to flourish." *Brown*, 308 F.3d at 957 (Reinhardt, J., dissenting).

Further, *Hazelwood* has already substantially increased censorship in this nation's secondary schools:

The Student Press Law Center already has established that the incidences of censorship in the nation's secondary schools have increased significantly since *Hazelwood*. For instance, between 1988, the year of the Supreme Court's *Hazelwood* decision, and the end of 1996, the number of inquiries to the Student Press Law Center from public school student journalists and their advisors rose 163%.

See Fiore, supra, at 1965.

In sum, *Hazelwood* deference must not be extended to the university setting because it runs counter to the mission of the university, may lead to a dangerous chilling of thought and expression, and would be "an extreme step for us to take absent more direction from the Supreme Court." *Hosty v. Carter*, 325 F.3d 945, 949 (7th Cir. 2003).

II. *Tinker* and *Healy* provide the correct standard for administrative deference.

In the context of student speech, *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), provides the appropriate standard of administrative deference. Holding that "Students . . . [do not] shed their constitutional rights to freedom of speech at the schoolhouse gate," *Tinker* required the government to prove that regulated speech, "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school" or "impinge upon the rights of other students." *Tinker*, 393 U.S. at 505, 509. It demanded that the state provide significant justification for limiting free debate. The "undifferentiated fear or apprehension of disturbance" would not suffice. Nor would the offensiveness of the student speech justify suppression. *Id.* at 508-09. If an administrator seeks to significantly burden free student expression, he or she must provide substantial justification.

Several years later, *Healy v. James*, 408 U.S. 169 (1972), revealed just how high the Court had set the bar in *Tinker*:

[In] 1969-70, [a] climate of unrest prevailed on many college campuses in this country. There had been widespread civil disobedience on some college campuses, accompanied by the seizure of buildings, vandalism, and arson. Some colleges had been shut down altogether, while at others files were looted and manuscripts destroyed. SDS chapters on some of those campuses had been a catalytic force during this period. [The College argues that its denial of recognition was justified because SDS adheres to] a philosophy of violence and disruption. [But as] repugnant as these views may [be], the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of "destruction" thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent. [The] critical line [is] the line between mere advocacy and advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action. (quoting *Brandenburg v. Ohio*, 393 U.S. 578, 588 (1969)).

Despite a very real threat of violence inherent in recognition of Students for a Democratic Society--certainly a much more imminent threat than in the present case--*Tinker* simply would not allow the college administration to deny SDS its freedom of expression. In the context of campus newspapers and publications, *Tinker* and *Healy* compel an equally high standard. The Court in *Papish v. Bd. of Curators*, 410 U.S. 667 (1973), held that a state university could not constitutionally expel a student merely for distributing on campus a newspaper containing a political cartoon depicting policemen raping the Statue of Liberty and an article using the phrase "Mother-fucker." Clearly, the Kerrywood administration did not meet its *Tinker/Healy* burden by providing substantial justification for its actions.

As for *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), the opinion controls only in the case of vulgar, lewd, or profane speech. See *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 442 (5th Cir. 2001) ("[In *Fraser*, t]he Supreme Court . . . held that it was appropriate for educators to protect students from sexually explicit, indecent, or lewd speech.

The Court was careful to note that "unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in [*Fraser*] were unrelated to any political viewpoint."). The censored expression in the present case falls under none of these categories. Thus, *Bethel* is irrelevant to the current analysis.

III. If *Hazelwood* does apply to the universities, it requires that the administrators' speech restrictions are reasonably related to a legitimate pedagogical purpose and that administrators apply speech restrictions in a viewpoint neutral manner.

A. Viewpoint neutrality is a cornerstone principle of First Amendment jurisprudence, and the Supreme Court would have acknowledged an abandonment of it in *Hazelwood*, had that been their intention.

Hazelwood's failure to mention the issue of viewpoint neutrality represents an implicit acceptance of this long-standing and deeply rooted principle of First Amendment law. The prohibitions upheld in *Hazelwood* are not viewpoint restrictions but content restrictions--a categorical ban on the discussion of highly controversial topics including teen pregnancy and divorce. *Hazelwood*, 484 U.S. at 263. Thus, *Hazelwood* does not sanction viewpoint discrimination.

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), presents the Court's current stance on this topic. It explains, "[t]he First Amendment does not permit [the government] to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 391. This idea is entirely consistent with the courts' myriad pronouncements in past cases that had all but enshrined the proscription against viewpoint-discrimination as an absolute First Amendment rule. See, e.g., *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995) ("It does not follow, however . . . that view-point-based restrictions are proper when the University

does not speak itself or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers."); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); ("Control over access to a non-public forum can be drawn on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("[T]he first amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); *Perry Educ. Ass'n v. Perry Local Educators's Ass'n*, 460 U.S. 37, 46 (1983) ("[T]he state may reserve the forum for its intended purpose and not an effort to suppress expression merely because public officials oppose the speaker's view."); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (City cannot deny Jehovah's witnesses permit to use a city park for bible talks when other religious and political groups had been allowed to sue the park for similar purposes); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (same); *Student Coalition for Peace v. Lower Merion Sch. Dist.*, 776 F.2d 431, 437 (3d Cir. 1985) ("Viewpoint discrimination . . . is impermissible regardless of the nature of the forum."); *Baugh v. Judicial Inquiry & Review Comm'n*, 907 F.2d 440, 443-44 (4th Cir. 1990) ("Viewpoint -neutrality is concerned with limitations on speech on the basis of the viewpoint expressed and 'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'").

"After *R.A.V.*, it is possible to state with great confidence that modern First Amendment jurisprudence erects what is in effect a per se rule prohibiting discrimination on the basis of viewpoint." (1 Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 12:19 (9th ed. 2004). In light of this litany of precedent, it is hardly surprising that the *Hazelwood* Court would forego yet another statement of a near universally accepted doctrine. At the least, if *Hazelwood*

meant to overturn or abridge a robust and established precedent, the Court would have announced *something* to this effect.

B. The Student Editors' column does not qualify for the government speech exception to the principle of viewpoint neutrality.

The circuit courts addressing the issue of whether *Hazelwood* allows viewpoint discrimination have evenly split. *Planned Parenthood, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (holding that *Hazelwood* requires viewpoint neutrality); *Searcy v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989) (same); *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993) (holding that *Hazelwood* does not require viewpoint neutrality); *C.H. v. Olivia*, 195 F.3d 167, 172 (3d Cir. 1999) (same), *reh'g en banc granted and vacated by* 197 F.3d 63 (3d Cir. 1999), *aff'd en banc by an equally divided court*, 226 F.3d 198 (3d Cir. 2000); *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 926 (10th Cir. 2002) (discussing circuit split over viewpoint discrimination by school officials). However, the cases arising in those circuits which have permitted viewpoint discrimination involved speech which clearly carried the school's imprimatur. In *Ward*, the regulated speech was a teacher's and occurred in a classroom setting. *Ward*, 996 F.2d at 450. In *Olivia*, a public school would not permit a child to read the Bible aloud in class to other first graders. *Olivia*, 195 F.3d at 170. The *Fleming* case involved a collaborative school-wide, school-sponsored memorial to the Columbine shooting. *Fleming*, 298 F.3d at 920.

In contrast, the Student Editors' expression contained no faculty input, did not occur in a traditional classroom setting, did not represent the collaborative efforts of an entire school, and would have carried, in effect, a disclaimer. It could not have reasonably been mistaken as the speech of the university itself. Indeed, in a factually similar case to the present one, *Bazaar v.*

Fortune, 476 F.2d 570 (5th Cir. 1973), *modified on reh'g*, 489 F.2d 225, the Fifth Circuit found that a student publication, produced with the aid of university funding and faculty advisors, could not reasonably be said to carry the university imprimatur. In *Bazaar*, the court ordered the University of Mississippi not to interfere with the publication and distribution of a school-sponsored student literary journal. The journal was student-written and student-edited, with some editorial advice from an English department faculty advisor. "The magazine was closely connected with a course in creative writing maintained as a regular portion of the English department's curriculum and taught by [the faculty advisor]." *Bazaar*, 476 F.2d at 572. Upon discovering that an upcoming issue was to contain two stories dealing with interracial love and black pride, a "panel of deans decided that publication would be 'inappropriate', apparently basing its decision on matters of 'taste.'" *Id.*

The court first noted that other school-funded student publications which were identifiable with the University, such as *The Daily Mississippian* and *Ole*, were not subject to any form of University censorship. *Id.* at 575. However, the University attempted to differentiate the literary magazine from these publications, claiming that because the magazine was "published with the advice of the English department," it was somehow more identifiable with the English department and, thus, the University. *Id.* The court rejected this claim. *Id.*

Further, as the Third and Seventh Circuits have noted, "school 'sponsorship' of student speech is not lightly to be presumed." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001); *Hedges v. Wauconda Cmty. United Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993). "In striking down a blanket prohibition against distributing religious materials on school grounds, the *Hedges* Court rejected the argument that the ban was justified under *Hazelwood* because observers might 'infer that the school endorses whatever it permits':

[The School District] proposes to throw up its hands, declaring that because misconceptions are possible it may silence its pupils, that the best defense against misunderstanding is censorship. . . . Public belief that the government is partial does not permit the government to become partial. Students therefore may hand out literature even if the recipients would misunderstand its provenance. The school's proper response is to educate the audience rather than squelch the speaker.

Saxe, 240 F.3d at 214 (citations omitted). Thus, even though other publications at Kerrywood carried a disclaimer, it should not be presumed that the *Kerrywood Gazette* is somehow more identifiable with the university simply because it did not.

C. The Administration of Kerrywood University violated the Student Editors' First

Amendment free speech rights when it failed to apply speech restrictions in a viewpoint neutral manner.

The administration failed to act in a viewpoint neutral manner when it treated the Student Editors' piece differently than other student-originated editorials expressing political views. Both *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (holding that a public school's exclusion of a Christian children's club from meeting after hours at school, based entirely on the religious nature of the club's activities, was unconstitutional viewpoint discrimination) and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) (concluding that the denial of student activities fund subsidies to an evangelical Christian student-written newspaper was based solely on its Christian viewpoint and was therefore an instance of unconstitutional viewpoint discrimination), stand for the proposition that a school administration engages in viewpoint discrimination when, on the basis of ideological disagreement, it treats the expression of one group of students differently from the expression of another group of similarly situated students.

In the present case, Kerrywood University had previously allowed the publication of student editorials which endorsed or rejected political positions and candidates. *Prince v.*

Kerrywood Univ., 4 D. 419, 420 (14th Cir. 2004). Like the Editors' column, many of these student editorials included both strong language and contentious stances upon controversial issues. *Prince*, 4 D. 419 at 420. Further, the writers of these earlier student opinion pieces were never required prove that their opinions were uninfluenced by any and all factually suspect sources. Therefore, by refusing to run the Staff Editorial, Dean Boomhauer and Prof. Elia Broozer did treat the Student Editors' expression differently than the expression of a group of similarly situated students.

The facts also indicate that, more likely than not, ideological disagreement motivated the administration's actions. Both Dean Boomhauer and Prof. Broozer are "well known fundraisers for Republican political causes." *Id.* at 421. Thus, the censors' political philosophy was clearly in conflict with the Student Editors'. Although the Dean claims that he considered the piece with a cool-head and an objective mind, his instantaneous, *emotional* reaction clearly belies this assertion. *Id.*

D. The Administration of Kerrywood University violated the Student Editors' First Amendment free speech rights when it censored the Editors' column for reasons not reasonably related to a legitimate pedagogical purpose.

Dean Boomhauer's actions indicate that he censored the piece out of political rather than pedagogical concerns and that his post hoc rationalization for the administration's action is pretense. The Dean's first ever decision to censor an opinion piece, allegedly for a failure to measure up to journalistic standards, appears highly suspect in light of his violent distaste for the piece's ideology. Therefore, as the Tenth Circuit held in *Axson-Flynn*, the Court may override his judgment because its "proffered goal or methodology [is] a sham pretext for an impermissible ulterior motive." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293 (10th Cir. 2004).

The University claims that its decision to censor was reasonably related to the teaching goal of professionalism. This assertion is not supported by the facts. As Judge Mathis noted below, "vivid adjectives" and the presentation of controversial viewpoints are a traditional part of editorial writing. Thus, the Student Editors' colorful rhetoric and contentious style do not fall outside of a reasonable and professional journalistic standard, the teaching of which is a primary pedagogical goal of the *Gazette*. *Prince*, 4 D. 419. Further, in contrast to the master's thesis at issue in *Brown*, the generally accepted professional and academic standards to which an undergraduate student editorial may fairly, and reasonably be held, are quite low.

Kerrywood's desire to distance itself from the content of the editorial is not a factually legitimate concern. See, *infra*, discussion of *Bazaar v. Fortune*, 476 F.2d 270 (5th Cir. 1973), *modified on reh'g*, 489 F.2d 225. The headline, "Staff Editorial," would have further made clear to the community that the University was not responsible for the content of the editorial and would have adequately distanced the University administration from any ensuing controversy.

The claim that the Student Editors relied upon sources of questionable factual validity, in violation of journalistic norms, is, itself, highly questionable. The modern world contains a tremendous number of information sources--television and cable news, the internet, the print media, friends and family--to name but a few. Considering that the Editors' beliefs may have been forged by literally thousands of divergent factual sources, that the Editors were aware of the controversy surrounding the movie's factual presentation, and that an entire month passed between the Editor's viewing of the film and their authorship of the column, the Dean's fixation upon the effect which one movie may have had on the Editors' overall viewpoint amounts to simple intellectual dishonesty. In reality, the Editors' limited reliance upon the facts presented in *Celsius 488* likely produced little or no change in their previously held opinions. Thus, an

accusation that the Editors failed to live up to journalistic norms, merely because *some* tiny part of their opinion *may* have been influenced by a movie that *allegedly* presented *some* misleading assertions, demands an unrealistic, unachievable, and, ultimately, completely unreasonably standard of journalistic purity.

CONCLUSION

For all the aforementioned reasons, the judgment of the United States Court of Appeals for the Fourteenth Circuit should be affirmed.

Respectfully submitted,

Number 120