

Katie Tritsler

Runner-up

Best Brief

No. 04-0103

---

IN THE SUPREME COURT OF THE UNITED STATES

---

KERRYWOOD UNIVERSITY,

*Petitioners,*

v.

Martin PRINCE, Bartholomew SIMPSON,  
and Milhouse VAN HOUTEN,

*Respondents.*

---

On Writ of Certiorari to the United States Supreme Court

---

BRIEF FOR THE PETITIONER

---

October Term, 2004

Number 115  
Counsel for Petitioner

## **QUESTION PRESENTED**

Whether Kerrywood University's censorship of a Kerrywood Gazette editorial violated First Amendment Free Speech guarantees.

## TABLE OF CONTENTS

	<u>page</u>
QUESTION PRESENTED.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	v
STATEMENT OF THE CASE.....	1
SUMMARY OF THE ARGUMENT.....	3
ARGUMENT.....	4
I. SINCE THE KERRYWOOD GAZETTE IS A NONPUBLIC FORUM, KERRYWOOD'S CENSORSHIP MUST ONLY BE REASONABLE.....	5
II. THE COURT OF APPEALS SHOULD HAVE PERFORMED ITS ANALYSIS UNDER <i>HAZELWOOD</i> .....	6
A. Since the primary consideration for the <i>Fraser</i> court was the use of vulgar language in front of an immature audience, <i>Fraser</i> is not analogous to Kerrywood and should not be applied.....	7
B. Since the restricted speech in <i>Tinker</i> just happened to occur on school grounds instead of being part of the curriculum bearing the imprimatur of the school, <i>Tinker</i> is not analogous to Kerrywood and should not be applied.....	7
C. Since the speech in <i>Hazelwood</i> was restricted for similar reasons and in an almost identical forum, the District Court was correct in applying the <i>Hazelwood</i> standard.....	8
D. <i>Hazelwood</i> can be applied in the university setting.....	9
III. THE RESTRICTION MEETS THE <i>HAZELWOOD</i> STANDARD AND THEREFORE IS NOT AN INFRINGEMENT ON THE STAFF'S FIRST AMENDMENT RIGHTS.....	11

A.	Kerrywood's concerns are legitimate and pedagogical.....	12
B.	<i>Hazelwood</i> does not require viewpoint neutrality.....	12
C.	Even if viewpoint neutrality is required, Kerrywood's restriction is still reasonable.....	13
CONCLUSION.....		14

## TABLE OF AUTHORITIES

<i>Axson-Flynn v. Johnson</i> , 356 F.3d 1277 (2004).....	6, 10, 11
<i>Bethel Sch. Dist. No. 403 v. Fraser</i> , 478 U.S. 675 (1986).....	4, 6, 7, 11, 14
<i>Bishop v. Aronov</i> , 926 F.2d 1066 (11th Cir. 1991).....	10
<i>Bose Corp. v. Consumers Union of U.S., Inc.</i> , 466 U.S. 485, 499 (1984).....	3
<i>Broussard by Lord v. Sch. Bd. of Norfolk</i> , 801 F. Supp. 1526, 1537 (E.D. Va. 1992).....	7
<i>Brown v. Li</i> , 308 F.3d 939 (9th Cir. 2002).....	10
<i>Cornelius v. NAACP Legal Defense &amp; Ed. Fund, Inc.</i> , 473 U.S. 788, 802 (1985).....	5, 6
<i>Fleming v. Jefferson County Sch. Dist.</i> , 298 F.3d 918 (10th Cir. 2002).....	13
<i>Hazelwood Sch. Dist. v. Kuhlmeier</i> , 484 U.S. 260 (1988).....	2, 3, 4, 6, 7, 10, 11, 12, 13, 14
<i>Healy v. James</i> , 408 U.S. 169 (1972).....	8, 9
<i>Kincaid v. Gibson</i> , 236 F.3d 342 (6th Cir. 2001).....	5, 10
<i>Perry Educ. Ass'n v. Perry Local Educators Ass'n</i> , 460 U.S. 37 (1983).....	3, 5, 6
<i>Planned Parenthood of Southern Nevada v. Clark County Sch. Dist.</i> , 941 F.2d 817 (9th Cir. 1991).....	13
<i>Prince v. Kerrywood Univ.</i> , 81 D. Supp. 71, 78-79 (N.D. Kerr. 2004).....	5
<i>Prince v. Kerrywood Univ.</i> , 4 D. 419, 419 (14th Cir. 2004).....	1, 2, 3, 5
<i>Regents of Univ. of Mich. v. Ewing</i> , 474 U.S. 214 (1985).....	5
<i>Rosenberger v. Rector and Visitors of the Univ. of Virginia</i> , 515 U.S. 819 (1995).....	13
<i>Searcy v. Harris</i> , 888 F.2d 1314 (11 <sup>th</sup> Cir. 1991).....	13
<i>Student Gov't Ass'n v. Bd. of Trs. of the Univ. of Massachusetts</i> , 868 F.2d 473 (1st Cir. 1989).....	10
<i>Tinker v. Des Moines Indep. Sch. Dist.</i> , 393 U.S. 503 (1969).....	3, 4, 6, 7, 8, 9, 14

## STATEMENT OF THE CASE

Kerrywood University ("Kerrywood") is a relatively calm state-run institution of higher learning. However, opposition to the war in Iraq has caused controversy on campus. Students have been protesting, arguing in coffeehouses, and distributing flyers regarding the war. Some students have even participated in name-calling, screaming, and shoving matches. *Prince v. Kerrywood Univ.*, 4 D. 419, 419 (14th Cir. 2004).

The controversy has invaded the campus newspapers. *Id.* The appropriate fora for scathing editorials and controversial debate at Kerrywood University are those newspapers run entirely by the students and not funded by the university. However, the respondents have attempted to use the Kerrywood Gazette, a university-funded newspaper included in the curriculum to teach the course "Journalism VI," to showcase their improperly researched and hate-filled editorial.

Kerrywood retains supervision over the high quality paper. Professor Elia Broozer supervises the paper and grades the students' work. Professor Broozer affords the students some independence in running the paper to give them real world experience. However, he often gives advice and sometimes requires students to modify their work. All issues are submitted to Dean George Boomhauer for review before they are published. *Id.* at 420.

The Gazette rarely covers controversial topics. The paper usually sticks to issues specific to Kerrywood University. *Id.* at 419. One of these issues was a redistricting plan that would help Representative Richard Cunningham get reelected. Chip Muir, one of the staff's editorial columnists, wrote a column in support of the redistricting plan because Muir felt that Cunningham would further the interests of Kerrywood University students. *Id.* at 420.

In response to the article, the Gazette received an especially high number of comments for the “Rants and Raves” section of the paper. Two-thirds of the responses opposed the reelection of Cunningham because of his support for President Bush. All responses would be published pursuant to the Gazette's policy. *Id.*

In addition to the large number of anti-Bush comments to be published, the editorial staff (“staff”) decided to publish their own views against Bush. The staff would run the editorial on the front page, an atypical location for an editorial. Instead of a signature, the headline would read “Staff Editorial.” *Id.*

The staff based their editorial on *Celsius 488*, a documentary that the staff admitted was an unreliable source of information. In addition to inadequately researching their topic, the staff used unprofessional language. The editorial said that Bush's Iraq policy “totally sucked” and charged Bush with the death of all Iraqis and Americans “from this god-forsaken war.” *Id.* The editorial called the president “at best a moron and at worst a pathological liar.” *Id.* The excessively negative tone and unprofessional nature of the editorial appalled both Professor Brooker and Dean Boomhauer. *Id.*

In an attempt to salvage the editorial, the Dean asked to meet with the staff. He suggested changes so that Kerrywood would not be associated with such unprofessional work or be accused of taking sides on such a controversial issue. However, the staff refused to compromise. They insisted on publishing the editorial unchanged. *Id.* at 421. After the administrative process denied relief for the staff, they filed this lawsuit in the United States District Court for the Northern District of Kerrywood.

The District Court held that Kerrywood's actions were constitutional under the standard of *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). The Fourteenth Circuit Court of

Appeals reversed. Using the standard established in *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969), the Court of Appeals found that Kerrywood's censorship was unconstitutional. This court must now independently examine the whole record. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). Kerrywood is asking this court to find that Kerrywood's actions did not violate First Amendment Free Speech guarantees and enter judgment in favor of Kerrywood.

### SUMMARY OF THE ARGUMENT

When a government entity restricts speech in a government owned or sponsored forum, the court must first perform a forum analysis. *See Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983). The Kerrywood Gazette is a nonpublic forum. The paper was not opened for indiscriminate use by the public or for limited discourse by a certain group. *See id.* at 46. Furthermore, the issue is properly waived because the District Court held, and the staff did not dispute at the appellate level, that the forum was nonpublic. *Prince*, 4 D. at 422. According to the forum analysis, the speech restriction must only be reasonable and viewpoint neutral. *See Perry*, 460 U.S. at 46.

The Supreme Court has not defined the guidelines for analysis of free speech restrictions in the university setting. However, three primary cases deal with restrictions in the school setting. The Court should perform its analysis under *Hazelwood* because, of the three cases, *Hazelwood* is most analogous to the present matter.

*Hazelwood* involved a high school newspaper funded by the Board of Education and used to teach a journalism class to students. The principal, who reviewed all issues prior to publication, removed two objectionable articles. The author had not complied with journalism standards and had discussed sensitive issues inappropriate for publishing in a student newspaper.



*Hazelwood*, 484 U.S. at 260. In *Tinker*, the second major case, a few high school students wore black armbands to school to passively object to the Vietnam War. *Tinker*, 393 U.S. at 503. This speech just happened to occur on school grounds and, thus, does not resemble the present matter in which the newspaper editorial bore the imprimatur of the school. Finally, in the third primary case, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), school administrators punished a student for his lewd speech at a high school assembly. Although the staff's editorial could be considered sexually explicit because of the use of the word "suck," the remainder of the editorial does not fall under the type of speech in *Fraser*. Therefore, the court should analyze the case under *Hazelwood* because of the similarities in the type of speech restricted and in the newspaper mediums.

*Hazelwood* requires that the control on speech be reasonably related to legitimate pedagogical concerns. *Hazelwood*, 484 U.S. at 273. Whether or not *Hazelwood* compels viewpoint neutral restrictions, Kerrywood's restrictions meet the requisite standard. Kerrywood restricted the editorial because it was improperly researched, contained unprofessional language and a harsh tone, and would give the impression that Kerrywood was taking sides against the president and the war in Iraq. The restriction was critical to preserving the curriculum's journalism standards, order on campus, and the university's reputation. Therefore, the restriction was constitutional.

## **ARGUMENT**

Public school students certainly do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 503. However, the Supreme Court has recognized that academic freedom does not rely solely on the independent exchange of ideas. Freedom also thrives on "autonomous decision-making by the academy itself."

*Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985). Schools should be given a certain amount of deference to preserve the school's academic reputation and foster learning on campus.

**I. SINCE THE KERRYWOOD GAZETTE IS A NONPUBLIC FORUM, KERRYWOOD'S CENSORSHIP MUST ONLY BE REASONABLE.**

The district court found that the Gazette is a nonpublic forum. *Prince v. Kerrywood Univ.*, 81 D. Supp. 71, 78-79 (N.D. Kerr. 2004). Neither party disputed this finding so the Court of Appeals regarded the issue as waived. *Prince*, 4 D. at 422. Should this court find that the issue needs to be reconsidered, *Perry* provides the framework for analysis.

*Perry* defines four different fora. Freedom of speech is most adamantly protected in the designated public forum, such as a park, and the traditional public forum. The government opens these fora for indiscriminate use by the public. *Perry*, 460 U.S. at 45-47. The Kerrywood Gazette is not open to the public as a traditional or designated public forum.

The next type of forum is the limited public forum. The government opens the limited public forum “for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.” *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985). The court in *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001), found that the university yearbook was a limited public forum. The yearbook in *Kincaid* is very distinct from the Kerrywood Gazette. The yearbook was not associated with any classroom activity and was funded through student activity fees. The students had sole editorial control over the yearbook. They did not receive grades or credit for their work. *Id.* at 343. These facts are in direct contrast to the Kerrywood Gazette, a part of the journalism curriculum and funded by the administration.

The Kerrywood Gazette is more similar to examples of the final type of forum, the

nonpublic forum. The government can regulate speech in a nonpublic forum in any reasonable manner. *Perry*, 460 U.S. at 46. The court in *Hazelwood* found that the student newspaper was a nonpublic forum because it was regulated by a teacher and the administration, incorporated into the curriculum for teaching purposes, graded as a class, and funded by the school. *Hazelwood*, 484 U.S. at 268. In *Axson-Flynn v. Johnson*, 356 F.3d 1277 (2004), the court found that a university play, as part of the school's curriculum, was a nonpublic forum. Because the Gazette, like the newspaper in *Hazelwood* and the play in *Axson-Flynn*, was part of the curriculum and overseen by the administration, the Gazette is a nonpublic forum.

In addition, an inquiry into Kerrywood's intent for the paper reveals that the Gazette is a nonpublic forum. The most important inquiry in determining the type of forum is whether the government intended to open the forum for public use. The court can look to the following factors: (1) policy; (2) practice; (3) nature of the property and compatibility with expressive activity; and (4) context. *Cornelius*, 473 U.S. at 802. Even though newspapers are generally used for expressive activity, the Gazette was created as a teaching tool. The common practice was for the administration to have final authority. The nature and context of the Gazette do not lend it to publishing inadequately researched articles containing unprofessional language. The administration clearly did not intend to open the newspaper to such submissions.

## **II. THE COURT OF APPEALS SHOULD HAVE PERFORMED ITS ANALYSIS UNDER *HAZELWOOD*.**

The three main cases providing the context for analysis of a First Amendment speech restriction claim in the school setting are: (1) *Fraser*; (2) *Tinker*; and (3) *Hazelwood*. The Supreme Court has not applied any of these cases to a university newspaper. Therefore, the court must continue its analysis under the case most analogous to the matter before the court.

**A. Since the primary consideration for the *Fraser* court was the use of vulgar language in front of an immature audience, *Fraser* is not analogous to *Kerrywood* and should not be applied.**

The *Fraser* court held that a school does not have to allow speech that would undermine the school's basic educational mission. *Fraser*, 478 U.S. at 685. By punishing a high school student for delivering a sexually explicit speech in front of a high school assembly, the school did not violate the First Amendment. The *Fraser* court advocated a strong amount of deference to the decisions of school administrators. *Id.*

The only speech from the editorial that would fall under *Fraser* is the statement that Bush's Iraq policies "totally sucked." A district court has recognized that the word "suck" has a sexual connotation. The court allowed school administrators to punish a student for not changing her shirt with "suck" written on it. *See Broussard by Lord v. Sch. Bd. of Norfolk*, 801 F. Supp. 1526, 1537 (E.D. Va. 1992). Because the remainder of the speech restriction in *Kerrywood* does not relate to *Fraser*, *Fraser* should not be applied.

**B. Since the restricted speech in *Tinker* just happened to occur on school grounds instead of being part of the curriculum bearing the imprimatur of the school, *Tinker* is not analogous to *Kerrywood* and should not be applied.**

In *Tinker*, a few high school students displayed their opposition to the Vietnam War by wearing black armbands to school. *Tinker*, 393 U.S. at 504. In holding that the school violated the Constitution by punishing the students, the court adopted a new standard. The school must reasonably believe that the speech would substantially interfere with the work of the school or impinge on the rights of other students. Mere unsupported fear or apprehension of disturbance will not suffice. *Id.* at 514.

The Court of Appeals should not have applied the *Tinker* standard to this case because the speech in *Tinker* is substantially different than the staff's editorial. First, the demonstration by the students in *Tinker* just happened to occur on school grounds. The students did not use a medium of communication associated with the school to express their views. Their speech did not involve any part of the school's curriculum. Second, the speech in *Tinker* did not bear the imprimatur of the school. Only a few students wore the armbands. By contrast, the staff's editorial would be printed on the front page of the newspaper. The newspaper would be distributed throughout the area for many people to view. The school's name would become associated with the tone, language, and lack of professionalism in the editorial. Third, the speech in *Tinker* did not carry the violent and unprofessional tone characterizing the staff's editorial. The only resemblance between *Tinker* and Kerrywood is that they both dealt with political speech in opposition to a war. This similarity is superficial.

One case applying *Tinker* to the college level is *Healy v. James*, 408 U.S. 169 (1972). In this case, a state college denied official recognition to a group of students who wanted to form a local chapter of the Students for a Democratic Society (SDS). The president said that the primary reason for the denial was that other SDS chapters had incited violence on college campuses nationwide. *Id.* at 176. Under the *Tinker* standard, the court found that this fear of violence was not enough to infringe on the First Amendment rights of these students if the students could prove that they were willing to abide by university rules. *Id.* at 194.

Kerrywood did have a legitimate fear that the editorial would incite more shoving and screaming matches on campus. Whether or not these fears meet the *Tinker* and *Healy* standard is irrelevant because the case should be analyzed under *Hazelwood*. Unlike in *Healy* or *Tinker*, the primary reasons for Kerrywood's restrictions were the editorial staff's harsh tone, unprofessional

language, association of the school with one side of a controversial issue, and failure to adhere to journalism standards. Because the issue to be determined in this lawsuit is whether Kerrywood's reasons for restricting the staff's speech were constitutional, the court should perform the analysis under a case with more analogous reasons for the university's restriction.

**C. Since the speech in *Hazelwood* was restricted for similar reasons and in an almost identical forum, the District Court was correct in applying the *Hazelwood* standard.**

The *Hazelwood* court distinguished *Tinker* because the speech in *Hazelwood* occurred as part of the school's curriculum. *Hazelwood*, 484 U.S. at 270. *Hazelwood* involved a high school newspaper similar to the Gazette. The newspaper was part of a journalism class and mostly funded by the school board. *Id.* at 260. A teacher oversees and grades the students work. The principal, who reviews the final drafts, objected to two articles. He objected to the first, an article about teen pregnancy, because some references to sexual activity and birth control were inappropriate for the younger students. He objected to the second article, which was about divorce, because the article violated professional standards of journalism. The staff had not given the parents mentioned in the article a chance to respond. *Id.* The court held that the school's actions were constitutional because the control was reasonably related to the school's legitimate pedagogical interest. *Id.* at 276.

The newspapers and reasons for objecting to the speech in *Hazelwood* are very similar to those in the matter before this court. The main difference is that *Hazelwood* occurred in a high school setting. Appellant argues that *Hazelwood* should not apply to a university setting. However, all of the other cases that the Supreme Court uses to evaluate Free Speech claims also occurred in a high school setting. Therefore, because *Hazelwood* is most analogous to Kerrywood, the *Hazelwood* standard should apply to this case.

**D. *Hazelwood* can be applied in the university setting.**

The circuits are split on whether *Hazelwood* applies to universities in the context of speech restriction. The First and Sixth Circuits have held that *Hazelwood* should not be applied at the university level. See *Kincaid*, 236 F.3d at 342; *Student Gov't Ass'n v. Bd. of Trs. of the Univ. of Massachusetts*, 868 F.2d 473 (1st Cir. 1989).

On the other hand, the Ninth, Tenth, and Eleventh Circuits have applied *Hazelwood* to speech at the university level. In *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), the university was allowed to restrict a professor's speech in class. In *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002), the court found that a university could restrict student speech in the acknowledgements section of a master's thesis. The court acknowledged that a university has a strong interest in setting its curriculum. Therefore, the university should have some control over core curricular speech. *Id.* at 952. The argument that the purpose of a master's thesis acknowledgements section is different than the purpose of an editorial does not preclude the use of *Hazelwood* in this case. *Brown* simply shows that *Hazelwood* can be applied at the university level, not that the editorial restriction met the *Hazelwood* standard.

The Tenth Circuit has applied *Hazelwood* to speech at the university level that is substantially similar to the speech at issue here. In *Axson-Flynn*, 356 F.3d at 1293, the court held that a university may restrict speech in a college play because the play is “school sponsored” speech. Students, parents, and members of the university could perceive that the speech bears the imprimatur of the school. Therefore, the university should have some control over speech to which its name is attached. Like the play in *Axson-Flynn*, the Gazette is designed to impart knowledge and skills on the students and is part of the curriculum. The editorial would appear on the front page of a newspaper associated with the school's name.

Even though the *Hazelwood* court was concerned with the needs of emotionally immature high school students, *Axson-Flynn* shows that *Hazelwood* can also address the problem of forcing a school to attach its name to speech inconsistent with the school's pedagogical purpose. The *Hazelwood* court's refusal to decide whether the case would apply to colleges does not preclude future courts from applying *Hazelwood* to colleges. Finally, there is a higher expectation of academic freedom and debate on college campuses. However, the court must remember that the difference in age between some high school and college students is only three months. The primary purpose of a college is to continue the learning process after high school. Deference should be given to universities so that they can fulfill this purpose.

### **III. THE RESTRICTION MEETS THE *HAZELWOOD* STANDARD AND THEREFORE IS NOT AN INFRINGEMENT ON THE STAFF'S FIRST AMENDMENT RIGHTS.**

*Hazelwood* expands the *Fraser* deference standard to create a standard for restrictions on speech that could be perceived as associated with the school. As long as the school's reasons for restricting the speech are reasonably related to legitimate pedagogical concerns, they do not violate the First Amendment. *Hazelwood*, 484 U.S. at 273. A school may dissociate itself from speech that is “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.” *Id.* at 271. In this case, a disclaimer would not properly dissociate Kerrywood from the headliner editorial. The administration approves each issue and funds the paper. Also, schools can require student work to meet a certain academic standard. By placing a disclaimer on the editorial, the school could not dissociate itself from the poorly written piece.

#### **A. Kerrywood's concerns are legitimate and pedagogical.**



The court in *Hazelwood* held that a concern about journalism standards is a legitimate pedagogical interest. The Gazette staff had researched the issue inadequately. Even though the piece was an editorial rather than an article, the staff must adhere to standards of professionalism. First, the editorial will bear the name of the school. Second, the Gazette's mission is to teach students about journalism, whether in the context of editorial or article writing. Third, the staff was going to place their editorial on the front page, an abnormal location for an editorial. Readers would expect to see an opinion piece when they open to the back section. However, the front page contains the headlines. Because the location would showcase the editorial as a headline, the piece should be subject to more rigorous research standards. Had the staff eliminated the name-calling and unprofessional tone and adequately researched the topic as the Dean suggested, the article would be appropriate to display as curricular work from the journalism program.

The Dean was also concerned that the article would represent to the public that the university is taking sides on the controversial war issue. The court in *Hazelwood* stated that a school's association with anything but neutrality is a legitimate concern. *Hazelwood*, 484 U.S. at 272. The editorial on the front page of the school's newspaper could reasonably represent that the school had taken sides on the issue. Therefore, the Dean's concerns were legitimate and pedagogical.

**B. *Hazelwood* does not require viewpoint neutrality.**

Again, the circuits are split on whether *Hazelwood* requires viewpoint neutrality because the opinion does not discuss the requirement. Some of the examples of justified censorship listed in the opinion, such as alcohol abuse and sex, are not viewpoint neutral. However, the Ninth and Eleventh circuits require viewpoint neutrality. The court in *Planned Parenthood of Southern*

*Nevada v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991), held that the requirement is simply assumed. The Eleventh Circuit in *Searcy v. Harris*, 888 F.2d 1314 (11<sup>th</sup> Cir. 1991), held that the Supreme Court could not have intended to rewrite First Amendment law by eliminating the viewpoint neutrality requirement.

On the other hand, the school environment is a unique setting. Schools require a certain amount of deference in their decision-making in order to maintain the order and teaching purposes of the school. The First, Third, and Tenth Circuits have determined that the viewpoint neutrality requirement need not be met in the public school setting. The Tenth Circuit noted that imposing a viewpoint neutrality requirement in *Hazelwood* would create an unnecessary replica of the nonpublic forum analysis. *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918 (10th Cir. 2002). This court has implied that restrictions on speech bearing the imprimatur of the school do not have to meet the viewpoint neutrality requirement. *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995). Therefore, the court could legitimately determine that viewpoint neutrality is not required under *Hazelwood*.

**C. Even if viewpoint neutrality is required, Kerrywood's restriction is still reasonable.**

Kerrywood's restriction was based on the manner in which the editorial was written rather than on the viewpoint of the editorial. The Dean cited the name-calling and the harsh tone as reasons for restricting the speech. These reasons relate only to the manner in which the viewpoints were expressed. The school's request for a certain degree of professionalism and adherence to journalism standards has nothing to do with the viewpoints expressed in the editorial. The Dean made suggestions in order to improve the professionalism of the editorial. His suggestions were intended to assist the students in expressing their views against the war.

The staff argues that because the Dean became upset after reading the editorial, he was restricting the speech based on its viewpoint. To the contrary, the dean was upset that the staff would publish such unprofessional work. He called the article “trash.” This description is not for the viewpoints expressed. Instead, it references the manner in which the editorial was written. Therefore, the Dean's reasons for restricting the article were viewpoint neutral.

### CONCLUSION

Courts are uncomfortable with applying *Hazelwood* to the university setting because the opinion refused to discuss the issue. However, analyzing this case under the *Tinker* or *Fraser* standards, both dealing with speech restrictions in high schools, will not solve the problem. The facts of this case are most analogous to the facts in *Hazelwood*. Also, the university paper is a nonpublic forum. Therefore, Kerrywood's restrictions must be reasonable and related to a legitimate pedagogical purpose. The restrictions were not based on the viewpoints expressed in the editorial. Instead, the Dean was ensuring that the university newspaper adhered to professionalism standards and that the university would not be perceived as taking sides in a highly controversial issue. He was attempting to maintain the integrity of the journalism curriculum and the university. These efforts could hardly be characterized as a suppression of the staff's freedom of speech.

Respectfully submitted,

---

Number 115  
Counsel for Petitioner