No. 05-377

IN THE

Supreme Court of the United States

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MARGARET L. HOSTY *et al.*,
Petitioners,

v.

PATRICIA CARTER,
Respondent.

— — — —

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

— — — —

BRIEF *AMICI CURIAE* OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION; THE COALITION FOR STUDENT & ACADEMIC RIGHTS; FEMINISTS FOR FREE EXPRESSION; THE FIRST AMENDMENT PROJECT; IFEMINISTS.NET; NATIONAL ASSOCIATION OF SCHOLARS; ACCURACY IN ACADEMIA; LEADERSHIP INSTITUTE; THE INDIVIDUAL RIGHTS FOUNDATION; THE AMERICAN COUNCIL OF TRUSTEES AND ALUMNI; AND STUDENTS FOR ACADEMIC FREEDOM IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae[1] represent a broad national coalition of groups concerned with free speech and academic freedom on the

[1] A complete list of the *Amici* is set out in Appendix A. Pursuant to S. Ct. R. 37.6, the *Amici* state that no counsel for a party to this action

nation's college and university campuses. For all the reasons stated below *Amici* believe the Seventh Circuit's opinion in *Hosty v. Carter* was wrongly decided and poses a serious threat to universities ability to function as a true "marketplace of ideas."

SUMMARY OF ARGUMENT

The Seventh Circuit's *en banc* decision in *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) is a grave threat to academic free speech and endangers the very existence of independent college media. *Hosty* directly contradicts recent Supreme Court precedent as well as decades of legal decisions protecting free speech on college campuses, and is irreconcilable with fundamental constitutional principles. The decision also conflicts with decades of opinions protecting the student press in other U.S. courts of appeals and opens the door to an unparalleled erosion of college student rights.

In *Hosty*, the Seventh Circuit treated mandatory student fees as a conventional government subsidy that could entitle a public university to control the speech of student fee recipients. This decision is diametrically opposed to this Court's decisions in *Board of Regents v. Southworth*, 529 U.S. 217 (2000), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). Under *Southworth* and *Rosenberger*, student fees are not considered to be part of a university's discretionary funds but rather constitute a pool of student money "to encourage a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834. This decision, however, will force students to pay into a student activities fund earmarked for a student-run newspaper only to have

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authored any portion of this brief *amici curiae* and that no person or entity, other than the *Amici*, made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of the Court pursuant to S. Ct. R. 37.2(a).

their fees used to finance an administration mouthpiece. *Hosty* turns what this Court rightly considered student money into governmental money that the government may use to promote its own message and exclude student opinions it dislikes—precisely the opposite of what this Court intended in *Rosenberger* and *Southworth*.

Moreover, the Seventh Circuit erred in applying the standard set forth in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)—a standard formulated for high school students—to adult college students. As the dissenting judges in *Hosty* so compellingly pointed out, in applying *Hazelwood*, the Seventh Circuit ignored both the profound differences between high school students and college students and the distinct missions of high schools and colleges. This Court has long recognized that universities should actively work to *facilitate* free speech and the free exchange of ideas. High schools—for all their many virtues—simply do not have the same historical and societal purpose.

The Seventh Circuit also erred in mechanistically applying forum analysis to a collegiate student newspaper. For decades, the independence of the student media and student groups had largely been presumed by courts. Under *Hosty*, however, once a student publication or student group is deemed to be "subsidized"—a dangerously vague term that could potentially include virtually all collegiate student groups—the administration then has the right to decide whether it is granted public forum or non-public forum status. If the administration designates the group as a non-public forum, the administration may engage even in explicit viewpoint discrimination if that decision is considered "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. This remarkably deferential standard provides all students with precious little, if any, real protection from censorship.

Furthermore, the Seventh Circuit's decision to grant qualified immunity to a public employee who demanded the power of prior restraint over a student newspaper ignores this Court's precedent clearly establishing prior restraint as the most egregious form of censorship the First Amendment exists to prevent.

Finally, outside the world of legal theory, the *Hosty* decision will compound an already existing free speech crisis on America's college campuses. For decades, college administrations have demonstrated a persistent, determined desire to limit free speech and open debate on campus. Hundreds of colleges have enacted speech codes that suppress undeniably protected speech. Universities have abused student fee systems to deny associational rights to disfavored groups, established "free speech zones" and other highly restrictive regulations, and too often have refused to prevent student mob censorship. Fortunately, federal courts and agencies[2] have limited administrative control over free expression to maintain the unique status of college campuses as a "marketplace of ideas." *Hosty* is a step in the opposite direction. It dangerously increases administrative discretionary powers over speech while decreasing administrative accountability.

If allowed to stand, *Hosty* will have numerous, specific, predictable, and far reaching negative consequences for free speech and robust debate on America's college campuses. The *Hosty* decision threatens the very existence of independ-

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[2] *See* First Amendment: Dear Colleague Letter from Gerald A. Reynolds, Assistant Secretary, Office for Civil Rights, U.S. Department of Education (July 28, 2003), *available at* http://www.ed.gov/about/offices/list/ocr/firstamend.html ("No OCR regulation should be interpreted to impinge upon rights protected under the First Amendment to the U.S. Constitution or to require recipients to enact or enforce codes that punish the exercise of such rights. There is no conflict between the civil rights laws that this Office enforces and the civil liberties guaranteed by the First Amendment.")

ent collegiate media as well as the independence of student groups; it re-opens issues relating to collegiate liability for student media and student groups formerly considered settled; and, it allows administrators great freedom to experiment with censorship. Finally, due to the tendency of public college principles to guide private college policies, the threat *Hosty* presents to campus speech will not likely be limited to public campuses. For these reasons, this Court should grant certiorari.

REASONS FOR GRANTING THE WRIT

I. THE *HOSTY* DECISION DIRECTLY CONTRADICTS SUPREME COURT PRECEDENT, AND IS INCONSISTENT WITH DECADES OF LEGAL DECISIONS PROTECTING FREE SPEECH ON COLLEGE CAMPUSES, AND LONG-ESTABLISHED CONSTITUTIONAL PRINCIPLES.

A. The Seventh Circuit grossly underestimated the special importance this Court has placed on free and open exchange in higher education.

This Court has long emphasized and understood the importance of free and open expression on campus:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

In the nearly fifty years since *Sweezy*, this Court and lower courts have repeatedly reaffirmed the special importance of robust free expression in higher education.[3] In *Healy v. James*, 408 U.S. 169 (1972), this Court made clear that students are an important part of the collegiate marketplace of ideas when it ruled that a college, acting "as the instrumentality of the State, may not restrict speech . . . simply because it finds the views expressed by any group to be abhorrent." *Healy* at 187-88. *See also Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) ("the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'").

The Seventh Circuit, however, held that the rationale of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), applied to collegiate student newspapers. By placing the rights of adult university students, engaged in reporting as part of their extracurricular activities—paid for out of fees extracted from them precisely for this purpose—on the same plane as the rights of high school students writing as part of a journalism class, the Seventh Circuit gravely discounted the

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[3] *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995) ("[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses"); *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) ("[t]he classroom is peculiarly the 'marketplace of ideas.' 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'") (citations omitted); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) ("The university environment is the quintessential "marketplace of ideas," which merits full, or indeed heightened, First Amendment protection"); *Linnemeier v. Ind. Univ.—Purdue Univ. Fort Wayne*, 155 F. Supp. 2d 1034, 1042 (N.D. Ind. 2001) ("A university setting is . . . a 'hub of ideas' and a place citizens traditionally identify with creative inquiry, provocative discourse, and intellectual growth").

special status of colleges and universities. This Court has rightly never held that the nation relies on its high schools as the engines of intellectual innovation, scientific discovery and open debate, but in opinions like *Sweezy*, this Court has recognized that higher education plays precisely this role. By applying *Hazelwood*'s weak speech protections to adult students and refusing to hold administrators accountable for brazen acts of censorship, the Seventh Circuit opinion threatens the vibrancy and effectiveness of our nation's colleges and universities.

B. The Seventh Circuit mistakenly treated mandatory student activity fees as a conventional government subsidy in conflict with *Southworth* and *Rosenberger*.

The Seventh Circuit directly contradicted Supreme Court precedent by applying doctrines relevant to institutionally "subsidized" speech simply because the *Innovator* (the campus newspaper in question) received funds from the student activity fee, *Hosty*, 412 F.3d at 735. The Seventh Circuit wrongly compared speech in the *Innovator* to other speech "underwritten at public expense," and stated that "[f]reedom of speech does not imply that someone else must pay," to defend the proposition that by granting student activity fees to the paper the university may have attached university control over the paper's views. *Id*. at 735, 737. Under this Court's decisions in *Board of Regents v. Southworth*, 529 U.S. 217 (2000) and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), however, student activity fees are student funds designated to fund student speech and cannot be used by the government to control student speech.

In *Southworth*, when a group of students challenged the use of mandatory student activity fees to fund speech with which they disagreed, this Court explicitly distinguished student activity fees from direct university support, writing that "[i]f

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*." *Southworth*, 529 U.S. at 229 (emphasis added).

The logic behind the *Southworth* decision is compelling: students should not be forced to subsidize groups or expression they despise. If, however, as this Court explained, mandatory student activity fees are treated as a pool of student money that can only be distributed on a viewpoint-neutral basis, the fee becomes a permissible student fund for free speech in general, not for a certain approved view in particular. *Hosty*, however, treats student activity fees as if they were of the same nature as the direct government funding provided in cases like *Rust v. Sullivan*, 500 U.S. 173 (1991) and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998). In cases of direct government funding, the government itself is deemed to be the speaker. However, this Court has made clear that student speech funded by student activity fees "is not that of the University or its agents." *Southworth*, 529 U.S. at 235.

Crucially, the Court held in *Southworth* that student activity fees *must* be distributed without regard to the viewpoint of the student groups receiving those fees. *Southworth*, 529 U.S. at 233. Dean Carter's viewpoint-based decision to prevent the publication of the *Innovator* because it criticized the university administration was not only a violation of GSU's own contractual promises and an impermissible prior restraint on speech, but also directly violated *Southworth*'s requirement of viewpoint neutrality.

Under the logic of *Hosty*, a state university would be responsible for—and theoretically control—the speech of all student fee recipients, including College Republicans, College Democrats, Campus Crusade for Christ, Hillel, Human Rights Campaign, and the Muslim Student Association. Ob-

viously, these groups have competing agendas and ideologies. They do not speak for the university, nor should the university be able to control their speech. However, *Hosty* gives the university just such an opportunity. The entire student fee structure is thus transformed from an engine of free speech into a pretext for institutional control.[4]

C. The Seventh Circuit erroneously applied *Hazelwood* to colleges and universities despite the profound differences in the nature and purpose of high schools and universities.

The most controversial component of the *Hosty* opinion was its decision to apply *Hazelwood* to cases involving the student media at institutions of higher education. The Seventh Circuit decided to apply a standard that ignores the dramatic differences between high school and college students and eviscerates the universally understood status the college student media has enjoyed for decades.

First, as noted above, the Seventh Circuit improperly characterized *Hazelwood* as a case primarily about school-funded speech, whereas this Court's decision in *Hazelwood* was based on far more than the school's mere financial support of the newspaper. This Court was also influenced by the fact that the school administration was sufficiently entangled with the publication of the newspaper—through editorial oversight and a written policy that the newspaper was part of the educational curriculum—that "students, parents, and members of the public might reasonably perceive [it] to bear the imprimatur of the school." *Hazelwood*, 484 U.S. 260, 271 (1988). None of these factors were present with the *Innovator*.

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[4] It is not clear that the university could control the student-run newspaper even if using taxpayer funds; however, this issue is for another time, for in this case the funds were student activity funds assessed against the students.

Second, the *Hosty* court's decision to apply the *Hazelwood* analysis to the paper as soon as it determined the existence of any financial support ignores the relationship between public colleges and the student media that has existed for decades. *See, e.g.*, *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983) ("[a] public university may not constitutionally take adverse action against a student newspaper, such as withdrawing or reducing the paper's funding, because it disapproves of the content of the paper"); *Schiff v. Williams*, 519 F.2d 257, 260 (5th Cir. 1975) ("the right of free speech embodied in the publication of a college student newspaper cannot be controlled except under special circumstances"). The independent student media has long been a collegiate institution, which benefits both students and the colleges themselves.

Third, in applying the *Hazelwood* standard, the Seventh Circuit also ignored the important distinctions between high school and college students. High school students are almost exclusively minors, while college students are almost exclusively adults.[5] *See Healy v. James*, 408 U.S. 169, 197 (1972) (Douglas, J., concurring) ("[s]tudents—who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age—are adults who are members of the college or university community"). *See also Kincaid v. Gibson*, 236 F.3d 342, 346 (6th Cir. 2001) (holding that *Hazelwood* did not apply to college setting because college students are "young adults"); *Bystrom v. Fridley High Sch.*, 822 F.2d 747, 750 (8th Cir. 1987) ("few college students are minors, and colleges are traditionally places of virtually unlimited free expression"); *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979) ("[c]ollege students today are no longer minors;

[5] According to the U.S. Census Bureau, only 1.2 percent of undergraduate students are below the age of 18. *See* 2002 U.S. Census Bureau Current Population Survey Report, Table A-6, "Age Distribution of College Students 14 years Old and Over, by Sex: October 1947 to 2002."

they are now regarded as adults in almost every phase of community life"); *Beach v. Univ. of Utah*, 726 P.2d 413, 418 (Utah 1986) ("[we] do not believe that [a college student] should be viewed as fragile and in need of protection simply because she had the luxury of attending an institution of higher education"); *Mazart v. State*, 109 Misc. 2d 1092, 1102, 441 N.Y.S.2d 600, 606-607 (N.Y. Ct. Cl. 1981) ("[i]t 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").

Finally, the Seventh Circuit also overlooked the profoundly different missions of high schools and universities. This Court has long recognized the unique status of universities as "vital centers for the Nation's intellectual life. . . ." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995). *See also Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) ("[t]he classroom is peculiarly the 'marketplace of ideas.'"). By contrast, this Court has described the status of public secondary schools as follows: "The role and purpose of the American public school system were well described by two historians, who stated: '[Public] education must prepare pupils for citizenship in the Republic. It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.'" *Bethel Sch. Dist. v. Fraser*, 487 U.S. 675, 681 (1986) (citations omitted).

D. The Seventh Circuit relied on an overly mechanistic application of public forum analysis rather than the longstanding presumption that student media is not merely a public forum, but an independent forum.

After erroneously ruling that *Hazelwood* applied, the court below asked: "was the reporter a speaker in a public forum (no censorship allowed?) or did the University either create a

non-public forum or publish the paper itself (a closed forum where content may be supervised)?" *Hosty*, 412 F.3d at 735-36. This question was improper and serves only to highlight the Seventh Circuit's misunderstanding of the basic purpose and function of the student press.

In many previous cases, the freedom of the student press was simply presumed without the need to conduct a forum analysis.[6] In *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973), the Fourth Circuit gave a clear statement of the traditional standard:

> It may well be that a college need not establish a campus newspaper, or, if a paper has been established, the college may permanently discontinue publication for reasons wholly unrelated to the First Amendment. But if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment.

This understanding is clear from the Court's decision in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), a case involving a Christian student publication that sought student fee funding. If the receipt of student fees could have converted the publication at issue into a non-public forum, then "viewpoint neutrality" would have been impossible. Administrative editorial decisions follow administrative control, and administrative control would have directly implicated the Establishment Clause. Evangelical Christian publications (such as the magazine at

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[6] *See, e.g.*, *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983); *Schiff v. Williams*, 519 F.2d 257, 260 (5th Cir. 1975); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970) ("[b]ecause of the potentially great social value of a free student voice in an age of student awareness and unrest, it would be inconsistent with basic assumptions of First Amendment freedoms to permit a campus newspaper to be simply a vehicle for ideas the state or the college administration deems appropriate").

issue in *Rosenberger*) may be written, edited, and published by students acting in their private capacity as students, but the state cannot adopt such an explicitly religious point of view.

By stripping the student media of its traditional presumption of independence—or at the very least, the presumption that when a university creates a student newspaper, it is a designated public forum—the Seventh Circuit has introduced dangerous ambiguity to the rights of all student groups engaged in expressive activities.

E. The qualified immunity holding is in direct conflict with Supreme Court precedent clearly establishing prior restraint as the most primitive form of censorship the First Amendment prevents.

In *Hosty*, the Seventh Circuit held that Dean Carter, who had insisted upon prior review of a student newspaper because the administration disliked its viewpoint, enjoyed the protection of qualified immunity. The Seventh Circuit held this despite the fact that the paper's freedom of expression was protected both by the U.S. Constitution and by a contractual promise from the university.[7] The court relied on the following two-factor test from *Saucier v. Katz,* 533 U.S. 194 (2001) to reach this determination: 1) "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the [public official's] conduct violated a constitutional right?" and 2) "If a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201.

[7] At the time of the *Hosty* decision, the university's policy was that each funded publication "will determine content and format . . . without censorship or advance approval." *Hosty*, 412 F.3d at 737.

The Seventh Circuit's decision to grant Dean Carter qualified immunity flies in the face of literally hundreds of years of legal scholarship[8] and decades of Supreme Court precedent establishing prior restraint as the most basic form of impermissible censorship.[9] As this Court stated in the context of discussing another student-fee-funded publication, "[t]he first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995). Moreover, Dean Carter's actions as an administrator directly violated this Court's holding in *Kunz v. New York*, 340 U.S. 290, 293 (1950), that a provision "which gives an administrative official discretionary power to control in advance the right of citizens to speak" is "clearly invalid as a prior restraint on the exercise of First Amendment rights."

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[8] *See* William Blackstone, *Commentaries on the Laws of England* (1765-1769); John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing* (1644).

[9] *See Near v. Minnesota*, 283 U.S. 697, 718 (1931) ("[t]he fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right"). *See also New York Times Co. v. U.S.*, 403 U.S. 713, 717 (1971) ("[b]oth 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"); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity"); *Niemotko v. Maryland*, 340 U.S. 268 (1950) (holding that prior restraints on speech violate the First and Fourteenth Amendments); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938) ("[w]hile this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of constitutional provision").

The Seventh Circuit held that *Hazelwood* and a small number of lower court decisions obscured whether or not Dean Carter could have known she was acting improperly. However, as Judge Evans stated in his dissent in *Hosty*, "[p]rior to *Hazelwood*, courts were consistently clear that university administrators could not require prior review of student media or otherwise censor student newspapers . . . *Hazelwood* did not change this well-established rule." *Hosty*, 412 F.3d at 742. The majority cited no cases implying that Dean Carter might have the power of prior restraint over a student newspaper merely because the paper received mandatory student activity fees assessed to and paid by the students. In fact, the case law regarding prior review of college student media clearly establish that this is not the case.[10] *Hazelwood* was not generally understood to apply to collegiate student newspapers; an examination of William A. Kaplin and Barbara A. Lee's *The Law of Higher Education*, which is perhaps the most comprehensive text dealing with higher education law,[11] does not even mention *Hazelwood* as a case that is applicable to the collegiate student press.[12] However, Kaplin

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[10] *See, e.g.*, *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970) (holding that state university could not require prior review of student newspaper funded by student fees); *Mazart v. State*, 109 Misc. 2d 1092, 1099, 441 N.Y.S.2d 600, 605 (N.Y. Ct. Cl. 1981) ("censorship or prior restraint of constitutionally protected expression in student publications at State-supported institutions has been uniformly proscribed by the courts").

[11] *See, e.g.*, Karl F. Brevitz, *Legal Resources for Higher Education Administrators and Faculty,* Change Mag., May-June 2003 ("Without question the most comprehensive resource on higher education law is this 1,023-page treatise by William A. Kaplin.. and Barbara A. Lee. . . . This book is used not only as a resource by college and university attorneys and administrators but also serves as one of the two primary texts used in the teaching of higher education law in law schools and schools of education").

[12] William A. Kaplin & Barbara A. Lee, *The Law of Higher Education* 538-549 (3d ed. 1995).

and Lee do mention that "[a]s perhaps the most staunchly guarded of all First Amendment rights, the right to a free press protects student publications from virtually all encroachments on their editorial prerogatives by public institutions." *Id.* at 539.

Simply put, if a state official imposing prior restraint over a collegiate student newspaper flatly because the administration disliked the paper's viewpoint does not constitute a clear violation of established law regarding freedom of expression, no restriction on freedom of expression does. The Seventh Circuit itself may have obscured the constitutionality of Dean Carter's actions by its opinion in this case, but at the time Dean Carter demanded prior restraint over the *Innovator*, the violation was or at least should have been perfectly clear to anyone in her position.

II. THERE IS ALREADY A FREE SPEECH CRISIS ON AMERICA'S COLLEGE CAMPUSES AND, IF ALLOWED TO STAND, THE *HOSTY V. CARTER* DECISION WILL SERIOUSLY EXACERBATE THE EXISTING PROBLEM.

Commentators from across the political spectrum, while often disagreeing on the source, the scale, and the cause of the chilling of free speech on campus, have described the current campus environment as one where the "marketplace of ideas" is under siege.[13] Whether in the name of "toler-

[13] *See* Forum, *A Chilly Climate on the Campuses*, Chron. Higher Educ. (Wash., D.C.), Sept. 9, 2005, at B7 ("Rarely has the climate on college campuses seemed such a cause for concern . . . What is notable is not that so many people are talking about a big chill, but that so many different people—representing very different perspectives—are doing so"). The Chronicle forum included essays from leading commentators on campus freedom including Robert O'Neil, Stanley Kurtz, Jonathan Cole, Chon Noriega, Ellen Willis, and Amy Gutmann discussing the campus chill on free speech from a multitude of perspectives.

ance," risk management, or merely peace and quiet, hundreds (if not thousands) of universities have enacted policies and engaged in practices hostile to free and open discourse over the past few decades.[14] Starting in the 1980s, colleges enacted "speech codes" under a variety of creative legal theories. Despite numerous decisions ruling these codes unconstitutional[15] and this Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), which indicated that viewpoint-based speech codes would be unconstitutional, the number of university speech codes actually increased through the 1990s, *see* Jon Gould, *The Precedent that Wasn't*, 35 Law & Soc'y Rev. 345 (2001). Over the past twenty years, numerous books have been written alleging an illiberal, intolerant, and/or partisan atmosphere on campus[16] in which dissenting viewpoints and unpopular groups are repressed through a variety of measures. More recently, universities have adopted highly restrictive, and sometimes absurd "speech

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[14] For examples of these policies and practices, see the Foundation for Individual Rights in Education's database of restrictive campus speech codes at www.thefire.org/spotlight. The website is constantly being updated, and currently includes 421 institutions and links directly to thousands of primary documents, including universities' actual policies, statements and handbooks.

[15] *See, e.g.*, *Booher v. Bd. of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 22, 1998); *Dambrot v. Central Mich. Univ.*, 839 F. Supp. 477 (E.D. Mich. 1993); *The UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

[16] *See, e.g.*, David E. Bernstein, *You Can't Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws* (2003); Donald Alexander Downs, *Restoring Free Speech and Liberty on Campus* (2004); Alan Charles Kors & Harvey A. Silverglate, *The Shadow University: The Betrayal Of Liberty On America's Campuses* (1998).

zone" policies restricting speech from all but small corners of the university.[17]

Thus far, the law has served to protect the collegiate marketplace of ideas from overreaching administrations, requiring policies and practices in keeping with the First Amendment and academic freedom. For example, in *Rosenberger*, this Court granted religious student groups equal access to student fee funding. In *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003), a federal court in Pennsylvania ruled Shippensburg University's speech code was unconstitutionally overbroad, and in *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004), a federal court in Texas dismissed a speech zone policy as unconstitutionally overbroad.

The *Hosty* decision, however, is a step in the opposite direction. College administrators have already demonstrated a tenacious will to censor even when the law clearly limited their ability to do so. The legal ambiguity that *Hosty* creates, the unparalleled discretion it grants college administrators, and the legal protection it provides to administrators who censor all threaten to dramatically worsen the campus free speech crisis.

If allowed to stand, *Hosty* will have numerous, specific, predictable, and far reaching negative consequences for free speech and robust debate on America's college campuses. It is no exaggeration to say that the *Hosty* opinion threatens the existence of the independent collegiate media. Universities have not shown great tolerance for the free press. If there is no longer a presumption of independence or of public forum status when a public university establishes a student news-

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[17] *See generally* Mary Beth Marklein, *Students are Giving Colleges a Lesson in Free Speech*, USA Today, May 19, 2003; David L. Hudson Jr., *Free Speech Zones*, *available at* http://www.firstamendmentcenter.org/speech/pubcollege/topic.aspx?topic=free-speech_zones.

paper, there should be no doubt that administrators who wish to censor will take advantage of this ambiguity. Public universities will be able to argue that any paper that receives any kind of benefit—whether financial support or simply the use of office space—from the university is subject to administrative control. If past experience is any guide, colleges will pay lip service to the importance of student press freedom, but they will quickly take advantage of any legal means available to punish or control student newspapers that anger or offend students or administrators. For example, in a memorandum to all California State University presidents written only ten days after the *Hosty* decision, California State University General Counsel Christine Helwick wrote that:

> [w]hile the Hosty decision is from another jurisdiction and, as such, does not directly impact the CSU, the case appears to signal that CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers, provided that there is an established practice of regularized content review and approval for pedagogical purposes.[18]

In this same way, *Hosty* threatens the existence of independent student groups. If the primary question under *Hosty* is whether a student group is in some way "subsidized," any group that receives any sort of benefit or student fees could be threatened with administrative control. The possibility that a court might later determine that the student group or publication was entitled to some form of public forum status would hardly protect the overwhelming majority of these groups that are neither willing nor affluent enough to mount a legal defense.

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[18] Memorandum from Christine Helwick, General Counsel, California State University, to CSU Presidents (June 30, 2005), *available at* http://www.splc.org/csu/memo.pdf.

This case also re-opens issues relating to collegiate liability for student media and student groups formerly considered settled. It also allows administrators virtually unlimited freedom to experiment with censorship above and beyond even the broad discretion granted to them under *Hosty*. Finally, there is no reason to believe this holding will remain limited to public colleges—private colleges that promise free speech to their students tend to base their own speech policies on First Amendment standards.[19] *Hosty v. Carter* will have reverberations from the community college to the Ivy League. Administrators will impose the "intellectual strait jacket" that this Court has long feared, and the consequences will be profound. As FIRE co-founder Alan Charles Kors once said, "A nation that does not educate in freedom will not survive in freedom, and will not even know when it is lost."[20]

CONCLUSION

For all of the reasons stated above we ask that the Supreme Court grant the writ of certiorari.

Respectfully submitted,

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[19] Kaplin and Lee even suggest "private institutions may want to adhere to much the same guidelines for promulgating rules as are suggested for public institutions, despite the fact they are not required to do so by law." Kaplin and Lee, *supra* note 12, at 464-465.

[20] Alan Charles Kors, Keynote Address to Phi Beta Kappa of Delaware County, (Oct. 13, 2004).

APPENDIX

LIST OF PARTIES TO BRIEF *AMICI CURIAE*

The Foundation for Individual Rights in Education, Inc. ("FIRE"), is a non-profit, tax-exempt educational and civil liberties organization pursuant to section 501(c)(3) of the Internal Revenue Code, interested in promoting and protecting academic freedom and First Amendment rights at American institutions of higher education. FIRE receives hundreds of complaints each year concerning attempts by college administrators to justify punishing student expression through misinterpretations of existing law. FIRE believes that, for academic freedom and robust collegiate expression to survive, the law must remain clearly and vigorously on the side of free speech on campus.

The Coalition for Student & Academic Rights ("CO-STAR") is a national network of lawyers that helps college students and professors with their legal problems. CO-STAR offers a wide range of services, including legal counseling, mediation, legal education and advocacy. CO-STAR is based in Bucks County, Pennsylvania and is a 501(c)(3) corporation.

Feminists for Free Expression (FFE) is a national not-for-profit organization of diverse feminist women and men who share a commitment both to gender equality and to preserving the individual's right and responsibility to read, view, and produce expressive materials free from government intervention. Originally organized in 1992 in response to the many efforts to solve society's problems by book, music or movie banning, FFE provides a leading voice opposing state and national legislation that threatens free speech; defends the right to free expression in court cases, including those before the Supreme Court; supports the rights of artists whose works have been suppressed or censored and provides expert speak-

ers to universities, law schools and the media throughout the country.

The First Amendment Project is a nonprofit organization dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

Ifeminists.net (a site for individualist feminism) is one of the longest-standing feminist sites on the Internet—which challenges many of the ideological assumptions that are common on campus today, especially in Women's Studies Departments. Indeed, many of our subscribers are university students. If the debate and dialogue upon which intellectual growth depends is to occur, then it is essential that student publications be allowed freedom of speech and not be censored by university authorities who may have a vested interest in the status quo. Ifeminists believes that the decision reached by the Seventh Circuit Court of Appeals in *Hosty v. Carter* will lead to unconstitutional censorship of student journalism and, therefore, hopes the Court will intervene to overturn this dangerous precedent.

The National Association of Scholars is an organization of professors, graduate students, college administrators, trustees, and independent scholars, committed to rational discourse as the foundation of academic life in a free and democratic society.

The Leadership Institute identifies, recruits, trains, and places conservatives in the public policy process. The Institute's Campus Leadership Program launches and maintains independent conservative groups and newspapers at colleges and universities nationwide, and works with over 300 now-active organizations on campuses in all 50 states. Independence and freedom of expression are essential to these

organizations, as they commonly face attempts at administrative censorship.

Accuracy in Academia, a non-profit research group based in Washington, D.C., wants colleges and universities to return to their traditional mission—the quest for truth. To this end, AIA focuses on the use of classroom and/or university resources to indoctrinate students; discrimination against students, faculty or administrators based on political or academic beliefs; and campus violations of free speech. AIA publishes in its monthly newsletter, Campus Report, and posts on its websites, www.academia.org and www.campusreportonline.net, hundreds of stories each year that present the evidence behind these complaints.

The Individual Rights Foundation ("IRF") litigates civil rights and First Amendment issues and educates the public about the importance of the First Amendment's free speech and associational guarantees. Founded in 1993, the IRF is a nonprofit organization that represents parties to litigation and files amicus curiae briefs involving significant civil rights and First Amendment issues. The IRF is committed to the principle of equality of rights for all persons, and to the goal of protecting fundamental civil rights and First Amendment rights.

Students for Academic Freedom ("SAF") is a national coalition of independent campus groups dedicated to restoring academic freedom and educational values to America's institutions of higher learning. SAF is committed to the goal of promoting intellectual diversity at colleges and universities. SAF seeks to secure greater representation for underrepresented ideas and to promote intellectual fairness and inclusion in all aspects of the curriculum and the campus public square.

The American Council of Trustees and Alumni (ACTA) is a 501(c)(3), tax-exempt, nonprofit, educational organization

committed to academic freedom, excellence and accountability at America's colleges and universities. ACTA works with college and university trustees to safeguard the free exchange of ideas, support liberal arts education, uphold high academic standards, and ensure that the next generation receives an open-minded, high quality education at an affordable price. ACTA has members from over 400 colleges and universities. Its quarterly publication, *Inside Academe*, goes to over 12,000 readers, including 3,500+ college and university trustees.