Case Nos. 05-3266 & 05-3284

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KATIE LANE and SARAH RICE,

Appellants/Cross-appellees,

v.

TODD F. SIMON and STEPHEN E. WHITE,
in their official and individual capacities,

Appellees/Cross-appellants.

Appeal from the U.S. District Court for the District of Kansas
Case No. 04-CV-04079-JAR-JPO
The Honorable Julie A. Robinson

BRIEF OF *AMICI CURIAE* STUDENT PRESS LAW CENTER, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE ASSOCIATED COLLEGIATE PRESS, COLLEGE MEDIA ADVISERS, COLLEGE NEWSPAPER BUSINESS AND ADVERTISING MANAGERS, THE COMMUNITY COLLEGE JOURNALISM ASSOCIATION, THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION INC., THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND THE SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF APPELLANTS/CROSS-APPELLEES' REQUEST FOR PARTIAL REVERSAL OF DISTRICT COURT AND IN OPPOSITION TO APPELLEES/CROSS-APPELLANTS' REQUEST FOR PARTIAL REVERSAL OF DISTRICT COURT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In addition to the trial judge, parties, counsel and "other potentially interested entities" identified in the Certificate submitted by Appellants/Cross-Appellees, which is hereby adopted as part of this Certificate, pursuant to Tenth Circuit Rule 46.1 and Rule 26.1 of the Federal Rules of Appellate Procedure, the *amici curiae* submit that the following entities also have an interest in the outcome of this case:

Alston & Bird LLP (counsel for *amici curiae*)

American Society of Newspaper Editors

Associated Collegiate Press

Biegel, Adam J. (counsel for *amici curiae*)

College Media Advisers

College Newspaper Business and Advertising Managers

Community College Journalism Association

Foundation for Individual Rights in Education Inc.

Goodman, S. Mark (counsel for *amici curiae*)

National Scholastic Press Association

Reporters Committee for the Freedom of the Press

Society of Professional Journalists

Student Press Law Center

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The Student Press Law Center, American Society of Newspaper Editors, Associated Collegiate Press, College Media Advisers, College Newspaper Business and Advertising Managers, Community College Journalism Association, Foundation for Individual Rights in Education, Reporters Committee for the Freedom of the Press, and Society of Professional Journalists include and represent nearly every major national organization of college journalists and college media advisers, as well as a civil liberties organization and organizations representing professional journalists and the news organizations they work for, and thus have a particular interest in the ultimate resolution of this case, which involves issues concerning college media advisers and the First Amendment rights of student journalists.

The **Student Press Law Center** is a national, nonprofit, non-partisan organization established in 1974 to perform legal research and provide information and advocacy for the purpose of promoting and preserving the free expression rights of student journalists. As the only national organization in the country devoted exclusively to defending the legal rights of the student press, the Center has collected information on student press cases nationwide and has submitted various *amicus* briefs, including to this Court, the Supreme Court and many other federal courts of appeal.

The **American Society of Newspaper Editors** is a nonprofit organization founded in 1922. It has a nationwide membership of approximately 850 persons who hold positions as directing editors of daily newspapers throughout the United States, with members recently being added in Canada and other countries in the Americas. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

The **Associated Collegiate Press** is a division of the National Scholastic Press Association, a 501(c)(3) non-profit association of student media groups at colleges, universities and secondary schools throughout the United States and in several other countries. Founded in 1921, the college/university division represents about 700 media organizations and more than 20,000 student journalists. The associations provide journalism education and recognition opportunities for their members, including reporting competitions and programs on press law and ethics.

College Media Advisers, with more than 800 members, has a 48-year history of representing the people who advise the nation's collegiate newspapers, yearbooks, magazines and electronic media. This organization endorses student press freedom as guaranteed by the First Amendment of the U.S. Constitution and has long held that a free and unencumbered student press serves the learning

environment of an academic community far better than a student press restrained by prior review and censorship.

College Newspaper Business and Advertising Managers is a national organization of college newspaper business staffs. Founded in 1972, CNBAM represents over 120 student newspapers with a circulation of over 1.4 million and over $50 million in annual sales. Their annual conference brings together students, professional staff members and industry experts to discuss advertising trends and exchange ideas. The organization also provides educational opportunities and recognition to student sales staffs through its annual advertising contest.

The **Community College Journalism Association** is an international organization that fosters the improvement of journalism instruction in higher education, especially in two-year institutions. Founded in 1968, CCJA is dedicated to the precept that community college journalism education must seek high standards in the preparation of men and women for effective careers in the mass media.

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 **Reporters Committee for Freedom of the Press** is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The **Society of Professional Journalists** is the largest and most broad-based journalism organization in the United States, with a membership consisting of professional working journalists, college and university professors, and student journalists. The Society is committed to encouraging the free practice of journalism, improving the quality of journalism, and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects the guarantees of freedom of speech and press found in the First Amendment to the United States Constitution.

ARGUMENT AND CITATION OF AUTHORITIES

This is a case of censorship by proxy. University officials at Kansas State University disapproved of student editors' decisions concerning whether and how to cover certain campus events and communities in the student newspaper. Unable to influence the student editors directly, the administration instead sent them a message by firing their longtime adviser. The University expressly based its action on a self-described "content analysis" of the student paper. Yet the district court held that this analysis and the adviser's resultant dismissal did not affect the student editors' First Amendment rights, because the analysis and removal were somehow related only to the paper's "quality," not its content.

This rationale is a sham. A newspaper's quality and content are legally and logically inseparable. This is especially true here, where the University expressly stated that it fired the students' adviser due to the results of a "content analysis" of the student paper, and where that "content analysis" itself was prompted by student and faculty protests against the student editors' coverage decision.

Allowing University officials to influence student editors' decisions about the content of their newspaper in this manner is contrary to a vast and longstanding body of First Amendment law and should not be sanctioned by this Court. Accordingly, *amici curiae* respectfully submit that the district court's holding that the student editors failed to state a First Amendment claim, and that their claim is

barred by the Eleventh Amendment, should be reversed. The district court's holding that the student editors have standing to bring their claim should be affirmed.

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF JOURNALISTS' SECTION 1983 COMPLAINT, WHICH ADEQUATELY ALLEGED THAT THE REMOVAL OF THEIR MEDIA ADVISER VIOLATED THEIR FIRST AMENDMENT RIGHTS.

It is well-established that "[a] public university may not constitutionally take adverse action against a student newspaper . . . because it disapproves of the content of the paper." *Stanley v. Magrath,* 719 F.2d 279, 282 (8th Cir. 1983). *See also Joyner v. Whiting,* 477 F.2d 456, 460 (4th Cir. 1973) (striking down public university president's attempt to withhold funding from student newspaper that published controversial editorial that president said failed to meet "standard journalistic criteria"); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970) (rejecting public university president's attempt to freeze student newspaper's funding and establish a faculty board to pre-approve content following publication of article he deemed "garbage" and "trash"). Neither the district court nor the parties in this case take issue with these general principles. (*See* Aplt. App. at 130 (quoting *Joyner* and *Stanley*).)

Furthermore, all parties agree that the student newspaper in this case, the *Collegian*, was established and operates as a publication in which the student editor

in chief has "final authority for publication content, and content decisions rest in the hands of the student editors." (Aplt. App. at 121.) They agree that the newspaper's adviser had no control over the content of the publication. (*Id*.; *see also* Aplt. App. at 65.)[1]

Nor is there any dispute that officials of a state entity – Kansas State – removed adviser Ronald Johnson, the Director of Student Publications of the privately incorporated student newspaper after University officials performed and analyzed a self-described "content analysis" of the student publication.[2] However, the district court dismissed a Section 1983 action by *Collegian* editors Katie Lane and Sarah Rice ("Plaintiff Journalists") against the responsible Kansas State officials, Todd Simon and Stephen White ("University Defendants"),[3] relying

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[1] This case does not raise questions debated in *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc), *petition for cert. filed*, 74 U.S.L.W. 3213 (U.S. Sept. 16, 2005) (No. 05-377). The rationale of *Hosty*, which conflicts with every federal court ruling regarding the free press rights of college student journalists over the last four decades, involves the right of university officials to censor student publications when the school claims that student editors have *not* been given content control. Although *amici* strongly disagree with the reasoning and conclusion of *Hosty*, they note that ruling has no relevance to the facts in the instant case. This Court need offer no opinion of that decision to reach a conclusion here.

[2] At this stage, the Court must take all well-pleaded allegations contained as true. In addition, in response to the Plaintiff Journalists' preliminary injunction motion, the University Defendants admitted that the content analysis was a motivating factor in their removal of Mr. Johnson. (Aplt. App. at 169-71.)

[3] Although Mr. Simon was Chairman of the Board of Student Publications, Inc., the Kansas corporation that publishes the *Collegian*, he also was the chairman of the journalism department and a professor in Kansas State's A.Q. Miller School of Journalism. (Aplt. App. at 310-12.) Mr. White was dean of the University's College of Arts and Sciences. (Aplt. App. at 157.) No party has argued or alleged that either person was acting outside their capacity as

almost entirely on its determination that the self-described "content analysis" that led to the adviser's removal was not, in fact, an impermissible evaluation of the newspaper's content, but merely a permissible evaluation of the newspaper's "overall quality." (Aplt. App. at 130-134.)

This interpretation of the University's "content analysis" is unsupported by First Amendment law and threatens to undermine the freedoms of all student and professional journalists. Therefore, the crucial question to be reviewed *de novo* by this Court is whether Plaintiff Journalists' allegations that the University Defendants removed Mr. Johnson from his adviser position on a privately incorporated student newspaper to impermissibly influence, or exact punishment for, the content of the newspaper, stated a violation of the First Amendment. *See Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989); *PeTA, People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1204 (10th Cir. 2002) (restricting government's regulation of a public forum to content-neutral time, place and manner restrictions). *Amici* argue that the punitive removal of a newspaper adviser based on a "content analysis" used to assess a publication's "overall quality," as alleged here, constitutes clearly impermissible content-based censorship as a matter of law.

University representatives in connection with the issues in this case. It is undisputed that both are state actors.

A. Plaintiff Journalists Properly Pleaded That the University's Decision Not to Reappoint Their Media Adviser Violated Their First Amendment Rights.

Although the Tenth Circuit has not addressed the specific issue of the standard for pleading a public university's improper content-based interference with a student publication, it has recognized that a university campus is a place that is "'peculiarly the marketplace of ideas'" where "'the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.'" *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1229-30 (10th Cir. 2005) (quoting *Healy v. James,* 408 U.S. 169, 180 (1972) and *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 835 (1995)).

Consistent with this case law, the Eighth Circuit has articulated the appropriate two-step analysis for evaluating such First Amendment claims. In *Stanley v. Magrath*, the Eighth Circuit held that a public university impermissibly interferes with the First Amendment rights of student journalists when it (1) makes an "adverse" decision (2) that is "substantially motivated by the content of the newspaper." 719 F.2d at 282. *See also Kincaid v. Gibson*, 236 F.3d 342, 348 n.6 (6th Cir. 2001) (noting that university cannot cut student newspaper's funding

based on disapproval of paper's content); *Am. Future Sys., Inc. v. Pa. State Univ.*, 752 F.2d 854, 864 n.28 (3d Cir. 1984) (same).[4]

Plaintiff Journalists here properly alleged sufficient facts in their well-documented complaint to satisfy both criteria of the Eighth Circuit's two-prong test, and that test should be applied in this case. Accordingly, Plaintiff Journalists clearly stated a viable First Amendment claim under Rule 12, and the district court's contrary finding should be reversed. *Id.*

1. Plaintiff Journalists Sufficiently Pleaded That An Adverse Action Was Taken Against Them.

First, Plaintiff Journalists here clearly alleged that an adverse action was taken by the University Defendants, and no serious argument has been made to the contrary. Plaintiff Journalists' complaint states that when the University Defendants told Mr. Johnson he would no longer serve as Director of Student Publications, they lost the valuable support and advice that he, as a veteran journalism adviser, had provided them as student journalists. (*See* Aplt. App. at 11, 13 ¶¶ 21, 27, 29.)

In addition, Plaintiff Journalists alleged that they suffered harm in the form of a chilling effect in the *Collegian* newsroom as a result of the University

[4] As noted above, the district court cited *Stanley* in recognizing that public entities may not interfere with college newspapers based on impermissible motives, but failed to properly apply *Stanley*'s two-step analysis. (Aplt. App. at 130.)

Defendants' decision.[5] The University Defendants' actions caused newspaper staff to second-guess their news decisions for fear that any reconsideration of Mr. Johnson's status, or the fate of any future adviser, might be negatively affected. (*See* Aplt. App. at 81-82.) One of the plaintiffs stated that, following Mr. Johnson's removal, the newspaper provided front-page coverage of news stories that normally do not meet its standards for front-page coverage, and that the paper received thinly veiled threats of additional censorship from other University officials if it did not provide certain coverage. (*See* Aplt. App. at 87-88 ¶¶ 3-6.)

Notably, the district court did not take issue with Plaintiff Journalists' allegations that an adverse action had been taken against them through Mr. Johnson's removal. The district court held in its standing analysis discussed below that "the non-reappointment of Johnson resulted in the *Collegian* losing its adviser," which the court found to be a particularized, actual injury to Plaintiff Journalists as newspaper editors. (Aplt. App. at 128.) No credible argument can

[5] Although the Plaintiff Journalists' complaint does not specifically reference a "chilling effect," this aspect of their injuries is implied by the alleged First Amendment violations and should be considered under established principles of notice pleading. *See generally Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512-14 (2002) (discussing notice pleading standards in context of motion to dismiss); *see also* Fed. R. Civ. P. 8(a)(2) (requiring "short and plain statement of the claim showing that the pleader is entitled to relief"); *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (stating "court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."). Here, the University Defendants are clearly on notice of the First Amendment claim. The notion of a "chilling effect" is just a description of the nature of the harm or damage inflicted on the Plaintiff Journalists and does not have to be pleaded to avoid dismissal. *See Conley v. Gibson*, 355 U.S. 41, 48 (1957) (noting "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome").

now be made that Plaintiff Journalists did not adequately plead an adverse action was taken against them in connection with Mr. Johnson's removal.

2. Plaintiff Journalists Sufficiently Pleaded That Mr. Johnson's Removal Was Impermissibly Motivated by the Content of the *Collegian.*

The district court's central holding — the University Defendants' removal of the *Collegian*'s adviser was not motivated by the *Collegian*'s content (*see* Aplt. App. at 130-134.) — is a patently untenable conclusion, based on the pleadings in this case and well-established First Amendment law.

Plaintiff Journalists' complaint, as discussed in their principal brief and the district court's Order, sets forth in detail the series of events that unfolded in the spring of 2004. That semester, minority groups on campus, including the Black Student Union, staged protests regarding the *Collegian*'s failure to cover events of interest to them. (Aplt. App. at 5 ¶ 14; 121.) Two public forums were held on campus at which administrators, faculty, and student leaders of these minority groups met with editors of the *Collegian*. (*Id.*) Mr. Johnson and the University Defendants attended the second forum. (Aplt. App. at 9 ¶ 14.) At the forums and in the *Collegian*, the editors of the *Collegian* apologized for their lack of coverage of these minority groups. (*Id.* at ¶ 15.)

After the forums, the University's associate provost for diversity publicly stated that Mr. Johnson should be removed as the *Collegian*'s adviser because of

her disappointment with the paper's content. (*Id.* at ¶ 16.) Likewise, in April 2004, minority students led a march through campus calling for Mr. Johnson's removal. (*Id.*; Aplt. App. at 121.) Later that month, the associate provost told the *Collegian* that "nothing less than an enduring solution" would resolve the complaints about the newspaper's lack of diverse content. (Aplt. App. at 9 ¶ 16.)

In response to these protests, Defendant Simon undertook what he described as a "content analysis" of the *Collegian*'s reporting. (Aplt. App. at 10 ¶ 18, 36.) This analysis looked at "news story content" of the *Collegian* over the past four years. (Aplt. App. at 10 ¶ 18.) A copy of this "content analysis" — which Defendant Simon provided confidentially to his University superior, Defendant White, but not to any student editor, to Mr. Johnson or to fellow members of the Board of the entity that published the *Collegian* — is attached to the complaint. When Defendant Simon sent to Defendant White in May 2004 his recommendation that Mr. Johnson be removed from his *Collegian* post, Defendant Simon explained that he had prepared his content analysis "to obtain a more reliable measure of how the content compared across the newspapers." (*See* Aplt. App. at 9 ¶ 17, 36-38, 40-43; *see also* Aplt. App. at 121-122 (noting recommendation concluded that "[n]ews content has fallen below standards that are widely acceptable").)

Finally, Plaintiff Journalists also alleged that after Defendant White reviewed this analysis, he removed Mr. Johnson and stated the decision was based

on the *Collegian*'s content. (*See* Aplt. App. at 11 ¶ 21, 122.) Plaintiffs thus have alleged Mr. Johnson was removed from his position primarily as a result of the *content* of the student-run *Collegian*. (*See* Aplt. App. at 10 ¶ 18.)

Despite these allegations, and the clear import of documents attached to the complaint, the district court held that the University Defendants' self-described "content analysis" was not content-based at all. Rather, the district court held that the University Defendants' analysis focused only on the *Collegian*'s "overall quality," and that the paper's quality was somehow distinct from its content. (Aplt. App. at 131.)

The unsupported but dispositive hypothesis articulated by the district court that a newspaper's "quality" is somehow divorced from its "content" is legally incorrect. *See, e.g., Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975) (rejecting university president's attempt to control newspaper content because of its allegedly poor "grammar, spelling, and language expression"). Taking punitive action against a student publication based on a self-described "content analysis" of its articles is content-based censorship prohibited by the First Amendment.

The content versus quality distinction articulated by the district court has not been recognized by any federal court, and, in fact, has been rejected by at least two federal courts of appeal. *See, e.g., Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (*en banc*); *Schiff*, 519 F.2d at 261. In *Kincaid*, an *en banc* panel of the Sixth

Circuit found that university administrators violated the First Amendment rights of student editors when they confiscated all copies of the student yearbook, which they deemed to be of "poor quality." 236 F.3d 342. In particular, school officials objected to the yearbook's purple cover, its "destination unknown" theme, the lack of captions under some of the photos and the inclusion of a current events section in the book. *Id.* at 345.

The district court here incorrectly credited the University Defendants' attempt to justify their content-based action with the explanation that the content analysis was done with only "quality" concerns in mind. The University Defendants' removal of Mr. Johnson from his *Collegian* position based upon a self-described "content analysis" are necessarily and by definition content-based actions, and it defies logic to assert otherwise. However, regardless of claimed motive, the key facts alleged here – which are not in dispute – show that the University Defendants conducted an analysis of the content of the stories on the pages of the *Collegian*, and they made the decision to remove Mr. Johnson based upon that content.

Furthermore, the district court's dismissal based on its interpretation of the University Defendants' intent is particularly tenuous in the context of a motion to dismiss where countervailing facts appear in the complaint. "'For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing

courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). Dismissal of a plaintiff's complaint is appropriate only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Hishon*, 467 U.S. at 73; *see also Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1359 (10th Cir. 1989) (stating that "'[t]he Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim'"); *Mounkes v. Conklin,* 922 F. Supp. 1501, 1506 (D. Kan. 1996) ("Dismissal is a harsh remedy to be used cautiously so as to promote the liberal rules of pleading while protecting the interests of justice.").

Here, Plaintiff Journalists clearly alleged that an adverse action — the removal of Mr. Johnson — was impermissibly taken in response to the content of the *Collegian.* They attached a letter to the Dean from Defendant Simon that unequivocally states that an analysis of the paper's content was performed. The letter also recommended that Mr. Johnson should be removed from his position as a result of the content analysis — an act then taken by Defendant White. In the face of these facts strongly indicating an adverse content-based decision, Plaintiff

Journalists' allegations at this early stage of the proceedings were more than sufficient to satisfy Rule 12.

The district court thus committed reversible error in dismissing Plaintiff Journalists' complaint for failure to state a claim.

B. Close Judicial Scrutiny Is Required to Combat Attempts by Universities to Interfere with Established First Amendment Rights of Student Journalists.

As detailed above, it is beyond debate that censoring a student publication such as the *Collegian* based on its content violates Plaintiff Journalists' First Amendment rights. *See Rosenberger*, 515 U.S. at 828 (holding state actors may not regulate speech based on substantive content or message it conveys). But content-based interference takes many forms. Student journalists have suffered from a history and constant threat of indirect forms of content censorship, including universities reacting to unfavorable content in the pages of student newspapers by (1) reducing financial support, *see Joyner*, 477 F.2d 456; *Stanley*, 719 F.2d 279; (2) dismissing editors, *see Thonen v. Jenkins*, 491 F.2d 722 (4th Cir. 1973) (per curiam); (3) requiring editors to submit material for prior approval, *Antonelli*, 308 F. Supp. 1329; *Trujillo v. Love*, 322 F. Supp. 1266 (D. Colo. 1971); and (4) confiscating publications, *see Kincaid*, 236 F.3d 342.

Confronted with these many species of interference with First Amendment rights, *amici* remind the Court that both Supreme Court and this Court's precedents

recognize the special duty to preserve First Amendment freedoms on university campuses. *See O'Connor*, 416 F.3d at 1229-30; *see also Widmar v. Vincent*, 454 U.S. 263, 267-68 n.5 (1981) ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'" (quoting *Healy*, 408 U.S. at 180). Censorship of the collegiate press in any form erodes this marketplace of ideas, and journalists – supported by the courts – must be poised to rebuke attempts by university officials to control students' well-established First Amendment rights.

"Vital First Amendment speech principles are at stake here. The 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. The second, and corollary, danger is to speech from the chilling of individual thought and expression." *Rosenberger*, 515 U.S. at 835-36.

C. The University Defendants' Removal of Mr. Johnson Was a Punitive Action that Interfered with Plaintiff Journalists' Journalistic Decision-Making and Caused a Chilling Effect on Speech.

Despite the University Defendants' attempt to fit their actions in this case under the heading of "quality" control, their punitive second-guessing of Plaintiff Journalists' freedom to select stories to cover – or not cover – is no different than if the University Defendants had fired the *Collegian*'s editors, cut the paper's funding or imposed prior restraints on its coverage, all of which clearly would have

been impermissible. And the result that the University Defendants achieved through the removal of Mr. Johnson should be met with no more solicitude.

In order to provide context for why the University Defendants' removal of Plaintiff Journalists' adviser interfered with their editorial discretion and caused a chilling effect on the students' free speech, it is important to understand that the vast majority of student news organizations have operated for decades at public university campuses nationwide free from administrative censorship, even when financially supported with funds collected by the school or tied to an academic department. Following the guidance of courts from coast to coast, student editors at public universities have been afforded the right and autonomy to make all decisions related to the editorial content of their publications.

This is why, as noted above, school officials cannot suspend or fire an editor in an attempt to control, manipulate or punish past or future content. *Joyner,* 477 F.2d at 460; *Trujillo*, 322 F. Supp. at 1271.[6] 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*, 408 U.S. at 187-88. Therefore, even though a public university may choose not to establish a student

[6] In exchange, universities have been protected from liability for the content decisions student editors make. *See Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466 (Minn. Ct. App. 2005), *review denied* (Minn. June 14, 2005); *Mazart v. State*, 441 N.Y.S.2d 600 (1981); *Milliner v. Turner*, 436 So.2d 1300 (La. Ct. App. 1983).

newspaper, the "publication cannot be suppressed because college officials dislike its editorial comment." *Joyner*, 477 F.2d at 460.

In this case, the board of the privately incorporated *Collegian* decided to appoint and hire Mr. Johnson, who also served as a University journalism professor, to serve as the newspaper's adviser to provide support and advice to them as journalists. Advisers like Mr. Johnson have many roles, both formal and informal. They explain journalism conduct to student editors and help create a supportive environment for editors before and after they make myriad decisions about style, structure, presentation, ethics and content under tight deadlines and the press of multiple time demands.

But, as the district court found (Aplt. App. at 128.) and the University concedes (Aplt. App. at 65.), Mr. Johnson at no time had any authority to control and did not control the editorial content of the *Collegian.* In fact, the Code of Ethics of *amicus* College Media Advisers, of which Mr. Johnson is a former president, explicitly provides that "[f]aculty, staff and other non-students who assume advisory roles with student media must remain aware of their obligation to

defend and teach without censoring, editing, directing or producing."[7] Thus, Mr. Johnson played an important role, but one without direct editorial power.[8]

As a result, Mr. Johnson's removal from his *Collegian* post by anyone other than the entity that appointed him – let alone the University Defendants during a campus controversy based on a "content analysis" of decisions over which Mr. Johnson admittedly had no control – was an odd but harsh rebuke of the students' journalistic autonomy and editorial discretion, and one designed to chill their freedom to independently operate the newspaper.

The Supreme Court has recognized that First Amendment rights may be violated where a plaintiff is "chilled from exercising her right to free expression or forgoes expression" in order to avoid consequences. *See N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13-14 (1st Cir. 1996) (citing *Meese v. Keene*, 481 U.S. 465, 473 (1987); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988)). Courts have held that subtle actions can cause a chilling effect on students' First Amendment rights. For example, in *Circle Schools v. Pappert*, the Third Circuit held that a statute that required schools to notify parents

[7] The CMA's Code of Ethics is available at http://www.collegemedia.org/index.php?option=com_content&task=view&id=11&Itemid=45.

[8] It is important to note that University Defendants have neither suggested nor presented evidence that Mr. Johnson was removed for failing to provide training to student journalists he advised. Rather, the University Defendants hold him responsible for content decisions that student editors made and that he had no authority to prevent. In fact, the University Defendants fail to recognize that student editors are under no obligation to cover "diversity" issues, regardless of what Mr. Johnson or the University Defendants would advise.

of children who declined to recite the Pledge of Allegiance or refrained from saluting the flag chilled the students' speech rights. 381 F.3d 172, 181 (3d Cir. 2004).

Also, when the University of Illinois issued a directive that prevented students and staff from speaking without permission to prospective student athletes, the court held that the directive chilled potential speech. *Crue v. Aiken,* 204 F. Supp. 2d 1130, 1139 (C.D. Ill. 2002). The Supreme Court has held that restricting funding for college student publications that "primarily promot[e] or manifes[t] a particular belie[f] in or about a deity or an ultimate reality" has a chilling effect on the college editors' speech. *Rosenberger,* 515 U.S. at 836.

As in this case, public college publications advisers often find themselves used as scapegoats and excuses for censorship. Kansas State is not the first school to attempt to remove an adviser based on student editors' decisions about a publication's content. For example, in 1999 a Georgia newspaper adviser was fired because university administrators did not approve of the content of the student newspaper, *The Peachite*. *Adviser Sues University After Firing*, 20 Student Press L. Center Rep. 15 (Fall 1999), *available at* http://www.splc.org/report_detail.asp?id=465&edition=7. The adviser was removed after *The Peachite* reported that a university vice president left a former job after being accused of questionable financial dealings. *Id.* Another *Peachite*

story reported that a student died after an asthma attack that campus security allegedly failed to properly treat. *Id.* The adviser sued the school based and eventually settled his claim for $192,000 and a university commitment to adopt a new policy that protected student press freedom. *See Fired Adviser Settles Claim with Fort Valley State U. for $192,000,* Student Press Law Center News Flash, Apr. 25, 2002, http://www.splc.org/newsflash.asp?id=416&year=2002.

More recently, Barton County Community College in Kansas notified a part-time professor and adviser of the student newspaper that it would not renew her contract after she refused to prohibit the student editors from printing a letter written by a former athlete that criticized the school's basketball coach. *See Kansas College Drops Adviser Who Refused Demands to Censor Student Paper,* Student Press Law Center News Flash, May 3, 2004, http://www.splc.org/newsflash.asp?id=803&year=2004. When the editor delivered a copy of the letter to the college president "as a courtesy," the school's lawyer informed the adviser of the paper that the administration expected her not to allow the paper to publish "personal attacks." *Id.* Following the adviser's refusal to censor the paper, the college elected not to renew her contract despite 20 years of journalism experience and outstanding teacher evaluations. *Id.*

The printing of the allegations ultimately led to the coach's guilty plea to charges of fraud and embezzlement. *See* AP, *Former Coach Gets Probation in*

Fraud Case (Dec. 5, 2005), *available at* http://www.sportsline.com/collegebasketball/story/9078891. But the college never reinstated the adviser. Her Section 1983 action is pending. *See Schartz v. Barton County Comm. College,* 2005 WL 1799257 at *2, No. Civ. A. 05-2128-KHV (D. Kan. July 13, 2005) (denying defendant's motion to dismiss because complaint contained sufficient allegations of impermissible interference with First Amendment rights); *Former adviser alleges college violated 1st Amendment*, 27 Student Press Law Center Report 18 (2005), *available at* http://www.splc.org/report_detail.asp?id=1233&edition=37.

As in such cases, and as discussed in Plaintiff Journalists' brief, the University Defendants' removal of Mr. Johnson had and continues to have a chilling effect on *Collegian* editors' right to free expression. At the July 14, 2004, hearing before the district court, Plaintiff Rice described how Mr. Johnson's removal affected the newsroom environment.[9] She stated that after Mr. Johnson's removal, the editors had to "second-guess" everything that they were doing and worried that university administrators would act again if they didn't like the *Collegian*'s content. (Aplt. App. at 87-88.)

[9] The district court stated hat although all parties cited to such testimony, the court did not consider this or any other evidence beyond the complaint to avoid converting the motion to dismiss into one for summary judgment. (Aplt. App. at 126.) Such evidence nevertheless makes clear that had their case been allowed to proceed, the Plaintiff Journalists would have easily supported their well-pleaded allegations of a First Amendment violation and its effects on their conduct going forward.

As is demonstrated by the allegations here, student editors will not feel comfortable making unpopular content decisions if they know their adviser may be removed by a University official because of their protected content decisions.

II. THE DISTRICT COURT PROPERLY HELD THAT PLAINTIFF JOURNALISTS HAD STANDING TO CHALLENGE THE UNIVERSITY'S VIOLATION OF THEIR FIRST AMENDMENT RIGHTS.

A. The University Defendants' Retaliatory Conduct Had a Chilling Effect on Plaintiff Journalists' Speech and Constitutes an Injury in Fact Sufficient to Confer Article III Standing.

The district court held that Plaintiff Journalists properly invoked federal court jurisdiction by satisfying the case-or-controversy requirement imposed by Article III of the Constitution. A plaintiff must satisfy three requirements in order to establish Article III standing: (1) an "injury in fact," which is a harm that is both "concrete" and "actual or imminent, not conjectural or hypothetical," (2) causation, and (3) redressability. *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 765 (2000); *Ward*, 321 F.3d at 1266. The only issue of standing raised by the University Defendants before the district court was the injury-in-fact analysis.

The district court correctly held that Plaintiff Journalists "satisfied the injury requirement as the non-reappointment of Johnson resulted in the *Collegian* losing its adviser, and hence a particularized, actual injury to plaintiffs as editors of the paper." (Aplt. App. at 128.)

This ruling is consistent with the longstanding rule in the First Amendment context that constitutional violations may arise from the deterring or "chilling" effect of governmental actions that fall short of a "direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972). In fact, "[t]he decisions in these cases fully recognize that governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights." *Id.* at 12-13. In order to demonstrate a cognizable injury and establish standing, however, the plaintiff must be within the class of persons potentially chilled by the impermissible conduct. *Osediacz v. City of Cranston*, 414 F.3d 136, 142 (1st Cir. 2005) (citing *Laird*, 408 U.S. at 13); *see also D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004) (stating that "[o]ur cases have recognized that an ongoing chilling effect can, in some circumstances, amount to a sufficient injury to support standing").

In the case here, Plaintiff Journalists allege that the University Defendants retaliated against them by not reappointing Mr. Johnson as the *Collegian*'s adviser in response to content decisions made by Plaintiff Journalists. As discussed above, Plaintiff Journalists alleged that this retaliatory action was taken to influence the *Collegian*'s content and that it had a substantial chilling effect on the editorial discretion of Plaintiff Journalists and subsequent editors of the *Collegian*.

In sum, when the complaint was filed, the editorial discretion of Plaintiff Journalists was impermissibly limited by the University Defendants' actions. This chilling effect of Mr. Johnson's non-reappointment continues to this day.

B. Plaintiff Journalists' Standing Is Not Undermined by Their Subsequent Graduation from the University or their Departure from the *Collegian*.

To the extent the University Defendants contend in their cross-appeal that Plaintiff Journalists do not raise a live controversy because they are not currently editors for the *Collegian*, this Court should affirm the district court's proper ruling rejecting this argument. (*See* Aplt. App. at 128.)

Plaintiff Lane was the editor of the *Collegian* during the spring of 2004 when the content analysis that led to Mr. Johnson's non-reappointment was conducted. (Aplt. App. at 7 ¶ 7.) It was her content decisions upon which the University Defendants based their actions. Plaintiff Rice was the managing editor at that time and was editor during the fall of 2004 and spring of 2005. (Aplt. App. at 105.) Although Plaintiff Journalists subsequently graduated and left the *Collegian*, they may request a declaration by the courts that the University Defendants' actions were in conflict with their constitutional rights. Furthermore, Plaintiff Journalists have the right to bring claims for prospective injunctive relief because they have standing to vindicate the constitutional rights of the subsequent editors of the *Collegian*. Although constitutional rights are generally considered

personal and cannot be asserted vicariously, the Supreme Court has recognized some exceptions to this rule when circumstances present "'weighty countervailing policies.'" *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973). "One such exception is where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves." *Id.* (citing *Eisenstadt v. Baird*, 405 U.S. 438, 444-46 (1972); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)).

In this situation, a party may have standing to assert the constitutional rights and claims of third parties not before the court, or *jus tertii* standing. *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976). Such an exception is particularly important here, as it has long been held that the First Amendment needs "breathing space" and that standing requirements should be relaxed to protect these important rights. *See Broadrick*, 413 U.S. at 611-12.

The Supreme Court has made clear that limitations on standing to assert the rights of third parties are not constitutionally mandated, but rather stem from a "salutary 'rule of self restraint' designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative." *Craig*, 429 U.S. at 193 (quoting *Barrows v. Jackson*, 346 U.S. 249, 255 (1953)). Furthermore, the Supreme Court has not refused to adjudicate constitutional merits relevant to injured third parties where such a refusal would

only "foster repetitive and time-consuming litigation under the guise of caution and prudence." *See Craig*, 429 U.S. at 194. If the parties before the Court can assert the constitutional questions "vigorously and 'cogently,'" the denial of *jus tertii* standing would serve no functional purpose. *Id.*

In the case at bar, Plaintiff Journalists have *jus tertii* standing to vindicate the rights of subsequent *Collegian* editors. Although Plaintiff Journalists have left the newspaper, they suffered an identical injury from Mr. Johnson's removal. The chilling effect of this retaliatory action has continued unabated throughout Plaintiff Journalists' tenure as editors of the *Collegian* and through the present day. (Aplt. App. at 73). If Plaintiff Journalists are denied standing, the current editors will be forced to file a new suit to litigate the identical issues that are before the Court in what can only be considered repetitive litigation and an unnecessary waste of judicial resources. The inherently transient nature of a student's role as editor of the *Collegian* (*i.e.*, single-semester appointments) will always create standing problems before appellate review can be completed.

Plaintiff Journalists, as *Collegian* editors, seek to redress the identical injury and cause thereof that the current *Collegian* editors are confronting. Plaintiff Journalists, therefore, have standing *jus tertii* to redress this continuing harm.[10]

[10] Other courts seem to have recognized these principles without discussion. For example, in a strikingly similar case, former student editors filed a First Amendment challenge to a university decision to deny funding to a newspaper in retaliation for content decisions made by

In sum, public policy dictates that student editors must have a clear avenue to challenge University actions that infringe their constitutional rights of free speech. To allow such conduct to evade review through narrow application of standing doctrine would imperil students' free speech rights. Not only is such a position inconsistent with established law, but it also ignores the Supreme Court's admonition that "'[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Healy*, 408 U.S. at 180-81.

III. BECAUSE PLAINTIFF JOURNALISTS PROPERLY STATED A FIRST AMENDMENT CLAIM, THE RELIEF THEY SEEK IS NOT BARRED BY THE ELEVENTH AMENDMENT.

A. Plaintiff Journalists' Complaint Seeks Prospective Relief Against a State Actor That Is Permissible Under *Ex Parte Young*.

Compounding its erroneous finding that Plaintiff Journalists have not adequately stated a violation of their First Amendment rights, the district court incorrectly ruled that the Eleventh Amendment barred their requested relief. (Aplt. App. at 134-137.) The Supreme Court held in *Ex Parte Young* that a private individual can bring suit in federal court against a state official for prospective injunctive relief even if the Eleventh Amendment bars such claims from being brought against the state itself. 209 U.S. 123, 159-60 (1908). The justification for

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the editors during their tenure. *Stanley*, 719 F.2d 279. The Eighth Circuit found for the plaintiffs despite the fact they had no continuing role or personal stake in the litigation at the time of the appeal.

this exception is that if an official has violated a federal law or the Constitution in the performance of his or her duties, the official does so outside the cloak of state authority. *Id.* at 159. Because, as with Plaintiff Journalists' complaint, such a suit does not affect the state in its "sovereign or governmental capacity," the Eleventh Amendment does not apply. *Id.*

In deciding whether *Ex Parte Young* governs a particular case, this Court has applied a four-prong test: (1) whether the action is against a state official or the state itself, (2) whether the conduct of the state official violates federal law, (3) whether the relief sought is permissible prospective relief or analogous to a retroactive award of damages impacting the state treasury, and (4) whether the suit implicates "'special sovereignty interests.'" *Chaffin v. Kansas State Fair Bd.*, 348 F.3d 850, 866 (10th Cir. 2003) (citing *Robinson v. Kan.*, 295 F.3d 1183, 1191 (10th Cir. 2002)). The first and fourth prongs of this test are not contested in this case.

The district court's finding that Plaintiff Journalists' claims are barred by the Eleventh Amendment predominately relied on the court's finding that Plaintiff Journalists failed to allege a continuing violation of their First Amendment rights under the second prong of the *Chaffin* analysis. (Aplt. App. at 136-137.) For the reasons discussed above, the district court's finding should be reversed. Furthermore, this Court has stated that the second prong of the analysis does not

require the Court to ascertain whether state officials actually violated federal law. *Id.* at 866. Instead, the Court needs only to determine whether Plaintiff Journalists stated a "non-frivolous" claim for relief against state officials "that does not merely allege a violation of federal law 'solely for the purpose of obtaining jurisdiction.'" *Id.* at 866-67 (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 n.10 (1949)). In light of the allegations in the complaint and the facts in the record, Plaintiff Journalists' claims here can hardly be considered "frivolous" or designed "solely for the purpose of obtaining jurisdiction." Consequently, the district court's findings on the second prong of the *Chaffin* analysis must be reversed.

The second issue is whether Plaintiff Journalists' complaint seeks prospective relief against the University Defendants. *Chaffin*, 348 F.3d at 866. The "'overriding question'" in this analysis is "'whether the relief will remedy future rather than past wrongs.'" *Id.* at 867 (quoting *Elephant Butte Irrigation Dist. of N.M. v. Dep't of Interior*, 160 F.3d 602, 611 (10th Cir. 1998)). As discussed above, the harm that Plaintiff Journalists seek to remedy is the chilling effect that Johnson's removal continues to have on *Collegian* editors in the exercise of their editorial discretion.[11] Because Plaintiff Journalists' claims fall

[11] The addition of a claim for declaratory relief that does not seek from the state any monetary damages for past breach of its duty does not change this analysis. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.,* 535 U.S. 635 (2002).

within the exception discussed above, their injury is, for purposes of this lawsuit, continuing and a proper subject of relief.

IV. CONCLUSION

The issues raised by this case go to the heart of the First Amendment rights of student journalists on public college and university campuses. If the University Defendants can take punitive action against a student newspaper's protected content decisions simply by justifying their action as based on the "overall content" of the publication, no editor can feel safe. Today, the complaint of this university is concern about a lack of "diversity" coverage. Tomorrow it could be concerns about insufficient coverage of a university administrator's pet project or excessive coverage of campus crime. In any context, the district court's holding is a recipe for diminished journalism and limited debate in an environment where free expression is most important.

Respectfully submitted,

/s/_____

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1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,964 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). *See* Fed. R. App. P. 29(d) (stating *amicus* brief may not exceed one-half the maximum length permitted for a principal brief). Fed. R. App. P. 29(d). In making this certification, the undersigned has relied upon the word count of the word-processing system used to prepare this brief.

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