Statement on *Hosty v. Carter*

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SUMMARY OF FIRE'S POSITION

The U.S. Court of Appeals for the Seventh Circuit's *en banc* opinion in *Hosty v. Carter*, No. 01-4155 (7th Cir. June 20, 2005), is a poorly conceived opinion that, if upheld, will do serious harm to freedom of speech on campus far beyond the realm of student media.

The Court ruled that a dean of students who exercised prior restraint over a student newspaper—unequivocally because of its content—is entitled to immunity from liability. It also decided that the logic of *Hazelwood v. Kuhlmeier*—an opinion that has been used to drastically curtail the rights of high school students and teachers—applies to the college media. Applying this decision in the college environment drastically reduces the rights of the college media, which have traditionally enjoyed rights more comparable to their counterparts on CNN or in the *New York Times* than to their counterparts in high school.

While FIRE opposes the holding of *Hosty*—that a dean of students was entitled to immunity despite engaging in a brazen and intentional act of censorship—the real damage of the *Hosty* opinion lies in the fact that it blurs the critical distinction established in Supreme Court precedent between funding from mandatory "student fees" and direct payments from the university. The Seventh Circuit's finding in *Hosty* would open up virtually any student publication or other student group that receives any benefit from the university to the possibility of heavy-handed content-based regulation by university administrators, thus reviving the Supreme Court-settled issue of whether students can be made to pay fees that go to support expressive activities with which they disagree.

A guiding principle in First Amendment law is that, where speech is concerned, the law must be exceedingly clear so citizens need not have to guess if they can be punished for their speech. The threat of vague, confusing or unclear decisions is that speech will be chilled since only the bravest will risk punishment to speak their minds. After *Hosty*, student newspapers and groups that once could be confident in their free speech rights will now have to guess at whether their speech is free or subject to even the crudest forms of censorship. At the same time, colleges will be left to guess if they can now be held liable in lawsuits brought against the formerly clearly independent student media. Murkiness in free speech jurisprudence has real consequences, and the *Hosty* opinion will be seized

[1] This report was prepared with the help of FIRE staff, including Azhar Majeed.

upon by administrators tired of being criticized, by students looking for universities with deep pockets to compensate them for being offended by the student press, by faculty members who wish to make the student media "more sensitive" or to eliminate controversial reporters or columnists, and by outside forces who will demand the student media cover or not cover any of a host of issues or stories.

And make no mistake about it, college administrators are already relying on the logic of *Hazelwood* to regulate speech outside of the student media context. The Seventh Circuit's decision in *Hosty* will accelerate this trend and provide justification enough for administrators to intervene to "regulate" speech even in instances where the speech had once been unquestionably protected. Far smaller loopholes, ambiguities, and exceptions to free speech are abused on a daily basis on the contemporary college campus, and the *Hosty* opinion provides would-be censors with an unprecedented opportunity to punish or stifle expression they dislike. In FIRE's experience, where such opportunities exist, abuses will, with virtual certainty, quickly follow.

FIRE has joined with and will continue to collaborate with the Student Press Law Center (SPLC) in opposing this potentially disastrous opinion. The parties intend to appeal this case to the Supreme Court, and FIRE will be supporting this effort through public awareness and by helping to build a broad coalition to petition the Supreme Court to take the case. FIRE hopes that the Supreme Court will restore some clarity and sense to the law regarding student's rights.

The purpose of this statement is to provide a preliminary overview of some of the major problems presented by the decision—a full examination of all the potential harms and legal problems with the decision would be far longer. For a more in-depth look into the legal aspects of this case, FIRE recommends the amicus brief that SPLC, FIRE and two dozen organizations filed on Hosty's behalf. FIRE is determined to forge an even larger coalition to bring this case before the Supreme Court of the United States. Groups interested in joining the coalition should contact FIRE at hosty@thefire.org.

BACKGROUND

In 2000, Margaret Hosty was the editor of the Governors State University student newspaper, *The Innovator*, which was supported primarily by student fee allocations. That fall, Patricia Carter, the university's Dean of Student Affairs and Services, informed the company that printed *The Innovator* that a school official must review the paper before it could be published. The printer initially objected, mentioning that such an action might not be lawful, but ultimately agreed.

Why did Dean Carter demand prior review of the student newspaper? The administration was unhappy about the content and viewpoint of the paper. Carter made the demand despite more than 30 years of court cases that strongly protect the rights of the student press and despite the fact that for literally hundreds of years, requiring "prior review" of publications has been considered the most pernicious and primitive form of censorship. Carter also acted in the face of GSU policy that clearly stated that the student staff of *The Innovator* "[would] determine content and format of their respective publications *without censorship or advance approval*" (emphasis added).

When Hosty and two other members of *The Innovator* staff sued GSU for violating their constitutional rights, both the district court and a three-judge panel of the United States Court of Appeals for the Seventh Circuit denied Carter "qualified immunity." Qualified immunity, which

protects government officials from liability for civil damages in certain circumstances, would have protected Carter if she could not have reasonably been expected to know that demanding prior review of an independent student newspaper violated the First Amendment. The district and three-judge courts, however, found the violation to be so brazen and obvious that they refused Dean Carter this special protection. Carter had argued that her duties under the law were actually uncertain because it was unclear if a Supreme Court case, *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), which has been used to severely limit the rights of student journalists and even teachers in the *high school* setting, applied to the college media.

After the three-judge panel's decision, Carter requested a rehearing by the full court (an *en banc* hearing). On June 20, 2005, the U.S. Court of Appeals for the Seventh Circuit, sitting *en banc* in *Hosty v. Carter*, No. 01-4155 (7th Cir. June 20, 2005) (from this point on, simply "the *Hosty* court"), overturned the findings of the three-judge panel and the lower court. The *Hosty* court decided that Carter was, in fact, entitled to qualified immunity, that *Hazelwood* did apply to college media, and that, for all intents and purposes, the student media needed to be evaluated in an entirely different, and far less protective, way than it had been for the last several decades.

FIRE'S ANALYSIS OF THE *HOSTY* OPINION

I. Qualified Immunity

Some commentators have opined that *Hosty* will not be as damaging to the free speech rights of the collegiate media as free speech advocates fear because it is primarily a "qualified immunity" case. This interpretation of the case greatly minimizes the potentially damaging impact of *Hosty* for the student media and for student free speech in general.

In *Hosty*, the court used two factors to decide whether or not a public official like Carter is entitled to qualified immunity: 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." *Hosty*, No. 01-4155, at 4.

To the first question, the *Hosty* court seemed to answer a grudging "possibly," despite the fact that constitutional rights of student newspapers have been upheld by courts, including the Supreme Court, for decades, and that prior review has been considered especially threatening to free speech since at least the days of John Milton and William Blackstone.

To the second question it answered "no." In so answering, the *Hosty* court incorrectly decided that *Hazelwood* altered the large body of case law holding that college administrators cannot censor student newspapers. In reality, 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*, No. 01-4155, at 20-21.

II. *Hazelwood*

Perhaps the most harmful legacy of the *Hosty* opinion will be that it applied *Hazelwood*, a case dealing with a newspaper produced as part of a high school journalism class, to cases involving college and university student media. The Supreme Court's decision in *Hazelwood* is inapplicable to this case, and more generally, is inapplicable to cases involving student newspapers at colleges and universities. As an initial matter, the *Hosty* court improperly characterized *Hazelwood* as a case primarily about school-funded speech, and furthermore improperly equated student fees with direct school funding in violation of Supreme Court precedent. Second, the *Hosty* court failed to seriously consider the important legal, moral and pragmatic distinctions between high school and college students. Finally, the court failed to appreciate the significance of the differences in the respective missions of high schools and colleges and universities.

A. *Hazelwood* was about much more than school-funded speech.

The *Hosty* court held that "*Hazelwood* provides our starting point" because it was about a student newspaper "financed by public funds as part of a journalism class." *Hosty*, No. 01-4155, at 4. The court characterized *Hazelwood*'s holding as follows: "the Court observed that the school's subvention of the paper's costs distinguished the situation from one in which students were speaking independently." *Id.* In other words, the *Hosty* court treated the *Hazelwood* decision as one primarily about a school's authority to determine the content of school-funded speech.

However, the *Hazelwood* Court's decision that the newspaper might be viewed as institutional speech was based on far more than the school's financial support of the newspaper. Financial support was only one of many factors that the Supreme Court considered in deciding that the paper in *Hazelwood* was a "school-sponsored publication[]…that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood*, 484 U.S. 260, 271 (1988). The Court was also strongly influenced by the fact that the newspaper was written and edited as part of a journalism class, was subject to a great deal of oversight by the journalism teacher, and by the school's written policy that "production of Spectrum was to be part of the educational curriculum and a 'regular classroom activity.'" *Id.* at 268. Therefore, the *Hosty* court erred in holding that *Hazelwood* was automatically applicable to any publication receiving financial support from an educational institution.

Furthermore, for the Court to apply the *Hazelwood* analysis to the paper as soon as it determined the existence of any subsidy ignores the relationship between public colleges and the student media that has existed for decades. Just to cite a few examples, the Eighth Circuit has held that "[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." *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983). The Fifth Circuit has held that "the right of free speech embodied in the publication of a college student newspaper cannot be controlled except under special circumstances" that would permit "the state to circumscribe certain activity which would otherwise fall within the generally protected area." *Schiff v. Williams*, 519 F.2d 257, 260 (5th Cir. 1975); *Bazaar v. Fortune*, 476 F.2d 570, 576 (5th Cir. 1973). If the First Amendment is to have any meaning, a student writing an article that is critical of her university's administration—and student criticism of a university administration was very much at issue in *Hosty*—cannot possibly constitute such a "special circumstance." It is likely that in every one of these cases, the student

newspaper received some form of "subsidy" from the university, whether in the form of money from student fees, the provision of on-campus offices, or even direct grants.

By focusing on whether or not a student newspaper is "subsidized," the *Hosty* court muddled the entire legal playing field for student media. If the threshold question from now on for dealing with student media or other student groups is merely whether or not a student newspaper receives a subsidy, then the free speech rights of virtually any student media or student group are in question. Does a small grant equal a subsidy? How about an ad in the school paper? Is a paper that receives 80% of its revenue from advertising and 20% of its funding from the journalism department considered a "subsidized" paper and subjected to the possibility of prior review? What happens when a college grants a student magazine office space? What about the college merely allowing a student publication the use of any on-campus facilities?

B. The *Hosty* court improperly characterized student fees as institutional funding.

The *Hosty* court also made a legal and logical misstep by analyzing this case as involving a university "subsidized student newspaper." The problems with this analysis are 1) that the "subsidies" that *The Innovator* received all came from student fees that under Supreme Court cases like *Board of Regents v. Southworth*, 529 U.S. 217 (2000), are not considered to be the universities' discretionary funds in the first place and 2) that under *Southworth,* public universities must distribute student fees in a "viewpoint neutral" manner.

In *Southworth*, a case in which a group of students challenged the use of mandatory student fees to fund speech with which they disagreed, the Supreme Court distinguished student fees from direct university support, noting 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. In other words, when speech at a college or university is funded by student fees, "the speech is not that of the University or its agents." *Id.* at 235.

Yet in making no distinction between funds coming from student fees and a those coming from a direct university subsidy of the student newspaper, the Seventh Circuit ignores the *Southworth* decision entirely and seems, in fact, to reject the Supreme Court's holding in that case.

It is obvious here, and it was certainly obvious to the GSU administration, that *The Innovator* articles did not constitute institutional speech. The fact that a newspaper, along with other clubs and organizations, receives student activity funds does not provide a legitimate basis for an inference that the university endorses or approves of the content of the paper. Rather, as the Supreme Court explained in *Rosenberger v. Rectors and Visitors of the Univ. of Virginia*, 515 U.S. 819, 834 (1995), when a university funds a variety of student activities and publications, it merely "expends funds to encourage a diversity of views from private speakers." No one could reasonably infer that all of the diverse views and expressions funded or otherwise subsidized by a university under a student fee distribution system could be attributed to the administration itself. Drawing such a conclusion would require the observer to view an single university administration as simultaneously espousing and advancing the respective views of a campus Christian group, an atheist or agnostic student group, a gay and lesbian alliance, a Muslim student group, and countless other student organizations with diverging and contradictory viewpoints—an impossible task. In the present case, the *Innovator*

itself was one such independent and student-run group. Moreover, the entire controversy began with the *Innovator*'s choice to run articles critical of the university administration. It can hardly be said that the administration was concerned that it would be viewed as criticizing itself!

Before *Hosty*, it had been quite clear that a student newspaper at a public college was not under the control of the administration and therefore enjoyed substantial free speech rights similar to those enjoyed by the media in larger society. Now that principle is anything but clear. Where such ambiguity exists, power will be abused and speech will be chilled.

C. *Hazelwood* should not be applied to college students because of the inherent differences, legal and otherwise, between high school and college students.

Before going into specifics, let's state the obvious: high school students are almost exclusively minors, while college students are almost exclusively adults.[2] As Justice Douglas said in his concurring opinion in *Healy v. James*, 408 U.S. 169, 197 (1972), "[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."

The Supreme Court has recognized that high school students are less mature than college students, and that "minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443 U.S. 622, 635 (1979). By contrast, whereas pre-college students may not have the maturity to make their own decisions on weighty matters such as religion, "college students are less impressionable and less susceptible to religious indoctrination." *Tilton v. Richardson*, 403 U.S. 672, 686 (1971).

In *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979), the Third Circuit provided powerful examples of the many ways in which college students are adults: **"[c]ollege students today are no longer minors; they are now regarded as adults in almost every phase of community life. For example except for purposes of purchasing alcoholic beverages, eighteen year old persons are considered adults by the Commonwealth of Pennsylvania. They may vote, marry, make a will, qualify as a personal representative, serve as a guardian of the estate of a minor, wager at racetracks, register as a public accountant, practice veterinary medicine, qualify as a practical nurse, drive trucks, ambulances and other official fire vehicles, perform general fire-fighting duties, and qualify as a private detective. Pennsylvania has set eighteen as the age at which criminal acts are no longer treated as those of a juvenile, and eighteen year old students may waive their testimonial privilege protecting confidential statements to school personnel."** *Bradshaw*, 612 F.2d at 139. *See also 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").

These realities have been recognized by many other courts as well. For instance, the court in *Bystrom v. Fridley High Sch.*, 822 F.2d 747 (8th Cir. 1987) upheld a high school's prohibition of the distribution of an unofficial newspaper on its premises, but added that the decision applies only to

[2] Judge Evans emphasized this important fact in his dissent in *Hosty*. 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 (CPS) Rep., Table A-6, "Age Distribution of College Students 14 years Old and Over, by Sex: October 1947 to 2002." *Hosty*, No. 01-4155, at 15 n.1.

"minors," not to university students, because "few college students are minors, and colleges are traditionally places of virtually unlimited free expression." *Bystrom*, 822 F.2d at 750. In *Sypniewski v. Warren Reg'l Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002), which held that a high school's racial harassment policy was not facially unconstitutional, the court asserted that the public school setting is "fundamentally different" from the university setting because high school students are "minors." *Sypniewski*, 307 F.3d at 267. And the court in *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) determined that a university could not suppress a yearbook and that *Hazelwood* did not apply because university students are "young adults." *Kincaid*, 236 F.3d at 346 n.5.

This is a crucial point. When we talk about college students, we are talking about voting age adults who, but for having chosen to attend college, would be living independently, participating in the workforce, or even serving in the military. Denying these individuals their constitutionally guaranteed freedoms simply because they have chosen to obtain additional education is indefensible.

Furthermore, the existence of a small percentage of students at colleges who may be under 18 is not a compelling reason to limit the rights of the other 99% of college students. It may be argued that being admitted to college is a *better* indicator of maturity than turning 18 alone. Admission into college is a rite of passage that indicates that an educational institution believes a student is ready to enter an adult educational atmosphere.

D. *Hazelwood* should not be applied to college students due to the fundamentally different functions of colleges and universities in our society and their highly distinct missions.

Beyond the age difference between high school and college students, the respective missions of high schools and universities are also entirely different.

The Supreme Court has recognized the unique status of universities as "vital centers for the Nation's intellectual life…." *Rosenberger v. Rectors and Visitors of the Univ. of Virginia*, 515 U.S. 819, 836 (1995). In *Rosenberger*, the Court discussed the history of the university, stating that "[i]n ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn." As such, the Court held, universities have "a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Id.* at 835-36. *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.' 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'").

By contrast, the Supreme 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 School Dist. v. Fraser*, 487 U.S. 675, 681 (1986) (internal citations omitted).

Nothing presented to the court in *Hosty* required deciding if *Hazelwood* applied to college students or not. If the court's goal was to insulate Carter from liability, it could simply have decided that the law was sufficiently unsettled for her to lose her "qualified immunity." While FIRE opposes such a decision because it believes Carter's duty not to engage in viewpoint-based prior restraint was obvious, such an opinion would not have been nearly as problematic for free speech on campus. Instead the court decided to break new ground and apply a standard that ignores the dramatic differences between high school and college students and eviscerates the status the college student media has enjoyed for decades.

III. Forum Analysis

Once the *Hosty* court decided to apply *Hazelwood*, it followed the structure that *Hazelwood* set forth. The court wrote: "*Hazelwood*'s first question therefore remains our principal question as well: 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*, No. 01-4155, at 8.

The opinion's need to "figure out" what a collegiate student newspaper is highlights the mechanistic and overly academic approach of the court; it is as if a student newspaper was an issue of first impression for any court as opposed to something that is both well understood by students and courts alike. In *Hazelwood* there was actual doubt about what the newspaper at issue was—it was written by students, but only as part of a journalism class, and, at least according to the opinion, it was clearly run and controlled by the administration. In *Hosty*, we have a classic college student newspaper.

In previous cases the independence of the college student media had simply been assumed. See *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (a university student yearbook is a limited public forum); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970) (university did not have right to editorial control and prior review of student newspaper); *Mazart v. State*, 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981) (university did not have vicarious liability in defamation suit against student newspaper, because it did not have editorial control over newspaper content); *Milliner v. Turner*, 436 So. 2d 1300 (La. Ct. App. 1983) (university was not liable to professors for defamatory articles in student newspaper, because it did not have editorial control over content).

But the *Hosty* court has greatly complicated the analysis, leaving open the possibility that any student publication—even when the university's policy guarantees that it will be free from censorship—may have to prove that it is some form of designated or limited public forum. Where such ambiguity exists censorship will result, with administrations asserting that school papers are independent when it suits their purpose to avoid liability, and asserting that they are non-public forums when they wish to punish papers for publishing something that might offend some students, or—as in *Hosty*—when the paper criticizes the administration.

CONCLUSION: THE PRACTICAL EFFECT OF THE *HOSTY* OPINION

In FIRE's experience, loopholes, ambiguities in the law and even relatively humble exceptions to free speech are quickly seized upon by college faculty, students and administrators to punish speech that is deemed offensive, inappropriate, or that may—as here—merely be critical of the administration.

FIRE's case archive (http://www.thefire.org/index.php/case/) is replete with dozens upon dozens of examples of far smaller ambiguities and far smaller exceptions to free speech being used to squelch what would be clearly protected speech in the larger society. Just in the past year, FIRE has dealt with multiple instances where the law was warped and abused to justify censorship. Here are just a few examples from the past few months:

- William Paterson University (N.J.) convicted a student employee of "discrimination" and "harassment" without due process merely for stating his belief that homosexuality is a "perversion" in a *private email* to a professor. See http://www.thefire.org/index.php/case/682.html.

- The University of New Hampshire evicted a student from university housing and sentenced him to mandatory counseling and probation after finding him guilty of violating policies on affirmative action, harassment, and disorderly conduct, stemming from his posting fliers in his residence hall joking that freshmen women could lose the "Freshman 15" by walking up the dormitory stairs. While claims of "harassment" have been used for decades by administrators to punish clearly protected speech, UNH's use of disorderly conduct to punish a joking flyer is representative of a growing trend. See http://www.thefire.org/index.php/case/651.html.

- Washington State University paid for hecklers to attend the performance of a musical, then justified the hecklers' repeated disruptions and threats of physical violence as a legitimate exercise of free speech. WSU relied on an absurd redefinition of "the public forum doctrine"—arguing that the theater was, in fact, an open forum for back and forth debate—in order to justify its support of mob censorship. See http://www.thefire.org/index.php/case/683.html.

- Seminole Community College (FL) refused to allow a student to distribute PETA literature on equal terms with other students and student groups, insisting that she could do so only within the college's so-called "free speech zone," which for all practical purposes severely limited her ability to speak and be heard. One administrator astoundingly justified this suppression by stating that the PETA literature "instill[ed] a feeling" in her that she did not like. SCC justified its clear attempt at viewpoint discrimination as an appropriate use of "time, place and manner" restrictions. See http://www.thefire.org/index.php/case/679.html.

- Occidental College (CA) fired a student from his position as host of a radio program and somehow found him guilty of sexual harassment for satirical jokes he made on the air. The administration then used the case as a pretext for dissolving the entire student government. See http://www.thefire.org/index.php/case/647.html.

- Indian River Community College (FL) refused to allow a film to be shown on campus, claiming that it had an unwritten policy banning all R-rated movies, despite the fact that the students involved were adults, and that the university had, at around the same time, allowed a theatrical production that would have been R-rated and sponsored at least one other R-rated movie on campus. See http://www.thefire.org/index.php/case/661.html.

The *Hosty* opinion will allow public university administrators greater freedom to control the content of all student media, and this greater control will be used to the detriment of students' right to speak, as seen in several pre-*Hosty* cases:

- In 2002, Harvard Business School (MA) reprimanded the editor-in-chief of a student newspaper and attempted to control the content of the newspaper, resulting in the resignation of the editor-in-chief. See http://www.thefire.org/index.php/case/31.html.

- In a 2004 controversy, Southwest Missouri State University (now Missouri State University) investigated a student newspaper, requested its faculty advisor and student editor to attend "mediation," and even "advised" them that reporting on the university's intervention could violate university policy. All of this stemmed from an editorial cartoon that a Native American group found "offensive." The faculty advisor was soon removed from her post. See http://www.thefire.org/index.php/case/652.html.

- Earlier this year, Craven Community College (NC) considered granting prior editorial review of the paper to college administrators after the student newspaper published a "sex column," claiming that the college was "not authorized to provide its students an independent and open forum." See http://www.thefire.org/index.php/case/680.html.

- In 2002, the University of California at San Diego sought to punish a student satire magazine because of its content, and then sought to prevent another student newspaper from reporting on the hearing against the satire magazine. See http://www.thefire.org/index.php/case/36.html.

The *Hosty* opinion will also be used to justify the denial of First Amendment rights to any student group that receives student fee money, since under *Hosty* any group receiving student fee money could be considered a "subsidized" group subject to increased regulation by the university. This aspect of the opinion could seriously erode, or completely do away with, student groups' freedom of association. This danger is illustrated by several FIRE cases:

- In 2004, the University of North Carolina at Chapel Hill derecognized a Christian fraternity and shut off its access to campus facilities, services, and programs because it deemed the fraternity to be "discriminatory" for allowing only Christians to become members. This came two years after UNC made the same argument against the InterVarsity Christian Fellowship. See http://www.thefire.org/index.php/case/645.html.

- In 2002, Rutgers University (NJ) banned the InterVarsity Multi-Ethnic Christian Fellowship from using campus facilities and stripped it of university funding because the group selected its leadership on the basis of religious belief. See http://www.thefire.org/index.php/case/24.html.

- In 2002, the University of Miami (FL) denied official approval for a conservative student group under the reasoning that the presence of the College Republicans on campus made the new group redundant and unnecessary. Without official approval, the group could not use vital facilities and resources, could not be listed on the website for approved groups or in the

student handbook, and could not "promote the organization and its activities on campus." See http://www.thefire.org/index.php/case/17.html.

The *Hosty* opinion will result in a chilling of free speech and, like the *Hazelwood* opinion, will likely not stay confined to the student media. *Hosty* will encourage universities to draft their student media policies more ambiguously, in order to keep the status of even the most obviously independent student newspaper's independence an issue of triable fact. It will also embolden university administrators who know that, even if they seek forms of censorship as expansive as prior review, they will still be protected by qualified immunity if the case goes to trial.

On the downside for college administrations, *Hosty* will make it more likely that they could be found liable in suits brought against the student press for offenses like libel, fraud, and harassment. Fear of this liability will likely cause the universities to either seek more control over the student press in order to avoid liability, or to not provide any funding or subsides to the student press. Either way, the independent student press is greatly endangered by this opinion.

Unless the Supreme Court handily overturns the Seventh Circuit en banc opinion in *Hosty*, we can only expect that threats to expression and to liberty generally will grow still worse on America's campuses.

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