No. 05-377

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

! "#$%&% ' ("$) (*)+% , -.)%/ !)0)%1

No. 05-377

MARGARET L. HOSTY

nation's college and university campuses. For all the reasons stated below believe the Seventh Circuit's opinion in 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 decision in , 412 F.3d 731 (7th Cir. 2005) is a grave threat to academic free speech and endangers the very existence of independent college media. 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 prote

their fees used to finance an administration mouthpiece. turns what this Court rightly considered

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 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 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.
>
> , 354 U.S. 234, 250 (1957).

In the nearly fifty years since

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 , this Court has recognized that higher education plays precisely this role. By applying '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 and .

The Seventh Circuit directly contradicted Supreme Court precedent by applying doctrines relevant to institutionally "subsidized" speech simply because the (the campus newspaper in question) received funds from the student activity fee, , 412 F.3d at 735. The Seventh Circuit wrongly compared speech in the 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. . at 735, 737. Under this Court's decisions in , 529 U.S. 217 (2000) and , 515 U.S. 819 (1995), however, student activity fees

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.

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

The logic behind the 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. , however, treats student activity fees as if

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, 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 to colleges and universities despite the profound differences in the nature and purpose of high schools and universities.

The most controversial component of the opinion was its decision to apply 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 as a case primarily about school-funded speech, whereas this Court's decision in

Second, the court's decision to apply the 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. , , 719 F.2d 279, 282 (8th Cir. 1983) ("[a] public university may not constitutionally take adverse action against a student newspaper, such as with-

they are now regarded as adults in almost every phase of community life"); , 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"); , 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. . . ."

non-public forum or publish the paper itself (a closed forum where content may be supervised)?" , 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 , 477 F.2d 456, 460 (4th Cir. 1973), the Fourth Circuit gave a clear statement of the traditional standard:

issue in) 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 , the Seventh Circuit held that Dean Carter, who

The Seventh Circuit held that and a small number of lower court decisions obscured whether or not Dean Carter could have known she was acting improperly. Howe

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." 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 , 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 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] Forum, , Chron. Higher Educ. (Wash., D.C.), Sept. 9, 2005, at B7 ("Rarely has the climate on college campuses seemed such a cause for concern . . .

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 , 505 U.S. 377 (1992), which indicated that viewpoint-based speech codes would

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 , this Court granted religious student groups equal

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 . 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] will have reverberations from the community college to the Ivy League. Administrators will impose the "intelleu

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 constitu-

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, persons forgarts osonts fo415Tm/TT16011