Statement on [illegible]

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SUMMARY OF FIRE'S POSITION

The U.S. Court of Appeals for the Seventh Circuit's [illegible] opinion in [illegible], 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 [illegible]—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 [illegible] than to their counterparts in high school.

While FIRE opposes the holding of [illegible]—that a dean of students was entitled to immunity despite engaging in a brazen and intentional act of censorship—the real damage of the [illegible] 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 [illegible] 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 [illegible], 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 [illegible] 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,

protects government officials from liability for civil damages in certain circumstances, would have protected Carter if she could not have reasonably

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 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

itself was one such independent and student-run group. Moreover, the entire controversy began with the [illegible]'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 [illegible], 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. [illegible] 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 [illegible], 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." *B[illegible]*, 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." [illegible], 403 U.S. 672, 686 (1971).

In *B[illegible]*, 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**

"minors," not to university students, because "few college students are minors, and colleges are traditionally places of virtually unlimited free expression." *B* , 822 F.2d at 750. In . *B.* *E.* ., 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." , 307 F.3d at 267. And the court in . *G* , 236 F.3d 342 (6th Cir. 2001) determined that a university could not suppress a yearbook and that . did not apply because university students are "young adults." . , 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 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. . 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…." , 515 U.S. 819, 836 (1995). In , 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." . at 835-36. . *B.* ., 385 U.S. 589, 603 ("[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.'" *B.* *D.* *F* , 487 U.S. 675, 681 (1986) (internal citations omitted).

Nothing presented to the court in [illegible] required deciding if [illegible] 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 [illegible] court decided to apply [illegible], it followed the structure that [illegible] set forth. The court wrote: "[illegible]'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)?"

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

The 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- 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 opinion will also be used to justify the denial of First Amendment rights to any student group that receives student fee money, since under 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

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

The opinion will result in a chilling of free speech and, like the opinion, will likely not stay confined to the student media. 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, 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 , we can only expect that threats to expression and to liberty generally will grow still worse on America's campuses.

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